



CRIMINAL LAW

CRIMINAL LAW

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CRIMINAL LAW

INTRODUCTION: GENERAL APPROACH

The Multistate Examination directs examinees to answer questions according to “the generally accepted view” unless otherwise noted. In Criminal Law, the examiners may tell you the law to apply if there is no prevailing view. For example:

- (i) The call of a question might tell you that the common law applies or that the state follows the Model Penal Code (“M.P.C.”) approach; hence, you should be familiar with both the common law rules and the important M.P.C. distinctions discussed in this outline.
- (ii) A fact pattern may also include a statute that you are to apply to the facts; the outline discusses typical statutes on a variety of chapters that may be the subject of examination questions.
- (iii) Finally, a question might reference a well-known legal doctrine (e.g., the Wharton rule or the *M’Naghten* test); you should review those doctrines in the outline as well.

Note that if the examiners do not tell you whether the common law or a statutory version of the crime applies, it likely means that specific elements of the crime are not relevant to the question—for example, the question may concern whether voluntary intoxication is a defense to a crime, in which case the relevant factor is what type of mental state the crime requires, not other elements of the crime that may vary from jurisdiction to jurisdiction.

I. JURISDICTION AND GENERAL MATTERS

A. JURISDICTION

As used in this section, jurisdiction means the authority of a sovereign to **create** substantive criminal law. The authority of a court to **enforce** criminal laws is also an aspect of jurisdiction, but is more properly treated as a matter of criminal procedure.

1. Federal Criminal Jurisdiction

The power of the federal government to create crimes falls into the following broad categories:

a. Power over Federally Owned or Controlled Territory

The federal government has extensive power to enact general criminal codes governing conduct in the District of Columbia, the territories, and federal enclaves (e.g., naval yards, federal courthouses, national parks, etc.).

b. Power over Conduct Occurring Within a State

In contrast, federal power to criminalize conduct within a state is limited by the requirement that each statute be founded upon an express or implied constitutional grant of authority.

c. Power over United States Nationals Abroad

Federal criminal statutes may, by express provision, reach conduct by citizens while on foreign soil.

d. Power over Conduct on Ships or Airplanes

Federal “maritime jurisdiction” extends to conduct by all persons aboard American ships or aircraft when on or over the high seas or even in foreign waters or ports.

2. State Criminal Jurisdiction

Unlike the federal government, every state has inherent authority by virtue of its “police power” to regulate its internal affairs for the protection or promotion of the health, safety, welfare, and morals of its citizens.

a. Situs of the Crime

At common law, and in those states that have not expanded jurisdiction by statute, only the state in which the situs of the crime is located has jurisdiction over the crime. “Situs” is generally defined as the place where the proscribed act (or omission) takes place, if the crime is defined in these terms; or the place of the harmful result, if the crime includes a result as a material element.

Example: A libelous statement may be made a crime where it is published, not where it is written, because the crime of libel proscribes the act of publication rather than the act of writing the libelous statement.

b. Modern Bases for Jurisdiction

A person is subject to prosecution in a state for an offense that he commits within or outside that state, by his own conduct or that of another for which he is legally accountable, under the following conditions:

- 1) When the *offense is committed wholly or partly within the state* (“partly within the state” includes occurrences within the state of either (i) conduct that is an element of the offense, or (ii) a result constituting such an element—e.g., in homicide, the “result” is either the physical contact causing death or the death itself); or
- 2) When there is *conduct outside the state that constitutes an attempt or conspiracy* to commit an offense within the state *plus an act inside the state*; or
- 3) When there is *conduct within the state constituting an attempt, solicitation, or conspiracy to commit, in another jurisdiction, an offense* under the laws of both the state and such other jurisdiction; or
- 4) When an offense based on the *omission of performance of a duty* imposed by the law of a state is committed within that state, regardless of the location of the offender at the time of the omission.

B. SOURCES OF CRIMINAL LAW

1. Common Law Crimes

A common law crime is one created and enforced by the judiciary in the absence of a statute defining the offense.

a. No Federal Common Law Crimes

Federal criminal law is governed entirely by statute. Although there are no federal

common law crimes, Congress has provided for common law crimes in the District of Columbia.

b. Traditional Approach—Common Law Crimes Retained

From the colonial period forward, American criminal law included the English common law of crimes, unless repealed expressly or impliedly by statute.

c. Modern Trend—Common Law Crimes Abolished

In recent years, a great many states have enacted comprehensive criminal codes and, in doing so, most have abolished common law crimes, either explicitly or by implication. However, jurisdictions that have abolished common law crimes have not necessarily abolished common law *defenses* to crime, such as insanity and necessity, where their statutes do not expressly provide for these defenses.

2. Constitutional Crimes

The Constitution defines treason as levying war against the United States, adhering to enemies of the United States, or giving them aid and comfort. No person can be convicted of treason unless two witnesses testify to the same overt act, or unless the defendant confesses.

3. Administrative Crimes

A legislature may delegate to an administrative agency the power to prescribe rules, the violation of which may be punishable as a crime. Note, however, that the legislature may not delegate the power to determine which regulations shall carry criminal penalties; nor may it delegate the power of adjudication (i.e., the determination of guilt or innocence). With the proliferation of administrative agencies, this source of criminal law is becoming increasingly important.

Example: Violation of the antifraud rules adopted by the Securities and Exchange Commission may result in severe criminal liability.

4. The Model Penal Code

Although not a source of law, the Model Penal Code (“M.P.C.”) was a scholarly endeavor to compile a comprehensive and coherent body of criminal law. Since its publication in 1962, the M.P.C. has greatly influenced the drafting of state criminal statutes. Due to its enlightened position on many different issues, the M.P.C. may be the single most important source of general criminal law.

C. THEORIES OF PUNISHMENT

Historically, several theories have been advanced to justify criminal punishment.

1. Incapacitation (Restraint)

While imprisoned, a criminal has fewer opportunities to commit acts causing harm to society.

2. Special Deterrence

Punishment may *deter the criminal* from committing future crimes.

3. General Deterrence

Punishment may *deter persons other than the criminal* from committing similar crimes for fear of incurring the same punishment.

4. Retribution

Punishment is imposed to vent society's sense of outrage and need for revenge.

5. Rehabilitation

Imprisonment provides the opportunity to mold or reform the criminal into a person who, upon return to society, will conform her behavior to societal norms.

6. Education

The publicity attending the trial, conviction, and punishment of some criminals serves to educate the public to distinguish between good and bad conduct and to develop respect for the law.

D. CLASSIFICATION OF CRIMES

At common law, all crimes were divided into three classes: treason, felonies, and misdemeanors. Several additional means of classifying crimes are now frequently employed either by the courts or by state statutory schemes.

1. Felonies and Misdemeanors

Most states now classify as *felonies* all crimes punishable by *death or imprisonment exceeding one year*. Under such modern schemes, *misdemeanors* are crimes punishable by *imprisonment for less than one year or by a fine* only. At common law, the only felonies were murder, manslaughter, rape, sodomy, mayhem, robbery, larceny, arson, and burglary; all other crimes were considered misdemeanors.

2. Malum In Se and Malum Prohibitum

A crime *malum in se* (wrong in itself) is one that is *inherently evil*, either because criminal intent is an element of the offense, or because the crime involves "moral turpitude." By contrast, a crime *malum prohibitum* is one that is wrong only because it is *prohibited by legislation*.

Example: Battery, larceny, and drunken driving are mala in se, whereas hunting without a license, failure to comply with the Federal Drug Labeling Act, and driving in excess of the speed limit are mala prohibita.

3. Infamous Crimes

At common law, infamous crimes are all crimes involving fraud, dishonesty, or the obstruction of justice. Under modern law, this concept has been expanded to include most felonies.

4. Crimes Involving Moral Turpitude

The concept of moral turpitude—committing a base or vile act—is often equated with the concept of malum in se. Conviction of a crime involving moral turpitude may result in the deportation of an alien, the disbarment of an attorney, or the impeachment of a trial witness.

E. PRINCIPLE OF LEGALITY—VOID-FOR-VAGUENESS DOCTRINE

The Due Process Clause of the federal Constitution, found in the Fifth and Fourteenth Amendments, has been interpreted by the Supreme Court to require that no criminal penalty be imposed without fair notice that the conduct is forbidden. The "void-for-vagueness" doctrine, which has been held to require particular scrutiny of criminal statutes capable of reaching speech protected by the First Amendment, incorporates two considerations:

1. Fair Warning

A statute must give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.

2. Arbitrary and Discriminatory Enforcement Must Be Avoided

A statute must not encourage arbitrary and erratic arrests and convictions.

F. CONSTITUTIONAL LIMITATIONS ON CRIME CREATION

In addition to the constitutional requirement that a criminal statute be sufficiently specific to provide fair warning and prevent arbitrary enforcement, Article I of the federal Constitution places two substantive limitations on both federal and state legislatures.

1. No Ex Post Facto Laws

The Constitution expressly prohibits ex post facto laws. The Supreme Court has defined an ex post facto law as one that operates retroactively to:

- (i) *Make criminal an act* that when done was not criminal;
- (ii) *Aggravate a crime or increase the punishment* therefor;
- (iii) *Change the rules of evidence* to the detriment of criminal defendants as a class; or
- (iv) *Alter the law of criminal procedure* to deprive criminal defendants of a substantive right.

[*Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798)]

2. No Bills of Attainder

Bills of attainder are also constitutionally prohibited. A bill of attainder is a legislative act that inflicts punishment or denies a privilege *without a judicial trial*. Although a bill of attainder may also be an ex post facto law, a distinction can be drawn in that an ex post facto law does not deprive the offender of a judicial trial.

G. INTERPRETATIONS OF CRIMINAL STATUTES

1. Plain Meaning Rule

When the statutory language is plain and its meaning clear, the court must give effect to it even if the court feels that the law is unwise or undesirable. An exception to this rule exists if the court believes that applying the plain meaning of a statute will lead to injustice, oppression, or an absurd consequence.

2. Ambiguous Statutes Strictly Construed in Favor of Defendant

The rule of lenity requires that an ambiguous criminal statute must be strictly construed in favor of the defendant. Ambiguity should be distinguished from vagueness. An ambiguous statute is one susceptible to two or more equally reasonable interpretations. A vague statute is one that is so unclear as to be susceptible to no reasonable interpretation.

3. *Expressio Unius, Exclusio Alterius*

According to this maxim, the expression of one thing impliedly indicates an intention to exclude another.

Example: A criminal statute defines bigamy as the act of remarriage by one who has a living spouse. The statute expressly provides an exception for one whose spouse disappeared more than seven years before. Can a person remarry if the spouse has been gone for less than seven years provided he or she believes in good faith that the spouse is dead? Most jurisdictions answer no. The fact that the statute provides one exception impliedly excludes all others.

4. **The Specific Controls the General, the More Recent Controls the Earlier**

If two statutes address the same subject matter but dictate different conclusions, the more specific statute will be applied rather than the more general. The more recently enacted statute will control an older statute.

Examples: 1) If one statute prohibits all forms of gambling and another permits charity-sponsored raffles, the latter will control a church raffle.

2) A 1980 statute banning advertising of cigarettes will govern a 1975 statute providing a limit on advertising expenditure by cigarette manufacturers.

5. **Effect of Repeal**

At common law, in the absence of a saving provision, the repeal or invalidation of a statute operates to bar prosecutions for earlier violations, provided the prosecution is pending or not yet under way at the time of the repeal. However, a repeal will not operate to set free a person who has been prosecuted and convicted and as to whom the judgment has become final.

a. **Saving Provision**

Many of the new comprehensive codes include a provision to the effect that crimes committed prior to the effective date of the new code are subject to prosecution and punishment under the law as it existed at the time the offense was committed.

H. **MERGER**

1. **Common Law Rule**

a. **Merger of Misdemeanor into Felony**

At common law, if a person engaged in conduct constituting both a felony and a misdemeanor, she could be convicted only of the felony. The misdemeanor was regarded as merged into the felony.

b. **No Merger Among Offenses of Same Degree**

If the same act or a series of acts that were all part of the same transaction constituted several felonies (or several misdemeanors), there was no merger of any of the offenses into any of the others.

2. **Modern Rule**

There is generally no merger in American law, with the following limited *exceptions*:

a. **“Merger” of Solicitation or Attempt into Completed Crime**

One who solicits another to commit a crime (where solicitation itself is a crime) cannot be convicted of both the solicitation and the completed crime (if the person solicited

does complete it). Similarly, a person who completes a crime after attempting it may not be convicted of both the attempt and the completed crime. Conspiracy, however, does not merge with the completed offense (e.g., one can be convicted of robbery and conspiracy to commit robbery).

b. “Merger” of Lesser Included Offenses into Greater Offenses

Lesser included offenses “merge” into greater offenses, in the sense that one placed in jeopardy for either offense may not later be retried for the other. Nor may one be convicted of both the greater offense and a lesser included offense. A lesser included offense is one that consists entirely of some, but not all, elements of the greater crime. This rule is sometimes labeled a rule of merger, but it is also clearly required by the constitutional prohibition against double jeopardy.

Examples: 1) D allegedly possessed certain narcotics. On the basis of this, she is charged with (i) illegal possession of narcotics, (ii) illegal possession of narcotics for sale, and (iii) possession of a drug not in a properly stamped container. May she be convicted of all three offenses? *Held:* No. She may not be convicted of simple possession and possession for sale. She may be convicted of possession for sale and possession in an improper container, because neither is a lesser included offense of the other. Each requires proof of something the other does not, i.e., intent to sell and use of an improper container.

2) D is convicted of operating a motor vehicle without the owner’s consent. She is then charged with stealing the vehicle based upon the same incident. Operating the vehicle without the owner’s consent is a lesser included offense of theft, because theft requires proof of everything necessary to prove operation of a vehicle without consent of the owner *plus* the intent to steal. May D be prosecuted for theft? *Held:* No. Conviction for a lesser included offense bars prosecution for the greater offense. [Brown v. Ohio, 432 U.S. 161 (1977)]

3) D is convicted of felony murder based on proof that his accomplice shot and killed a store clerk during an armed robbery. He is then charged with and convicted of armed robbery based on the same incident. *Held:* Because the armed robbery was the underlying felony for the felony murder conviction, it is a lesser included offense of the felony murder and the subsequent prosecution is barred. [Harris v. Oklahoma, 433 U.S. 682 (1977)]

c. "Merger" of More than One Inchoate Crime

Under the M.P.C., a defendant may not be convicted for more than one inchoate crime when his conduct was designed to culminate in the commission of the same crime.

3. Developing Rules Against Multiple Convictions for Parts of Same “Transaction”

Many jurisdictions are developing prohibitions against convicting a defendant for more than one offense where the multiple offenses were all part of the same “criminal transaction.” In some states, this is prohibited by statute. In others, courts adopt a rule of merger or of double jeopardy to prohibit it.

- a. No Double Jeopardy If Statute Provides Multiple Punishments for Single Act**
 Imposition of cumulative punishments for two or more statutorily defined offenses, specifically intended by the legislature to carry *separate punishments*, arising from the same transaction, and constituting the same crime, does not violate the Double Jeopardy Clause prohibition against multiple punishments for the same offense when the punishments are imposed at a single trial. [Missouri v. Hunter, 459 U.S. 359 (1983)]
Example: D robs a store at gunpoint. D can be sentenced to cumulative punishments for armed robbery and “armed criminal action” under a “use a gun, go to jail” statute.

II. ESSENTIAL ELEMENTS OF CRIME

A. ELEMENTS OF A CRIME

Culpability under Anglo-American criminal law is founded upon certain basic premises that are more or less strictly observed by legislatures and courts when formulating the substantive law of crimes. Consequently, the prosecution is generally required to prove the following elements of a criminal offense:

- (i) *Actus Reus* (guilty act): A physical act (or unlawful omission) by the defendant;
- (ii) *Mens Rea* (guilty mind): The state of mind or intent of the defendant at the time of his act;
- (iii) *Concurrence*: The physical act and the mental state existed at the same time; and
- (iv) *Harmful Result and Causation*: A harmful result caused (both factually and proximately) by the defendant’s act.

Virtually all crimes require a physical act and may require some sort of intent. Many crimes also require proof of certain *attendant circumstances* without which the same act and intent would not be criminal. For example, the crime of receipt of stolen property requires that the property received has in fact been stolen. If the defendant receives property (the act) that he believes to have been stolen (the mental element), when in fact the property has not been stolen, the absence of this required circumstance renders the defendant not liable for receipt of stolen property. Other crimes require result and causation. Homicide, for example, requires that the victim die and that the defendant’s act be the cause of death.

B. PHYSICAL ACT

For there to be criminal liability, the defendant must have either performed a voluntary physical act or failed to act under circumstances imposing a legal duty to act. For this purpose, an act is defined as a *bodily movement*. A thought is not an act. Therefore, bad thoughts alone cannot constitute a crime. Note, however, that speech, unlike thought, is an act that can cause liability (e.g., perjury, solicitation).

1. Act Must Be Voluntary

The defendant’s act must be voluntary in the sense that it must be a *conscious exercise of the will*. *Rationale:* An involuntary act will not be deterred by punishment. The following acts are *not* considered “voluntary” and therefore cannot be the basis for criminal liability:

- a. Conduct that is ***not the product of the actor's determination***.
Example: A shoves B into C, with the result that C falls to his death. Can B be held criminally liable for C's death? No.
- b. ***Reflexive or convulsive*** acts.
- c. Acts performed while the defendant was either ***unconscious or asleep unless*** the defendant knew that she might fall asleep or become unconscious and engaged in dangerous behavior.

2. Omission as an "Act"

Although most crimes are committed by affirmative action rather than by nonaction, a defendant's ***failure to act*** will result in criminal liability provided ***three requirements*** are satisfied.

a. Legal Duty to Act

The defendant must have a legal duty to act under the circumstances. A legal duty to act can arise from the following sources:

- 1) A ***statute*** (e.g., filing an income tax return or reporting an accident).
- 2) A ***contract*** obligating the defendant to act, such as one entered into by a lifeguard or a nurse.
- 3) The ***relationship*** between the defendant and the victim, which may be sufficiently close to create a duty.
Examples:
 - 1) A parent has the duty to prevent physical harm to his or her children.
 - 2) A spouse has the duty to prevent harm to his or her spouse.
- 4) The ***voluntary assumption of care*** by the defendant of the victim. Although in general there is no common law duty to help someone in distress, once aid is rendered, the Good Samaritan may be held criminally liable for not satisfying a reasonable standard of care.
Examples:
 - 1) A, while hiking, sees B drowning in a river. Although A is a good swimmer, he takes no steps to save B, who drowns. Was A's failure to act an "act" upon which liability could be based? No, because A had no duty to act. Note that the answer would be the same even if A recognized B as a person whom he disliked and took great pleasure in watching B drown.
 - 2) If A began to swim out toward B and only after reaching B decided that B was someone not worth saving, A would have violated his duty to act by unreasonably abandoning a rescue effort that was voluntarily undertaken.
- 5) The ***creation of peril*** by the defendant.
Example: Believing that B can swim, A pushes B into a pool. It becomes apparent that B cannot swim, but A takes no steps to help B. B

drowns. Was A's failure to attempt a rescue an "act" on which liability can be based? Yes.

b. Knowledge of Facts Giving Rise to Duty

As a general rule, the duty to act arises when the defendant is aware of the facts creating the duty to act (e.g., the parent must know that his child is drowning before his failure to rescue the child will make him liable). However, in some situations the law will impose a duty to learn the facts (e.g., a lifeguard asleep at his post would still have a legal duty to aid a drowning swimmer).

c. Reasonably Possible to Perform

It must be reasonably possible for the defendant to perform the duty or to obtain the help of others in performing it.

Example: A parent who is unable to swim is under no duty to jump in the water to attempt to save his drowning child.

3. Possession as an "Act"

Criminal statutes that penalize the possession of contraband generally require only that the defendant have control of the item for a long enough period to have an opportunity to terminate the possession. Possession need not be exclusive to one person, and possession also may be "constructive," meaning that actual physical control need not be proved when the contraband is located in an area within the defendant's "dominion and control."

a. State of Mind Requirement

Absent a state of mind requirement in the statute, the defendant must be aware of his possession of the contraband, but he need not be aware of its illegality or true nature. However, many statutes and the M.P.C. add a "knowingly" state of mind element to possession crimes (*see* C.6., *infra.*). Under such statutes, the defendant ordinarily must know the identity or nature of the item possessed. On the other hand, a defendant may not consciously avoid learning the true nature of the item possessed; knowledge may be inferred from a combination of suspicion and indifference to the truth.

C. MENTAL STATE

1. Purpose of Mens Rea Requirement

The reason that mens rea is normally required is to distinguish between inadvertent or accidental acts and acts performed by one with a "guilty mind." The latter type of act is more blameworthy and, arguably, can be deterred. However, in some cases (strict liability crimes), mens rea is not required.

2. Specific Intent

If the definition of a crime requires not only the doing of an act, but the doing of it with a specific intent or objective, the crime is a "specific intent" crime.

a. Significance

It is necessary to identify specific intent for two reasons:

1) Need for Proof

The existence of a specific intent cannot be conclusively imputed from the mere

doing of the act, and the prosecution must produce evidence tending to prove the existence of the specific intent. That said, *the manner* in which an act was done may provide circumstantial evidence of intent.

Example: A shoots B. The fact that A shot B does not show that A had the intent to shoot and kill B. However, if A bought a revolver and ammunition shortly before shooting B, carefully loaded the revolver, took careful aim at B, and fired several times, that evidence may circumstantially prove A's intent to kill B.

2) Applicability of Certain Defenses

Some defenses, such as voluntary intoxication and unreasonable mistake of fact, apply only to specific intent crimes.

b. Enumeration of Specific Intent Crimes

The major specific intent crimes and the intent they require are as follows:

- 1) *Solicitation*: Intent to have the person solicited commit the crime;
- 2) *Attempt*: Intent to complete the crime;
- 3) *Conspiracy*: Intent to have the crime completed;
- 4) *First degree premeditated murder* (where so defined by statute): Premeditated intent to kill;
- 5) *Assault*: Intent to commit a battery;
- 6) *Larceny and robbery*: Intent to permanently deprive another of his interest in the property taken;
- 7) *Burglary*: Intent at the time of entry to commit a felony in the dwelling of another;
- 8) *Forgery*: Intent to defraud;
- 9) *False pretenses*: Intent to defraud; and
- 10) *Embezzlement*: Intent to defraud.

3. Malice—Common Law Murder and Arson

Although the intents required for the “malice” crimes—common law murder and arson—sound similar to specific intent (e.g., the “intent to kill” for murder), these crimes are *not* open to the specific intent defenses. The common law created this special mental state category especially to deny to murder and arson the specific intent defenses. To establish malice in these cases, the prosecution need only show that the defendant recklessly disregarded an obvious or high risk that the particular harmful result would occur.

4. General Intent—Awareness of Factors Constituting Crime

Generally, all crimes require “general intent,” which is an awareness of all factors constituting the crime; i.e., the defendant must be aware that she is acting in the proscribed way

and that any attendant circumstances required by the crime are present. (Note that the defendant need not be certain that these attendant circumstances exist; it is sufficient that she is aware of a high likelihood that they exist.)

Example: To commit the crime of false imprisonment (*see* VII.D., *infra*), the defendant must be aware that she is confining a person, and that the confinement has not been specifically authorized by law or validly consented to by the person confined.

a. Inference of Intent from Act

A jury can infer the required general intent merely from the doing of the act. It is not necessary that evidence specifically proving the general intent be offered by the prosecution.

5. Strict Liability Offenses

A strict liability offense is one that does not require awareness of all of the factors constituting the crime. Generally, the requirement of a state of mind is not abandoned with respect to all elements of the offense, but only with regard to one or some of the elements. The major significance of a strict liability offense is that *defenses that would negate state of mind*, such as mistake of fact, are *not available*.

a. Identification of Strict Liability Offenses

Strict liability offenses, also known as public welfare offenses, are generally “regulatory” offenses (i.e., offenses that are part of a regulatory scheme) that implicate public health or safety. They generally involve a relatively low penalty and are not regarded by the community as involving significant moral impropriety. Note that the mere fact that a statute is silent on the question of mental state does not necessarily mean that the offense is a strict liability offense. If no mental state is expressly required by the statute, the courts may still interpret the statute as requiring some mens rea, especially if the statute appears to be a codification of a traditional common law offense or if the statute imposes a severe penalty.

Example: Federal legislation prohibits the transfer of firearms not registered under federal law. Is it a defense that the defendant was ignorant of the fact that a firearm was not registered? *Held:* No, because this is a strict liability offense. Awareness of the fact of nonregistration is not necessary, although it is necessary that the defendant have been aware of the fact that she was possessing a firearm.

Compare: Federal legislation requires registration of any fully automatic machinegun. The statute is silent on the question of mental state and provides a penalty of up to 10 years’ imprisonment. *Held:* Defendant may assert as a defense that he was not aware that the weapon in his possession was automatic. The type of statute and the harsh penalty indicate that Congress did not intend to dispense with the mens rea requirement. [Staples v. United States, 511 U.S. 600 (1994)]

b. Constitutionality

The majority view is that strict liability offenses are constitutional. *Exception:* The Supreme Court struck down as a violation of due process a Los Angeles municipal

ordinance imposing strict liability for failure to register as a felon. The key factor in the court's decision was the absence of "circumstances which might move one to inquire as to the necessity of registration." *Note*: The scope of this holding is limited to statutes making criminal the failure to register.

6. Model Penal Code Analysis of Fault

The M.P.C. advocates the elimination of the ambiguous common law distinction between general and specific intent. Instead, the M.P.C. proposes four categories into which the mental component of a criminal offense (i.e., the element of fault) can be characterized. Because consistent use of these categories leads to analytical clarity, they have been incorporated into several state criminal codes. They likewise provide a convenient way of analyzing problems on the exam that incorporate statutes.

a. Purposely, Knowingly, or Recklessly

When a statute requires that the defendant act purposely ("intentionally"), knowingly, or recklessly, a subjective standard is being used; i.e., the question is what was actually going on in the defendant's mind.

1) Purposely

A person acts purposely with respect to his conduct when it is his conscious object to engage in certain conduct or cause a certain result, e.g., burglary.

2) Knowingly

A person acts knowingly with respect to the nature of his conduct when he is aware that his conduct is of that nature or that certain circumstances exist. He is deemed to be aware of these circumstances when he is aware of a high probability that they exist and deliberately avoids learning the truth. He acts knowingly with respect to the result of his conduct when he knows that his conduct will necessarily or very likely cause such a result. Conduct performed knowingly frequently satisfies the mental state of a statute that requires willful conduct (*but note*: some criminal statutes define willfulness as requiring that a defendant act knowingly and intentionally).

3) Recklessly

A person acts recklessly when he *consciously disregards a substantial and unjustifiable risk* that circumstances exist or that a prohibited result will follow, and this disregard constitutes a *gross deviation from the standard of care* that a reasonable person would exercise in the situation. An act performed recklessly is also performed wantonly. Recklessness requires that the actor take an unjustifiable risk and that he know of and consciously disregard the risk. Mere realization of the risk is not enough. He must know that injury might result (if he knows that it is *certain* to result, he acts *knowingly*). Thus, recklessness involves both objective ("unjustifiable risk") and subjective ("awareness") elements.

b. Negligence

A person acts negligently when he *fails to be aware of a substantial and unjustifiable risk* that circumstances exist or a result will follow, and such failure constitutes a *substantial deviation from the standard of care* that a reasonable person would exercise under the circumstances. To determine whether a person acted negligently, an

objective standard is used. However, it is not merely the reasonable person standard that is used in torts; the defendant must have taken a **very unreasonable risk** in light of the usefulness of his conduct, his knowledge of the facts, and the nature and extent of the harm that may be caused.

Example: D held himself out to the public as a doctor even though he was not a licensed physician. He treated a sick woman by wrapping her in kerosene-soaked flannels for three days. The woman died. *Held:* D is guilty of manslaughter. His good intentions were irrelevant. By objective standards, he took an unjustifiable risk.

1) Violation of Statute or Ordinance as Evidence of Negligence

Violation of a state statute, municipal ordinance, or administrative regulation may—as in tort law—be evidence of liability.

Example: A, driving in excess of the speed limit, hits and kills B, a pedestrian. A's speeding violation may be admissible as evidence of his negligence in a prosecution for manslaughter.

c. Analysis of Statutes Using Fault Standards

1) State of Mind Applies to All Material Elements of Offense

Often a statute will establish a culpable state of mind without indicating whether it is required for all the material elements of the offense. In that case, the specified state of mind applies to all material elements of the offense unless a contrary purpose appears in the statute.

Example: Under a statute imposing criminal liability on anyone who “knowingly makes a sale of an intoxicating beverage to a minor,” the M.P.C. would require knowledge for each material element of the offense. Thus, if the defendant can show that she did not know that a sale took place, that the beverage was intoxicating, or that the purchaser was a minor, she will be able to avoid liability.

2) General State of Mind Requirement—Recklessness

If the statute defining the offense (other than a strict liability offense) does not include a state of mind requirement, the defendant must have acted with at least recklessness with regard to each material element of the offense.

a) Higher Degree of Fault Suffices

Under the M.P.C.'s hierarchy of fault levels, a showing of a higher state of mind automatically satisfies a lower mental state requirement of a statute. Thus, a showing that the defendant acted purposely or knowingly will satisfy the general requirement of recklessness.

b) Other Levels of Fault Must Be Specified

Because a standard of recklessness is assumed where the state of mind is not specified, if a lower standard of negligence will satisfy liability, or if a higher standard of knowledge or purpose is required, those standards must be indicated in the language of the statute.

Example: Under a statute creating criminal liability for anyone who “sells intoxicating beverages to one whom he should know to be a minor,” the material elements include the act of selling and the attendant circumstances that the beverage be intoxicating and that the purchaser be a minor. Under the M.P.C. formula, a minimum standard for recklessness is required as the state of mind for the first two elements, while the third element of the statute specifies that only a negligence level of fault is required.

7. Vicarious Liability Offenses

A vicarious liability offense is one in which a person without personal fault may nevertheless be held vicariously liable for the criminal conduct of another (usually an employee). The criminal law doctrine of vicarious liability is analogous to the tort doctrine of respondeat superior. *Note:* Unlike strict liability, which dispenses with the mens rea requirement but retains the requirement that the defendant have personally engaged in the necessary acts or omissions, vicarious liability dispenses with the personal actus reus requirement but retains the need for *mental fault on the part of the employee*.

a. Limitation on Punishment

Because the imposition of criminal liability for faultless conduct is contrary to the basic premise of criminal justice that crime requires fault on the part of the accused, at least one state court has held that imprisonment in such cases violates the due process guarantees of the state constitution. The current trend in the legislatures is to limit vicarious liability to *regulatory crimes* and to limit punishment to *finis*.

b. Implying Vicarious Liability from Underlying Strict Liability Offense

Despite some decisions to the contrary, the mere fact that the underlying offense is clearly a strict liability offense should *not* imply a legislative intent to impose vicarious liability.

Example: A statute makes it a crime “for anyone to serve an alcoholic beverage to a minor.” Although a bartender may be strictly liable under this statute regardless of her belief that the customer was legally old enough to drink, this statute should not be construed to impose liability on the tavern owner who neither was present at the time the minor was served nor authorized the actions of the bartender.

8. Enterprise Liability—Liability of Corporations and Associations

a. Common Law—No Criminal Liability

At common law, a corporation could not commit a crime because it was unable to form the necessary criminal intent.

b. Modern Statutes—Vicarious Criminal Liability

Modern statutes often provide for the liability of corporations and sometimes even unincorporated associations (e.g., partnerships). This liability is, by necessity, vicarious. Under such provisions, corporations may be held liable under the following conditions:

1) **Act Within Scope of Office**

Except where the law specifically provides otherwise, the conduct giving rise to corporate liability must be performed by an agent of the corporation acting on behalf of the corporation and within the scope of his office or employment.

2) **“Superior Agent Rule”**

Some jurisdictions limit corporate criminal liability to situations in which the conduct is performed or participated in by agents sufficiently high in the corporate hierarchy to presume that their acts reflect corporate policy.

c. **Model Penal Code**

Under the M.P.C., a corporation may be guilty of a criminal offense provided the offense:

- 1) Consists of the *failure to discharge a specific duty* imposed by law on the corporation;
- 2) Is defined by a statute in which a *legislative purpose to impose liability* on corporations plainly appears; or
- 3) Was “authorized, requested, commanded, performed, or recklessly tolerated *by the board of directors or by a high managerial agent* acting on behalf of the corporation within the scope of his office or employment.”

d. **Individual Liability Independent of Enterprise Liability**

The person who, in the name of the corporation, performs (or causes to be performed) the conduct that is an element of the offense is legally accountable and subject to punishment to the same extent as if the conduct were performed in his name or on his own behalf. Similarly, the fact that the corporation is liable does not prevent the conviction of the individual who committed the offense.

9. **Transferred Intent**

If a defendant intended a harmful result to a particular person or object and, in trying to carry out that intent, caused a similar harmful result to another person or object, her intent will be transferred from the intended person or object to the one actually harmed. Any defenses or mitigating circumstances that the defendant could have asserted against the intended victim (e.g., self-defense, provocation) will also be transferred in most cases. The doctrine of transferred intent most commonly applies to homicide, battery, and arson. It does **not** apply to **attempt**.

Example: A shoots at B, intending to kill him. Because of bad aim, she hits C, killing him. Is A guilty of C’s murder? *Held:* Yes. Her intent to kill B will be transferred to C. Note that A may also be guilty of the attempted murder of B.

Compare: A shoots twice at B, thinking that B was C, whom she had wanted to kill. She wounds not only B, but also D, a bystander. Is A guilty of the attempted murder of B and D? *Held:* A is guilty of the attempted murder of B, because her mistake as to B’s identity is a mistake of fact that does not negate her intent to kill the person in front of her (B). There is no transferred intent issue.

in that scenario. However, most courts would hold that she is not guilty of the attempted murder of D.

10. Motive Distinguished

The motive for a crime is distinct from the intent to commit it. A motive is the reason or explanation underlying the offense. It is generally held that *motive is immaterial* to substantive criminal law. A good motive will not excuse a criminal act. On the other hand, a lawful act done with bad motive will not be punished.

Example: An impoverished woman steals so that her hungry children may eat. Despite her noble *motive*—feeding her children—the woman could be held criminally liable for her acts because her *intent* was to steal.

D. CONCURRENCE OF MENTAL FAULT WITH PHYSICAL ACT REQUIRED

The defendant must have had the intent necessary for the crime at the time he committed the act constituting the crime. In addition, the intent must have prompted the act.

Example: A decides to kill B. While driving to the store to purchase a gun for this purpose, A negligently runs over B and kills him. Is A guilty of murder? No, because although at the time A caused B’s death he had the intent to do so, this intent did not prompt the act resulting in B’s death (i.e., A’s poor driving).

Compare: With the intent to kill B, A strangles B to the point of unconsciousness, but does not actually kill B. Thinking B is dead, A buries B, and B dies as a result. Is A guilty of murder, even though the death-causing act of burying B was done without the intent to murder? Yes, in a majority of jurisdictions. Most courts would find that the two acts were part of a single transaction with a common intent.

E. CAUSATION

Some crimes (e.g., homicide) require a harmful result and causation. For a full discussion of causation, see VII.C.5., *infra*.

III. ACCOMPLICE LIABILITY

A. PARTIES TO A CRIME

1. Common Law

The common law distinguished four types of parties to a felony: *principals in the first degree* (persons who actually engage in the act or omission that constitutes the criminal offense); *principals in the second degree* (persons who aid, command, or encourage the principal and are present at the crime); *accessories before the fact* (persons who aid, abet, or encourage the principal but are *not* present at the crime); and *accessories after the fact* (persons who assist the principal after the crime).

a. Significance of Common Law Distinctions

At common law, the distinctions between the parties had a great deal of procedural significance. For example, an accessory could not be convicted unless the principal had already been convicted, although both could be convicted in a joint trial if the jury

determined the principal's guilt first. Most modern jurisdictions have abandoned this requirement, and an accessory can be convicted even if the principal has evaded apprehension or has been tried and acquitted.

2. Modern Statutes

Most jurisdictions have abolished the distinctions between principals in the first degree, principals in the second degree, and accessories before the fact (accessories after the fact are still treated separately). Under the modern approach, all "parties to the crime" can be found guilty of the criminal offense. For convenience, this section will designate the actual perpetrator of the criminal act as the principal and the other parties to the crime as accomplices.

a. Principal

A principal is one who, with the requisite mental state, *actually engages in the act or omission* that causes the criminal result. Also, anyone who acts through an innocent, irresponsible, or unwilling agent is classified as a principal.

Example: A gives a poisonous drink to B to give to C. B does so; C drinks it and dies. If B did not know that the drink was poisonous, or if B was mentally ill or under duress, A, not B, is the principal. Note that the principal need not be present when the harm results.

b. Accomplice

An accomplice is one who (i) with the intent to assist the principal and the intent that the principal commit the crime (ii) actually aids, counsels, or encourages the principal before or during the commission of the crime.

c. Accessory After the Fact

An accessory after the fact is one who receives, relieves, comforts, or assists another, knowing that he has committed a felony, in order to *help the felon escape arrest, trial, or conviction*. The crime committed by the principal must be a *felony* and it must be *completed* at the time the aid is rendered. Today, the crime is usually called "harboring a fugitive," "aiding escape," or "obstructing justice."

1) Penalty

Typically the punishment for this crime bears no relationship to the principal offense; five years is the most common maximum sentence. Exemptions are usually provided for close relatives of the principal offender (the common law exempted only the spouse).

B. MENTAL STATE—DUAL INTENT REQUIRED

In order to be convicted of a substantive crime as an accomplice, the accomplice must have (i) *the intent to assist the principal* in the commission of a crime; and (ii) *the intent that the principal commit* the substantive offense. When the substantive offense has recklessness or negligence as its mens rea, most jurisdictions would hold that the intent element is satisfied if the accomplice (i) *intended to facilitate* the commission of the crime; and (ii) *acted with recklessness or negligence* (whichever is required by the particular crime).

1. Provision of Material

In the absence of a statute, most courts would hold that mere *knowledge* that a crime would

result from the aid provided is insufficient for accomplice liability, at least where the aid involves the sale of ordinary goods at ordinary prices. However, procuring an illegal item or selling at a higher price because of the buyer's purpose may constitute a sufficient "stake in the venture" for a court to find intent to aid.

Example: A tells B that he wants to buy a can of gasoline from B to burn a house down. B sells A the gasoline and A burns down the house. B is not liable as an accomplice to arson (unless it was illegal to sell gasoline in cans or B charged A twice his usual price because of what A was using the gasoline for).

C. SCOPE OF LIABILITY

An accomplice is responsible for the crimes he did or counseled **and** for any other crimes committed in the course of committing the crime contemplated, as long as the other crimes were **probable or foreseeable**.

Example: A commands B to burn C's house, and B does so. The fire spreads to X's house, and it was foreseeable that it would do so. A is an accomplice to the burning of X's house.

1. Inability to Be Principal No Bar to Liability as Accomplice

One who may not be convicted of being a principal may be convicted of being an accomplice.

Example: At common law, a woman may not be convicted of rape as a principal, but she may be convicted of that crime as an accomplice.

2. Exclusions from Liability

Under some circumstances, a person who would otherwise be liable as an accomplice is not subject to conviction, either because of a legislative intent to exempt him or because he has a special defense.

a. Members of the Protected Class

If the statute is intended to protect members of a limited class from exploitation or overbearing, members of that class are presumed to be immune from liability, even if they participate in the crime in a manner that would otherwise make them liable.

Example: A is charged with transporting B, a woman, in interstate commerce for immoral purposes; B is charged as an accomplice, on the ground that she encouraged and assisted A. Is B guilty? *Held:* No. The statute was intended to protect women, and thus the woman transported cannot be convicted.

b. Necessary Parties Not Provided For

If a statute defines a crime in a way that necessarily involves more than one participant and provides for the liability of only one participant, it is presumed that the legislative intent was to immunize the other participant from liability as an accomplice. The rule is most often applied to statutes making the sale of certain items a criminal offense.

Example: A asked B to sell her some heroin. B did so. Both were apprehended. B was charged as a principal for the sale of narcotics; A was charged as an accomplice. Is A subject to conviction? *Held:* No. Since the statute prohibiting sale does not mention the liability of the buyer, the presumed legislative intent is to exempt her.

c. **Withdrawal**

One who has rendered encouragement or aid to another may avoid liability as an accomplice if he voluntarily withdraws from the crime before it is actually committed by the principal. What is necessary for an effective withdrawal *depends upon what the person initially did*.

- (i) If the person merely *encouraged* the commission of the crime, withdrawal requires that he *repudiate* this encouragement.
- (ii) If the person assisted by *providing some material* to the principal, withdrawal requires at least that the person attempt to *neutralize this assistance*, e.g., by doing everything possible to retrieve the material provided.

If it is impossible to withdraw by these methods, an alternative means of withdrawing is to *notify authorities* or take some other action to prevent the commission of the offense. In any case, the withdrawal must occur *before* the chain of events leading to the commission of the crime becomes unstoppable.

Example: B expresses a desire to kill C. A encourages him to do so, and provides him with a gun. Later, A changes his mind. He seeks B out, and tells B that his earlier position was wrong and that B should not kill C. He also gets his gun back. Nevertheless, B obtains another gun and kills C. Is A liable as an accomplice? *Held:* No, since he did all that was possible to render his encouragement and assistance ineffective before B's plan to kill C became unstoppable.

IV. INCHOATE OFFENSES

A. **IN GENERAL**

The inchoate offenses are solicitation, attempt, and conspiracy. An inchoate offense is committed prior to and in preparation for what may be a more serious offense. It is a complete offense in itself, even though the act to be done may not have been completed. At common law under the doctrine of merger, inchoate offenses were regarded as misdemeanors; if the principal offense was carried out, they were considered felonies. The doctrine of merger has been abandoned in many jurisdictions in cases involving a conspiracy, allowing an accused to be convicted of *both* conspiracy and the principal offense. However, an accused *cannot* be convicted of either attempt or solicitation *and* the principal offense.

B. **SOLICITATION**

At common law it was a misdemeanor to solicit another to commit a felony or an act that would breach the peace or obstruct justice. Modern statutes often retain the crime of solicitation, but some restrict it to the solicitation of certain serious felonies.

1. **Elements**

Solicitation consists of inciting, counseling, advising, inducing, urging, or commanding another to commit a crime with the specific *intent that the person solicited commit the crime* (general approval or agreement is insufficient). The offense is complete at the time the

solicitation is made. It is not necessary that the person solicited agree to commit the crime or do anything in response. (If the person solicited committed the crime, the solicitor would be liable for the crime as a party; if the person solicited proceeded far enough to be liable for attempt, the solicitor would be a party to that attempt.)

2. Attempt Distinguished

Solicitation generally is not an attempt to commit the crime solicited. This distinction is important in jurisdictions where there is no crime of solicitation or where the crime of solicitation does not extend to as many offenses as does the crime of attempt.

3. Defenses

a. Factual Impossibility Is No Defense

It is not a defense that the solicitation could not have been successful, as where the person solicited was a police undercover agent. The culpability of the solicitor is measured by the circumstances as she believed them to be.

b. Withdrawal or Renunciation Is No Defense

Once the solicitation has been made, it is generally no defense that the solicitor changed her mind or countermanded her advice or urging. The M.P.C. recognizes renunciation as a defense if the defendant prevents the commission of the crime, such as by persuading the person solicited not to commit the crime.

c. Exemption from Intended Crime Is a Defense

If the solicitor could not be guilty of the intended crime because of a legislative intent to exempt her, she would have a defense. For example, a minor female could not be found guilty of solicitation of statutory rape by urging an adult male to have intercourse with her, because she could not be guilty of the completed crime.

C. CONSPIRACY

1. Elements

The elements of conspiracy at common law are as follows:

- (i) An *agreement between two or more* persons;
- (ii) An *intent to enter into an agreement*; and
- (iii) An *intent to achieve the objective* of the agreement.

Under the traditional definition of conspiracy, the agreement itself was the culpable act (the *actus reus*). Today, a majority of states require an *overt act* in furtherance of the conspiracy, but mere preparation will usually suffice.

a. Agreement Requirement

The parties must agree to accomplish the same objective by mutual action. The agreement need not be express. The existence of an agreement may be shown by a concert of action on the part of the conspirators over a period of time under circumstances showing that they were aware of the purpose and existence of the conspiracy and agreed

to participate in the common purpose. Where multiple crimes and multiple parties are involved, there are often problems in deciding whether there is a single conspiracy or several smaller conspiracies.

1) Object of the Agreement

At common law, it was not necessary that there be an agreement to commit a crime in order to find a criminal conspiracy. It was only necessary that the object of the agreement was something “unlawful” or that the parties intended to accomplish something lawful by “unlawful” means. “Unlawful” in this context covered a variety of noncriminal matters that were regarded as contrary to the public welfare. Most states, however, now provide that the object of the conspiracy must be *some crime or some felony* or the achievement of a *lawful object by criminal means*.

2) Multiple Crimes

Where the same parties perform a number of crimes over an extended period of time, is each individual crime the subject of a separate conspiracy or are all the crimes to be treated as arising out of one overriding conspiracy? If there is an initial agreement among the parties to engage in a *course of criminal conduct* constituting all the crimes, then there is only *one conspiracy*.

Example: A and B agree to commit one bank robbery each month for one year. Even though they plan to rob 12 banks, they are guilty of only one conspiracy.

3) Number of Conspiracies in Multiple Party Situations

In complex situations involving numerous parties, it is sometimes important to determine how many conspiracies existed and who conspired with whom. There are two general ways to characterize situations of this sort.

a) “Chain” Relationship—One Large Conspiracy

If there is a series of agreements, all of which are regarded as part of a single large scheme in which all of the parties to the subagreements are interested, the situation will be regarded as one large conspiracy involving all of the participants. The subagreements will be characterized as “links” in the overall “chain” relationship.

b) “Hub-and-Spoke” Relationships—Multiple Conspiracies

One participant may enter into a number of subagreements, each involving *different persons*. All of the agreements are similar in that they have *one common member*. However, if it is established that the *subagreements are reasonably independent of each other*—if, for example, the members of each agreement (other than the common member) have little or no interest in whether the other agreements succeed—the situation will be regarded as involving numerous different and independent conspiracies. The common member can be characterized as the “hub” (as of a wheel) and each subagreement as a “spoke.” The common member is, of course, a member of each conspiracy. But the members of each “spoke” conspiracy are not members of the other “spoke” conspiracies and have not conspired with the members of those conspiracies.

Examples: 1) In a large narcotics ring, a smuggler brings heroin into the country and sells it to a wholesaler. The wholesaler sells it to numerous retailers. How many conspiracies? One, because this is a “chain” situation. Because the smuggler-wholesaler agreement and the wholesaler-retailers agreements were all part of a scheme in which all participants were interested, there is only one conspiracy.

2) Brown agreed with A, B, and C to help each of them make fraudulent loan applications. Each application was to be an independent action and the applicants in one situation had no interest in whether the other fraudulent applications were successful. How many conspiracies? Three: Brown with A, Brown with B, and Brown with C. Since the subagreements were not part of an overall scheme in which A, B, and C all were interested, this is a “hub-and-spoke” situation. A has not conspired with B and C, but only with Brown.

4) Requirement of Two or More Parties

Since conspiracy, by definition, requires an agreement between two or more persons, a question arises whether a person may be convicted of conspiracy when his alleged co-conspirator is only feigning agreement (e.g., the alleged co-conspirator is an undercover police officer).

a) Modern Trend—“Unilateral” Approach

The modern trend follows the Model Penal Code’s “unilateral” approach to conspiracy, which requires that only *one* party have genuine criminal intent. Accordingly, under the unilateral approach, a defendant can be convicted of conspiracy if he conspires with one person only and that individual is a police officer working undercover.

b) Traditional Rule—“Bilateral” Approach

At common law, a conspiracy requires at least two “guilty minds,” i.e., persons who are actually committed to the illicit plan. Under this “bilateral” approach, if one person in a two-party agreement is only feigning agreement, the other party cannot be convicted of conspiracy. This requirement of two guilty minds gives rise to a number of problems.

(1) Husband and Wife

At common law, a husband and wife could not conspire together because the law viewed them as one person. They could, however, be guilty of conspiracy with a third person. This distinction has been abandoned in virtually all states today.

(2) Corporation and Agent

Since a corporation can act only through an agent, it has been held that there can be no conspiracy between the corporation and a single agent acting on behalf of the corporation. There is a split of authority as to

whether the agents can be deemed co-conspirators. Note that a corporation may be a party to a conspiracy with other corporations or individuals who are not agents of the corporation.

c) Wharton-Type Problems

(1) Wharton Rule

Where two or more people are necessary for the commission of the substantive offense (e.g., adultery, dueling, sale of contraband), the “Wharton rule” (named after its author) states that there is ***no crime of conspiracy unless more parties participate in the agreement than are necessary for the crime***. Some courts hold that, if the Wharton rule applies, there can never be a conviction for conspiracy. Others hold that, if the rule applies, it prohibits conviction for both conspiracy and the crime that the parties agreed to commit.

Example: A and B agree to meet at dawn to engage in a duel. They are apprehended before daybreak, however. Dueling is a crime in the jurisdiction, and A is charged with conspiracy to commit dueling. Does A have a defense? Yes. The Wharton rule applies and prevents liability.

Compare: The Wharton rule does not apply to agreements with “***necessary parties not provided for***” (see III.C.2.b., *supra*). Thus, where a state statute prohibiting the sale of narcotics imposes criminal liability only on the seller and not on the buyer, both the buyer and seller may be guilty of conspiracy to sell narcotics (even though both parties are necessary for commission of the substantive offense).

(2) Agreement with Person in “Protected Class”

If members of a conspiracy agree to commit an act that violates a statute that was designed to protect persons within a given class, ***a person within that class*** cannot be guilty of the crime itself. (See III.C.2.a., *supra*.) Moreover, she ***cannot be guilty of a conspiracy*** to commit that crime. It follows, then, that between two people, the person ***not*** in the protected class cannot be guilty of criminal conspiracy on the basis of an agreement with the person in the protected class.

Example: A, a woman, and B, a man, agreed on a scheme in which A would be transported over state lines for purposes of prostitution. Is B guilty of criminal conspiracy? No. The act of transporting women over state lines for immoral purposes violates a statute (the Mann Act) that was designed to protect women; thus, A could not be guilty of a violation of the Act and cannot be guilty of conspiracy to violate the Act. Therefore, B cannot be guilty of criminal conspiracy because there were not two guilty parties to the agreement.

d) Effect of Acquittal of Other Conspirators

A conspiracy requires two guilty parties at common law. Thus, in most courts, the acquittal of *all* persons with whom a defendant is alleged to have conspired precludes conviction of the remaining defendant. This rule does *not* apply where the other parties are not apprehended, are charged with lesser offenses, or are no longer being prosecuted (*nolle prosequi*).

b. Mental State—Specific Intent

Conspiracy is a *specific intent* crime. There are two different intents that are necessary: intent to agree and intent to achieve the objective of the conspiracy.

1) Intent to Agree

It is very difficult to separate the intent to agree from the act of agreement. Hence, most courts do not even try. For bar exam purposes, the only thing that is important to remember is that the intent to agree can be *inferred* from conduct.

2) Intent to Achieve Objective

The defendant must intend to achieve the objective of the conspiracy. This intent must be established as to *each* individual defendant. Under the common law approach, a minimum of two persons must intend to achieve the same purpose; i.e., there must be a “meeting of guilty minds.”

Example: A, B, and C agree to steal D’s car, but only A and B intend to keep it permanently; C intends to return it to D. Only A and B are guilty of conspiracy to commit larceny, because only they had the intent to permanently deprive D of his car. If only A so intended, and both B and C intended to return the car, then A could not be liable for conspiracy to commit larceny.

3) Intent to Facilitate a Conspiracy

A person who acts with the intent to facilitate a conspiracy may thereby become a member of the conspiracy. However, *intent cannot be inferred from mere knowledge*. Therefore, a merchant who sells a good in the ordinary course of business that he knows will be used to further a conspiracy does not thereby join the conspiracy. On the other hand, a merchant may be held to have joined the conspiracy if the good sold is a specialty item that cannot easily be obtained elsewhere or if the merchant otherwise has a stake in the criminal venture (e.g., by raising the price of the good because of the buyer’s purpose).

4) “Corrupt Motive” Not Required

The majority rule is that the parties to a conspiracy need not have been aware that their plan was an illegal one. A minority of courts have held to the contrary, however, reasoning that a requirement of evil motive flows implicitly from the word conspiracy. According to the “corrupt motive” doctrine, which operates as an exception to the general rule that ignorance of the law will not excuse criminal liability, the parties to a conspiracy must have known that their objective was criminal. The corrupt motive doctrine is usually limited to offenses that are *malum prohibitum* (*see I.D.2., supra*).

5) Conspiracy to Commit “Strict Liability” Crimes

Conspiracy is a specific intent crime. Therefore, in most jurisdictions, a conspiracy to commit a “strict liability” crime (for which intent is not required) requires intent.

Example: A and B agree on a scheme to persuade C, a 12-year-old girl, to have intercourse with one of them. They believe she is 21, but this would not be a defense to the completed crime of statutory rape. Can they be convicted of conspiracy to commit statutory rape? No, because conspiracy to commit statutory rape requires knowledge of the victim’s age even though the completed crime does not.

c. Overt Act

At common law, the conspiracy was complete when the agreement with the requisite intent was reached. This is still the law in some states. Most states, however, require that an *act in furtherance of the conspiracy* be performed. If an overt act is required, any act in pursuit of the conspiracy will suffice, even an act of mere preparation. The act may be performed by any one of the conspirators.

Example: A, B, and C agreed to rob a bank. A, unbeknownst to B and C, rents a car to be used in the getaway. If an overt act is required, the renting of a car is sufficient.

1) Attempt Distinguished

In attempt cases, the law requires that there be a *substantial step* toward commission of the crime, whereas the overt act for conspiracy requires only an act of mere preparation. The reason for this is that the secret activity in conspiracy cases is potentially more dangerous to society and, since a group is involved, it is more difficult for one person to stop the activity once the agreement has been made.

2. Termination of Conspiracy

Since acts or declarations of co-conspirators are admissible only if made in furtherance of the conspiracy, it becomes critically important to determine when the conspiracy ends. This is also important for statute of limitations purposes.

a. Acts of Concealment

Since most criminals attempt to conceal the fact that they have committed a crime, courts have generally taken the view that *evidence of overt acts of concealment is not sufficient to make the act of concealment part of the conspiracy*. In other words, there must be direct evidence that the parties specifically agreed, prior to commission of the crime, that they would act in a certain way to conceal the fact that they had committed the crime.

Example: Suppose the statute of limitations for tax evasion is six years. If A and B conspire to commit tax evasion, does their conspiracy end at the time of the commission of the fraud, or does it extend for the six years during which time A and B presumably endeavor to keep their crime a secret? The answer depends upon whether at the time of the agreement to commit tax evasion there was also a specific subsidiary agreement to conceal the crime until the statute of limitations had run. If there was no such specific agreement, as, for example, if A and B were not aware of

the statute of limitations, then the conspiracy does not extend beyond the completion of the act of evasion.

b. Government Frustration of Conspiracy’s Objective

The government’s defeat of the conspiracy’s ultimate objective does not automatically terminate the conspiracy. [United States v. Jimenez-Recio, 537 U.S. 270 (2003)]

Example: Police stop A, who was transporting illegal drugs in his vehicle. Instead of simply arresting A, the police instead decide to set up a “sting” operation. They drive the vehicle to a preset location, and instruct A to contact B, a drug dealer, in accordance with A and B’s original plan. B tells A that he will call C and D and have them pick up the vehicle with the drugs. C and D do so. C and D can be convicted of conspiracy to distribute illegal drugs. The fact that the government defeated the conspiracy’s objective does not terminate the conspiracy, and impossibility is no defense to a charge of conspiracy (*see* below).

3. Liability of One Conspirator for Crimes Committed by Other Conspirators

One conspirator may, by virtue of his participation in the scheme, meet the requirements for “aiding and abetting” the commission of crimes by his co-conspirators and therefore be liable for those crimes as an accomplice. Even if the conspirator did not have the sufficient mental state for accomplice liability, a separate doctrine provides that each conspirator may be liable for the crimes of all other conspirators if *two requirements* are met:

- (i) The *crimes were committed in furtherance* of the objectives of the conspiracy; and
- (ii) The crimes were “a natural and probable consequence” of the conspiracy, i.e., *foreseeable*.

This doctrine applies only if the conspirator has not made a legally effective withdrawal from the conspiracy before the commission of the crime by the co-conspirator. (*See* 4.b., *infra*.)

4. Defenses

a. Factual Impossibility Is No Defense

Factual impossibility is *not a defense* to conspiracy. Even if it was factually impossible to achieve the ultimate objective of the conspiracy, the defendants can be found guilty of the conspiracy itself.

Example: A and B agree to rape a woman whom they believe is asleep. In fact, she is dead. A and B may be convicted of conspiracy to rape.

b. Withdrawal Is No Defense to Conspiracy Charge

The general rule is that withdrawal from a conspiracy is *not a defense* to a charge of conspiracy, because the conspiracy is complete as soon as the agreement is made and an overt act is committed. The M.P.C. recognizes voluntary withdrawal as a defense if the defendant thwarts the success of the conspiracy (e.g., by informing the police).

1) Defense to Subsequent Crimes of Co-Conspirators

A person may limit his liability for subsequent acts of the other members of the conspiracy, including the target crime for which the conspiracy was formed, if

he withdraws. To withdraw, he must perform an affirmative act that ***notifies all members*** of the conspiracy, and such notice must be given in time for them to have the opportunity to abandon their plans. (Note that if he has also provided material assistance so as to be liable as an accomplice, he must attempt to neutralize the assistance (*see* III.C.2.c., *supra*.)

5. **No Merger—Conviction for Conspiracy and Substantive Crime**

Under the old rule, if the conspirators committed a substantive offense, the crime of conspiracy “merged” into the completed crime. While the members of the agreement could be convicted of the substantive offense, they could not be convicted of the conspiracy. This is no longer the law in most jurisdictions. (*See* the discussion of merger in I.H., *supra*.) Now, if the conspirators are successful, they can be ***convicted of both criminal conspiracy and the substantive offense***.

6. **State Codifications**

While at common law a conspiracy was defined as a combination or agreement between two or more persons to accomplish some criminal or unlawful purpose, or to accomplish a lawful purpose by unlawful means, recent state codifications require that the object of the conspiracy be a specifically proscribed offense. Yet many states essentially codify the expansive common law notion by making it a crime to conspire to commit acts injurious to the public welfare. The Supreme Court has indicated that such statutes are unconstitutionally vague unless construed narrowly.

7. **Punishment**

Because a defendant may be convicted of both conspiracy and the completed crime, most jurisdictions have enacted express penalty provisions for conspiracies. Some statutes make conspiracy a misdemeanor regardless of its objective; some provide a permissible maximum sentence regardless of the objective; and still others provide different maximums depending upon the objective. Note that because the punishment for conspiracy usually is not expressed as a fraction of the punishment for the completed crime, the punishment for conspiracy may be more severe than the punishment for the completed crime.

D. **ATTEMPT**

A criminal attempt is an act that, although done with the intention of committing a crime, falls short of completing the crime. An attempt therefore consists of two elements: (i) a specific intent to commit the crime, and (ii) an overt act in furtherance of that intent.

1. **Intent**

The defendant must have the intent to perform an act and obtain a result that, if achieved, would constitute a crime.

a. **Attempt Requires Specific Intent**

Regardless of the intent required for a completed offense, an attempt always requires a ***specific intent***. For example, attempted murder requires the specific ***intent to kill*** another person, even though the mens rea for murder itself does not necessarily require a specific intent to kill (*see* VII.C.2.a.1), *infra*).

b. Attempt to Commit Crimes Requiring Recklessness or Negligence Is Logically Impossible

A crime defined as the reckless or negligent production of a result cannot be attempted, because if there were an intent to cause such a result, the appropriate offense would be attempt to intentionally commit the crime rather than attempt to recklessly or negligently cause the harm.

c. Attempt to Commit Strict Liability Crimes Requires Intent

Although a strict liability crime does not require criminal intent, to attempt a strict liability crime the defendant must act with the intent to bring about the proscribed result.

2. Overt Act

The defendant must have committed an act *beyond mere preparation* for the offense. Several tests have been used to determine whether the act requirement for attempt liability has been satisfied:

a. Traditional Rule—Proximity Test

Traditionally, courts used a proximity approach; i.e., they have evaluated the act based on how close the defendant came to completing the offense. Under the typical proximity test, attempt requires an act that is dangerously close to success.

Example: Pointing a loaded gun at an intended victim and pulling the trigger is sufficient under the proximity test, but going to the store to purchase bullets or even driving to the intended victim's house is insufficient. [See *People v. Rizzo*, 246 N.Y. 334 (1927)]

b. Majority Rule—Model Penal Code Test

The M.P.C. and most state criminal codes require that the act or omission constitute a “substantial step in a course of conduct planned to culminate in the commission of the crime.” In addition, an act will not qualify as a substantial step unless it is strong corroboration of the actor's criminal purpose.

3. Defenses

a. Impossibility of Success

Factual impossibility traditionally has been distinguished from legal impossibility, and should be distinguished for exam purposes.

1) Legal Impossibility Is a Defense

If the defendant, having completed all acts that he had intended, would have committed no crime, he cannot be guilty of an attempt to do the same when he fails to complete all of the intended acts. True legal impossibility is rare.

Example: Defendant was charged with attempted subornation of perjury for soliciting false testimony from a third party witness in a divorce proceeding brought by Wife on the grounds of adultery. The divorce complaint alleged one act of adultery. The witness's testimony, which was never offered at trial, would have falsely accused Husband of having extramarital relations on an occasion that was

not alleged in the complaint. Because Wife's complaint made no mention of this event, the witness's testimony, had it been offered at trial, would have been immaterial to the resolution of the complaint. The materiality of false testimony is an essential element of the crime of perjury; therefore, if the witness had testified falsely as planned, Defendant could not have been convicted of subornation of perjury. In equal measure, then, she cannot be guilty of an attempt to do the same. [People v. Teal, 196 N.Y. 372 (1909)]

a) Effect of Statute or Case Abolishing Impossibility Defenses

Even a jurisdiction with a statute or case law purporting to do away with impossibility defenses will recognize the above type of legal impossibility. Such statutes ordinarily contain a provision that the defendant must be charged with the attempt *of a crime*, thus implicitly recognizing a true legal impossibility defense. Such statutes or cases generally have the effect of preventing factual impossibility from becoming a good defense by its being labeled as legal impossibility.

2) Factual Impossibility Is No Defense

It is no defense that the substantive crime is incapable of completion due to some *physical or factual condition*, unknown to the defendant.

Example: In an attempt to steal A's wallet, B sticks his hand in A's back pocket. The pocket, however, is empty. Can B be convicted of attempted larceny? Yes, the "emptiness" of A's back pocket describes its physical condition at the time B reached his hand in. This factual impossibility is no defense to liability.

a) Includes Impossibility Due to Attendant Circumstances

Impossibility is also no defense when the defendant engages in conduct while mistaken about certain attendant circumstances: Had the circumstances been as she believed they were, what she set out to do would be a crime. However, because the circumstances were otherwise, what she has set out to do will not be a crime. Courts traditionally have split on whether this is legal or factual impossibility, but the *better view* is that it is factual impossibility and not a defense.

Example: An adult police officer, while pretending to be a minor, arranges for a time and place for a sexual encounter with an adult defendant. When the defendant shows up for the encounter, he is arrested and charged with some form of attempted statutory rape crime, even though the "minor" is in reality an adult. Given that there is no minor involved, there is no way for the defendant to complete the substantive crime. May the defendant be convicted? The answer is "yes," given that the defendant has engaged in conduct that would have constituted some sort of statutory rape type crime had the defendant been able to complete the crime and had the circumstances been as he believed them to be.

3) Distinguishing Between Factual and Legal Impossibility

The bright-line division between legal and factual impossibility above is a bit of an artifice; courts are not as consistent in distinguishing the two. However, for exam purposes, you should use the “better view” outlined above and define legal impossibility narrowly. Ask yourself: “If the defendant were able to complete all of the acts that he intended to do, and if all of the attendant circumstances actually were as the defendant believed them to be, would the defendant have committed a crime?” The answer usually will be yes, in which case the impossibility is factual and not a defense. In the unusual case where the answer is no, the defendant most likely has a legal impossibility defense.

b. Abandonment

If a defendant has, with the required intent, gone beyond preparation, may she escape liability by abandoning her plans? The majority rule is that abandonment is *never a defense*. The M.P.C. approach, followed in a number of jurisdictions, is that *withdrawal will be a defense but only if*:

- 1) It is *fully voluntary* and not made because of the difficulty of completing the crime or because of an increased risk of apprehension; and
- 2) It is a *complete abandonment* of the plan made under circumstances manifesting a renunciation of criminal purpose, not just a decision to postpone committing it or to find another victim.

4. Prosecution for Attempt

A defendant charged with a completed crime may be found guilty of either the completed crime or an attempt to commit the crime as long as the evidence presented supports such a verdict. The reverse is not true. A defendant charged only with attempt may not be convicted of the completed crime.

5. Punishment for Attempt

Most states punish attempt less severely than the crime attempted. The most common statutory scheme permits a penalty up to one-half the maximum penalty for the completed crime, with a specific maximum set for attempts to commit crimes punishable by death or life imprisonment. Under the M.P.C. and some state statutes, an attempt may be punished to the same extent as the completed crime, except for capital crimes and the most serious felonies.

V. RESPONSIBILITY AND CRIMINAL CAPACITY

A. INSANITY

The insanity defense exempts certain defendants because of the existence of an abnormal mental condition at the time of the crime. The various formulations differ significantly on what effects a mental illness must have had to entitle the defendant to an acquittal. Note that insanity is a *legal term* rather than a psychiatric one. Furthermore, insanity is a generic term comprising many possible mental abnormalities, all of which have only one thing in common: they are recognized by law as dictating certain legal consequences. Usually, the cause of a defendant’s mental illness or insanity is irrelevant in determining the legal consequences.

1. Formulations of Insanity Defense

a. *M'Naghten* Rule

1) Elements

The traditional *M'Naghten* rule provides that a defendant is entitled to an acquittal if the proof establishes that:

- a) A *disease* of the mind
- b) *Caused a defect* of reason
- c) Such that the defendant *lacked the ability at the time* of his actions to either:
 - (1) Know the *wrongfulness* of his actions; or
 - (2) Understand the *nature and quality* of his actions.

2) Application

a) Defendant with Delusions

If the defendant suffered from delusions (false beliefs), it is necessary to determine whether his actions would have been criminal if the facts had been as he believed them to be.

Example: A, because of a mental illness, believed B wanted to kill him. A killed B. Is A entitled to an acquittal on insanity grounds under the *M'Naghten* rule? *Held:* No. Even if A's delusion had been accurate, he would not have been legally entitled to kill B simply because B wanted to kill him.

b) Belief that Acts Are Morally Right

A defendant is not entitled to an acquittal merely because he believes his acts are morally right, unless he has lost the capacity to recognize that they are regarded by society as wrong.

c) Inability to Control Oneself

Under the traditional interpretation given to the *M'Naghten* rule, it is irrelevant that the defendant may have been unable to control himself and avoid committing the crime. Loss of control because of mental illness is *no defense*.

3) Evidence Admissible

In practice, the *M'Naghten* rule does not unduly restrict the evidence heard by juries. Most jurisdictions admit any evidence that reasonably tends to show the mental condition of the defendant at the time of the crime.

b. Irresistible Impulse Test

Under the irresistible impulse test, a defendant is entitled to an acquittal if the proof establishes that because of mental illness he was *unable to control his actions or to*

conform his conduct to the law. Contrary to what the name irresistible impulse might imply, this inability need not come upon the defendant suddenly. Some jurisdictions apply both *M’Naghten* and the irresistible impulse test. Thus, a person is entitled to an acquittal if he meets either test.

c. *Durham* (or New Hampshire) Test

Under the *Durham* rule, a defendant is entitled to an acquittal if the proof establishes that his crime was the “*product of mental disease or defect.*” A crime is a “product of” the disease if it would not have been committed *but for* the disease. In this way, the *Durham* test is broader than either the *M’Naghten* or irresistible impulse tests; it was intended primarily to give psychiatrists greater liberty to testify concerning the defendant’s mental condition. Although severely criticized for being unduly vague, the *Durham* rule was followed in the District of Columbia from 1954 until 1972, at which time the court of appeals replaced it with the A.L.I. test. (*See below.*) It remains the law only in New Hampshire.

d. American Law Institute (“A.L.I.”) or Model Penal Code Test

Under this test, the defendant is entitled to an acquittal if the proof shows that he suffered from a *mental disease* or defect and as a result *lacked substantial capacity* to either:

- (i) *Appreciate the criminality* (wrongfulness) of his conduct; or
- (ii) *Conform his conduct* to the requirements of law.

This test combines the *M’Naghten* and the irresistible impulse tests by allowing for the impairment of both cognitive and volitional capacity.

2. Exclusion of “Psychopaths”

Many formulations (including the A.L.I. test) expressly exclude the psychopathic criminal—the person who repeatedly commits crimes without experiencing guilt. This is usually accomplished by defining “mental illness” so as to exclude any abnormality evidenced only by repeated antisocial conduct. “Sociopathic” and “psychopathic” are synonymous.

3. Refusal to Participate in Psychiatric Examination

If the defendant does not put his mental state in issue and does not plan to use an insanity defense, he may refuse to participate in a court-ordered psychiatric examination to determine competency to stand trial. If he does not refuse, he is entitled to the *Miranda* warnings prior to such an examination.

4. Procedural Issues Related to Insanity Defense

Several important procedural matters are raised by the insanity defense.

a. Burdens of Proof

1) Presumption of Sanity and Burden of Producing Evidence

All defendants are presumed sane. The insanity issue is not raised, then, until the defendant comes forward with some evidence tending to show that he was insane under the applicable test. Depending upon the jurisdiction, this burden is carried

either by a mere shred (or scintilla) of evidence, or by evidence sufficient to raise a reasonable doubt as to sanity.

2) Burden of Persuasion

In most states, the defendant must prove his insanity, generally by a preponderance of the evidence. In some jurisdictions and under the M.P.C., however, once the issue has been raised, the prosecution must prove the defendant was sane beyond a reasonable doubt. Federal courts require the defendant to prove insanity by clear and convincing evidence.

b. When Defense May Be Raised and Who May Raise It

1) Defense May Be Raised After Arraignment

The insanity defense may be raised at the arraignment when the plea is taken, but the defendant need not raise it then. A simple “not guilty” at that time does not waive the right to raise the defense at some future time. A minority of jurisdictions, however, require that the defendant give reasonable notice to the prosecution of an intent to raise the defense at trial.

2) Neither Prosecutor Nor Judge May Raise Defense for Competent Defendant

Neither a prosecutor nor a judge can assert the insanity defense when a competent defendant, who is adequately represented, has elected not to do so.

c. Pretrial Psychiatric Examination

1) Right to Support Services for Defense

Where a defendant has made a preliminary showing that it is likely he will be able to use the insanity defense, the state must provide a psychiatrist for the preparation of the defense. Where the state presents evidence that the defendant is likely to be dangerous in the future, the defendant is entitled to psychiatric examination and testimony in the sentencing proceeding. [Ake v. Oklahoma, 470 U.S. 68 (1985)]

2) No Privilege Against Self-Incrimination

At the present time, a defendant has no right to refuse to be examined by a psychiatrist appointed to aid the court in the resolution of his insanity plea. However, a defendant who does not put his mental state in issue is entitled to the *Miranda* warnings before he may be compelled to undergo a court-ordered competency examination; the defendant may then refuse to be examined.

5. Post-Acquittal Commitment to Mental Institution

a. Committed Until Cured

In most jurisdictions, acquittal by reason of insanity puts into operation a procedure by which the acquitted defendant may be committed to a mental institution until cured. In some jurisdictions, such commitment is possible only if it is proven that the defendant is presently mentally ill and dangerous. In others, commitment follows automatically.

b. Confinement May Exceed Maximum Period of Incarceration Carried by Offense

The confinement of an insanity acquittee in a mental hospital, based solely on the trial

court's finding of insanity by a preponderance of the evidence, may last until he has regained his sanity or is no longer dangerous. This *does not deny due process* even if the result is confinement for a period longer than the maximum period of incarceration carried by his offense. Nor is the insanity acquittee entitled, at the end of the statutory maximum incarceration period, to a civil commitment hearing at which proof of his insanity would have to be established by clear and convincing evidence. [Jones v. United States, 463 U.S. 354 (1983)]

6. Mental Condition During Criminal Proceedings

In addition to being a defense to criminal liability, the abnormal mental condition of a defendant is relevant at two other stages of the legal proceeding.

a. Incompetency to Stand Trial

Under the Due Process Clause of the United States Constitution, a defendant may not be tried, convicted, or sentenced if, as a result of a mental disease or defect, he is *unable*:

- (i) *To understand the nature of the proceedings* being brought against him; or
- (ii) *To assist his lawyer* in the preparation of his defense.

The Due Process Clause prevents a defendant from being declared incompetent without notice and a hearing. Many jurisdictions grant a right to a jury determination of competence. A finding of incompetence will suspend the criminal proceedings and invariably *result in commitment* until such time as the defendant regains competence. The Constitution may demand that the defendant's hospitalization be limited to a reasonable period of time necessary to decide whether there is a likelihood of recovery in the near future.

b. Incompetency at Time of Execution

A defendant may not be executed if he is incapable of understanding the nature and purpose of the punishment. Modern statutes often permit only the warden to raise this issue. Some expressly provide for a jury determination.

7. Limits on Testimony Regarding Sanity Issue

About half the states limit evidence on the issue of insanity to expert psychiatric testimony. The M.P.C. rejects this approach, and would allow any type of evidence relevant to the issue of whether the defendant had the mental state required for the particular crime charged.

8. Diminished Capacity

Some states recognize the defense of "diminished capacity," under which the defendant may assert that as a result of a mental defect (e.g., neurosis, obsessive compulsiveness, or dependent personality) short of insanity, he did not have the particular mental state (purpose, knowledge, recklessness, or negligence) required for the crime charged. Most states recognizing this defense limit it to specific intent crimes.

9. Bifurcated Trial

Some states, such as California, employ a two-stage trial process whenever the defense of insanity is raised. The first stage determines *guilt* (did the defendant actually perform the criminal act?); the second stage (which may be tried before a new jury at the judge's

discretion) determines *insanity* (was the defendant legally insane at the time he performed the act?).

B. INTOXICATION

Intoxication may be caused by *any substance*. Alcohol, drugs, and medicine are the most frequent. Evidence of intoxication may be raised whenever the intoxication negates the existence of an element of a crime. The law generally distinguishes between voluntary and involuntary intoxication.

1. Voluntary Intoxication

Intoxication is voluntary (self-induced) if it is the result of the intentional taking without duress of a substance known to be intoxicating. The person need not have intended to become intoxicated.

a. Defense to Specific Intent Crimes

Voluntary intoxication evidence may be offered, when the defendant is charged with a crime that requires *purpose (intent) or knowledge*, to establish that the intoxication prevented the defendant from formulating the requisite intent. Thus, voluntary intoxication may be a good defense to *specific intent* crimes, but will *not* be a defense to *general intent crimes*. The defense is not available if the defendant purposely becomes intoxicated in order to establish the defense.

b. No Defense to Strict Liability Crimes or Crimes Requiring Malice, Recklessness, or Negligence

Voluntary intoxication is not a defense to crimes requiring malice, recklessness, or negligence, or crimes of strict liability. Thus, voluntary intoxication is not a defense to common law murder, which requires a mens rea of “malice aforethought” (*see* VII.C.2.a.1), *infra*).

Example: After drinking heavily, A breaks into a house, wrongly thinking it is her own. When surprised by B, the owner, A reacts with force, beating B with her fists. While driving home, A is cited for speeding. Will A have a defense of intoxication: (i) to burglary? (Yes, if as a result she did not know that the house belonged to B or did not have the intent to commit a felony therein); (ii) to battery? (No, because as defined battery may be the result of recklessness); or (iii) to speeding? (No, because speeding is a strict liability offense).

1) Crimes that Require Recklessness

While crimes calling for recklessness require a conscious disregard of a substantial and unjustifiable risk (*see* II.C.6.a.3), *supra*), a person who was not consciously aware of the risk only because he was intoxicated will be deemed to have acted recklessly with regard to the risk.

c. Defense to First Degree Murder, But Not Second Degree Murder

It is generally held that voluntary intoxication may reduce first degree (premeditated) murder to second degree murder, but it will not reduce second degree murder to manslaughter. *Rationale:* In a jurisdiction that divides murder into degrees (*see* VII.C.3. *infra*), all murders are second degree murder unless the prosecution proves, e.g.,

deliberation and premeditation. Common law “depraved heart” murders would fall into the second degree category. Although voluntary intoxication may negate the defendant’s ability to deliberate and premeditate (first degree murder), it cannot negate the criminal recklessness required for depraved heart murder (second degree murder).

2. Involuntary Intoxication

Intoxication is involuntary only if it results from the taking of an intoxicating substance (i) *without knowledge* of its nature, (ii) *under direct duress* imposed by another, or (iii) *pursuant to medical advice* while unaware of the substance’s intoxicating effect.

Involuntary intoxication may be *treated as mental illness*, in which case a defendant is entitled to acquittal if, because of the intoxication, she meets whatever test the jurisdiction has adopted for insanity.

3. Relationship to Insanity

Intoxication and insanity are two separate defenses. However, continuous, excessive drinking or drug use may bring on actual insanity (e.g., delirium tremens). Thus, a defendant may be able to claim both an intoxication defense and an insanity defense.

C. INFANCY

1. Common Law

At common law, the defense of lack of capacity to commit a crime by reason of infancy gave rise to three presumptions. *Physical age* (not mental age) *at the time of the crime* (not at the time of the trial) governs.

a. Under Seven—No Criminal Liability

Under the age of seven, a child could not be held responsible for any crime (conclusive presumption of incapability of knowing wrongfulness of acts).

b. Under Fourteen—Rebuttable Presumption of No Criminal Liability

Children between the ages of seven and 14 were presumed incapable of knowing the wrongfulness of their acts, but this presumption was rebuttable by clear proof that the defendant appreciated the nature and quality of his act (e.g., conduct undertaken to conceal the crime). Note, however, that children under 14 were *conclusively* presumed incapable of committing *rape*.

c. Over Fourteen—Adult

Children age 14 or older were treated as adults.

2. Modern Statutes

a. Some Have Abolished Presumptions

A number of modern statutes have abolished the presumptions of the common law and have provided that no child can be convicted of a crime until a stated age is reached, usually 13 or 14. Other states, however, retain the common law presumptions.

b. Juvenile Delinquency

All states have enacted some type of juvenile delinquency laws or have set up special

juvenile or family courts. These laws ordinarily provide that with respect to conduct that would be deemed criminal if committed by an adult, the juvenile court has exclusive jurisdiction over children under a certain age, and concurrent jurisdiction (with the criminal courts) over older children. In the “concurrent jurisdiction” situation, the child must be “charged” with delinquency in juvenile court unless the juvenile court waives jurisdiction and authorizes the trial of the child as an adult in criminal court. In most jurisdictions, the common law immunity rules for infants do not apply in juvenile court because the primary goal is rehabilitation rather than punishment. The M.P.C. follows this approach, providing that the juvenile court has exclusive jurisdiction over minors younger than 16 and concurrent jurisdiction over 16- and 17-year-old minors.

VI. PRINCIPLES OF EXCULPATION

A. JUSTIFICATION

Under certain circumstances, the commission of a proscribed act is viewed by society as justified and hence not appropriate for criminal punishment. Generally, the defendant must raise the issue of justifiable use of force by introducing *some* evidence (“more than a scintilla”) tending to show justification as an affirmative defense. Once she has done this, the state may require the prosecution to prove that the use of force was not justified, or it may impose on the defendant the burden of proving this affirmative defense by a preponderance of the evidence.

1. Self-Defense

a. Nondeadly Force

As a general rule, an individual who is without fault may use *such force as she reasonably believes is necessary* to protect herself from the imminent use of unlawful force upon herself. (See discussion *infra* on reasonableness and unlawful force.) There is *no duty to retreat* before using nondeadly force, even if retreat would result in no further harm to either party.

b. Deadly Force

A person may use deadly force in self-defense if she (i) is without fault, (ii) is confronted with unlawful force, and (iii) reasonably believes that she is threatened with imminent death or great bodily harm.

1) Without Fault

A person who has initiated an assault or provoked the other party will be considered the aggressor. (See discussion *infra*.)

2) Unlawful Force

The attacker must be using unlawful force (i.e., force that constitutes a crime or a tort).

3) Threat of Imminent Death or Great Bodily Harm

The defendant must *reasonably* believe that she is faced with imminent death or great bodily harm if she does not respond with deadly force. The danger of harm

must be a present one. There is no right to use deadly force if harm is merely threatened at a future time or the “attacker” has no present ability to carry out the threat.

Example: A, who has his arms tied behind his back, says to D, “I am going to kill you.” D pulls out a gun and shoots A. No self-defense.

4) Retreat

Must a person retreat as far as possible before using deadly force, if such retreat is possible without the person endangering himself? For purposes of the examination, the *majority rule* is that there is *no duty to retreat*. A person (other than the initial aggressor) may use deadly force in self-defense even if this could be avoided by retreating. Even in the minority of courts that follow a common law rule and impose a duty to retreat, retreat is only sometimes necessary. First, no retreat is necessary unless it can be made in complete safety. Second, no retreat is necessary in several special situations: (i) where the attack occurs in one’s own home, (ii) where the attack occurs while the victim is making a lawful arrest; or (iii) where the assailant is in the process of robbing the victim.

Example: A is standing in a public park feeding the birds. B walks up to A, pulls a knife from his pocket, and—as he comes closer to A—says, “I am going to kill you.” A pulls a gun from her pocket and shoots B, killing him. Does A have a defense of self-defense? Under the majority rule the answer would be yes, because A had no duty to retreat before using deadly force, as long as the force was necessary to defend herself against imminent attack. Even under the minority approach the answer might be yes, because even if A was under a general duty to retreat before using deadly force, here it did not appear that such retreat could have been done in complete safety.

c. Right of Aggressor to Use Self-Defense

Generally, one who is at fault for starting a confrontation has no right to use force in her own defense during that confrontation. But an aggressor can “regain” her right to use force in self-defense in two ways:

1) Withdrawal or Retreat

An aggressor who, in good faith, attempts to remove herself from the fight, and communicates to the other person her desire to remove herself, regains her right to use force in self-defense.

2) Sudden Escalation

If the victim of the initial aggression suddenly escalates a “minor” fight into one involving deadly force and does so without giving the aggressor the chance to withdraw or retreat, the aggressor may use deadly force in her own defense.

2. Defense of Others

There are two issues in determining whether a person who has used force to defend another person is criminally liable for her acts.

a. Relationship with Person Aided

Must there be some special relationship between the defendant and the person in whose

defense she acted? The majority rule is no. One may use force in defense of any other person if the other requirements of the defense are met. A few jurisdictions require that the person whom the defendant aided must either have been a member of the defendant's family or the defendant's employee or employer.

b. Status of Person Aided

A defendant has the defense of defense of others only if she reasonably believed that the person she assisted had the legal right to use force in his own defense. If in fact that person had no such legal right, does the defendant still have a defense? The better view is yes, because all that is necessary for the defense is the *reasonable appearance of the right to use force*. In a minority of jurisdictions, however, the answer is no, because the defendant "steps into the shoes of the person she defends" and therefore has no defense if that person had no legal right to use force in self-defense.

3. Defense of a Dwelling

a. Nondeadly Force

A person is justified in the use of nondeadly force in defense of her dwelling when, and to the extent that, she reasonably believes that such conduct is necessary to prevent or terminate another's unlawful entry into or attack upon her dwelling.

b. Deadly Force

One is generally justified in the use of deadly force in two situations:

1) Tumultuous Entry Plus Personal Danger

Use of deadly force is justifiable where the entry was made or attempted in a riotous, violent, or tumultuous manner *and* the person reasonably believes that the use of force is necessary to prevent a personal attack upon herself or another in the dwelling.

2) Felony

Use of deadly force is also justifiable where the person reasonably believes that such force is necessary to prevent the entry into the dwelling by a person who intends to commit a felony in the dwelling.

4. Defense of Other Property

a. Nondeadly Force

Nondeadly force may be used to defend property in one's possession from unlawful interference. In the case of real property, this means entry or trespass; in the case of personal property, this means removal or damage. The person must reasonably believe that force is needed, and the need to use force must reasonably appear imminent. Thus, force may not be used if a request to desist or refrain from the activity would suffice. In addition, the right is limited to property in one's possession. Force cannot be used to regain possession of property that he reasonably believes was wrongfully taken, unless the person using it is in "immediate pursuit" of the taker.

b. Deadly Force May Not Be Used

Defense of property alone can never justify the use of deadly force. A person may use

deadly force in the defense of property generally only in conjunction with another privileged use of force, e.g., self-defense, defense of others, or to effectuate an arrest.

5. Crime Prevention

a. Nondeadly Force

Generally, one is privileged to use force to the extent that he reasonably believes is necessary to prevent a felony, riot, or other serious breach of the peace, although some states (e.g., California) have extended this to the prevention of any crime.

b. Deadly Force

The traditional rule was that deadly force could be used to prevent the commission of any felony, but the modern view is that deadly force may be used only if it appears reasonably necessary to prevent a “dangerous felony” involving risk to human life. This would include robbery, arson, burglary of a dwelling, etc.

6. Use of Force to Effectuate Arrest

a. By Police Officer

The use of deadly force to apprehend a fleeing felon constitutes a seizure. The force used to effect a seizure must be reasonable. Deadly force is reasonable only when the felon threatens death or serious bodily harm and deadly force is necessary to prevent his escape. [Tennessee v. Garner, 471 U.S. 1 (1985)] For purposes of state criminal law, under this rule a police officer cannot use deadly force to apprehend an unarmed, nondangerous felon; but an officer may use deadly force to prevent a felon from escaping if the police officer has probable cause to believe that the felon poses a threat of serious bodily harm to the officer or others.

1) By Person Acting At Direction of Police Officer

A police officer may summon a bystander to assist him in making a lawful arrest. The bystander has the same authority as the officer to use force in making the arrest, and the bystander's good faith assistance is justified even if it later turns out that the officer was exceeding his authority.

b. By Private Person

A private person has the same right to use force to make an arrest as a police officer or one acting at the direction of a police officer, except that the private person has a defense to the use of *deadly force only if* the person harmed was *actually guilty* of the offense (i.e., felony) for which the arrest was made. It is not enough that it reasonably appeared that the person was guilty. A private person has a privilege to use *nondeadly force* to make an arrest if a crime was in fact committed and the private person has *reasonable grounds to believe* the person arrested has in fact committed the crime.

7. Resisting Arrest

a. Right to Resist Person Not Known to Be Police Officer

An individual may lawfully repel, with deadly force if necessary, an attack made by a police officer trying to arrest her if the individual does not know that the person is a police officer.

b. Right to Resist Known Police Officer

May a person resist arrest if the person attempting to make the arrest is known to be a police officer? The majority rule is that *nondeadly force* may be used to resist an improper arrest even if a known officer is making that arrest. A minority of courts and the M.P.C. take the position that force may not be used to resist one known to be a police officer.

8. Necessity

Conduct otherwise criminal is justifiable if the defendant reasonably believed that the conduct was necessary to avoid some harm to society that would exceed the harm caused by the conduct. The *test is objective*; a good faith belief in the necessity of one's conduct is insufficient. However, causing the death of another person to protect property is never justified.

Example: Throwing cargo overboard during a violent storm, if necessary to save the lives of the crew and other people on board a ship, would not constitute criminal damage to property. On the other hand, throwing some members of the crew overboard to save the cargo would never be justifiable.

The defense of necessity is not available if the defendant is at fault in creating a situation requiring her to choose between two evils. Finally, under the traditional common law view, the pressure producing the choice of evils had to come from natural forces; however, modern cases *do not require that the necessity arise from natural forces*.

9. Public Policy

A police officer (or one assisting her) is justified in using reasonable force against another, or taking property, provided the officer acts pursuant to a law, court order, or process requiring or authorizing her to so act.

Example: The public executioner is not guilty of murder when she carries out a lawfully imposed sentence of execution. If the sentence was not lawful, the executioner is still immunized from criminal liability by a reasonable belief that her conduct was required by law.

10. Domestic Authority

The parents of a minor child, or any person "in loco parentis" with respect to that child, may lawfully use reasonable force upon the child for the purpose of promoting the child's welfare. Whether or not the force is "reasonable" is judged by the totality of the circumstances, including the age, sex, and health of the child.

B. EXCUSE OF DURESS (ALSO CALLED COMPULSION OR COERCION)

A person is not guilty of an offense, *other than homicide*, if he performs an otherwise criminal act under the threat of imminent infliction of death or great bodily harm, provided that he reasonably believes death or great bodily harm will be inflicted on himself or on a member of his immediate family if he does not perform such conduct. *Threats to harm any third person* may also suffice to establish the defense of duress. Traditionally, *threats to property* were not sufficient; however, a number of states, consistent with the M.P.C., do allow for threats to property to give rise to a duress defense, assuming that the value of the property outweighs the harm done to society by commission of the crime. Note that an act committed under duress is termed excusable rather than justifiable. The subtle distinction stems from the fact that criminal acts performed under duress are condoned by society rather than encouraged.

1. Necessity Distinguished

Unlike necessity, duress *always* involves a human threat.

Example: A points a gun at B and threatens to kill B if she does not break into C's house and steal food. B does as she is told. B may raise the defense of duress. If, however, B is a starving victim of a plane crash in a desolate area and commits the same act, she has the defense of necessity.

C. OTHER DEFENSES

1. Mistake or Ignorance of Fact

a. Mistake Must Negate State of Mind

Ignorance or mistake as to a matter of fact will affect criminal guilt only if it shows that the defendant did not have the state of mind required for the crime.

Example: A, hunting in the woods, shoots at what he reasonably believes to be a deer. In fact, it is B, who is killed. A's mistake of fact establishes that he did not have the state of mind required for murder.

Compare: A, hunting in the woods, shoots through the trees at a figure he believes to be his enemy B, intending to kill him. In fact, the figure is C, who is killed. A is guilty of murdering C despite his mistake of fact as to C's identity, because A's mistake does not negate his intent to kill a person.

b. Requirement that Mistake Be Reasonable

1) Malice and General Intent Crimes—Reasonableness Required

If the mistake or ignorance is offered to negate the existence of general intent or malice, it must be a reasonable mistake or ignorance, i.e., the type of mistake or ignorance that a reasonable person would have made under the circumstances.

2) Specific Intent Crimes—Reasonableness Not Required

Any mistake of fact, reasonable or unreasonable, is a defense to a specific intent crime.

Example: A, leaving a restaurant, takes an umbrella, believing that it was the one she had left there a week ago. In fact, it belongs to B. Is A guilty of larceny? *Held:* No; since A believed the umbrella was hers, she could not have intended to deprive B of his right to it. Therefore, she lacked the state of mind necessary for larceny. Since her mistake negates a specific intent, it is not material whether it was a reasonable mistake or not.

c. Strict Liability Crimes—Mistake No Defense

Since strict liability crimes require no state of mind, mistake or ignorance of fact is no defense to them.

2. Mistake or Ignorance of Law

a. General Rule—No Defense

It is not a defense to a crime that the defendant was unaware that her acts were

prohibited by the criminal law or that she mistakenly believed that her acts were not prohibited. This is true even if her ignorance or mistake was reasonable.

b. Mistake or Ignorance of Law May Negate Intent

If the mental state for a crime requires a certain belief concerning a collateral aspect of the law, ignorance or mistake as to that aspect of the law *will negate the requisite state of mind*. This situation involves ignorance of some aspect of the *elements* of a crime rather than the *existence* of the statute making the act criminal.

Examples: 1) A is charged with violating a statute prohibiting the sale of a pistol to one known to be a convicted felon. A was unaware of the statute prohibiting this, but was aware that the person to whom the pistol was sold had been convicted of assault. A mistakenly believed, however, that assault was a misdemeanor; in fact, it was a felony. Is A guilty? *Held:* No. A's ignorance of the statute prohibiting the sale does not affect her liability, but the statute requires awareness that the buyer was a convicted felon. Since A believed the buyer to be only a convicted misdemeanant, she lacked the state of mind required for the crime.

2) B, who has had her car repossessed by a loan company, honestly believes she is still the lawful owner of the vehicle and is lawfully entitled to possession of it. She sees it sitting in a parking space in front of the loan company office and takes it. Even if B is wrong about her right to take the automobile, she is not guilty of larceny because she lacks the requisite intent to deprive another of his property.

c. Exceptions

1) Statute Not Reasonably Available

The defendant has a defense if the statute proscribing her conduct was not published or made reasonably available prior to the conduct.

2) Reasonable Reliance on Statute or Judicial Decision

The defendant has a defense if she acted in reasonable reliance on a statute or judicial decision, even though the statute is later declared unconstitutional or the decision is overruled. The defense is strongest when the decision relied on was rendered by the highest court in the jurisdiction.

3) Reasonable Reliance on Official Interpretation or Advice

At common law, it was no defense that the defendant relied on an erroneous official statement of the law contained in an administrative order or grant, or in an official interpretation by the public officer or body responsible for the interpretation, administration, or enforcement of the law. The emerging rule, advocated by the M.P.C., provides a defense when the statement is obtained from one "charged by law with responsibility for the interpretation, administration, or enforcement of the law."

4) Compare—Reasonable Reliance on Advice of Private Counsel

Unlike reasonable reliance on an official interpretation of the law (e.g., an opinion of the Attorney General), relying on the advice of one's own counsel is normally

not allowed as a true affirmative defense to a crime. If, however, the reliance on the attorney negates an otherwise necessary mental state element (e.g., knowingly violating the law), such reliance can demonstrate that the government has not proved its case beyond a reasonable doubt.

3. Consent

a. May Negate Element of Offense

Consent of the victim is generally no defense. However, if it negates an element of the offense, consent is a complete defense.

Examples: 1) Showing that the victim consented to intercourse is a defense to a charge of forcible rape.

2) Showing that an adult person consented to traveling with the defendant is a defense to kidnapping.

For some crimes, the consent of the victim is of no relevance (e.g., consent of a victim of statutory rape has no legal significance). For other offenses, consent may be of limited effect (e.g., within limits, victim may consent to infliction of physical violence, and one inflicting it will therefore not be guilty of assault or battery).

b. Requirements of Consent as Defense

Whenever consent may be a defense, it must be established that:

- 1) The consent was voluntarily and *freely given* (without compulsion or duress);
- 2) The party was *legally capable* of consenting; and
- 3) *No fraud* was involved in obtaining the consent.

4. Condonation by Injured Party No Defense

Forgiveness by the injured party after the crime has been committed ordinarily does not operate as a defense to the commission of a crime, unless a statute establishes such a defense.

Example: Forgiveness by an assault victim would not bar a criminal prosecution of the perpetrator.

Compare: Some statutes provide that marriage of the parties will bar a prosecution for seduction.

5. Criminality of Victim No Defense

The nearly universal rule is that illegal conduct by the victim of a crime is no defense.

Example: A, knowing that B has amassed a fortune through illegal gambling, defrauds B in a real estate deal. Does B's unlawful gambling activity provide A with a defense to fraud? No.

6. Entrapment

Entrapment occurs if the intent to commit the crime originated not with the defendant, but rather with the creative activities of law enforcement officers. If this is the case, it is presumed that the legislature did not intend to cover the conduct and so it is not criminal. The defense of entrapment consists of two elements:

- (i) The *criminal design* must have *originated with law enforcement* officers; and
- (ii) The defendant must *not* have been *predisposed* to commit the crime prior to the initial contact by the government.

If the defendant offers credible evidence on these two elements, in most jurisdictions the government must then show predisposition beyond a reasonable doubt.

a. Offering Opportunity to Commit Crime Distinguished

It is not entrapment if the police officer merely provides the opportunity for the commission of a crime by one otherwise ready and willing to commit it.

Example: A, an undercover police agent, poses as a narcotics addict in need of a fix. B sells narcotics to A. Does B have the defense of entrapment? No. By posing as an addict, A merely provided an opportunity for B to commit the criminal sale.

b. Inapplicable to Private Inducements

A person cannot be entrapped by a private citizen. Inducement constitutes entrapment only if performed by an officer of the government or one working for him or under his control or direction.

c. Availability If Offense Denied

If a defendant denies her participation in the offense, she has elected not to pursue entrapment and is not entitled to raise the issue, even if the facts would otherwise permit her to do so. Under the modern trend, however, a defendant may raise the defense of entrapment even while denying participation in the offense. The Supreme Court has adopted this rule for federal offenses. [Mathews v. United States, 485 U.S. 58 (1988)]

d. Practical Difficulties of Entrapment

In cases where there is extended inducement by the government, the issue becomes whether the defendant was predisposed to commit the offense or whether the intent to commit it was instilled by the officers. Predisposition must exist prior to the government's initial contact with the defendant. A mere "inclination" to engage in the illegal activity is not adequate proof of predisposition. [Jacobson v. United States, 503 U.S. 540 (1992)] However, even if predisposition is not proved, the introduction by the prosecution of potentially damaging evidence on the issue of the defendant's predisposition may cause a jury to convict on the basis of the extensive evidence of the defendant's culpable state of mind.

e. Minority Rule—Objective Test

The minority rule would replace the entrapment elements set out above with a test based entirely on the nature of the police activity. Under this test, a defendant would be entitled to acquittal if the police activity was reasonably likely to cause an innocent (i.e., unpredisposed) person to commit the crime. The defendant's innocence or predisposition is irrelevant. Under this approach, the issue is decided by the judge rather than the jury.

f. Provision of Material for Crime by Government Agent Not Entrapment

The Supreme Court has held that under federal law an entrapment defense cannot be

based solely upon the fact that a government agent provided material for commission of the crime, even if the material provided was contraband. [United States v. Russell, 411 U.S. 423 (1973); Hampton v. United States, 425 U.S. 484 (1976)] A few states, however, make the provision of essential material—such as ingredients for drugs or the drugs themselves—entrapment.

VII. OFFENSES AGAINST THE PERSON

A. ASSAULT AND BATTERY

1. Battery

Battery is an unlawful application of force to the person of another resulting in either bodily injury or an offensive touching. Simple battery is a misdemeanor.

a. State of Mind—Specific Intent Not Required

A battery can be, *but need not be*, intentional. It is sufficient that the defendant caused the application of force with general intent, interpreted in most jurisdictions today as requiring no more than criminal negligence.

b. Indirect Application of Force Sufficient

The force need not be applied directly. Thus, it is sufficient if the force is applied by a force or substance put in motion by the defendant. For example, battery may be committed by causing a dog to attack the victim or by causing the victim to take a poisonous substance.

c. Aggravated Battery

Most statutes define certain acts as aggravated batteries and punish them as felonies. Among the most common are batteries in which:

- 1) A *deadly weapon* is used (any ordinary object may become a deadly weapon depending upon how it is used);
- 2) *Serious bodily injury* is caused; or
- 3) The *victim is a child, woman, or police officer*.

d. Consent as a Defense

Contrary to the general rule that consent of the victim is not a valid defense, some jurisdictions recognize consent as a defense to simple battery and/or certain specified batteries, e.g., a medical operation, or reasonable injuries incurred in consensual athletic contests.

2. Assault

In a majority of jurisdictions, an assault is either:

- (i) An *attempt to commit a battery*; or
- (ii) The *intentional creation*—other than by mere words—of a *reasonable apprehension* in the mind of the victim of imminent bodily harm.

A minority of jurisdictions limit assault to an attempt to commit a battery. Simple assault is a misdemeanor.

a. Present Ability to Succeed

Some statutes define assault as an unlawful attempt to commit a battery coupled with a present ability to succeed. Lack of an ability to succeed precludes liability under such statutes.

Example: A points an unloaded gun at B. A pulls the trigger, thereby frightening B. Is A guilty of assault under a statute defining assault as “an attempt to commit a battery, coupled with the present ability to succeed”? No. Because the gun was unloaded, A could not have succeeded in committing a battery.

b. Battery Distinguished

If there has been an actual touching of the victim, a battery has been committed. If there has been no such touching, the act may or may not constitute an assault, depending on the circumstances.

c. Statutory Aggravated Assault

All jurisdictions treat certain “aggravated assaults” more severely than simple assault. Such aggravated assaults include, but are not limited to, assaults:

- 1) With a *dangerous (or deadly) weapon*;
- 2) With *intent to rape, maim, or murder*.

B. MAYHEM

1. Common Law

At common law, the felony of mayhem required either dismemberment (the removal of some bodily part) or disablement of a bodily part. The crime was enforced to preserve the King’s right to his subjects’ military service.

2. Modern Statutes

Most states retain the crime of mayhem in some form, although the recent trend is to abolish mayhem as a separate offense and to treat it instead as a form of aggravated battery. Modern statutes have expanded the scope of mayhem to include permanent disfigurement. A few states require a specific intent to maim or disfigure.

C. HOMICIDE

1. Classifications of Homicides

At common law, homicides were divided into three classifications:

- a. *Justifiable* homicides (those commanded or authorized by law);
- b. *Excusable* homicides (those for which there was a defense to criminal liability); and
- c. *Criminal* homicides.

2. Common Law Criminal Homicides

At common law, criminal homicides were subdivided into three different offenses.

a. Murder

Murder is the unlawful killing of another *human being* with *malice aforethought*. Malice aforethought may be express or implied.

1) Malice Aforethought

In the absence of facts excusing the homicide or reducing it to voluntary manslaughter, malice aforethought exists if the defendant has any of the following states of mind:

- (i) Intent to kill (express malice);
- (ii) Intent to inflict great bodily injury;
- (iii) Reckless indifference to an unjustifiably high risk to human life (“abandoned and malignant heart”); or
- (iv) Intent to commit a felony (felony murder; *see infra*).

In the case of (ii), (iii), or (iv), the malice is “implied.”

2) Deadly Weapon Rule

Intentional use of a deadly weapon authorizes a permissive inference of intent to kill. A deadly weapon is any instrument—or in some limited circumstances, any part of the body—used in a manner calculated or likely to produce death or serious bodily injury.

Example: The following persons may be held guilty of murder under the deadly weapon rule: (i) one who intentionally pilots a speed-boat through a group of bathers; (ii) one who fires a bullet into a crowded room; and (iii) a professional boxer who beats up and kills a belligerent tavern owner.

b. Voluntary Manslaughter

Voluntary manslaughter is a killing that would otherwise be murder but is distinguishable from murder by the existence of adequate provocation—i.e., a killing in the heat of passion.

1) Elements of Adequate Provocation

At common law, provocation would reduce a killing to voluntary manslaughter only if it met four tests:

- a) The provocation must have been one that would arouse *sudden and intense passion* in the mind of an *ordinary person* such as to cause him to lose his self-control;
- b) The defendant must have *in fact* been *provoked*;

- c) There *must not have been a sufficient time* between the provocation and the killing for the passions of a reasonable person to cool. (This is a factual question that depends upon the nature of the provocation and the attendant circumstances, including any earlier altercations between the defendant and the victim); and
- d) The defendant *in fact* did not cool off between the provocation and the killing.

2) When Provocation Is Adequate

Adequate provocation is most frequently recognized in cases of:

- a) Being subjected to a *serious battery* or a threat of *deadly force*; and
- b) Discovering one's *spouse in bed with another person*.

3) Provocation Inadequate as a Matter of Law

At common law, some provocations were defined as inadequate as a matter of law. The most significant was "*mere words*." Modern courts tend to be more reluctant to take such cases from juries and are more likely to submit to the jury the question of whether "mere words" or similar matters constitute adequate provocation.

4) Imperfect Self-Defense

Some states recognize an "imperfect self-defense" doctrine under which a murder may be reduced to manslaughter even though:

- a) The *defendant was at fault* in starting the altercation; or
- b) The defendant *unreasonably but honestly believed* in the necessity of responding with deadly force.

c. Involuntary Manslaughter

Involuntary manslaughter is of two types.

1) Criminal Negligence

If death is caused by criminal negligence (or by "recklessness" under the M.P.C.), the killing is involuntary manslaughter. Criminal negligence requires a greater deviation from the "reasonable person" standard than is required for civil liability. (Some states also require that the defendant have had a subjective awareness of the risk.)

2) "Unlawful Act" Manslaughter

A killing caused by an unlawful act is involuntary manslaughter. There are two subcategories of such acts:

a) "Misdemeanor-Manslaughter" Rule

A killing in the course of the commission of a misdemeanor is manslaughter, although most courts would require either that the misdemeanor be malum in

se (i.e., an inherently wrongful act), or if *malum prohibitum*, that the death be the foreseeable or natural consequence of the unlawful conduct.

b) Felonies Not Included in Felony Murder

If a killing was caused during the commission of a felony but does not qualify as a felony murder case, the killing will be at least involuntary manslaughter. The death also must be a foreseeable consequence of the felony. (*See* 4.c.3), *infra*.)

3. Statutory Modification of Common Law Classification

Modern statutes often divide murder into degrees, and the bar examination often contains questions based on statutes similar to them. Under such schemes, all murders are *second degree* murders (similar to common law murder) unless the prosecution proves any of the following, which would make the murder *first degree* murder:

a. Deliberate and Premeditated Killing

“Deliberate” means that the defendant made the decision to kill in a cool and dispassionate manner. “Premeditated” means that the defendant actually reflected on the idea of killing, if only for a very brief period.

b. First Degree Felony Murder

Many state statutes list specific felonies that may serve as the basis for felony murder. If a killing is committed during the commission of one of these enumerated felonies, the killing is usually first degree murder without the prosecution needing to show that the killing was either deliberate or premeditated. The felonies most commonly listed are burglary, arson, rape, robbery, and kidnapping, but other felonies that are inherently dangerous to human life are often specifically added.

1) Second Degree Felony Murder

Even if the state lists the felonies to be included under the doctrine, a separate statute (or case) may provide for criminal liability for a killing committed during the course of a felony that is *not* listed. Such killings typically will be classified as second degree murder.

2) Other State Variations

Some states may not list the felonies to be included under the felony murder doctrine at all. Other states that permit felony murder liability based on a felony that is not listed sometimes include the additional requirement that the felony be inherently dangerous to human life or that the felony be dangerous to human life as committed.

c. Others

Some statutes make killings performed in certain ways first degree murder. Thus, killing by lying in wait, poison, or torture may be first degree murder.

4. Felony Murder (and Related Matters)

As the definition of malice aforethought above makes clear, a killing—even an accidental one—committed during the course of a felony is murder. Malice is implied from the intent to commit the underlying felony.

a. What Felonies Are Included?

Under the common law, there were only a handful of felonies (*see* I.D.1., *supra*). Today, the criminal codes of states have created many more.

b. Scope of the Doctrine

When the felony murder doctrine is combined with conspiracy law, the scope of liability becomes very broad. If, in the course of a conspiracy to commit a felony, a death is caused, all members of the conspiracy are liable for murder if the death was caused in furtherance of the conspiracy and was a foreseeable consequence of the conspiracy.

c. Limitations on Liability

There are some limitations on liability under the broad felony murder doctrine.

1) Commission of Underlying Felony

To convict a defendant of felony murder, the prosecution must prove that he committed or attempted to commit the underlying felony. Thus, if the defendant has a *substantive defense* that negates an element of the underlying felony, he has a defense to felony murder. However, procedural defenses (such as a statute of limitations defense to the underlying felony) will not be a defense to felony murder in most states.

2) Felony Must Be Independent of Killing

The felony murder rule can be applied only where the underlying felony is independent of the killing. Thus, a felony such as manslaughter or aggravated battery will not qualify as the underlying felony for purposes of felony murder liability.

3) Foreseeability of Death

The majority rule is that death must have been a foreseeable result of the commission of the felony. However, it is important to note that *courts have been willing to find most deaths foreseeable*. A minority of courts do not apply a foreseeability requirement, requiring only that the felony be *malum in se*.

Example: A intentionally sets fire to a dwelling. B, a firefighter, dies in an effort to extinguish the blaze. C, the owner of the dwelling, dies of a heart attack while watching his largest possession being destroyed. Is A guilty of felony murder? Of B, yes. The death of a firefighter is a foreseeable consequence of setting a fire. Of C, no. The heart attack was unforeseeable.

4) During the Commission of a Felony—Termination of Felony

The death must have been “caused during” the commission or attempted commission of the felony, but the fact that the felony was technically completed before death was caused does not prevent the killing from being felony murder. Deaths caused while fleeing from the crime are felony murder. But once the felon has reached a *place of “temporary safety,”* the impact of the felony murder rule ceases and deaths subsequently caused are not felony murder.

5) Killing of Co-Felon by Victims of Felonies or Pursuing Police Officers

Is the defendant liable for a co-felon’s death caused by resistance of the victim or

police? The majority view is no. The so-called *Redline* view (the majority position) is that *liability for murder cannot be based upon the death of a co-felon* from resistance by the victim or police pursuit.

a) Compare—Killing of Innocent Party by Victim or Police

The “agency” theory of felony murder provides that for a felon to be held liable for felony murder, the killing must have been committed by the felon or his “agent” (i.e., an accomplice). Thus, if a bystander is accidentally killed by a police officer during a shootout at the crime scene, there would be no felony murder liability because a police officer caused the bystander’s death. (There are limited exceptions in cases in which the victim was used as a shield or otherwise forced by the felon to occupy a dangerous place.) Under the “proximate cause” theory, felons are liable for the deaths of innocent victims caused by someone other than a co-felon, since they put into operation a series of events that caused the death of the innocent party.

d. Related Limits on Misdemeanor Manslaughter

Limits similar to those placed on felony murder are placed on involuntary misdemeanor manslaughter. If the misdemeanor involved is not malum in se, i.e., one that involves conduct that is inherently wrong, a death caused during the commission of a misdemeanor is manslaughter only if death was a foreseeable result of the commission of the misdemeanor. A minority of courts limit the doctrine to malum in se misdemeanors.

Example: K is driving on a good road in excellent weather, but is slightly exceeding the posted speed limit. V dashes from behind a bush into the street and is struck by K’s car. V dies. Is K guilty of involuntary manslaughter, assuming that speeding is a misdemeanor? The best answer is no, because the misdemeanor was not malum in se and death was not a foreseeable result of its commission.

5. Causation

a. General Requirement—Must Be Cause-in-Fact and Proximate Cause

When a crime is defined to require not merely conduct but also a specified result of that conduct, the defendant’s conduct must be both the cause-in-fact and the proximate cause of the specified result.

1) Cause-in-Fact

The defendant’s conduct must be the cause-in-fact of the result; i.e., the result would not have occurred “*but for*” the defendant’s conduct.

2) Common Law Requirement—“Year and a Day” Rule

The death of the victim must occur within one year and one day from the infliction of the injury or wound. If it does not occur within this period of time, there can be no prosecution for homicide, even if it can be shown that “but for” the defendant’s actions, the victim would not have died as and when he did. The rule has been sharply criticized by the United States Supreme Court as “an outdated relic of the common law,” and most of the states that have reviewed the rule have abolished it.

3) “Proximate” Causation

Problems of proximate causation arise only when the victim’s death occurs because of the defendant’s acts, but in a manner not intended or anticipated by the defendant. The question in such cases is whether the difference in the way death was intended or anticipated and the way in which it actually occurred breaks the chain of “proximate cause” causation.

a) All “Natural and Probable” Results Are Proximately Caused

The general rule is that a defendant is responsible for all results that occur as a “natural and probable” consequence of his conduct, even if he did not anticipate the precise manner in which they would occur. All such results are “proximately caused” by the defendant’s act. This chain of proximate causation is broken only by the intervention of a “superseding factor.”

b. Rules of Causation

1) Hastening Inevitable Result

An act that hastens an inevitable result is nevertheless a legal cause of that result.
Example: A terminates the life support system of B, resulting in B’s death. B had only 24 hours to live. Can A be held liable for B’s death? Yes. Note that society may not wish to condemn such an “act of mercy.” Nevertheless, for purposes of causation analysis, A’s act caused B’s death.

2) Simultaneous Acts

Simultaneous acts by two or more persons may be considered independently sufficient causes of a single result.

3) Preexisting Condition

A victim’s preexisting condition that makes him more susceptible to death does not break the chain of causation; i.e., the defendant “takes the victim as he finds him.”
Example: A, with malice aforethought, shoots B in the leg. B bleeds to death before he can receive medical attention because he is a hemophiliac. A is liable for murder despite the fact that a person without hemophilia would not have died from the shooting.

c. Intervening Acts

As a general rule, an intervening act will shield the defendant from liability if the act is a mere coincidence or is outside the foreseeable sphere of risk created by the defendant’s act.

Examples:

- 1) **Act of Nature:** A is driving negligently. To avoid A’s swerving car, B takes an unaccustomed route home. B’s car is struck by lightning, and B dies. Can A be charged with manslaughter? No. The fact that lightning struck B was a mere coincidence.

- 2) **Act by Third Party:** A, intending to kill B, merely wounds him. B receives negligent medical treatment at a nearby hospital. B dies. Can A be held liable for B’s death? Yes. Despite improvements in medical

care, negligent care remains a *foreseeable risk*. A contrary result would follow if B died due to gross negligence or intentional mistreatment.

3) *Acts by the Victim*: A, intending to kill B, merely wounds him. B refuses medical treatment for religious reasons and dies. If modern medical knowledge could have saved B, can A be held liable for B's death? Most jurisdictions have held yes, because A's act directly created the risk of death and because the refusal of medical care may be found to be foreseeable. This rule may apply even if the victim acts affirmatively to harm himself. Suppose B, in unbearable pain, commits suicide. The suicide may be found to be a foreseeable consequence of A's actions. Thus, A would be liable for B's death.

6. Born Alive Rule

Traditionally, an infant had to be "born alive" to be a victim of a homicide crime, meaning that the infant must be completely expelled from his mother and show independent signs of vitality. A number of states have abrogated this rule by statute by extending protection to unborn children as potential victims of homicide crimes.

7. Summary—Analytical Approach

In analyzing any homicide situation, the following questions must be asked and answered:

- a. Did the defendant have any of the *states of mind* sufficient to constitute malice aforethought?
- b. If the answer to a. is yes, is there proof of anything that will, under any applicable statute, raise the homicide to *first degree murder*?
- c. If the answer to a. is yes, is there evidence to reduce the killing to *voluntary manslaughter*, i.e., adequate provocation?
- d. If the answer to a. is no, is there a sufficient basis for holding the crime to be *involuntary manslaughter*, i.e., criminal negligence or misdemeanor manslaughter?

- e. Is there *adequate causation* between the defendant's acts and the victim's death? Was the defendant's act the *factual cause* of death? Is there anything to break the chain of *proximate causation* between the defendant's act and the victim's death?

Example: A came upon B, who was letting the air out of a tire on A's car. When A shouted at B, B picked up a rock and threw it at A, shouting obscenities. B ran off, but A went to his car, pulled a gun out, and shot at B, hitting him in the leg. B was taken to a hospital where he underwent surgery; the wrong gas was used as an anesthetic, and B died. Generally, wounds of this sort are not deadly. A testifies under oath that he merely intended to wound B as revenge for causing A the inconvenience of the flat tire. What is A's liability?

- 1) Even if A intended only to wound B with a bullet, this is intent to inflict great bodily injury and is sufficient for malice aforethought.

- 2) If the statute makes premeditated killings first degree murder, A almost certainly did not premeditate.
- 3) While B's shouted obscenities might not be adequate provocation, a jury could certainly find that throwing the rock was such provocation.
- 4) If the answer to inquiry a. had been no, A's actions would have constituted criminal negligence.
- 5) There is causation. But for A's shot, B would not have died. Negligent medical care is not a superseding intervening factor that will break the chain of proximate causation, unless it is "gross" negligence or intentional malpractice.

D. FALSE IMPRISONMENT

The common law misdemeanor of false imprisonment consisted of:

- (i) Unlawful
- (ii) Confinement of a person
- (iii) Without his valid consent.

1. Confinement

Confinement requires that the victim be compelled either to go where he does not wish to go or to remain where he does not wish to remain. It is not confinement to simply prevent a person from going where he desires to go, as long as alternative routes are available to him. The confinement may be accomplished by actual force, by threats, or by a show of force. The M.P.C. takes a similar approach in that the confinement must "interfere substantially" with the victim's liberty.

2. "Unlawfulness"

Confinement is unlawful unless it is specifically authorized by law or by the consent of the person.

3. Lack of Consent

Consent to the confinement precludes it from constituting false imprisonment, but the consent must be *freely given* by one with *capacity* to give such consent. Thus, consent is invalidated by coercion, threats, deception, or incapacity due to mental illness, substantial cognitive impairment, or youth.

E. KIDNAPPING

At common law, the misdemeanor of kidnapping was the forcible abduction or stealing away of a person from his own country and sending him into another. Modern statutes and the M.P.C. generally expand the definition of kidnapping far beyond the common law definition, although it usually remains a form of aggravated false imprisonment.

1. General Pattern

Kidnaping is often defined as confinement of a person that involves either:

- a. Some *movement* (i.e., “asportation”) of the victim; *or*
- b. *Concealment* of the victim in a “secret” place.

2. Aggravated Kidnapping

Modern statutes often contain as a separate offense an aggravated kidnapping crime. Among the more common forms of this offense are:

a. Kidnapping for Ransom

The abduction or secretion of a person for the purpose of obtaining anything of value for the return of the person is often defined as aggravated kidnapping.

b. Kidnapping for Purpose of Commission of Other Crimes

Abduction or secretion for the purpose of committing other offenses, such as robbery, is sometimes defined as aggravated kidnapping.

c. Kidnapping for Offensive Purpose

Abduction or secretion with the intent of harming the person or of committing some sexual crime with him is sometimes defined as aggravated kidnapping.

d. Child Stealing

Leading, taking, enticing, or detaining a child with the intent to keep or conceal the child from a guardian or parent is often defined as aggravated kidnapping. Use of “enticement” covers the situation in which a child is persuaded by promises or rewards to come with the defendant or remain. The consent of a child to his detention or movement is not of importance, because the child is incapacitated by age from giving valid consent.

3. Required Movement

Although at common law extreme movement was required, most modern statutes require only some movement of the person; if such movement occurs, the extent of the movement is not material. Other statutes require no movement, making confinement (as used in false imprisonment) sufficient.

4. Secrecy

Generally, it is not necessary that kidnapping involve secrecy. Some statutes, however, require secrecy when the kidnapping is based on confinement rather than movement of the victim.

5. Consent

As with false imprisonment, free consent given by a person competent to give it precludes the confinement or movement of a person from being kidnapping. But a person may be incompetent to give such consent by reason of age (*see above*) or mental condition.

6. Relationship to Other Offenses

Statutes that define kidnapping as detention involving movement of the victim mean that it is arguable that kidnapping often occurs incident to the commission of other crimes, such as robbery or rape. Some courts—but not all—have held that in such situations kidnapping (in addition to the robbery or rape) is committed only if the movement of the victim

substantially increases the risk to the victim over and above that necessarily involved in the other crime. If no such increased risk is involved, the defendant will be held to have committed only the robbery or rape.

VIII. SEX OFFENSES

A. RAPE

Traditionally, rape (a felony) was the unlawful carnal knowledge of a woman by a man, not her husband, without her effective consent. Today, a number of states have renamed “rape” as “sexual assault” and have made such statutes gender neutral.

1. Penetration Sufficient

Rape requires only the penetration of the female sex organ by the male sex organ. Emission is not necessary to complete the crime.

2. Absence of Marital Relationship

At common law and under the M.P.C., the woman must not have been married to the man who committed the act. Today, however, most states have either dropped this requirement where the parties are estranged or separated, or abolished it entirely.

3. Lack of Effective Consent

The intercourse must be without the victim’s effective consent. Consent, even if given, may be ineffective in several situations.

a. Intercourse Accomplished by Force

If the intercourse is accomplished by actual force, no question concerning consent is raised.

b. Intercourse Accomplished by Threats

If intercourse is accomplished by placing the victim in fear of great and immediate bodily harm, it constitutes rape. Any consent obtained by such threats is ineffective. The failure of the victim to “resist to the utmost” does not prevent the intercourse from being rape if resistance is prevented by such threats.

c. Victim Incapable of Consenting

If the victim is incapable of consenting, the intercourse is rape. Inability to consent may be caused by unconsciousness, by the effect of drugs or intoxicating substances, or by the victim’s mental condition. If the victim is so insane or cognitively impaired as to be incapable of giving consent, intercourse with her constitutes rape.

d. Consent Obtained by Fraud

Only in limited circumstances will intercourse with consent obtained by fraud constitute rape.

1) Fraud as to Whether Act Constitutes Sexual Intercourse

If the victim is fraudulently caused to believe that the act is not sexual intercourse, the act of intercourse constitutes rape.

Example: D persuaded V that what was actually an act of intercourse was medical treatment accomplished by surgical instruments. Was D guilty of rape? Yes.

2) Fraud as to Whether Defendant Is Victim's Husband

If the defendant fraudulently persuades the victim that he is her husband, is the intercourse rape? The best answer is no.

Example: D arranges for X to pretend to marry D and V. In fact, X has no authority to marry persons and there is no marriage. After the sham marriage, D has intercourse with V. Is D guilty of rape? The best answer is no because there was consent.

3) Other Fraud

Other kinds of fraud will not make the intercourse rape.

Example: D promises to marry V at a later time and thereby induces V to consent to intercourse. D never intended to marry V. Is D guilty of rape? No. (But D may be guilty of seduction (*see F., infra.*))

B. STATUTORY RAPE

1. Victim Below Age of Consent

Statutory rape is the crime of carnal knowledge of a person under the age of consent. Even if the victim willingly participated, the offense is nevertheless committed because consent is irrelevant. The age of consent varies from state to state, generally from 16 to 18.

2. Mistake as to Age

Will a defendant's reasonable mistake as to the victim's age prevent liability for statutory rape? For purposes of the examination, the best answer is no, since statutory rape is a *strict liability crime*. A second best answer, to be used only if no alternative making use of the best position is presented, is that a reasonable mistake as to age will prevent conviction if the defendant reasonably believed the victim was old enough to give an effective consent.

C. CRIMES AGAINST NATURE

An early (1533) English statute made sodomy—a generic term encompassing many different acts—a felony, so that it became part of the American common law of crime. However, because of recent court decisions, it is unlikely that a defendant could be successfully prosecuted for most of these crimes if the act was consensual. Bestiality, which is the carnal copulation with an animal by a human being (male or female), is probably the only crime that survives.

D. ADULTERY AND FORNICATION

Adultery and fornication were not common law crimes in England, but were punished by the church as ecclesiastical offenses. They are made misdemeanor offenses by statute in some states.

1. Adultery

Under modern statutes, any person who cohabits or has sexual intercourse with another not his spouse commits the misdemeanor offense of adultery if:

- a. The behavior is *open and notorious; and*

- b. The person is *married* and the other person involved in such intercourse is not his spouse; or
- c. The person is not married and knows the *other person* in such intercourse is *married*.

2. Fornication

Fornication is sexual intercourse between or open and notorious cohabitation by unmarried persons.

E. INCEST

Incest is a statutory offense, usually a felony, that consists of either marriage or a sexual act (intercourse or deviate sexual conduct) between persons who are too closely related.

1. Degree of Relationship

No uniformity exists among the states. A majority restricts the crime to blood relations, although a significant number of states include some nonblood relatives.

2. Degree of Responsibility

Some states make a distinction in penalties depending on the parties involved.

F. SEDUCTION OR CARNAL KNOWLEDGE

A statutory felony in many states, the crime of seduction is committed when a male person induces an unmarried female of previously chaste character to engage in an act of intercourse on promise of marriage. The M.P.C. includes a section on seduction; it requires only that there be a false promise of marriage and does not require chastity or that the female be unmarried.

In many states, subsequent marriage of the parties is a defense, but there is no uniformity as to whether the marriage must be entered into before indictment, after sentence, or anywhere in between.

G. BIGAMY

Bigamy is a traditional strict liability offense that consists of marrying someone while having another living spouse. At common law, a defendant is guilty of bigamy even if she reasonably believes that a purported divorce is valid or that her spouse is dead.

IX. PROPERTY OFFENSES

This section deals with a number of property offenses. Many of these offenses have been consolidated into state theft statutes. But for purposes of the examination, the greatest challenge is in distinguishing among three property crimes: larceny, embezzlement, and false pretenses. There is no difference among the intents required for the three crimes. The major differences among these crimes are in the kind of misappropriation of the property.

A. LARCENY

Larceny was the basic common law property offense. It has been significantly modified by statute in many American jurisdictions. Larceny consists of:

- (i) A taking (caption);
- (ii) And carrying away (asportation);
- (iii) Of tangible personal property;
- (iv) Of another;
- (v) By trespass;
- (vi) With intent to permanently (or for an unreasonable time) deprive the person of his interest in the property.

1. Property that May Be the Subject of Larceny

Larceny can be committed only by the acquisition of *personal property* capable of being possessed and of some value.

a. Realty and Severed Material

Realty and its fixtures are *not* subjects of larceny. If something is severed from the realty and taken before it comes into possession of the landowner as personal property, larceny is not committed. If, however, the landowner gains possession of the severed material as personalty, a subsequent taking of it is larceny.

Example: A went onto land owned by B and cut down 15 trees. She loaded 10 into her truck and drove off. B came onto the land, found the remaining five trees, and placed them in his shed. A returned and took them. Is A guilty of larceny of 15, 10, five, or no trees? *Held:* A is guilty of larceny of the five trees that came into B's possession after their severance from the realty.

b. Services

Traditionally, obtaining services wrongfully cannot give rise to larceny.

c. Intangibles

Intangibles cannot give rise to larceny.

Example: A wrongfully obtains entrance to B's theater and observes a performance of a play. Has A committed larceny of that performance? *Held:* No. The right or ability to observe a play is intangible.

Note that gas and electricity are considered to be personal property that may be stolen.

d. Documents and Instruments

Documents and instruments were, at common law, regarded as merged with the matter they represented. Thus, unless they had monetary value in themselves, they could not be the subject of larceny.

Example: A takes a deed to certain realty and a contract for the sale of cattle from B's desk. Is A guilty of larceny? *Held:* No. The deed "merged" with the realty and the contract merged with the intangible contract right; thus, there was no larceny.

Modern statutes have expanded larceny to include written instruments embodying intangible rights.

2. Property “Of Another”

Larceny is a crime against property. All that is necessary is that the property be taken from someone who has a possessory interest superior to that of the defendant.

a. Requirement that Taking Be from One with “Possession”

The property must be taken from someone with possession other than the defendant. If the defendant had possession at the time of the taking (e.g., defendant is a bailee of the property), the resulting offense is not larceny, although it may be embezzlement. However, if the defendant has “custody” rather than “possession,” her misappropriation of the property is larceny.

1) Custody vs. Possession

Possession involves much greater scope of authority to deal with the property than does custody.

Example: A, while in a store, asks B, the clerk, if she may take a certain suit of clothing home on approval. B consents. A then asks to see a watch to examine it; B gives it to her. A then absconds with both items. Have either of them been taken from B’s possession? *Held:* The watch was taken from B’s possession, because A had only the authority to look at it. The suit, on the other hand, was in A’s possession at the time it was misappropriated, because of the extent of control B had given A over it.

2) Employees

Low level employees generally have only custody of their employers’ property. They have possession, however, if the employer gives them especially broad powers over it or if the property is given directly to them by a third person, without the employer having intermediate possession.

3) Bailee and “Breaking Bulk”

Generally, a *bailee has possession*. If, however, she opens closed containers in which the property has been placed by the bailor (i.e., she “breaks bulk”), the possession is regarded by use of a fiction as returning to the bailor. If a bailee misappropriates property *after breaking bulk*, she takes it from the possession of the bailor and is guilty of *larceny* if she has the intent to steal.

b. Possession at the Time of the Taking

In determining whether someone has committed larceny, it is important to determine who had lawful possession of the property in question at the time of the taking. If a person has lawful possession when she takes the property, she is not guilty of larceny, even if she does not own the property. (But she may be guilty of embezzlement.) By contrast, a person can be guilty of larceny for taking her own property, if someone else had lawful possession at the time the owner takes it.

Example: A owns two cars but only uses one of them. She decides, therefore, to lease the unused car to B for one year. Six months into the one year

lease, A decides she wants the car back. When B refuses to rescind the lease, A sneaks into B's driveway and drives the car away, using her extra key. A is guilty of larceny even though she is the owner of the car, since B had lawful possession of the vehicle when A took it.

c. Stolen Property

Stolen property can be the subject of larceny (i.e., a second thief is guilty of larceny when he takes property from a first thief).

d. Joint Property

At common law, larceny could not be committed by the taking of jointly held property by one of the joint owners.

e. Lost, Mislaid, and Abandoned Property

Lost or mislaid property is regarded as constructively in the possession of the owner, and thus if it is found and taken, it is taken from his possession and larceny might be committed. Abandoned property, however, has no owner and larceny cannot be committed by appropriating it.

3. Taking

It is essential that the defendant actually obtain control of the property.

a. Destruction or Movement Is Not Sufficient

Mere destruction or movement of the property is not sufficient to constitute a taking.

Example: D knocked a glass from X's hand. It fell and broke. Is D guilty of larceny? No. Although X may have lost possession, D never obtained control. The damage to the item is irrelevant.

b. Sufficient If Caused to Occur by Innocent Agent

Even if a defendant obtains control of the property through the act of an innocent agent, it is a taking.

Example: D, pointing out a cow in a nearby field, offers to sell it to X for \$10. X gives D the money and then takes the cow. In fact, the cow belonged to Y. Is D guilty of larceny of the cow? Yes. She obtained control of it by virtue of X, an innocent agent of hers.

4. Asportation

Larceny requires asportation, i.e., that all parts or portions of the property be moved and that this movement—which need only be slight—be part of the carrying away process.

Example: A came upon two upside-down wheelbarrows in B's yard. She turned them both right side up, and moved one six inches toward the gate. Was she guilty of larceny of one, two, or no wheelbarrows? *Held:* Guilty of larceny of one. Merely turning the wheelbarrows over is not part of the carrying away movement; thus, it is not asportation. But merely moving the other wheelbarrow a short distance is enough, because that movement is part of carrying it away.

5. Taking Must Be "Trespassory"

The defendant must take the property from the custody or possession of another in a

trespassory manner, i.e., without the consent of the person in custody or possession of the property.

a. Taking by Consent Induced by Misrepresentations—“Larceny by Trick”

If the victim consents to the defendant’s taking custody or possession of the property, but this consent has been induced by a misrepresentation, the consent is not valid. The resulting larceny is often called “larceny by trick.” A major difficulty is in distinguishing larceny by trick from false pretenses. (*See C.1., infra.*)

6. State of Mind Required—Intent to Permanently Deprive

Generally, larceny requires that at the time of the taking the defendant must have the intent to permanently deprive the person from whom the property is taken of his interest in the property. The intent has to exist at the moment of the taking of the property.

a. Sufficient Intent

1) Intent to Create Substantial Risk of Loss

If the defendant intends to deal with the property in a manner that involves a substantial risk of loss, this is sufficient for larceny.

2) Intent to Pledge Goods or Sell Them to Owner

It is larceny to take goods with the intent to sell them back to the owner or to pledge them, because this involves the substantial equivalent of permanent loss or the high risk of permanent loss.

b. Insufficient Intent

1) Intent to Borrow

If the defendant intends to return the property within a reasonable time and at the time of the taking has a substantial ability to do so, the unauthorized borrowing does not constitute larceny. Note that many states make it a crime to borrow a motor vehicle, even when the borrower fully intends to return it (“joyriding”).

2) Intent to Obtain Repayment of Debt

It is not larceny to take money or goods of another if the defendant honestly believes that she is entitled to them as repayment for a debt of the other (although the goods must not be worth more than the amount of the debt). In these situations, the defendant believes the property is “hers” and therefore lacks an intent to deprive someone else of “his” property.

c. Possibly Sufficient

1) Intent to Pay for Property

If the property taken is not for sale, the fact that the defendant intends to pay the other for it does not negate the larceny. If the property is for sale and the defendant has a specific and realistic intent to repay the person, the taking is not larceny.

2) Intent to Claim Reward

If the defendant takes goods, intending to return them and hoping for a reward,

this is not larceny. However, if she takes them not intending to return them unless she is assured of a reward, this is larceny because it creates a substantial risk of loss.

7. Specialized Application of Larceny Doctrine

There are several situations in which the application of the requirements for larceny is highly technical.

a. Abandoned or Lost Property

Property abandoned by its owner, i.e., discarded with the intent of giving up all rights in it, cannot be the subject of larceny. One who finds property that has merely been lost by its owner can, however, commit larceny of it. Two requirements exist:

- (i) The finder must know or have reason to believe she *can find* out the *identity of the owner*; and
- (ii) The finder must, at the moment she takes possession of the lost property, have the *intent* necessary for larceny.

If the finder takes custody of the lost property without the intent to steal, but later formulates this intent, she has not committed larceny. Nor has she committed embezzlement, since no trust relationship between the finder and the owner has been created. (See below.)

b. Misdelivered Property

One to whom property is delivered by mistake may, by accepting the property, commit larceny of it. Two requirements must be met:

- 1) The recipient must, at the time of the misdelivery, *realize the mistake* that is being made; and
- 2) The recipient must, at the time she accepts the delivery, have the *intent* required for larceny.

c. “Container” Situations

1) Issue Is Whether Defendant Already Has Possession

One subcategory of “misdelivery” cases presents special problems: The “container” cases, in which the defendant is charged with larceny of an item that she discovers within another item after she has legitimately taken possession of the larger item—or the container—from the victim. The difficult question is whether, at the time she appropriates the item, does she already have possession? If so, larceny is not committed because the property is not taken from the possession of another.

2) Larceny May Depend on Whether Parties Intended to Transfer Container

One solution to this problem is to distinguish among cases according to whether or not the parties intended the original transfer to be the transfer of a container, i.e., an item containing other items. If the parties intended to transfer a container,

the recipient is regarded as taking immediate possession of both the container and its contents. Her later misappropriation of the contents is not larceny, because it occurs at a time when she already has possession. If, however, both parties did not intend to transfer a container but rather regarded the items transferred as empty (or otherwise not involving a transfer of contained items), the recipient does not obtain possession of the contents until she discovers them. If at the time she discovers and appropriates them she has the intent to steal, she is guilty of larceny.

d. “Continuing Trespass” Situations

A trespassory taking of property without the intent required for larceny is not, of course, larceny. However, if a defendant takes property with a wrongful state of mind but without the intent to steal, and later, while still in possession of it, forms the intent to steal it, the trespass involved in the initial wrongful taking is regarded as “continuing” and the defendant is guilty of larceny. This doctrine has no application if the defendant’s initial taking of the property, although trespassory, was not motivated by a wrongful state of mind.

Example: A took X’s umbrella from X’s possession without X’s permission, intending to use the umbrella and return it the next day. The next morning when A awoke, she examined the umbrella carefully and decided to keep it. Is A guilty of larceny of the umbrella? Yes. The larceny took place when A formed the intent to steal it. Since her initial possession was wrongful, the trespass continued until she formed the intent to steal. On the other hand, if A had taken X’s umbrella by mistake, and later decided to keep it after discovering her mistake, the doctrine would not apply because her initial taking was done with an innocent state of mind.

B. EMBEZZLEMENT

Embezzlement was not originally a common law crime. Intended to plug the gaps in the law of larceny, it was made a misdemeanor by statute in 1799 and is regarded as part of American common law. Modern statutes often distinguish between grand embezzlement (a felony) and petit embezzlement (a misdemeanor) based upon the value of the property embezzled. Although variously defined in different jurisdictions, embezzlement generally requires:

- (i) The fraudulent;
- (ii) Conversion;
- (iii) Of property;
- (iv) Of another;
- (v) By a person in lawful possession of that property.

1. Distinguished from Larceny

a. Manner of Obtaining Property

In embezzlement, the misappropriation of the property occurs while the defendant has

lawful possession of it. In larceny, it occurs generally at the time the defendant obtains wrongful possession of the property.

Example: A was foreman of a construction crew. One day, he took a tool used by the crew to his home. The next day, he was fired. On his way out, he took another tool. Was he guilty of embezzlement of one, two, or no tools? *Held:* Only of the first tool, which he converted while it was in his possession by virtue of his employment. He had no right to possession of the tools at the time he took the second.

b. Manner of Misappropriation

Larceny requires caption and asportation with the intent to permanently deprive. Embezzlement requires intentional conversion. (*See below.*)

2. Conversion

The conversion required by embezzlement requires only that the defendant deal with the property in a manner inconsistent with the trust arrangement pursuant to which he holds it. No movement or carrying away of the property is required. The conversion need not result in direct personal gain to the defendant.

Example: A trustee who siphons off trust fund money in order to donate to a favorite charity is as guilty of embezzlement as the trustee who uses the converted funds to pay his overdue gambling debts.

3. Property

Embezzlement statutes are often worded in terms of “property that may be subject to larceny”; i.e., real property and services may not be embezzled. Some relatively expansive statutes, however, make embezzlement of real property a crime.

Example: A, an agent with apparent authority to sell B’s real estate, fraudulently transfers the title to a bona fide purchaser. Is A guilty of embezzlement? No, under the traditional embezzlement statute. Yes, under the more expansive statute.

4. Requirement that Property Be that “Of Another”

Embezzlement requires that the property converted be that of someone other than the converter. Therefore, a person who borrows money, converts the sum to his own use, and subsequently fails to repay it is not guilty of embezzlement.

5. Fraudulent Intent

A defendant must intend to defraud for a conversion to become embezzlement. This appears to be the functional equivalent of larceny’s specific intent to permanently deprive.

a. Intent to Restore

If the defendant intended to restore the *exact* property taken, it is not embezzlement. But if he intended to restore *similar or substantially identical* property, it is embezzlement, even if it was money that was initially taken and other money—of identical value—that he intended to return.

b. Claim of Right

As in larceny, embezzlement is not committed if the conversion is pursuant to a claim of right to the property, as where it is retained for payment of a debt honestly believed to be owed. The fact that the defendant retained the property openly tends to establish a claim of right.

6. Necessity for Demand for Return

If it is clear that there has been a conversion of the property, the victim need not make a demand that it be returned. If, however, there is doubt as to the existence of a conversion, a demand by the owner for return and a refusal to return by the defendant may be necessary.

7. Limitation to Property Entrusted

Some states limit embezzlement to the fraudulent conversion of property “entrusted” or “delivered” to the embezzler. These states would not punish one who finds lost property and, while in lawful possession of it, fraudulently converts it.

C. FALSE PRETENSES

The offense of false pretenses was created by English statute in 1757, and consequently is part of the common law in those American states that use 1776 as the determining date. Like larceny and embezzlement, most jurisdictions distinguish grand false pretenses (a felony) from petit false pretenses (a misdemeanor). The offense of false pretenses generally consists of:

- (i) Obtaining title;
- (ii) To the property of another;
- (iii) By a knowing (or, in some states, an intentional) false statement of past or existing fact;
- (iv) With intent to defraud the other.

1. “Larceny by Trick” Distinguished

False pretenses differs from larceny by trick in what is obtained. If only *custody* of the property is obtained by the defendant, the offense is larceny by trick. If *title* is obtained, the offense is false pretenses. What is obtained depends upon what the victim intended to convey to the defendant.

Example: D asked X if X would sell a car and offered as payment what was purported to be a demand note signed by Y. D falsely represented that the note was one executed by Y; in fact, D himself had forged it. X agreed to sell the car but told D that the sale would not be final until she had collected the amount of the note from Y. X then permitted D to use the car until Y could be located. D drove off in the car. Has he committed larceny or false pretenses? Larceny, because X did not intend to transfer title to D. X intended only to transfer possession pending collection on the note.

Compare: Same facts as above, except the note purportedly signed by Y is due in 30 days rather than on demand. Based on Y’s good credit, X agreed to convey full title to the car in exchange for the note. D drove off in the car. D has committed false pretenses rather than larceny.

2. Misrepresentation Required

There are several limits upon the misrepresentations required for false pretenses. (These also apply to larceny by trick.)

a. False Representation Concerning Matter of Fact

The defendant must have created a false impression as to the matter of fact. If his

statements reasonably construed constitute only an opinion or a “puffing,” they are not representations. It is not misrepresentation to fail to correct what is known to be a mistaken belief that the victim holds, *if* the defendant was not responsible for creating that belief, or the defendant has no fiduciary duty to the aggrieved party.

b. Misrepresentation of Past or Existing Fact

Traditionally, the defendant’s misrepresentation must have related to a past or present fact, and false promises to do something in the future, even without the present intent to perform, were not sufficient. However, under the M.P.C. and the modern prevailing view, any false representation suffices for the crime of false pretenses, including a false promise to perform in the future.

3. Requirement that Representation Be the “Cause” of Obtaining Property

The victim must actually be deceived by, or act in reliance on, the misrepresentation, and this must be a major factor (or the sole cause) of the victim passing title to the defendant.

4. State of Mind Required

The defendant must have known the statement to be false when he made it; however, most states will find that the defendant “knew” of the falsity of any statements when, after being put on notice of the high probability of the statement’s falsity, he deliberately avoided learning the truth. On the other hand, if he believes the statement to be true, he has not committed false pretenses (even if his belief was unreasonable). The defendant also must have intended that the victim rely on the misrepresentation. Subjecting the victim to a risk of loss will suffice for the intent to defraud.

Example: A obtained money from B by representing that he was securing it by a first mortgage on certain property. He intended to pay back the loan. The mortgage actually given was, as A knew, only a second mortgage. Is A guilty of false pretenses? *Held:* Yes. He knowingly subjected B to a substantially greater risk of loss of the money than B was aware of. This was a sufficient intent to defraud.

5. Related Crimes

Many states have enacted specific legislation covering certain conduct that resembles the crime of false pretenses but is sufficiently different to warrant separate consideration.

a. Bad Check Legislation

Almost all jurisdictions have created a new and separate statutory crime prohibiting the giving of a no-account or insufficient funds check with the intent to defraud.

b. Abuse or Misuse of Credit Card

Most jurisdictions have enacted legislation making it a misdemeanor to knowingly obtain property by means of a stolen, forged, canceled, revoked, or otherwise unauthorized credit card.

D. ROBBERY

Robbery, a felony in all jurisdictions, consists of the following:

- (i) A taking;

- (ii) Of personal property of another;
- (iii) From the other's person or presence;
- (iv) By force or intimidation;
- (v) With the intent to permanently deprive him of it.

Thus, robbery is basically an aggravated form of larceny in which the taking is accomplished by force or threats of force.

1. Force or Threats Necessary

If force is used, it obviously must be sufficient to overcome the victim's resistance. If threats are used, they must be threats of immediate death or serious physical injury to the victim, a member of her family, a relative, or a person in her presence at the time. A threat to do damage to property will not suffice, with the exception of a threat to destroy the victim's dwelling house.

2. Property Must Be Taken from Person or Presence of Victim

The property must be taken from some location reasonably close to the victim, but it need not be taken from her person. Property is in the victim's presence if it is in her vicinity. Property in other rooms of the house in which the victim is located is in her presence.

3. Force or Threats Must Be Used to Obtain Property or Immediately Retain It

The force or threats must be used either to gain possession of the property or to retain possession *immediately* after such possession has been accomplished.

Example: A reached into B's pocket without B's knowledge and removed B's wallet. B felt the wallet slip out, turned around, and grabbed A as he moved away. A struck B, rendering her unconscious, and ran. Is A guilty of robbery? *Held:* Yes. The force was used to prevent the victim from immediately apprehending A and regaining the property. Thus, it is sufficiently related to the taking.

4. Aggravated Robbery

Statutes often create a form of aggravated robbery, usually defined as robbery accomplished with a deadly weapon.

E. EXTORTION

Extortion is an offense that generally has been expanded by modern statutes far beyond its initial common law definition.

1. Common Law Definition—Collection of Unlawful Fee

The common law misdemeanor of extortion consisted of the corrupt collection of an unlawful fee by an officer under color of his office.

2. Modern Definition—Blackmail

In many modern statutes, extortion (or blackmail) is defined as obtaining property from another by means of certain oral or written threats. The prohibited threats often include threats to do physical harm to the victim or others, or threats to damage the victim's

property. Under some statutes, the crime is completed when the threats are made with the intent to obtain money or something of value; the threat is the essence of the offense. Under other statutes, the money or property must actually be obtained by means of the threats.

a. Threats Need Not Involve Immediate or Physical Harm

Extortion may be committed by threats that are not sufficient for robbery. To constitute extortion, the threats do not need to involve immediate or physical harm.

b. Property Need Not Be in Victim's Presence

To constitute extortion, it is generally not necessary that the property be obtained from the victim's person or presence (as is necessary for robbery).

F. RECEIPT OF STOLEN PROPERTY

The common law misdemeanor of receipt of stolen property is substantially identical to the modern offense. The elements of the crime are:

- (i) Receiving possession and control;
- (ii) Of "stolen" personal property;
- (iii) Known to have been obtained in a manner constituting a criminal offense;
- (iv) By another person;
- (v) With the intent to permanently deprive the owner of his interest in the property.

1. Possession

Manual possession of the property, while sufficient for "receiving," is not necessary. It is also receiving if: (i) the thief places the stolen property in a place that the defendant has designated; or (ii) for profit, the defendant arranges for a sale of the property by the thief to a third person.

2. "Stolen" Property

Most jurisdictions define "stolen" property broadly to include property obtained by commission of any of the property offenses. However, the property must have "stolen" status at the time it is received by the defendant. Thus, if stolen goods have been recovered by the police and are used in an undercover operation with the owner's permission, the goods are not stolen and the defendant cannot be guilty of receipt of stolen property; however, the defendant may be guilty of attempt to receive stolen goods (*see* IV.D.3.a.2)a), *supra*).

G. STATUTORY CHANGES IN PROPERTY ACQUISITION OFFENSES

Modern criminal codes and the M.P.C. have substantially altered the common law. Among the major changes are the following:

1. Consolidation of Offenses into Theft

There is a growing tendency to consolidate larceny, embezzlement, false pretenses, and receipt of stolen goods under the single heading: Theft. It is important to note that theft is a modern statutory crime, not a traditional common law offense.

2. Expansion of Property Subject to Larceny (and Other Offenses)

The things subject to the offenses have often been expanded to cover services, documents, and intangibles, as well as joint property.

3. Rejection of Asportation for Larceny

Some jurisdictions have rejected the requirement of asportation and require only that “control” of property be obtained.

4. Rejection of Technicalities of Trespass Requirement

A number of jurisdictions have replaced the detailed technicalities of the trespass requirement by a simplified requirement that the defendant have obtained unauthorized “control” over the property.

H. FORGERY

At common law, forgery and uttering a forged instrument are separate offenses.

1. Forgery

Forgery consists of the following:

- a. Making or altering;
- b. Of a false writing;
- c. With intent to defraud.

2. Uttering a Forged Instrument

Uttering consists of:

- a. Offering as genuine;
- b. An instrument that may be the subject of forgery and is false;
- c. With intent to defraud.

3. Writings that Are Possible Subjects of Forgery

Any writing that has *apparent legal significance* is a potential subject of forgery. Writing includes typewritten, printed, engraved, and similar material.

Example: A drafts and signs what purports to be a letter of introduction from a local physician and a letter of recommendation from a firm represented as a former employer. Both are false. Has A committed one, two, or no forgeries? *Held:* One forgery. The recommendation has apparent legal significance, because one who recommends another may incur legal liability if his recommendation is false. Thus, it can be the subject of forgery. But the letter of introduction has only social significance, and cannot be the subject of forgery.

Writings that derive their value from the mere fact of their existence—historical or artistic value—cannot be the subject of forgery.

Example: A painted a picture and signed it “Rembrandt.” She then sold it to X, representing it as an original “Rembrandt.” Is A guilty of forgery? No, because the

picture and signature derive their value from the fact of their existence. (*Note:* A did commit false pretenses by the sale.)

4. Required Falsity—Writing Itself Must “Be a Lie”

It is not sufficient that the writing contains a false statement. The writing must represent itself to be something that it is not.

Examples: 1) A, in charge of a warehouse, issues a warehouse receipt that represents that the warehouse has received certain grain. It has not. Is this forgery? *Held:* No. The warehouse receipt contains a misrepresentation. But it is what it purports to be, i.e., a warehouse receipt issued by one with authority to issue it.

2) B obtains blank receipts from A’s warehouse, fills them in so they represent that certain grain has been received, and signs A’s name. Is this forgery? *Held:* Yes. The instruments purport to be what they are not, i.e., warehouse receipts issued by one with authority to do so.

5. Required “Making”

a. Entire Instrument or Material Alteration

Forgery can be committed by the “making” of an entire instrument. It can also, however, be committed by altering an existing instrument, if the alteration is “material,” that is, if it affects a legal right. Alteration may be in the form of changing some of the writing, adding to the existing writing, removing some of the existing writing, or improperly filling in blanks left by the signer.

b. Fraudulently Obtaining Signature of Another

If the defendant fraudulently causes a third person to sign a document that the third person does not realize he is signing, forgery has been committed. But if the third person realizes he is signing the document, forgery has not been committed even if the third person was induced by fraud to sign it.

6. Required Intent—Intent to Defraud

The defendant must have had the intent to defraud, although no one need actually have been defrauded. It is not necessary that she intended to do pecuniary harm; it is sufficient if she intended to harm another in any way.

I. MALICIOUS MISCHIEF

The common law misdemeanor of malicious mischief consists of:

- (i) Malicious;
- (ii) Destruction of, or damage to;
- (iii) Property of another.

1. Damage Required

Destruction of the property is not required for malicious mischief. All that is necessary is that some physical damage be done that impairs the utility of the property or materially diminishes its value.

2. State of Mind Required—Malice

Malice requires no ill will or hatred. It does, however, require that the damage or destruction have been intended or contemplated by the defendant.

X. OFFENSES AGAINST THE HABITATION

A. BURGLARY

At common law, the elements of burglary are:

- (i) A breaking;
- (ii) And entry;
- (iii) Of the dwelling;
- (iv) Of another;
- (v) At nighttime;
- (vi) With the intent of committing a felony therein.

1. Breaking Required

a. Actual Breaking—Minimal Force Sufficient

Actual breaking requires some use of force to gain entry, but minimal force is sufficient; opening a closed but unlocked door constitutes a breaking. If force is used to enlarge an opening so that entry can be made, the traditional rule was that this did not constitute a breaking. Under the better view, however, a breaking has occurred because force was used to gain entry.

Example: D, intending to steal a valuable painting inside V's house, approaches V's door. The door is open about six inches. D pushes it fully open and enters. Is D guilty of burglary? The best answer is yes, since force—although only minor force—was used to gain entry.

b. Constructive Breaking

Constructive breaking consists of gaining entry by means of fraud, threat, or intimidation, or by use of the chimney.

Example: P wants to get into V's apartment to commit a felonious assault on V, but V's door is securely locked. P knocks and when V asks who it is, P responds, "I am a friend of your brother and he asked me to deliver this message to you." V then unlocks the door and invites P in. P enters. P has never met V's brother. Is P guilty of burglary? Yes. Since entry was obtained by fraud, this is constructive breaking.

c. Requirement of Trespass—Consent to Enter

A breaking requires a trespass, so that if the defendant had the consent of the resident to enter, his use of force to gain entry is not a breaking. The existence of consent to enter

during limited periods, however, will not prevent entry by force at other times from being a breaking. Moreover, if the consent was procured by fraud or threats, this is a constructive breaking.

d. Requirement that Breaking Be “Of the House”

The breaking must be to effect entry into the structure or some separately secured subportion of it. Thus, it is sufficient that the defendant broke to enter a closed closet or wall safe within a dwelling, but it is not enough if he merely breaks open a box or trunk within the dwelling.

e. Breaking to Exit Insufficient

The breaking *must be to gain entry*. It is not burglary to hide in a dwelling, with the intent to commit a felony, and then break to get out of the dwelling.

2. Entry Required

Entry is made by placing any portion of the body inside the structure, even momentarily. Insertion of a tool or inanimate object into the structure is entry if it is inserted for the purpose of accomplishing the felony. It is not sufficient if it is inserted for purposes of gaining entry.

Examples:

1) A approached B’s dwelling and shot a bullet through his window, intending to kill B. Has A committed burglary? *Held:* Yes. He has inserted an inanimate object into the dwelling by breaking for the purpose of committing the felony.

2) Z intends to go into V’s house and steal valuable jewels from a safe. He carefully cuts out a small portion of glass from a window and reaches in with his hand to unlock the window. At that point he is apprehended. Is Z guilty of burglary? Yes. His hand had “entered” the dwelling.

3. “Dwelling”—Used for Sleeping Purposes

A structure is a dwelling if it is used with regularity for sleeping purposes.

a. Used for Other Purposes—Still a Dwelling

A structure remains a dwelling even if it is also used for other purposes, such as conducting a business.

b. Temporary Absence of Inhabitants—Still a Dwelling

Temporary absence of those dwelling in a structure will not deprive it of its character as a dwelling. It is not a dwelling, however, before anyone has moved in, even if it was built for use as a dwelling, nor does it remain a dwelling after the last dweller has moved out with no intent to return.

4. “Of Another”—Occupancy Is Determinative

The requirement is that the structure be used as a dwelling by someone other than the defendant. Occupancy rather than ownership is material. An owner can commit burglary of his own structure if it is rented and used as a dwelling by others.

5. Requirement of Nighttime

Burglary could be committed only during the nighttime, defined as that period during which the countenance of a person could not be discerned by natural light.

6. Required Intent—Intent to Commit a Felony at Time of Entry

The defendant must have intended to commit a felony. It is not necessary that this be carried out. It is, however, essential that the intent exist at the time of entry; if the intent is formed after entry is completed, burglary is not committed.

7. Modern Statutory Changes

Modern statutes have modified the common law definition of burglary in a variety of ways that differ among jurisdictions. Some of the most common are as follows:

a. Abandonment of Requirement of Breaking

In many jurisdictions, it is sufficient that the defendant entered the structure, even if he did not break to gain entry.

b. Remaining in a Structure

It is often a burglary to remain concealed in a structure with the intent to commit an offense.

c. Broadening Structures that Can Be Burglarized

The description of structures that can be burglarized is often expanded beyond dwellings and sometimes beyond structures to include yards and cars.

d. Elimination of Nighttime Requirement

The requirement that entry be at nighttime is often abandoned, although burglary at nighttime is often assigned a more severe penalty than other burglaries. Nighttime is often defined by statute in terms of sunset and sunrise.

e. Intent to Commit Misdemeanor Theft

The intent necessary is often expanded to make it sufficient that the defendant intended to commit any theft, even if it was misdemeanor theft.

B. ARSON

At common law, arson consists of:

- (i) The malicious;
- (ii) Burning;
- (iii) Of the dwelling;
- (iv) Of another.

1. Requirement of a “Burning”

a. Necessity of Fire

At common law, the required damage (*see* below) must be caused by *fire*; damage caused by an explosion does not constitute arson.

b. Damage Required—“Scorching” (Insufficient) vs. “Charring” (Sufficient)

Traditionally, destruction of the structure or even significant damage to it is not required

to complete the crime of arson. But mere blackening by smoke or discoloration by heat (scorching) is not sufficient. There must be some damage to the fiber of the wood or other combustible material; this is generally stated as the rule that “mere charring is sufficient.”

2. “Dwelling”

At common law, dwelling was defined for arson as it was for burglary. (*See above.*) Most states by statute extend arson to structures other than dwellings. (*Note:* Questions on the Multistate Exam that are testing on other arson issues (e.g., malice) will often assume without saying that the jurisdiction’s arson law applies to structures other than dwellings.)

3. “Of Another”—Ownership Immaterial

Arson, like burglary, is a crime against the habitation. Thus, the structure had to be used as a dwelling by another; ownership was not material, even if the defendant himself was the owner. (*Note:* At common law, the burning of one’s house was the misdemeanor of “houseburning” if other dwellings were nearby.)

4. State of Mind Required—Malice

The burning does not have to be with ill will or for any particular motive. No specific intent is required. On the other hand, it is not sufficient that the burning was accidental, even if the defendant was negligent. All that malice requires is that the defendant have acted with the intent or knowledge that the structure would burn, or with *reckless disregard* of an obvious risk that the structure would burn.

5. Related Offenses

a. Houseburning

The common law misdemeanor of houseburning consists of:

- 1) Malicious (as defined in arson);
- 2) Burning;
- 3) Of one’s own dwelling;
- 4) If the structure is situated either:
 - a) In a city or town; or
 - b) So near to other houses as to create a danger to them.

b. Arson with Intent to Defraud an Insurer

At common law, it was not arson to burn one’s own dwelling for purposes of fraudulently collecting the insurance on it. But this is often made an offense by modern statutes.

6. Modern Statutory Changes

Like statutory changes for burglary, modern arson statutes (including the M.P.C.) have modified the common law rules, usually to expand potential criminal liability. Most states

have expanded the definition of arson to include damage caused by explosion, and expanded the types of property that may be destroyed to include commercial structures, cars, trains, etc.

XI. OFFENSES INVOLVING JUDICIAL PROCEDURE

A. PERJURY

A misdemeanor at common law, perjury consisted of the willful and corrupt taking of a false oath in regard to a material matter in a judicial proceeding.

1. Materiality

Materiality is an element of this offense, which must be alleged in the indictment and proved by the prosecution. The statement is material if it might affect some phase or detail of the trial, hearing, declaration, etc.

2. Contradictory Statements

If a witness has made two contradictory statements at the same proceeding and admits, before the end of the proceeding, that one of the statements is false, he cannot be prosecuted for having made the false statement. This is to encourage witnesses to correct any false statements they may have made before substantial damage is caused.

3. Civil Liability

In litigation brought under 42 U.S.C. section 1983 (Civil Rights Act), all witnesses—including police officers—are absolutely immune from civil liability based on their testimony (i.e., alleged perjury) in judicial proceedings. [Briscoe v. LaHue, 460 U.S. 325 (1983)]

B. SUBORNATION OF PERJURY

A separate offense at common law, subornation of perjury consists of procuring or inducing another to commit perjury. In some states, this is not part of the perjury statute.

C. BRIBERY

The common law misdemeanor of bribery consisted of the corrupt payment or receipt of anything of value in return for official action. Under modern statutes, it can be a felony, and it may be extended to classes of persons who are not public officials (e.g., athletes). Either the offering of a bribe or the taking of a bribe may constitute the crime.

1. Mutual Criminal Intent Unnecessary

It is not necessary that there be mutual criminal intent on the part of both the person tendering the bribe and the recipient.

2. Failure to Report a Bribe

Some statutes also make it a misdemeanor offense to fail to report a bribe.

D. COMPOUNDING A CRIME

At common law, the misdemeanor of compounding a crime consisted of entering into an agreement *for valuable consideration* to not prosecute another for a felony or to conceal the commission of a felony or whereabouts of a felon. Under modern statutes, the definition remains

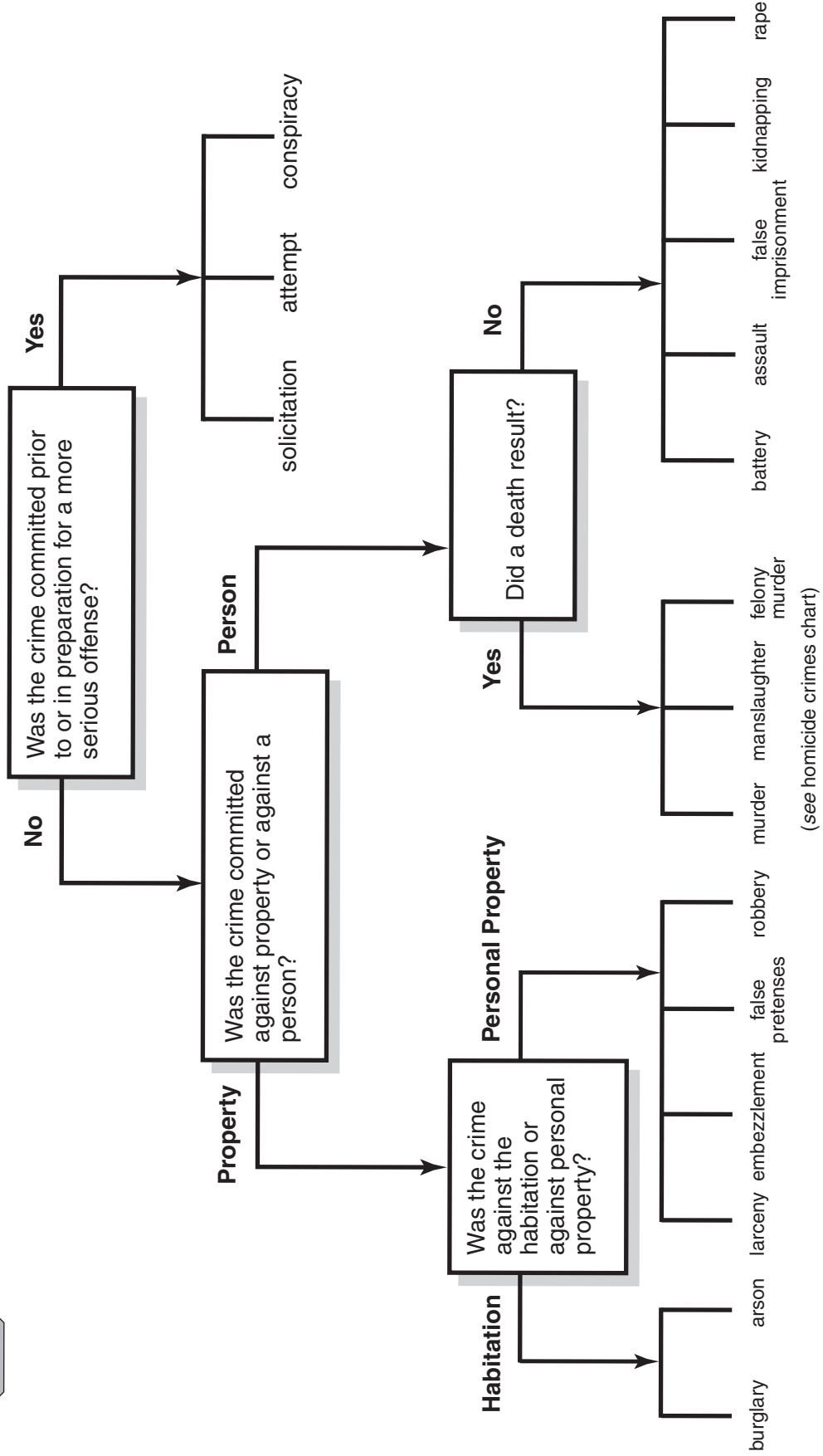
essentially the same, except that it refers to *any crime* (not only felonies). A few states make it a felony offense.

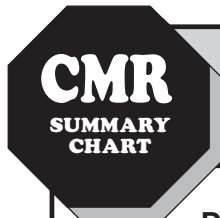
E. MISPRISION OF A FELONY

At common law, the misdemeanor of misprision of a felony consisted of the failure—by someone other than a principal or accessory before the fact—to disclose or report knowledge of the commission of a felony. Misprision was distinguished from compounding a crime in that no passage of consideration was required for the former. Today, most jurisdictions do not recognize the crime of misprision of a felony. In these jurisdictions, therefore, a person is under *no obligation to report a crime*.



CLASSIFICATION OF CRIMES





DEFENSES NEGATING CRIMINAL CAPACITY

<u>Defense</u>	<u>Elements</u>	<u>Applicable Crimes</u>
Insanity	Meet applicable insanity test (<i>M’Naghten</i> , irresistible impulse, <i>Durham</i> , or M.P.C.)	Defense to all crimes
Intoxication – Voluntary	Voluntary, intentional taking of a substance known to be intoxicating	Defense to specific intent crime if intoxication prevents formation of required intent
– Involuntary	Taking intoxicating substance without knowledge of its nature, under duress , or pursuant to medical advice	Treated as mental illness (<i>i.e.</i> , apply appropriate insanity test); may be a defense to all crimes
Infancy	Defendant under age 14 at common law ; under modern statutes , defendant under age 13 or 14	<i>Common law</i> : Under age seven, absolute defense to all crimes; under 14, rebuttable presumption of defense. <i>Modern statutes</i> : Defense to adult crimes but may still be delinquent
Diminished Capacity (some states)	As a result of mental defect short of insanity , defendant did not have the required mental state to commit the crime	Most states with this defense limit it to specific intent crimes

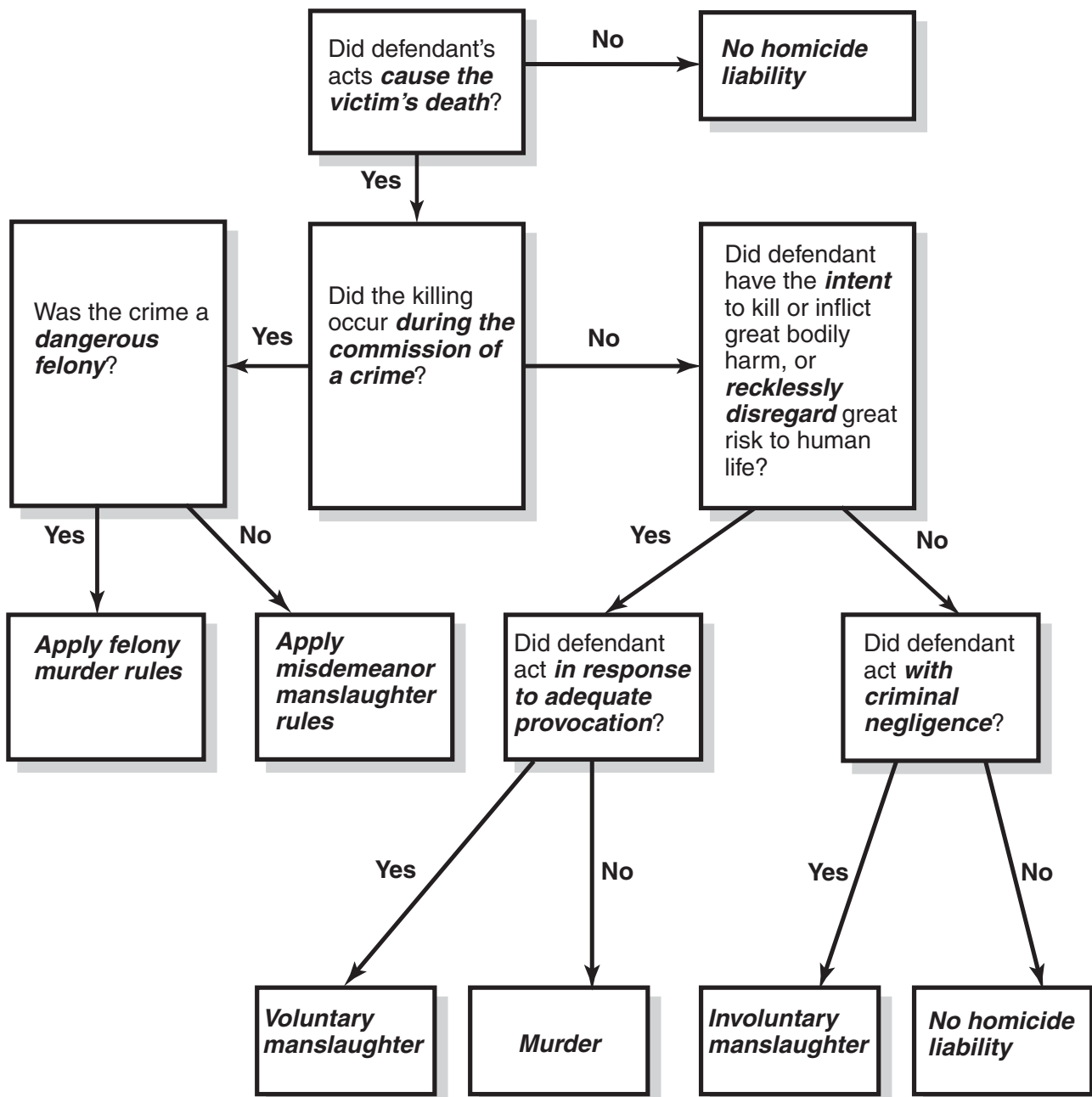
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JUSTIFICATION DEFENSES

<u>Defense</u>	<u>Amount of Force Allowed</u>	
	Nondeadly Force	Deadly Force
Self-Defense	If person reasonably believes force is necessary to protect self	Only if person reasonably believes that he is threatened with death or great bodily harm
Defense of Others	If person reasonably believes force is necessary to protect other person	Only if person reasonably believes that other is threatened with death or great bodily harm
Defense of Dwelling	If person reasonably believes force is necessary to prevent or end unlawful entry	Only if person inside reasonably believes he is threatened or to prevent felony inside
Defense of Other Property	If person reasonably believes force is necessary to defend property in his possession (but if request to desist would suffice, force not allowed)	Never
Crime Prevention	If person reasonably believes force is necessary to prevent felony or serious breach of peace	Only to extent person reasonably believes deadly force is necessary to prevent or end felony risking human life
Effectuate Arrest		
– Police	If officer reasonably believes force is necessary to arrest	Only to prevent escape of felon, and police officer reasonably believes that the suspect threatens death or great bodily harm
– Private Person	If crime in fact committed and reasonable belief that this person committed it	Only to prevent escape of person who actually committed felony, and person reasonably believes that the suspect threatens death or great bodily harm
Resisting Arrest	If improper arrest	Only if improper arrest and defendant does not know arrester is a police officer
Necessity	If reasonably necessary to avoid greater harm	Never



HOMICIDE CRIMES



Note: This chart will lead you to the prima facie homicide that defendant committed. You must then decide whether any defenses apply.

CRIMINAL LAW MULTIPLE CHOICE QUESTIONS

INTRODUCTORY NOTE

You can use the sample multiple choice questions below to review the law and practice your understanding of important concepts that you will likely see on your law school exam. To do more questions, access StudySmart Law School software from the BARBRI website.

Question 1

The accused was driving his beat-up old car along a narrow road when he was passed by the victim in her new car. The victim's daughter was lying down in the back seat and could not be seen. The accused sped up, drew even with the victim, and repeatedly rammed his car into the side of the victim's car. After several collisions, the victim was forced off the road, rolling down a cliff for several yards. Due to the rolling, both the victim and her daughter were severely injured. The accused was charged with attempted murder of both of them. At his trial, he testifies that he was angry because of the cavalier way the victim passed him in her new car, and that his only intent in smashing into her car was to scratch and dent it so that she would not be so haughty in the future.

Assuming that the jury believes this testimony, of whom may the accused be convicted of attempted murder?

- (A) The victim.
- (B) The victim's daughter.
- (C) Both the victim and her daughter.
- (D) Neither the victim nor her daughter.

Question 2

After drinking heavily at his bachelor party at a beachfront resort, the groom was helped into a speedboat by a few of his friends and transported to a small island off the coast as a joke. They left him on the island, which had a small shelter but no communication facilities, without telling anyone else. As a result, the groom missed his wedding the next day. One of the participants was charged with kidnapping, which is defined in the jurisdiction as the unlawful movement or concealment of a person without his consent. In his defense, the participant claims that he was so intoxicated that he did not realize what he was doing, and that the groom had consented to being left on the island.

Which of the following would *not* be helpful to his defense?

- (A) The groom was not legally intoxicated that evening.
- (B) Kidnapping is a general intent crime in the jurisdiction.
- (C) Kidnapping is a specific intent crime in the jurisdiction.
- (D) The participant had overheard the groom say that he was not sure about going through with the wedding.

Question 3

The defendant and the victim got into a minor verbal altercation, concluding with the defendant lightly shoving the victim. The victim lost his balance and struck his head on the pavement, causing serious bodily injury. The defendant was charged with battery, which is defined in the jurisdiction as “purposely or knowingly causing serious bodily injury to another.”

Should the defendant be convicted of battery?

- (A) No, because the defendant did not know that the victim would be seriously injured.
- (B) No, because the defendant did not strike a serious blow to the victim.
- (C) Yes, because the defendant purposely shoved the victim.
- (D) Yes, because the victim suffered serious bodily injury.

Question 4

An obsessive fan was heartbroken when her favorite actor announced his engagement to a well-known actress. The fan waited for the couple outside of a nightclub. When they arrived, the fan raised a gun and fired it at the actress, but as she fired, the actor’s bodyguard spotted the gun and knocked it to one side. The bullet grazed the bodyguard’s hand, causing minor injuries, and lodged in the actor’s chest. Through prompt emergency medical treatment, the actor survived the shooting.

The fan may be charged with attempted murder of:

- (A) The actress.
- (B) The actor.
- (C) The actress and the actor.
- (D) The actress, the actor, and the bodyguard.

Question 5

A kidnapper and his cohort hatched a scheme to kidnap the son of a wealthy man and hold him for ransom. After conducting a surveillance of the wealthy man's home, they decided that they would have to have inside help to disable the alarm at the home. They agreed that the kidnapper would contact the man's butler, who they learned was heavily in debt and frequented a local racetrack during his time off. The butler would be offered money to disconnect the alarm on the night of the planned kidnapping. Shortly before the kidnapper was to go to the track to make contact with the butler, the cohort had a change of heart about the scheme and contacted the butler. He warned the butler not to have anything to do with the kidnapper. The butler met with the kidnapper anyway and pretended to go along with his proposal, accepting the down payment that the kidnapper offered. After meeting with him, the butler contacted the authorities.

The kidnapper and cohort are charged with conspiracy in a jurisdiction that follows the common law rule for conspiracy.

What is the most likely result?

- (A) Both the kidnapper and cohort are guilty of conspiracy because the cohort agreed with the kidnapper to commit the offense.
- (B) The cohort is not guilty of conspiracy because he withdrew from the conspiracy by contacting the butler.
- (C) The cohort is not guilty of conspiracy because he withdrew from the conspiracy by contacting the butler, and the kidnapper is not guilty of conspiracy with the butler because one cannot be a conspirator by oneself.
- (D) The kidnapper is guilty of conspiracy with the butler.

Question 6

A petty thief and a felon decided to meet at the mall, armed with a gun or knife, to look for elderly women wearing expensive jewelry, intending to follow them home and rob them. The felon pocketed a gun and headed to the mall. The thief headed to the mall also, but began to have second thoughts when he considered that the felon had already done time for armed robbery and assault with a deadly weapon, and that he had vowed that he would never "do time" again because "somebody finked to the cops." The thief told the felon when they met at the mall that he had changed his mind and wanted no part of the action, and went home. That evening, the felon robbed and beat an elderly woman returning home from the mall. Because of her ill health and age, the woman died as a result of the beating.

Of what crime is the thief guilty?

- (A) No crime.
- (B) Conspiracy.
- (C) Murder.
- (D) Murder and conspiracy.

Question 7

A mob enforcer shot a pawnshop owner in the kneecap, intending to put him in the hospital because he was not paying his protection fees to the mob. However, the pawnshop owner hit his head on the edge of the counter when he fell. He suffered a blood clot and died as a result.

A statute in the jurisdiction provides that a criminal homicide constitutes murder in the first degree when it is committed by an intentional and premeditated killing, murder in the second degree when it is committed while the defendant is engaged in the commission of a dangerous felony, and murder in the third degree for all other types of murder at common law. Another statute provides that manslaughter is a killing in the heat of passion on adequate legal provocation or a killing caused by criminal negligence.

The crimes below are listed in descending order of seriousness.

If the enforcer is charged with the pawnshop owner's killing, what is the most serious crime for which he can be convicted?

- (A) Murder in the first degree, because the killing was the result of intentional and premeditated conduct.
- (B) Murder in the second degree, because the killing occurred during the commission of the felony of assault with a deadly weapon.
- (C) Murder in the third degree, because the enforcer had the intent to commit serious bodily harm.
- (D) Manslaughter, because the enforcer acted with criminal negligence.

Question 8

A robber attempted an armed robbery of a liquor store with an accomplice. A police officer arrived at the scene and shot and killed the robber's accomplice, who had been guarding the door with a gun and had not obeyed the officer's command to drop the weapon. Meanwhile, the store owner pulled out a gun and shot at the robber but missed. The robber then killed the store owner in self-defense before he could fire a second shot.

In most jurisdictions, the robber is guilty of felony murder for the death of:

- (A) The store owner and the accomplice.
- (B) The store owner only.
- (C) The accomplice only.
- (D) Neither the store owner nor the accomplice.

Question 9

A thief looking for targets in a hotel lobby one evening spotted the victim wearing what appeared to be expensive jewelry as she checked into the hotel. After finding out the victim's room number, the thief broke into a supply room and put on a bellhop's uniform. She then grabbed some flowers from a vase in the hall and knocked on the door to the victim's room, announcing the delivery of a bouquet of flowers. After the victim let her in, the thief scanned the room for the jewelry while putting the flowers in a vase. When she did not see the jewelry, she pulled out a knife and forced the victim to reveal the whereabouts of the jewelry, which turned out to be the hotel's safe. The thief made the victim call the front desk and ask that someone bring the jewelry to the room. The thief then locked the victim in the bathroom, changed out of the bellhop's uniform, and accepted the jewelry when it was brought to the room. She was apprehended a few days later trying to sell the jewelry.

Under these facts, what are the most serious crimes the thief can be convicted of?

- (A) Burglary and larceny.
- (B) Burglary and robbery.
- (C) Larceny only.
- (D) Robbery only.

Question 10

The defendant wanted to borrow his neighbor's car to go shopping for lawnmowers. Knowing that the neighbor was out of town for the weekend, the defendant opened the neighbor's garage door and took a car key that the neighbor hid in an old coffee can for emergencies. Once inside, the defendant, mistakenly believing that larceny applied only to the taking of items valued at over \$100, decided to take the neighbor's lawnmower (worth \$75) in order to trade it in on a new mower. However, on the way to the store with the mower, he was involved in an automobile accident, totaling the car.

In a common law jurisdiction, the defendant is guilty of larceny of:

- (A) Both the car and the mower.
- (B) Neither the car nor the mower.
- (C) The car, but not the mower.
- (D) The mower, but not the car.

Question 11

A cashier at a bookstore who accepted a \$50 bill as payment from a customer placed the bill underneath all of the \$20 bills in the cash register and took it home with her at closing time. At the cashier's second job as a truck driver, she drove her tractor to a trucking terminal and attached a trailer filled with wine. At the first truck stop, the cashier entered the trailer, took a bottle of wine from a case, and drank it.

In a common law jurisdiction, of which of the following crimes is the cashier guilty?

- (A) Larceny for the money and embezzlement for the wine.
- (B) Embezzlement for the money and larceny for the wine.
- (C) Larceny for both the money and the wine.
- (D) Embezzlement for both the money and the wine

Question 12

A homeowner decided to destroy his home by fire to collect the insurance money. To work up his courage, he had several drinks at a local bar. When he returned to his block that night, he was so intoxicated that he mistakenly believed that his neighbor's house, which was 20 feet to the right of his house and looked very similar, was his own house. He started a fire under the back porch and went off a short distance to watch it burn. Suddenly he realized that he had the wrong house. He ran back and grabbed a garden hose and was able to put out the fire with just some slight charring of the porch.

If the homeowner is charged with arson in a jurisdiction retaining the common law rules, what is the most likely verdict?

- (A) Not guilty, because he did not have the requisite intent to burn the dwelling of another.
- (B) Not guilty, because he realized his mistake before any burning of the dwelling occurred.
- (C) Guilty, because he acted with malice.
- (D) Guilty, because his intent to commit arson of his own house is transferred to his neighbor's house.

ANSWERS TO MULTIPLE CHOICE QUESTIONS

Answer to Question 1

- (D) The accused may not be convicted of attempted murder because he lacked the necessary intent. A criminal attempt consists of (i) a specific intent to commit the crime; and (ii) an overt act in furtherance of that intent. In other words, the defendant must have the intent to perform an act and obtain a result that would constitute the crime charged if achieved. Regardless of the intent required for the completed offense, an attempt always requires specific intent. Thus, attempted murder requires the specific intent to kill another person, even though the mens rea for murder itself does not require specific intent—had the victim or her daughter died, the accused could be convicted of murder because malice aforethought can be established here by awareness of an unjustifiably high risk to human life (*i.e.*, “abandoned and malignant heart”). However, the accused did not have the intent to kill either victim, so he lacked the intent necessary for attempt. (D) is therefore correct, and (A), (B), and (C) are incorrect. In answering questions such as this, remember to be objective and answer the question asked. Although the accused is surely guilty of some crimes (*e.g.*, assault and battery), he is not guilty of the crime charged.

Answer to Question 2

- (B) It would be least helpful to a kidnapping participant’s defense if kidnapping were a general intent crime in the jurisdiction. Although courts have not always clearly defined “general intent,” the mental state required for the material elements of the offense are analogous to “recklessness” under the Model Penal Code: conscious disregard of a substantial or unjustifiable risk that the material element exists or will result from his conduct. Thus, the defendant need not be certain that his conduct will cause the result or that the attendant circumstances required by the crime exist; it is enough if he is aware of a high likelihood of that result or circumstance. In contrast, a specific intent crime requires the doing of an act with a conscious intent or objective. Most importantly for the participant’s purposes, defenses such as voluntary intoxication and unreasonable mistake of fact are not recognized as defenses to general intent crimes, but are for specific intent crimes. If the jurisdiction treats kidnapping as a specific intent crime, the participant’s intoxication could be used to show that he was incapable of forming the requisite intent or that he mistakenly believed that the groom had consented to being left on the island. For specific intent crimes, any mistake of fact, even if unreasonable, is a defense. In contrast, voluntary intoxication is not a defense to a general intent crime, and any mistake of fact offered to negate a general intent must be reasonable to be valid. Hence, it would be helpful to the participant’s defense if the jurisdiction treated the offense as a specific intent crime, but not if it were treated as a general intent crime. Thus, (B) is correct because it is not helpful, and (C) is incorrect because it is helpful. (D) is incorrect because that fact may be helpful to the participant’s defense. If he believed that the groom wanted to be left on the island, he may not have had the intent required for the offense. (A) is incorrect because it is helpful to the participant’s defense. The offense is defined as the unlawful movement or concealment of a person without his consent. If the participant was not legally intoxicated, his consent would be a valid defense; if he was legally intoxicated, it could be argued that he was incapable of consenting, thus negating the participant’s defense.

Answer to Question 3

- (A) The defendant should not be convicted of battery. Under the statute’s fault standards, a defendant must have acted purposely (*i.e.*, with conscious intent to cause the result) or knowingly (*i.e.*, with

knowledge that his conduct will necessarily or very likely cause the result). The apparent inference to be drawn from the facts is that the defendant did not consciously desire, nor contemplate to a practical certainty, the *serious* injury to the victim that actually occurred. Had the defendant intended to cause such severe harm, he no doubt would have dealt the victim a strong blow rather than simply giving the victim a light shove. Therefore, as to the nature of the result, the defendant did not act with “purpose” or “knowledge” as those terms are defined in the Model Penal Code and modern criminal codes. (B), while close, is not as good of an answer as (A) because it does not address the state of mind issue in the problem. A light shove might be sufficient for a battery as defined under a different set of facts (*e.g.*, if the defendant believes that the victim would fall down stairs with a light shove). (C) is incorrect because it addresses the act but not the result. As defined in this question, battery must not only be committed by a purposeful act, but also be done with a “purposeful” or “knowing” state of mind as to the result. (D) is incorrect for much of the same reason—the state of mind requirement also applies to the result, as discussed above. The injury must have been purposely or knowingly caused, and that concept is not contained within choice (D).

Answer to Question 4

- (A) The fan should be charged with the attempted murder of her original target, the actress. A criminal attempt is an act that, although done with the intention of committing a crime, falls short of completing the crime. The fan fired a gun at the actress; her intentional use of a deadly weapon permits an inference that she had the intent to kill the actress. If her plan had succeeded, she would have been guilty of murder. (B), (C), and (D) are incorrect because the fan did not have the intent to kill the actor. Had the fan actually killed the actor, her intent to kill the actress could have been transferred to make her guilty of murdering the actor, but the doctrine of transferred intent does not apply to an attempt. (D) is also incorrect because the fan did not have intent to kill the bodyguard.

Answer to Question 5

- (A) Both the kidnapper and the cohort are guilty of conspiracy. At common law, a conspiracy was an agreement between two or more persons to commit an unlawful act or to commit a lawful act in an unlawful manner. The elements are: (i) an agreement between two or more persons; (ii) the intent to enter into an agreement; and (iii) the intent to achieve the objective of the agreement. When the kidnapper and the cohort decided to kidnap the wealthy man’s son, they were guilty of common law conspiracy, which does not require an overt act in furtherance of the conspiracy. (A majority of states now require an overt act in furtherance of the conspiracy, but mere preparation, such as the surveillance here, suffices.) (B) is wrong for two reasons: If a person withdraws from a conspiracy, he is no longer liable for future crimes committed in furtherance of the conspiracy, but he remains liable for the crime of conspiracy, which was complete at the time of the agreement. Second, to have a successful withdrawal, a person must communicate the withdrawal to his co-conspirators, which the cohort did not do. (C) is also wrong for two reasons: First, the cohort is still liable for conspiracy. Second, even if his withdrawal relieved him from liability for subsequent offenses, the kidnapper could still be convicted of conspiracy. (D) is wrong because, at common law, both parties must have the intent, at the time of the agreement, to commit the unlawful act. Given that the butler did not have the necessary intent, neither he nor the kidnapper can be convicted of conspiracy with respect to their conversations.

Answer to Question 6

- (B) The thief’s withdrawal from the conspiracy absolves him of liability for the subsequent murder committed by the felon, but does not provide a defense to the crime of conspiracy. Conspiracy

consists of: (i) an agreement between two or more persons; (ii) an intent to enter into an agreement; and (iii) an intent to achieve the objective of the agreement. In addition, most states require an overt act in furtherance of the conspiracy (although an act of mere preparation will suffice). Each conspirator is liable for the crimes of all other conspirators if such crimes were committed in furtherance of the objectives of the conspiracy and they were a natural and probable consequence of the conspiracy, *i.e.*, foreseeable. However, if a conspirator has made a legally effective withdrawal from the conspiracy at the time of commission of such a crime, he will not be liable for that crime. Withdrawal requires an affirmative act that notifies all members of the conspiracy and is done in time for them to have the opportunity to abandon their plans. Withdrawal, however, will not be a defense to the conspiracy charge itself. The thief and the felon agreed to rob elderly women whom they followed home from the shopping center. They intended to enter into this agreement and to achieve its objective (to rob the women). The felon's going to the mall at the agreed-on time, armed with a gun, constitutes a sufficient act in furtherance of the conspiracy. (Note that the overt act may be performed by any one of the conspirators.) Consequently, all of the elements of conspiracy have been satisfied. Given that he cannot use withdrawal from the conspiracy as a defense to that charge, the thief will be convicted of conspiracy. (A) is therefore incorrect. Ordinarily, the thief would also be guilty of the woman's murder. The killing resulted from a beating administered during the course of the robbery; thus, it was committed in furtherance of the conspiracy's objective. Also, it was foreseeable that death might result where all of the intended victims were elderly women. However, the thief had withdrawn from the conspiracy prior to the time the killing was committed. He made an effective withdrawal when he explicitly told the felon that he no longer wanted any part of the plan at a time when there was still an opportunity to abandon the plan. Thus, criminal liability for the killing will not attach to the thief, and (C) and (D) are therefore incorrect.

Answer to Question 7

- (C) The most serious crime for which the enforcer can be convicted is murder in the third degree. Under the statute in the question, all murders are third degree murder unless the prosecution proves any of the stated requirements for first or second degree murder, and here the facts do not establish any of those requirements. (A) is incorrect. The enforcer did not commit an intentional and premeditated killing because the facts state that he acted only with the intent to injure. (B) is incorrect because, while assault with a deadly weapon may be a dangerous felony, the felony murder rule can be applied only when the underlying felony is independent of the killing. A felony such as assault or battery that directly causes death (as in this case) would not be considered an independent felony. (D) is incorrect because the enforcer can be convicted of the more serious crime of third degree murder, because he acted with the intent to cause serious bodily injury and death occurred. This satisfies the malice aforethought requirement for common law murder.

Answer to Question 8

- (B) The robber can be found guilty of felony murder of the store owner only. This choice represents an exception to the general rule that almost any death occurring in the course of a felony is felony murder. In the majority of jurisdictions, the robber would not be held guilty of felony murder for a justifiable killing of a co-felon by a police officer. The *Redline* view (the majority position) holds that the killing of a felon by a police officer or resisting victim cannot be the basis for felony murder. Thus, (A) and (C) are incorrect. (C) and (D) are incorrect because a person has no right of self-defense when he is the aggressor, and especially if he is engaged in a felony. The store owner, who was the victim of this felony, had the right to use at least the threat of force against

the robber. Because the death occurred in the course of the felony, and the robber had no right of self-defense, he is guilty of felony murder, as well as deliberate premeditated murder.

Answer to Question 9

- (B) The thief can be convicted of burglary and robbery. At common law, the elements of burglary are: (i) a breaking (ii) and entry (iii) of the dwelling (iv) of another (v) at nighttime, (vi) with the intent to commit a felony therein. Here, the thief has committed a constructive breaking because she gained entry by means of a fraud. The hotel room constitutes a dwelling for purposes of burglary, and the thief apparently had the intent to commit larceny when she entered the room. The thief has also committed robbery, which is defined as (i) a taking (ii) of personal property of another (iii) from the other's person or presence (iv) by force or intimidation, (v) with the intent to permanently deprive the other of the property. The "presence" element is satisfied if the victim is in the vicinity when the property is taken. The thief used the threat of force against the victim to obtain the property, and obtained it while the victim was locked in the bathroom of a hotel room, which is close enough to be considered in the vicinity. Thus, she can be convicted of both burglary and robbery, making (C) and (D) incorrect. (A) and (C) are incorrect because the elements of larceny are contained within the more serious offense of robbery, which is basically an aggravated form of larceny.

Answer to Question 10

- (D) The defendant is guilty of larceny of the mower, but not the car. Larceny is the taking and carrying away of the personal property of another by trespass with the intent to permanently (or for an unreasonable time) deprive the other of his interest in the property. The intent to permanently deprive may be found when the defendant intends to use the property in such a manner as to create a substantial risk of loss. As to the mower, the defendant took and carried away the mower with the intent to permanently deprive his neighbor of it. The defendant's mistake as to the coverage of the criminal law does not negate his intent to commit the crime, and thus provides no mistake of law defense. Thus, (B) and (C) are incorrect. However, the defendant is not guilty of larceny of his neighbor's car because he did not have the intent to permanently deprive the neighbor of the car; rather, his intent was to borrow the car. Furthermore, merely driving a car does not constitute a use that creates a substantial risk of loss sufficient to find the intent to permanently deprive the neighbor of the car. As a result, (A) and (B) are incorrect.

Answer to Question 11

- (C) The cashier is guilty of larceny in both cases. Larceny is the taking and carrying away of tangible personal property of another by trespass, with the intent to permanently deprive the other of his interest in the property. The cashier is guilty of larceny in the case of the money, even though she originally had possession of the \$50 bill when she first received it from the customer. If she had converted it at that time, she would have been guilty of embezzlement because the money never reached the possession of her employer. However, when she placed the bill in the cash register, the employer then obtained possession of the bill, and the cashier's rights over the money were reduced to custody. When she took the bill from the cash register at the end of the day, she committed a trespassory taking from her employer's possession and therefore committed larceny. (B) and (D) are therefore incorrect. The cashier is also guilty of larceny in the case of the wine. Here, as a bailee, she clearly was in possession of the entire trailer. However, when she entered the trailer and took one wine bottle, she broke bulk, and possession of the wine bottle is deemed

to revert back to the owner of the wine. Thus, when she removed that bottle from its place in the trailer with the intention of depriving its owner of the wine permanently, she committed larceny; hence, (A) and (D) are incorrect.

Answer to Question 12

- (C) The homeowner should be found guilty. Common law arson consists of the malicious burning of the dwelling of another. At common law, the state of mind required—malice—is satisfied not only by intentionally burning the dwelling of another but also by acting with reckless disregard of an obvious risk that the structure would burn. While many courts ordinarily require that the defendant be subjectively aware of the risk, they will find malice when the failure to be aware of the risk is due to voluntary intoxication. Even had the homeowner done what he intended, he would have put his neighbor's house in jeopardy of burning. The fact that his intoxication caused him to fail to recognize the risk would not be a defense. Nor could he raise a mistake of fact defense because mistake of fact must be reasonable to negate the existence of malice, and here the facts state that his mistake was caused by his intoxication. (A) is incorrect because the malice required for common law arson may be satisfied by something less than the intent to burn down the dwelling of another, and here malice is established. (B) is incorrect because he caused a burning of the back porch, which is part of the dwelling, with the requisite malice; his conduct once he realized his mistake is irrelevant to his guilt. (D) is incorrect because his intent to burn down his own house does not constitute an intent to commit arson, which at common law is the burning of the house of another. His intent to burn down his own house also constituted malice for purposes of the burning of his neighbor's house, but not because of the doctrine of transferred intent.

APPROACH TO EXAMS

CRIMINAL LAW

IN A NUTSHELL: A person who actually commits a physical act that has been made illegal by law with the accompanying state of mind may be charged with and convicted of a crime. (If either the act or intent is lacking, the defendant is not guilty of that crime.) Additionally, any person who is an accomplice to that person also may be charged with and convicted of the crime. The law will list the physical acts and mental state(s) required for crime; these are called elements of the crime. Crimes include not only actual criminal acts, but also certain preparatory crimes (“inchoate offenses”). The study of crimes requires the study of the elements of the offense and the elements of a defense that the accused may raise.

I. ESSENTIAL ELEMENTS OF A CRIME

A. Physical Act

1. Must be voluntary act

B. Mental State

1. Specific intent
 - a. Requires doing an act with a specific intent or objective
 - b. Cannot infer specific intent from doing the act
 - c. Major specific intent crimes are solicitation, attempt, conspiracy, assault, larceny, robbery, burglary, forgery, false pretenses, embezzlement, and first degree premeditated murder
2. Malice
 - a. Applies to common law murder and arson
 - b. Generally shown with (at least) reckless disregard of an obvious or high risk that a particular harmful result would occur
3. General intent
 - a. Defendant must be aware that she is acting in the proscribed manner and that any attendant circumstances required by the crime are present
 - b. Can infer general intent from doing the act
4. Model Penal Code
 - a. Purposely—conscious object to engage in act or cause a certain result
 - b. Knowingly—as to nature of conduct: aware of the nature of conduct or that certain circumstances exist; as to result: knows that conduct will necessarily or very likely cause result
 - c. Recklessly—conscious disregard of a substantial and unjustifiable risk that circumstances exist or a prohibited result will follow, and this disregard is a gross deviation from a “reasonable person” standard of care
 - d. Negligently—failure to be aware of a substantial and unjustifiable risk that circumstances exist or a prohibited result will follow, and this disregard is a gross deviation from a “reasonable person” standard of care

II. ACCOMPLICE LIABILITY

A. Elements of Accomplice Liability

1. Must be intentionally aiding, counseling, or encouraging the crime—active aiding, etc.,

required. Mere presence not enough even if by presence defendant seems to be consenting to the crime or even if defendant fails to notify the police

2. If crime is one of recklessness or negligence, accomplice must intend to facilitate commission and act with recklessness or negligence
3. Liability is for the crime itself and all other foreseeable crimes
4. Accessory after the fact (is not an accomplice)
 - a. Helping someone escape
 - 1) Not liable for the crime itself
 - 2) A separate lesser charge

B. Defenses

1. Withdrawal is an affirmative defense if prior to the crime's commission
 - a. If encouraged crime, must repudiate encouragement
 - b. If provided material, must neutralize the assistance
 - c. Or may notify police or otherwise act to prevent crime

III. INCHOATE OFFENSES—SOLICITATION, CONSPIRACY, AND ATTEMPT

A. Solicitation

1. Elements:
 - a. Asking someone to commit a crime
 - b. With the intent that the crime be committed
2. Defenses:
 - a. The refusal or the legal incapacity of the solicitee is no defense
 - b. If legislative intent is to exempt solicitor, that is a defense

B. Conspiracy

1. Elements:
 - a. An agreement;
 - b. An intent to agree;
 - c. An intent to achieve the objective of the agreement; and
 - d. An overt act (most jurisdictions)
2. Liability—each conspirator is liable for all crimes of other conspirators if foreseeable and in furtherance of the conspiracy
3. Defenses:
 - a. Withdrawal
 - 1) General rule—can only withdraw from liability for future crimes; no withdrawal from conspiracy possible because agreement coupled with act completes crime of conspiracy
 - 2) M.P.C. recognizes voluntary withdrawal as defense if the defendant thwarts conspiracy (e.g., informs police)
 - b. Factual impossibility is no defense
4. Merger
 - a. No merger—can be convicted of both conspiracy and substantive offense

C. Attempt

1. Elements:
 - a. Specific intent; and

- b. Overt act—a substantial step in the direction of the commission of the crime (mere preparation not enough)
- 2. Defenses:
 - a. Factual impossibility is no defense
 - 1) Factual impossibility arises when defendant sets out to do an illegal act, but cannot complete the act due to some unknown reason
 - b. True legal impossibility is always a defense
 - 1) Legal impossibility arises when defendant sets out to do a legal act that he believes is illegal
 - c. Abandonment generally no defense after the substantial steps have begun
 - 1) M.P.C. recognizes abandonment as defense if (i) fully voluntary and (ii) complete (i.e., not a postponement due to unfavorable circumstances)

IV. DEFENSES/JUSTIFICATION

A. Insanity

1. *M’Naghten* test—disease of the mind caused a defect of reason so defendant lacked the ability at time of his actions to know wrongfulness or understand nature and quality of actions
2. Irresistible impulse test—unable to control actions or conform conduct to law
3. *Durham* test—crime was product of mental disease or defect
4. M.P.C. test—combination of *M’Naghten* and irresistible impulse tests

B. Intoxication

1. Voluntary intoxication is a defense if it negates “specific intent”

C. Self-Defense

1. Nondeadly force (“NDF”)—a person may use NDF in self-defense if she reasonably believes force is about to be used on her; no duty to retreat
2. Deadly force (“DF”)
 - a. A person may use DF if she is:
 - 1) Without fault;
 - 2) Confronted by unlawful force; and
 - 3) Reasonably believes that she is threatened with imminent death or great bodily harm
 - b. Duty to retreat before using DF
 - 1) Majority rule—no duty to retreat
 - 2) Minority rule—duty to retreat, except:
 - a) When it cannot be done safely, and
 - b) In one’s home
 - c. DF in self-defense may be used by original aggressor only if he tries to withdraw (e.g., run for door) and communicates that withdrawal to the original victim, or if sudden escalation of violence by original victim
 - d. Use of DF to arrest—officer must reasonably believe suspect armed or presents a danger to the public
 - e. If fact-finder determines absence of right to self-defense, defendant may be guilty of voluntary manslaughter under “imperfect self-defense” theory
3. Defense of others or dwelling

- a. NDF—person reasonably believes that NDF is necessary to protect other or dwelling (or to end unlawful entry)
- b. DF—only if a person reasonably believes that she is threatened with death or great bodily harm

D. Necessity

- 1. Choice of evils—harm to society exceeded by harm of criminal act
 - a. Objective test
 - b. Not available if defendant is at fault for creating situation requiring choice
 - c. Traditionally, choice had to arise from natural forces; modern cases do not have this requirement

E. Duress

- 1. Defendant performs a criminal act under a threat of death or serious bodily harm to him or another
 - a. Threat must be made by another human
 - b. Traditionally, threat to property was not sufficient; MPC now recognizes threat to property as sufficient if harm threatened outweighs harm of criminal act

F. Mistake

- 1. Mistake of fact
 - a. Must negate state of mind
 - b. Malice and general intent crimes—mistake must be reasonable
 - c. Specific intent crimes—mistake can be reasonable or unreasonable
 - d. Strict liability—mistake is not a defense
- 2. Mistake of law
 - a. Generally not a defense

G. Entrapment

- 1. Elements:
 - a. Criminal design originated with authorities; and
 - b. Defendant was not predisposed to commit crime

V. HOMICIDE

A. Murder

- 1. Elements of common law murder:
 - a. Unlawful;
 - b. Killing of another human being; and
 - c. With malice aforethought
 - 1) Malice means
 - a) Intent to kill;
 - b) Intent to do serious bodily harm;
 - c) Reckless indifference to unjustifiably high risk to human life (depraved heart murder); or
 - d) Felony murder
 - d. One of these four intents plus a lack of justification and no provocation and the defendant kills—what is the crime? Common law murder

2. Defenses:
 - a. Justification (self-defense); and
 - b. Provocation (reduces the crime to voluntary manslaughter)
3. Felony murder:
 - a. If defendant has a substantive defense to the underlying felony, he usually has a defense to felony murder; “procedural” defenses (e.g., statute of limitations) generally no defense
 - b. The killing must be foreseeable
 - c. Deaths caused while fleeing from a felony are felony murder, but deaths that arise after defendant has found some point of temporary safety are not
 - d. Majority rule—defendant is not liable for felony murder for the death of a co-felon as a result of resistance by the victim or the police

B. Manslaughter

1. Two kinds—voluntary and involuntary
2. Voluntary manslaughter
 - a. Elements:
 - 1) Adequate provocation;
 - 2) Gave rise to heat of passion; and
 - 3) No adequate cooling-off period
 - b. Failed self-defense claim is voluntary manslaughter
3. Involuntary manslaughter
 - a. Types:
 - 1) Killing resulting from criminal negligence; or
 - 2) Misdemeanor manslaughter

C. Causation

1. General rule—defendant is liable for all natural and probable consequences of his conduct unless the chain of causation is broken by the intervention of some superseding factor
 - a. Superseding factors:
 - 1) Acts of nature;
 - 2) Coincidence; or
 - 3) Negligent medical care not a superseding factor unless gross negligence or intentional malpractice
 - b. Two commonly encountered rules:
 - 1) Hastening an inevitable result; and
 - 2) Simultaneous acts by two or more parties
 - c. Add a causation analysis to any homicide question that presents the issue

VI. ALL OTHER CRIMES

A. Look for Elements of Offense

1. If no statute defining crime, look for elements of common law crime. Discuss modern expansion of liability (e.g., burglary no longer requires a breaking, can be any structure, can be any time of day)
2. If statute defines crime, look for those statutory elements
3. Elements of other commonly tested crimes (common law)
 - a. Battery

- 1) Unlawful application of force to another;
- 2) Resulting in bodily injury or offensive touching
- b. Assault
 - 1) Intent to commit battery (*see a., supra*); or
 - 2) Intentional creation (other than by mere words) of a reasonable apprehension in the mind of the victim of imminent bodily harm
- c. False imprisonment
 - 1) Unlawful;
 - 2) Confinement of a person;
 - 3) Without his valid consent
- d. Kidnapping
 - 1) Some movement or concealment of a victim in a “secret” place
 - 2) Some courts hold that “kidnapping” is committed when the victim is moved during the commission of another crime to a location that places her in more danger than that necessarily involved in the commission of the other crime
- e. Rape
 - 1) Any penetration of the female sex organ by the male sex organ (many states have made gender neutral);
 - 2) Without the victim’s effective consent;
 - a) Intercourse accomplished by actual force;
 - b) Intercourse accomplished by threats of great and immediate bodily harm;
 - c) Intercourse where the victim is incapable of consenting due to unconsciousness, intoxication, or mental condition; or
 - d) Intercourse where the victim is fraudulently caused to believe that the act is not intercourse
 - 3) In the absence of a marital relationship between the woman and the man (most states have abolished or modified this element)
- f. Larceny
 - 1) Taking;
 - 2) And carrying away;
 - 3) Of tangible personal property;
 - 4) Of another with possession;
 - 5) By trespass;
 - 6) With intent to permanently deprive that person of her interest in the property
- g. Embezzlement
 - 1) The fraudulent;
 - 2) Conversion;
 - 3) Of personal property;
 - 4) Of another;
 - 5) By a person in lawful possession of that property
- h. False pretenses
 - 1) Obtaining title;
 - a) If title is not obtained, the crime is larceny by trick
 - 2) To personal property of another;
 - 3) By an intentional false statement of a past or existing fact;
 - 4) With intent to defraud the other
- i. Robbery
 - 1) A taking;

- 2) Of personal property of another;
- 3) From the other's person or presence;
- 4) By force or threats of immediate death or physical injury to the victim, a member of his family, or some person in the victim's presence;
- 5) With the intent to permanently deprive him of it
- j. Receipt of stolen property
 - 1) Receiving possession and control;
 - 2) Of "stolen" personal property;
 - 3) Known to have been obtained in a manner constituting a criminal offense;
 - 4) By another person;
 - 5) With the intent to permanently deprive the owner of his interest in it
- k. Theft—not a traditional common law offense, but many modern statutes and the M.P.C. consolidate larceny, embezzlement, false pretenses, and receipt of stolen goods under the single heading of "theft"
- l. Burglary
 - 1) A breaking;
 - 2) And entry;
 - 3) Of a dwelling;
 - 4) Of another;
 - 5) At nighttime;
 - 6) With the intent to commit a felony in the structure
- m. Arson
 - 1) The malicious;
 - 2) Burning;
 - 3) Of the dwelling;
 - 4) Of another

B. Look for Applicable Defenses

- 1. Based on elements—required element has not been met
- 2. Lack of required mental state
- 3. Traditional defenses:
 - a. Insanity;
 - b. Intoxication;
 - c. Infancy;
 - d. Self-defense;
 - e. Duress or necessity;
 - f. Mistake of fact;
 - g. Consent (rare); and
 - h. Entrapment (rare)

ESSAY EXAM QUESTIONS

INTRODUCTORY NOTE

The essay questions that follow have been selected to provide you with an opportunity to experience how the substantive law you have been reviewing may be tested in the hypothetical essay examination question context. These sample essay questions are a valuable self-diagnostic tool designed to enable you to enhance your issue-spotting ability and practice your exam writing skills.

It is suggested that you approach each question as though under actual examination conditions. The time allowed for each question is 60 minutes. You should spend 15 to 20 minutes spotting issues, underlining key facts and phrases, jotting notes in the margins, and outlining your answer. *If* you organize your thoughts well, 40 minutes will be more than adequate for writing them down. Should you prefer to forgo the actual writing involved on these questions, be sure to give yourself no more time for issue spotting than you would on the actual examination.

The BARBRI technique for writing a well-organized essay answer is to (i) spot the issues in a question and then (ii) analyze and discuss each issue using the “CIRAC” method:

- C** — State your *conclusion* first. (In other words, you must think through your answer *before* you start writing.)
- I** — State the *issue* involved.
- R** — Give the *rule(s)* of law involved.
- A** — *Apply* the rule(s) of law to the facts.
- C** — Finally, restate your *conclusion*.

After completing (or outlining) your own analysis of each question, compare it with the BARBRI model answer provided herein. A passing answer does *not* have to match the model one, but it should cover most of the issues presented and the law discussed and should *apply the law to the facts* of the question. Use of the CIRAC method results in the best answer you can write.

EXAM QUESTION NO. 1

Bob, age 13, and Hal, age 16, bored by the prospect of another long summer afternoon, set out on their favorite pastime—rummaging through the garages and toolsheds of neighbors. In the past they had sometimes merely used, but had sometimes also taken, tools kept there. Hal's younger brother Jim, age six, tagged along for the first time.

The boys entered Smith's garage, which was attached to the rear of his home, through the closed but unlocked garage door. Bob and Hal rummaged through the toolboxes and practiced cutting wood on the table saw. Jim, alone near a corner shelf in the garage, saw a gold watch that had been left there inadvertently by Smith. Jim picked up the watch, put it in his pocket, and without a word left for home.

After about an hour in the garage Bob and Hal also left and continued to Jones's toolshed for the stated purpose of taking a large screwdriver that had, on a prior occasion, caught Bob's fancy. Jones's shed was detached and about 50 yards from her house. Although the door was always locked, the boys had never had difficulty in prying open the door, and on this occasion they again broke the lock. As Hal pushed the door open and stepped into the shed, he was shot in the head, suffering a fatal wound.

On the prior evening Jones had mounted a loaded pistol in the shed, aimed at the door and connected so that the pistol would discharge if the door were pushed open. Jones told the police she mounted the gun to protect her property from thieves, that she intended to scare them away and did not intend to kill anyone. No statute prohibited the use of spring guns.

- (1) Bob and Jim are charged with burglary of Smith's garage and larceny of Smith's watch.
- (2) Bob is charged with burglary of Jones's toolshed.
- (3) Jones is charged with the murder of Hal.

What result as to each charge? Discuss.

EXAM QUESTION NO. 2

John, Max, Rip, and Dopey, all engaged in the illegal numbers racket, planned to burn down the home of another numbers bookie. Pursuant to the plan, Dopey was given \$2 and sent to a nearby gas station to buy a can of gasoline to start the fire.

On the way, Dopey stopped in a tavern and spent the money on whiskey. Afraid to return without the gasoline, Dopey went to the station and attempted to fill the can from the pump while the operator wasn't looking. When he was spotted, Dopey ran across the highway carrying the full can with the operator chasing him. The operator, intent on catching Dopey, ran into the path of an oncoming automobile and was killed instantly. John, Max, Rip, and Dopey were arrested before the planned burning took place.

What crimes were committed by John, Max, Rip, and Dopey? Discuss.

EXAM QUESTION NO. 3

Adams suspected that his girlfriend, Kitty, was unfaithful to him. He told Barlow that he needed his help to test Kitty. Adams's plan was that he would bring a box of chocolates laced with a fatal dose of LSD to Barlow at the pool hall they frequented; Barlow was then to offer the chocolates to Kitty. If Kitty accepted the chocolates from Barlow, who was a stranger to her, this would satisfy Adams that she was unfaithful to him and deserved to die.

Barlow entertained excessive and irrational suspicions and distrust of others. For this reason and because he feared what Adams would do to him if he refused, he was afraid to refuse to join in the plan.

Adams brought the chocolates to the pool hall, laid the box beside his coat on a bench, and went off to shoot pool while waiting for Barlow to show up. Cox, the proprietor, opened the box and sampled the candy. He soon became unconscious. Adams discovered Cox and thought he was dead, although in fact the dose of LSD taken by Cox was not sufficient to kill him. Adams dragged the unconscious Cox out of the pool hall, put him in a car, and drove to a secluded spot and left him there. Shortly thereafter, Cox died from exposure without regaining consciousness.

Adams is charged with the attempted murder of Kitty. Is he guilty? Is he guilty of any other crime or crimes? Is Barlow? Discuss.

EXAM QUESTION NO. 4

Don, in need of funds, approached Oscar, a friend who sold stereo equipment. Oscar told Don that he had no ready cash to give him, but that he owned thousands of dollars worth of readily saleable and fully insured stereo equipment stored in a nearby warehouse that he also owned. Don replied that if this were the case Oscar would not lose any money if some of the equipment “disappeared” and Don sold it. Oscar then said he would give Don a duplicate key to the warehouse so that Don, with Don’s brother Allen, could remove the equipment, on condition that Don reimburse him for any loss for which he could not recover from his insurance company. Don said, “That’s great,” and left with the key.

Don told Allen about the plan, and Allen agreed to help him. Don and Allen entered the warehouse with the key, and the two men loaded Don’s truck with \$50,000 worth of equipment. After the items were removed and the warehouse locked, it was agreed that Allen would immediately drive the truck and equipment to Mexico, to be joined later by Don. It was also agreed that Don should go home by means of an automobile that the two had observed in an enclosed parking area to the rear of the warehouse.

Allen drove away and Don reentered the warehouse to reach the parking area. He took the automobile and with it rammed through the locked gate of the fence that enclosed the parking area and proceeded to his apartment.

Allen was driving in excess of the speed limit when a highway patrol officer attempted to stop him. Allen, believing the theft had been discovered, attempted to escape by driving at over 100 miles per hour. In the ensuing chase the highway patrol officer lost control of his patrol car and was killed when it overturned.

(A) Has Don committed burglary (i) in the removal of the stereo equipment, or (ii) in the theft of the vehicle? Discuss.

(B) Is Don guilty of either murder or manslaughter in the death of the highway patrol officer? Discuss.

(C) Is Oscar criminally liable for any crime or crimes committed by Don? Discuss.

ANSWERS TO ESSAY EXAM QUESTIONS**ANSWER TO EXAM QUESTION NO. 1****(1) Are Bob and Jim Guilty of Burglary of Smith's Garage?**

Jim is certainly not guilty of burglary of Smith's garage, and Bob too may not be guilty. At issue is whether a juvenile is able to form the mens rea necessary for criminal liability.

At common law, burglary is defined as the breaking and entering by trespass of the dwelling house of another, at night, with the intention of committing a felony therein. The facts stipulate that Bob and Jim "entered"; and, since their entry was unauthorized, it was "trespassory." The "breaking" element does not require damage to the structure, but simply the putting aside of some barrier to entry, no matter how flimsy. Hence, the boys' act in opening the garage door is a sufficient "breaking"; it makes no difference that the door was unlocked.

At common law, burglary was a nocturnal offense. Since the boys' activity occurred during the afternoon, they would *not* be guilty of burglary under the common law. However, most jurisdictions have eliminated the "nighttime" requirement, and for purposes of this answer, it will be assumed that such a change has been made.

The "dwelling house" element, even at common law, embraced outbuildings, such as a stable, within the curtilage or fenced area around the main house. A garage would be the modern equivalent of a stable. In any event, the scope of burglary has been expanded almost everywhere to include most types of enclosed structures, no matter where they are located.

The difficult issue is whether the boys had an intention to commit a felony *when they entered* the garage. Arguably, they had only a contingent intent to steal—the contingency being to take anything that might strike their fancy. However, there is no reason to treat this sort of intent any less seriously than a clear determination to steal.

As to Bob (age 13), there was at common law a *rebuttable* presumption that one between seven and 14 is too immature to form the mens rea for a crime. However, that presumption weakens as one nears 14, and would be overcome by a showing that Bob did in fact know that what he was doing was morally wrong.

As to Jim, at common law one under the age of seven was "conclusively presumed" too immature to form any mens rea. Therefore, Jim did not commit burglary.

Are Bob and Jim Guilty of Larceny?

Jim is not guilty of larceny because of his age. Again, at issue is whether a six-year-old can form criminal intent. Even though he may have trespassorily taken and carried away Smith's watch, Jim is under age seven, and therefore *conclusively presumed* incapable of formulating the requisite criminal intent for larceny. His otherwise criminal act is therefore excused.

Bob is not guilty of larceny either, because it appears that Jim was acting solely on his own when he took Smith's watch. At issue is whether derivative liability exists for the criminal acts of a potential co-conspirator/accomplice.

At common law, conspiracy requires (i) an agreement between two or more persons; (ii) an intent to enter into an agreement; and (iii) an intent to achieve the objective of the conspiracy. If a conspiracy is found, a conspirator becomes criminally liable for crimes committed in furtherance of the conspiracy so long as those crimes were foreseeable.

Here, however, there probably was no criminal conspiracy between Hal, Bob, and Jim. First, the facts state that Jim "tagged along," strongly implying that there was no agreement that Jim come along and commit any crimes. Second, Jim is six years old, and thus was legally incapable of forming the intent necessary to enter into a conspiracy. Thus, because Jim is not a member of the conspiracy (if one even existed between Hal and Bob), there can be no criminal liability based on a conspiracy theory.

That said, a similar question arises as to whether Bob can be an accomplice to Jim's "crimes." An accomplice is one who (i) with the intent to assist the principal and the intent that the crime be committed; (ii) actually aids, counsels, or encourages the principal before or during the crime. If one is an accomplice, he is criminally liable for the crimes he did or counseled and for any other crimes committed in the course of committing the crime contemplated, as long as the other crimes were probable or foreseeable.

Here, like the conspiracy discussed above, the problem of whether there was intent to encourage Jim in his crime arises. Again, the facts state that Jim merely "tagged along" with Bob and Hal, and that neither Bob nor Hal even knew that Jim took the watch. Thus, the intent to assist is lacking, and Bob cannot be guilty as an accomplice to Jim's wrongful act.

As a result, Bob is not guilty of larceny of the watch.

(2) Is Bob Guilty of the Burglary of Jones's Toolshed?

Bob may be guilty of burglary of Jones's toolshed (assuming that the jurisdiction has abolished some of the more arcane common law requirements). At issue (again) is Bob's capacity to form the mens rea necessary for criminal liability, along with whether the breaking element to burglary has been satisfied.

The requirements for burglary are discussed in (1), above.

The activities directed at the toolshed were clearly without the consent of the owner, and hence trespassory. As noted above, the opening of an *unlocked* door is a sufficient "breaking," and the opening of a *locked* door is all the more so. Since Hal "stepped into the shed" before he was shot, the requisite "entering" had occurred, thus taking Hal's acts beyond the category of *attempted* burglary. The specific intent requirement was satisfied by the boys' intent to take Jones's screwdriver; the intent to commit *any* larceny (grand or petit) is sufficient. The burglary was complete upon the entry. It is immaterial whether the target felony or larceny was accomplished.

As noted above, the boys' activities would not constitute burglary at common law because they occurred during the day. Furthermore, the toolshed was probably too far away from the main house (50 yards) to be considered "within the curtilage." However, modern burglary statutes generally cover entries of any structure at any time; and under such statutes, Hal's acts would be burglary. Although Bob himself did not enter, he was an *accomplice* of Hal (indeed, he was a co-principal in the first degree), and thus is chargeable with Hal's actions. Again, Bob might be able to avoid this accomplice liability because of his age (13), unless it is shown that he was mature enough to know that his acts were wrong.

(3) Is Jones Guilty of the Murder of Hal?

Jones clearly has committed a homicide. At issue is whether Jones committed a criminal act and whether Jones was justified in her actions. The spring gun she set was an actual cause of Hal's death—i.e., *but for* Jones's setting the trap, Hal would not have died when, where, and as he did. True, Jones's trap was not the *direct* cause of Hal's death because the gun would not have gone off except for Hal's *independent, intervening act* of opening the door. However, an independent, intervening force "breaks the chain of causation" only if it was not foreseen or foreseeable. Here, Jones clearly foresaw that someone might try to open the door; indeed, that is why she set the gun. Her act, therefore, is the proximate (legally recognized) cause of Hal's death.

If this homicide was committed with "malice," it will be murder at common law. Whether Jones had "malice" depends on her state of mind when she set the trap. Even if the jury believes Jones's claim that she intended only to scare away intruders and not to kill anyone, she must have been *aware* that her setting of the gun, aimed as it was at the door, created a *plain and serious risk* of killing or seriously injuring humans. Such awareness would constitute a wanton or reckless state of mind, which is one form of "malice."

Moreover, since Jones intentionally pointed a deadly weapon so that it would hit a vital part of the human body should the door be opened, a jury could infer that she actually *did* intend to kill or to

inflict serious bodily harm upon anyone who opened the door—regardless of her protestations to the contrary.

In the absence of any factor of justification, excuse, or mitigation, either of the above mental states is sufficient “malice” for murder.

Arguably, Jones’s use of deadly force may be justified as *prevention of a felony*. Jones’s purpose in setting the spring gun was to prevent criminal acts directed against her toolshed and its contents. Here, Hal (who has no “youthfulness” defense since he is over 14 years of age) *was* committing statutory burglary. The common law permitted the use of deadly force only to prevent “dangerous” or “atrocious” felonies, of which burglary was one. In many jurisdictions today, statutory burglary is similarly treated. In such jurisdictions, Jones’s homicide of Hal would be deemed justified, and hence the killing was without the requisite malice.

However, other jurisdictions hold (and this is deemed the better view) that using deadly force for the prevention of burglary is justified only when there is *actually* a human being within, or in the general vicinity of, the structure burglarized. Otherwise, the particular burglary is not “dangerous” or “atrocious.” In these jurisdictions, Jones would be guilty of common law murder—unless the court accepted “imperfect crime prevention” as a form of *mitigation*, which would reduce the homicide from murder to *voluntary manslaughter*. If the court rejects such an argument, Jones is guilty of common law murder because the killing is not otherwise justified, excused, or mitigated.

By statute, most jurisdictions today divide murder into two degrees. One form of first degree murder is an intentional murder with “premeditation and deliberation.” Another form is a murder committed by means of poison, torture, bomb, or ambush. If Jones is found to have *intended* to kill, she would be guilty of first degree murder, because she clearly premeditated and deliberated with respect to this intention. This inference is compelling in a spring gun situation, which by its very nature shows that the idea of killing was considered for an appreciable time, and then calmly acted upon.

ANSWER TO EXAM QUESTION NO. 2

Conspiracy

All four are guilty of conspiracy to commit arson. At issue is whether a sufficient overt act was committed to hold the defendants criminally liable for conspiracy. Conspiracy consists of an intentional agreement between two or more persons to commit an offense and (in most jurisdictions) an overt act by any member of the conspiracy in furtherance of the agreement. The four clearly intended and agreed to commit arson. The overt act requirement was satisfied when they sent Dopey to buy gas to start the fire. An act of preparation, even one innocent in itself, is sufficient. Thus, all four are guilty of a conspiracy to commit arson.

Attempted Arson

The four are *not* guilty of attempted arson. At issue is whether the defendants progressed far enough in their plan to be held liable for a criminal attempt. The mens rea of attempt is specific intent to commit the crime, and the four clearly intended to perpetrate an act that would be arson. But the actus reus of attempt requires an act beyond mere preparation: an act that comes very “close” to completing the crime and/or that is a “substantial step” toward the completion of the crime that strongly corroborates the defendant’s intent. The four were a long way from actually burning their competitor’s home. They still had to go there, spread the gas around, and set it on fire. Nor did the acts already accomplished unequivocally demonstrate an intent to commit arson. Obtaining a can of gas is a common act not ordinarily limited to arsonists. Although arson is a very heinous crime, so that one will be deemed to enter its zone of perpetration sooner than would be true as to some other crimes, this act was “preparatory” in the fullest meaning of the term. Thus, all four are not guilty of attempted arson.

Theft of \$2

Dopey is guilty of either petty larceny or petty embezzlement of the \$2. At issue is whether Dopey formed the intent to spend the money on whiskey before or after he received it. The others gave Dopey possession of the \$2 for the sole purpose of buying gas. If a bailee receives property, intending at that time to spend it on himself, and he does so, he is guilty of larceny. On the other hand, if a bailee receives property, and only later forms the intent to misappropriate it, when he does so, he is guilty of embezzlement. (In many jurisdictions both crimes would now be denominated simply as “theft,” so that the timing of Dopey’s intention to steal would not be important.) Theft of property worth less than \$200 (or in some jurisdictions as little as \$50) is petty theft. The \$2 Dopey stole is clearly in the petty category. It would be no defense to Dopey that the victims of his theft were themselves criminals. Thus, Dopey is guilty of either petty theft or petty embezzlement.

Theft of Gasoline

Dopey is also guilty of petty larceny of the gasoline. At issue is whether Dopey satisfied the asportation element of larceny. Larceny includes taking and carrying away the personal property of another without her consent (i.e., trespassorily) and with intent to deprive her of it permanently. All of these conditions were met here. The gas Dopey stole could not have been worth more than a few dollars and is clearly in the petty category. To move Dopey’s actions from attempted larceny to larceny itself, it is necessary only that he “carry away,” not that he “get away.” Thus, Dopey is guilty of petty theft of the gasoline.

Involuntary Manslaughter

Criminal Negligence Theory: Dopey may also be guilty of involuntary manslaughter, which consists of causing the death of another person through criminal negligence. At issue is whether Dopey’s actions rise to the level of *criminal* negligence and whether Dopey was the actual and proximate cause of the operator’s death. To establish “criminal negligence,” it must be shown that the accused’s conduct created a *serious risk of harm* to another of which a reasonable person would have been aware (a higher probability of such harm than in “ordinary” or civil negligence).

Here, a reasonable person may well have realized that in attempting to escape across a busy highway, it was foreseeable that the gas station operator would give chase and thereby be placed in danger from cars on the highway.

As for the causation requirement, Dopey’s acts must be shown to be both an actual and proximate cause of the operator’s death. They clearly were an actual cause, because “but for” the theft and attempted escape the operator would not have been killed. They were a proximate cause as well. It is true that two other events intervened to cause the death, but neither operates to “break the chain” of causation leading back to Dopey’s act. The act of the station operator in heedlessly pursuing Dopey out into the highway was a dependent or responsive cause, one generated by what Dopey did, and it cannot be said to be a totally abnormal response, especially from the vantage point of hindsight. The act of the driver in running down the station operator was an independent or coincidental intervening force, but it should have been foreseen by Dopey. Neither a normal *dependent* intervening force nor a foreseeable independent intervening force will “break the chain” of proximate causation between Dopey’s act and the operator’s death.

Thus, Dopey is guilty of involuntary manslaughter under a criminal negligence theory.

Misdemeanor Manslaughter Theory: Dopey could also be convicted of involuntary manslaughter under a misdemeanor manslaughter theory. At issue is whether the misdemeanor was complete when the operator was killed. Manslaughter (involuntary) can also be committed by killing another person in the course of committing a misdemeanor. As discussed above, Dopey perpetrated the misdemeanor of petty larceny against the operator, and this crime was a cause of the operator’s death. Even though the operator was killed after the larceny itself was consummated, in most jurisdictions flight *following* a

crime (especially where there is immediate pursuit) is considered part of the crime for purposes of the misdemeanor manslaughter rule. An additional requirement is that the misdemeanor be *malum in se*, which means inherently wrong by common moral standards. Larceny falls within this category. Thus, Dopey is guilty of involuntary manslaughter under a misdemeanor manslaughter theory.

Vicarious Liability

John, Max, and Rip are *not* liable for Dopey's substantive crimes. At issue is whether Dopey's theft and killing were a foreseeable result of the conspiracy. Conspirators are liable for acts of their co-conspirator that take place within the foreseeable scope of the conspiracy. However, Dopey's theft of the gasoline and his subsequent acts in escaping therefrom were *not* foreseeable to the other three; indeed, they had given him money to *buy* the gasoline. Therefore, his subsequent loss of the money and decision to steal the gasoline cannot be regarded as within the foreseeable scope of the criminal conspiracy. It was really a side excursion of his own to cover up the misappropriation of the money. Accordingly, John, Max, and Rip are not liable for the larceny of the gas or the death of the gas station operator. Since they neither advised nor aided the larceny of the gas, they were not accomplices to Dopey's theft. Thus, John, Max, and Rip are not liable for any of Dopey's substantive crimes.

ANSWER TO EXAM QUESTION NO. 3

Is Adams Guilty of the Attempted Murder of Kitty?

Adams is guilty of the attempted murder of Kitty. At issue is whether Adams had the intent required for an attempt and whether Adams proceeded far enough to be convicted of an attempt.

A criminal attempt consists of two elements: (i) a specific intent to cause a result that would be a crime; and (ii) an act beyond mere preparation for the offense.

Intent: That Adams had the requisite intent for attempted murder seems clear enough. (Remember that even if the jurisdiction requires malice for murder, an attempt will always require the specific intent to commit the target crime.) He intended to kill Kitty if she failed his "test" for faithfulness; and no legally recognized justification, excuse, or mitigation appears.

Act: Whether Adams's acts were beyond mere preparation depends on the test adopted by the jurisdiction for making such determinations. Under the proximity test, the act must be dangerously close to success. Adams's acts were insufficient—all he did was purchase chocolates, poison them, and go to the place where he was to pass them to his accomplice. Such acts are far from the last acts necessary for commission of the crime (he had yet to meet with Barlow to give him the chocolates).

However, Adams's act was probably sufficient under the Model Penal Code test, which requires that the act constitute a substantial step toward commission of the crime that strongly corroborates the defendant's intent to commit the crime. Buying poisoned chocolates and taking them to pass them on to an accomplice are certainly substantial steps toward commission of the murder plan here, and they strongly show Adams's intent to commit the crime; so Adams could be found guilty under this test.

If the court concludes that Adams's acts were sufficient for an indictable attempt, it is not a defense that Adams was mistaken as to the lethality of the candy. An accused need be shown only to have had the *apparent* ability to carry out his plan; therefore, as long as a reasonable person in Adams's shoes would have thought the candy contained enough LSD to kill Kitty, the crime would be complete even though the candy was, in fact, not lethal.

As a result, Adams is guilty of an attempted murder of Kitty.

Is Adams Guilty of Solicitation?

Adams is also guilty of a criminal solicitation. At issue is whether Adams asked Barlow to commit a crime.

Solicitation consists of counseling, inciting, and inducing another person to commit a crime, with the intention of procuring its commission. Adams's statements to Barlow fit within this definition, as he was in substance proposing that Barlow aid him in poisoning Kitty if she accepted the chocolates.

The crime of solicitation was complete when the plan was proposed by Adams. It is immaterial whether Barlow agreed thereto, or intended to carry it out. Thus, Adams is guilty of a criminal conspiracy. (However, if Barlow did in fact agree thereto, and such agreement constituted a criminal conspiracy, *see* below, most courts hold that the solicitation is *merged* with the conspiracy.)

Are Adams and Barlow Guilty of Conspiracy?

Adams and Barlow also committed a conspiracy to commit a criminal act. At issue is whether an overt act was committed and whether Barlow had the mental capacity to enter into the conspiracy.

A conspiracy is the combination or agreement of two or more persons for the purpose of committing an unlawful act; and, in most jurisdictions, an overt act committed in furtherance of the agreement.

Overt Act: Insofar as an "overt act" is required, Adams's procuring the LSD-laced chocolates would clearly suffice, since a mere act of preparation satisfies this requirement (even though such an act may *not* be enough for a criminal attempt; *see* above).

Barlow's Intent: There is no conspiracy at common law unless at least two persons have the requisite criminal intent. Barlow's assent to Adams's plan is inferred (we are told that he was afraid to refuse), but it is not clear whether Barlow really intended to carry out the plan or was merely feigning agreement. The fact that he entertained "excessive and irrational suspicions and distrust of others" and was afraid of Adams, and that he apparently did not show up at the pool hall, suggests that he was merely pretending to go along with Adams. If so, Barlow lacked the requisite criminal intent, so that neither he nor Adams could be prosecuted for conspiracy. (Adams could still be prosecuted for solicitation, however; *see* above.)

If, on the other hand, Barlow really intended to offer the chocolates to Kitty as per Adams's plan, there would be an indictable conspiracy.

Insanity: Barlow's "excessive and irrational" fears would *not* constitute insanity so as to excuse criminal liability. Even though "irrational" fears may indicate some mental disorder, there apparently was no impairment of his ability to realize that killing Kitty was wrongful. Hence, Barlow cannot be considered legally insane.

Coercion: The only other possible theory of exculpation would be coercion or duress. However, this too would fail because (i) coercion does not excuse a criminal homicide, and the same result should follow where a conspiracy to commit a criminal homicide is involved; and (ii) in any event, the coercion defense operates only where one person is making a threat to immediately kill or inflict serious injury upon another, and no such threat was made or is reasonably inferable from Adams's conduct.

Given that an overt act was committed and that Barlow had to enter into a conspiracy, both are guilty of the conspiracy to kill Kitty.

Is Adams Guilty of the Criminal Homicide of Cox?

Adams is guilty of the criminal homicide of Cox. At issue is whether Adams's conduct constitutes malice murder or manslaughter.

Adams's acts were both the actual and proximate cause of Cox's death. Cox would not have died but for Adams's having dumped him in the woods. Moreover, Adams's abandoning Cox in a helpless condition, exposed to the elements, was the direct cause of Cox's death (no intervening forces); every direct cause that takes effect within one year is recognized by the common law as a proximate cause for homicide purposes. Therefore, Cox's death is a homicide attributable to Adams.

Murder: Cox's death would be murder only if Adams acted with "malice aforethought." Since Adams did not intend to kill or injure Cox at all, "malice aforethought" can be established only if Adams's acts were so wanton and willful as to fall within the "abandoned and malignant heart"

category. This would require a showing that Adams intentionally performed acts that he (subjectively) was aware created a plain and serious risk (a very high probability) that another would die. Nothing in the facts lends support to this theory. First, Adams was apparently unaware that anyone would open and sample the box of poisoned candy that he had laid on the bench. Second, when Adams later dumped Cox in the woods, he clearly had no awareness of the risk to human life involved, because he thought the body was already lifeless. Consequently, Adams lacked the requisite mens rea for murder.

Manslaughter: Adams is apparently guilty of involuntary manslaughter, which is a criminal homicide committed without malice aforethought, as a result of *criminal negligence, or* in the commission of an *unlawful, malum in se act*.

The “unlawful act” category is clearly involved in this case. In dumping what he thought to be a lifeless body in the woods, Adams was apparently attempting to conceal evidence of what he thought was a crime. This attempt to conceal evidence is probably itself a crime; but even if it is not, it is clearly an attempt to interfere with the processes of justice and hence an inherently evil (“malum in se”) act. Consequently, any death resulting from the commission of such an act, even though accidental, is involuntary manslaughter.

It is also possible to argue that Adams is guilty of manslaughter on a “criminal negligence” theory—i.e., that he was grossly negligent *in determining whether Cox was still alive*, and it was this negligence that led to his dumping the body in the woods and Cox’s subsequent death. There was certainly no social utility whatsoever in Adams’s conduct, and he apparently made no effort whatsoever to seek medical aid or diagnosis, so that his acts would move quickly from the “ordinary” to the “criminal” negligence category. (*Comment:* It is tempting to discuss “criminal negligence” on the theory that Adams was negligent in leaving a box of LSD-laced chocolates lying around where others could eat them. However, this would be an erroneous analysis because leaving the box of chocolates was *not* the *cause of Cox’s death*. Cox died from exposure to the elements, not from consuming the chocolates.)

Thus, although Adams is not guilty of Cox’s murder, he is guilty of Cox’s manslaughter, and as a result is guilty of a criminal homicide of Cox.

Is Barlow Guilty of the Criminal Homicide of Cox?

Barlow is probably not guilty for the homicide of Cox. At issue is whether the homicide of Cox was in furtherance of the conspiracy between Adams and Cox.

The only conceivable theory on which Barlow might be held criminally liable for Cox’s death is to impute to him Adams’s acts on the theory that they were co-conspirators (*see* above).

A conspirator is criminally liable (as a principal in the second degree at common law) for acts of his co-conspirator committed *in furtherance* of the conspiracy. Basically, this includes all acts undertaken to promote the common goal, and which are a natural and probable consequence of the illegal combination or agreement.

However, it is highly unlikely that Adams’s acts and the results thereof would be held within the foreseeable scope of the Adams-Barlow conspiracy. The crime planned was to poison Kitty (murder), while the crime that resulted was the accidental killing of a third person through *other means*—being abandoned and exposed to the elements.

Under such circumstances, even assuming there was a conspiracy, Adams’s abandoning Cox in the woods was not in furtherance of the conspiracy, and hence Barlow is not vicariously liable for Cox’s death.

ANSWER TO EXAM QUESTION NO. 4

(A) Burglary

The Stereo Equipment: Don has not committed burglary in taking the stereo equipment. At issue is whether the trespass element has been satisfied.

Under the common law, the felony of burglary involved the trespassory breaking and entering of the dwelling house of another at night for the purpose of committing a felony therein. We are told that Don “entered” the warehouse. Furthermore, his use of a key to do so means that he opened a closed door—a sufficient physical act to constitute the element of “breaking.” Although at common law a commercial building, such as a warehouse, was not considered a “dwelling house” within the definition of burglary, this element has been universally expanded by statute; hence, in modern times many sorts of structures, including a warehouse, can be burglarized.

We are not told whether Don’s activity at the warehouse took place at night, as is required at common law; nor are we told whether, if it took place in the daytime, the jurisdiction involved is one that has abandoned the nighttime requirement for burglary, as many states have done. But in any event, Don’s activity does not constitute burglary because Oscar’s *consent* to the entry of the warehouse and the taking of the stereo equipment operates to eliminate the “trespass” element of this crime. Since Oscar authorized Don to do precisely what he did do, his entering of the structure was not trespassory, and his taking of the stereo equipment was not larcenous. Thus, he is not guilty of burglary with respect to the stereo equipment.

The Vehicle in the Parking Lot: It is unclear whether Don committed burglary in taking the vehicle. At issue again is whether there was a trespass, and whether there was a breaking.

This fact pattern raises a number of problems regarding the elements of the crime of burglary. First, there are the same “dwelling house” and “nighttime” issues discussed above. Second, burglary usually occurs when one enters a building in order to commit a felony “therein.” Where, as here, it is necessary to go through a closed building in order to commit a felony in an open area, it is possible that the entering of that building will be a burglary. Nevertheless, the problem remains that although we are told Don “reentered the warehouse,” we are left to infer whether he reopened a door to do so, or whether he opened any door in order to exit.

The question of consent also arises. Since the warehouse and the parking lot were owned and possessed by Oscar, presumably he would have authorized Don, his cohort in crime, to act as he did in the warehouse and in the parking lot area. If this were the case, there was no “trespass” by Don.

Finally, there is a problem as to whether Don’s actions in taking the automobile constituted larceny, since we are not told whether he intended to keep the automobile permanently or to use it temporarily and then abandon it. If his intent was to abandon the car, under the circumstances here the intent to steal for larceny would be missing, although it could be argued that Don’s action created a risk of loss of the automobile that would suffice for larceny. Thus, if his plan for the auto was not larcenous, then he lacked the “felonious intent” required for burglary at the time of his reentry, and he would not be guilty.

(B) Criminal Homicide of Police Officer

Don is guilty of the homicide of the police officer. At issue is whether Don has any derivative criminal liability for Allen’s actions.

Before Don’s liability can be determined, it is necessary to assess the liability of his accomplice, Allen, who was driving the speeding truck the officer was chasing at the time of his death. The first issue is whether Allen was a proximate cause of the officer’s death. There is no question that Allen was an *actual* cause of the death, because had he not done what he did, the officer would not have died when, where, and as he did. The difficulty is that Allen was not the *direct* cause of the officer’s death, because another causative factor—namely, the decision of the patrol officer to pursue Allen—intervened between Allen’s driving at over 100 m.p.h. and the actual death of the officer.

Nonetheless, this intervening force was a dependent or responsive one—that is, it was generated by Allen’s speeding in the first place. Therefore, since the officer’s action was not abnormal or extraordinary, its presence as an intervening force does not “break the chain of causation” so as to prevent Allen from being a “proximate” cause of the officer’s death.

Intent is a problem to finding Don guilty of murder in that Allen did not intend to kill or to inflict serious bodily injury upon the police officer. Moreover, since Don's activities with respect to the stereo equipment and the warehouse were not larcenous because of Oscar's consent (discussed above), the felony murder rule probably would not be operative (even if one assumes that at this time and place the felony was still being "perpetrated" as required by that rule) unless the jurisdiction treated the attempt to defraud the insurance company as a felony, but this is not indicated by the facts. However, it is possible to be guilty of murder even without committing a felony, and without intending harm. If one intentionally does an act with an awareness that it creates a plain and serious risk of death or grave bodily harm, and there is no factor of justification, excuse, or mitigation, the act is "wanton conduct" (sometimes called the act of one with a "depraved" or "abandoned and malignant heart"). One who unintentionally but proximately causes the death of another human being while engaging in "wanton conduct" is guilty of murder under the common law. Under modern statutes, such murder is second degree murder. Furthermore, even if a jury did not consider Allen's conduct to be wanton, driving an automobile at that rate of speed would at least be considered criminally negligent, in which event the homicide would be involuntary manslaughter.

Returning to Don's liability as an accomplice and a co-conspirator of Allen, Don is chargeable with any crimes that Allen foreseeably committed for the purpose of accomplishing the underlying criminal goals. Since it could be anticipated that Allen, hurrying with the truck toward Mexico, would drive in excess of the speed limit, and that if a police car tried to stop him, Allen would think that the "theft" had been discovered and try to escape the officer, the murder or manslaughter committed by Allen would be imputable to Don, his accomplice. As a result, Don may be criminally liable for the officer's death.

(C) Oscar's Liability

Oscar is certainly criminally liable for a criminal conspiracy committed with Don, for any burglary that Don committed, and for the police officer's death. Additionally, it is very likely that Oscar would be criminally liable for the attempt to defraud the insurance company. At issue is the criminal liability for the criminal acts committed by a co-conspirator in furtherance of the conspiracy.

The agreement between Don and Oscar to cause a phony "disappearance" of Oscar's insured stereo equipment, and thereby defraud Oscar's insurance carrier, amounts to the crime of conspiracy. This conspiracy expanded when Allen agreed to join it. An "overt act" occurred when Oscar handed Don the duplicate key.

In addition to being liable for the conspiracy itself, one who participates in a conspiracy is vicariously liable for a crime committed by the co-conspirators, either if the crime was the goal of the conspiracy, or if its commission could reasonably have been foreseen in the furtherance of that goal. Therefore, any liability that Don or Allen incurred would be imputable to Oscar. Overlapping the rule of vicarious liability in conspiracy situations is the concept of accomplice liability, which, again, would make Oscar liable for the activities of Don. Thus, Oscar would face criminal liability for the burglary and the death of the police officer.

It is unclear whether Oscar will face criminal liability for an attempt to defraud the insurance company. At issue is whether his plan to defraud the insurance company has progressed far enough to constitute an attempt.

There are two "tests" that are commonly used to determine if an attempt has occurred. Under the proximity test, if the acts committed by the defendant come dangerously close to completing the substantive crime, the defendant is criminally liable for an attempt of the substantive crime. Under the Model Penal Code test, if the defendant's acts amount to a "substantial step" toward the completion of the crime and are strongly corroborative of the defendant's intent to commit the substantive crime, the defendant is criminally liable for an attempt of the substantive crime.

Here, the facts tell us that Don and Allen have already broken into the garage and have absconded with the stereo equipment. The only thing left to do was report the property missing to the insurance

company. Under the substantial step test, there have been sufficient, concrete acts committed to corroborate the intent to defraud the insurance company. Under the proximity test, however, reporting the false theft to the insurance company may be required as the last act to come “dangerously close” to completing the crime, although it is certainly arguable that the plan has progressed far enough to satisfy even the proximity test. Oscar’s liability may come down to which test the jurisdiction uses.

As a result, it is unclear whether Oscar will face criminal liability for an attempt to defraud the insurance company.