

SAGE college
publishing

SAGE collegepublishing

Teaching isn't easy. | **Learning** never ends.
We are here for you.



Learn more about SAGE teaching and learning solutions
for your course at sagepub.com/collegepublishing.

About SAGE

Founded in 1965, SAGE is a leading independent academic and professional publisher of innovative, high-quality content. Known for our commitment to quality and innovation, SAGE has helped inform and educate a global community of scholars, practitioners, researchers, and students across a broad range of subject areas.

Cover image: stocksy.com/Helen Sotiriadis



LIPPMAN

CONTEMPORARY Criminal Law
SIXTH EDITION

SAGE

CONTEMPORARY Criminal Law

SIXTH EDITION

CONCEPTS, CASES,
AND CONTROVERSIES

MATTHEW LIPPMAN



Contemporary Criminal Law

6th Edition

Sara Miller McCune founded SAGE Publishing in 1965 to support the dissemination of usable knowledge and educate a global community. SAGE publishes more than 1,000 journals and over 800 new books each year, spanning a wide range of subject areas. Our growing selection of library products includes archives, data, case studies, and video. SAGE remains majority owned by our founder and after her lifetime will become owned by a charitable trust that secures the company's continued independence.

Los Angeles | London | New Delhi | Singapore | Washington DC |
Melbourne

Contemporary Criminal Law

Concepts, Cases, and Controversies

6th Edition

Matthew Lippman

University of Illinois at Chicago



Los Angeles | London | New Delhi
Singapore | Washington DC | Melbourne



FOR INFORMATION:

SAGE Publications, Inc.
2455 Teller Road
Thousand Oaks, California 91320
Email: order@sagepub.com

SAGE Publications Ltd.
1 Oliver's Yard
55 City Road
London, EC1Y 1SP
United Kingdom

SAGE Publications India Pvt. Ltd.
B 1/I 1 Mohan Cooperative Industrial Area
Mathura Road, New Delhi 110 044
India

SAGE Publications Asia-Pacific Pte. Ltd.
18 Cross Street #10-10/11/12
China Square Central
Singapore 048423

Copyright © 2023 by SAGE Publications, Inc.

All rights reserved. Except as permitted by U.S. copyright law, no part of this work may be reproduced or distributed in any form or by any means, or stored in a database or retrieval system, without permission in writing from the publisher.

All third-party trademarks referenced or depicted herein are included solely for the purpose of illustration and are the property of their respective owners. Reference to these trademarks in no way indicates any relationship with, or endorsement by, the trademark owner.

Model Penal Code © 1985 by the American Law Institute. Reprinted with permission. All rights reserved.

Printed in Canada

Library of Congress Cataloging-in-Publication Data

Name: Lippman, Matthew Ross, 1948- author.
Title: Contemporary criminal law : concepts, cases, and controversies / Matthew Lippman, University of Illinois at Chicago.
Description: 6th edition. | Thousand Oaks, California : SAGE Publications, Inc., 2022. | Includes bibliographical references and index.
Identifiers: LCCN 2021045898 | ISBN 9781071812990 (paperback) | ISBN 9781071862087 (loose-leaf) | 9781071812976 (epub)
Subjects: LCSH: Criminal law--United States. | LCGFT: Casebooks (Law)
Classification: LCC KF9219 .085 2022 | DDC 345.73--dc23/eng/20211006
LC record available at <https://lccn.loc.gov/2021045898>

Acquisitions Editor: Joshua Perigo

Content Development Editor: Darcy Scelsi

Production Editor: Tracy Buyan

Copy Editor: Melinda Masson

Typesetter: diacriTech

Cover Designer: Rose Storey

Marketing Manager: Victoria Velasquez

22 23 24 25 26 10 9 8 7 6 5 4 3 2 1

BRIEF CONTENTS

Preface	xvii
Acknowledgments	xxii
Chapter 1 The Nature, Purpose, and Function of Criminal Law	1
Chapter 2 Constitutional Limitations	21
Chapter 3 Punishment and Sentencing	65
Chapter 4 Actus Reus	117
Chapter 5 <i>Mens Rea, Concurrence, Causation</i>	161
Chapter 6 Parties to Crime and Vicarious Liability	213
Chapter 7 Attempt, Conspiracy, and Solicitation	259
Chapter 8 Justifications	315
Chapter 9 Excuses	395
Chapter 10 Homicide	469
Chapter 11 Criminal Sexual Conduct, Assault and Battery, Kidnapping, and False Imprisonment	549
Chapter 12 Burglary, Trespass, Arson, and Mischief	625
Chapter 13 Crimes Against Property	659
Chapter 14 White-Collar Crime	727
Chapter 15 Crimes Against Public Order and Morality	757
Chapter 16 Crimes Against the State	819
Notes	847
Glossary	870
Case Index	884
Subject Index	897
About the Author	919

DETAILED CONTENTS

Preface	xvii
Acknowledgments	xxii
Chapter 1 The Nature, Purpose, and Function of Criminal Law	1
Introduction	2
The Nature of Criminal Law	2
Criminal and Civil Law	3
The Purpose of Criminal Law	4
The Principles of Criminal Law	5
Categories of Crime	6
Felonies and Misdemeanors	6
<i>Mala in Se and Mala Prohibita</i>	6
Subject Matter	7
Sources of Criminal Law	10
The Common Law	10
State Criminal Codes	11
State Police Power	12
The Model Penal Code	12
Federal Statutes	13
Constitutional Limitations	14
Chapter Summary	17
Chapter Review Questions	19
Legal Terminology	19
Test Your Knowledge Answers	20
Chapter 2 Constitutional Limitations	21
Introduction	22
The Rule of Legality	23
Bills of Attainder and <i>Ex Post Facto</i> Laws	23
Bills of Attainder	23
<i>Ex Post Facto</i> Laws	23
The Supreme Court and <i>Ex Post Facto</i> Laws	24

Statutory Clarity	25
Clarity	25
Definite Standards for Law Enforcement	25
Void for Vagueness	26
Equal Protection	32
Three Levels of Scrutiny	32
Freedom of Speech	40
Overbreadth	43
Hate Speech	43
Privacy	53
The Constitutional Right to Privacy	54
The Constitutional Right to Privacy and Same-Sex Relations Between Consenting Adults in the Home	56
The Right to Bear Arms	57
Chapter Summary	62
Chapter Review Questions	63
Legal Terminology	63
Test Your Knowledge Answers	64
Chapter 3 Punishment and Sentencing	65
Introduction	66
Punishment	68
Purposes of Punishment	69
Retribution	70
Deterrence	70
Rehabilitation	70
Incapacitation	70
Restoration	71
Sentencing	71
Approaches to Sentencing	72
Sentencing Guidelines	73
Plea Bargaining	77
Truth in Sentencing	79
Victims' Rights	79
Cruel and Unusual Punishment	82
Methods of Punishment	82
The Amount of Punishment: Capital Punishment	84
Lethal Injection	86
The Juvenile Death Penalty	87
The Amount of Punishment: Sentences for a Term of Years	98
The Amount of Punishment: Drug Offenses	99

Criminal Punishment and Status Offenses	103
The Amount of Punishment: Marijuana Legalization	103
Equal Protection	105
Chapter Summary	112
Chapter Review Questions	113
Legal Terminology	114
Test Your Knowledge Answers	115
chapter 4 Actus Reus	117
Introduction	118
Criminal Acts	119
Voluntary Criminal Acts	120
Analysis	121
Status Offenses	128
Omissions	136
The American and European Bystander Rules	136
The Duty to Intervene	138
Possession	148
Chapter Summary	159
Chapter Review Questions	159
Legal Terminology	160
Test Your Knowledge Answers	160
Chapter 5 Mens Rea, Concurrence, Causation	161
Introduction	162
Mens Rea	162
The Evidentiary Burden	163
The Model Penal Code Standard	164
Purposely	166
Transferred Intent	169
Knowingly	170
Recklessly	174
Negligently	180
Strict Liability	186
Concurrence	192
Causation	195
Cause in Fact	195
Legal or Proximate Cause	196
Intervening Cause	196

Coincidental Intervening Acts	197
Responsive Intervening Acts	197
Chapter Summary	208
Chapter Review Questions	209
Legal Terminology	210
Test Your Knowledge Answers	210
Chapter 6 Parties to Crime and Vicarious Liability	213
Introduction	214
Parties to a Crime	214
Actus Reus of Accomplice Liability	216
Mens Rea of Accomplice Liability	223
Natural and Probable Consequences Doctrine	228
Accessory After the Fact	233
The Common Law	233
The Elements of Accessory After the Fact	234
Vicarious Liability	243
Corporate Liability	244
Public Policy	246
Automobiles, Parents, and Vicarious Liability	251
Traffic Tickets	251
Parents	251
Chapter Summary	255
Chapter Review Questions	256
Legal Terminology	257
Test Your Knowledge Answers	257
Chapter 7 Attempt, Conspiracy, and Solicitation	259
Introduction	260
Attempt	260
History of Attempt	261
Public Policy and Attempt	262
The Elements of Criminal Attempt	262
Mens Rea of Attempt	263
A Criminal Attempt Involves a Dual Intent	263
Actus Reus of Attempt	267
Three Legal Tests	268
The Physical Proximity and Substantial Step Tests	270
Impossibility	276
Abandonment	283

X Contemporary Criminal Law

Conspiracy	288
<i>Actus Reus</i>	288
Overt Act	289
Mens Rea	290
Parties	290
The Structure of Conspiracies	291
Criminal Objectives	292
Conspiracy Prosecutions	294
Solicitation	301
Public Policy	302
The Crime of Solicitation	302
Chapter Summary	309
Chapter Review Questions	312
Legal Terminology	312
Test Your Knowledge Answers	313

Chapter 8 Justifications **315**

Introduction	316
The Prosecutor's Burden	316
Affirmative Defenses	317
Mitigating Circumstances	318
Self-Defense	319
The Central Components of Self-Defense	320
The Law of Self-Defense: The Reasonable Person	323
Reasonable Belief	323
The Law of Self-Defense: Justifiable Force	331
Excessive Force	338
Retreat	338
Defense of Others	346
Defense of the Home	347
Execution of Public Duties	352
The Modern Legal Standard	354
Resisting Unlawful Arrests	364
Necessity	366
Consent	379
Chapter Summary	391
Chapter Review Questions	391
Legal Terminology	392
Test Your Knowledge Answers	392

Chapter 9 Excuses	395
Introduction	396
The Insanity Defense	396
The Right-Wrong Test	399
The Irresistible Impulse Test	402
The <i>Durham</i> Product Test	404
The Substantial Capacity Test	404
Burden of Proof	406
The Future of the Insanity Defense	406
Diminished Capacity	415
Intoxication	416
Voluntary Intoxication	416
Involuntary Intoxication	417
Age	423
Duress	433
The Elements of Duress	433
Duress and Correctional Institutions	435
The Duress Defense	436
Mistake of Law and Mistake of Fact	442
Mistake of Law	443
Mistake of Fact	445
Entrapment	447
The Law of Entrapment	448
The Subjective Test	448
The Objective Test	449
Due Process	451
The Entrapment Defense	451
New Defenses	455
Some New Defenses	456
The Cultural Defense	459
Chapter Summary	465
Chapter Review Questions	466
Legal Terminology	467
Test Your Knowledge Answers	467
Chapter 10 Homicide	469
Introduction	470
Types of Criminal Homicide	471
Actus Reus and Criminal Homicide	473
The Beginning of Human Life	474

The End of Human Life	481
Mens Rea and Criminal Homicide	482
Murder	482
First-Degree Murder	483
Capital and Aggravated First-Degree Murder	489
Second-Degree Murder	495
Depraved Heart Murder	500
Felony Murder	507
Corporate Murder	516
Manslaughter	522
Voluntary Manslaughter	522
Voluntary Manslaughter Reconsidered	524
Negligent Manslaughter	531
Misdemeanor Manslaughter	541
Chapter Summary	545
Chapter Review Questions	547
Legal Terminology	548
Test Your Knowledge Answers	548
Chapter 11 Criminal Sexual Conduct, Assault and Battery, Kidnapping, and False Imprisonment	549
Introduction	550
The Common Law of Rape	551
The Elements of the Common Law of Rape	552
Rape Reform	554
The Impact of Rape Reform	555
Punishment and Sexual Assault	555
The <i>Actus Reus</i> of Modern Rape	556
Other Approaches to the <i>Actus Reus</i> of Modern Rape	568
The <i>Mens Rea</i> of Rape	569
Statutory Rape	571
Withdrawal of Consent	576
Rape Shield Laws	581
Assault and Battery	585
The Elements of Battery	586
Simple and Aggravated Battery	586
Domestic Battery	588
Assault	589
Aggravated Assault	590
The Elements of Assault	591

Stalking	596
Kidnapping	607
Criminal Intent	608
Criminal Act	608
False Imprisonment	613
Chapter Summary	620
Chapter Review Questions	622
Legal Terminology	623
Test Your Knowledge Answers	623
Chapter 12 Burglary, Trespass, Arson, and Mischief	625
Introduction	626
Burglary	626
Breaking	627
Entry	627
Dwelling House	628
Dwelling of Another	629
Nighttime	629
Intent	629
Aggravated Burglary	630
<i>Do We Need the Crime of Burglary?</i>	631
Two Cases on Burglary	633
Trespass	639
Arson	642
Burning	643
Dwelling	643
Dwelling of Another	644
Willful and Malicious	644
Grading	644
Criminal Mischief	650
<i>Mens Rea</i>	651
Chapter Summary	656
Chapter Review Questions	657
Legal Terminology	657
Test Your Knowledge Answers	658
Chapter 13 Crimes Against Property	659
Introduction	660
Larceny	661
<i>Actus Reus: Trespassory Taking</i>	661
Asportation	662

Property of Another	663
<i>Mens Rea</i>	663
<i>Grades of Larceny</i>	664
Embezzlement	670
False Pretenses	675
<i>Actus Reus</i>	675
<i>Mens Rea</i>	676
Theft	682
Identity Theft	684
Computer Crime	691
Receiving Stolen Property	700
<i>Actus Reus</i>	700
<i>Mens Rea</i>	701
Forgery and Uttering	706
<i>Actus Reus</i>	707
<i>Mens Rea</i>	707
Uttering	707
Simulation	707
Robbery	711
<i>Actus Reus</i>	712
<i>Mens Rea</i>	713
Concurrence	713
Grading Robbery	713
Carjacking	720
Extortion	720
Chapter Summary	723
Chapter Review Questions	724
Legal Terminology	725
Test Your Knowledge Answers	725
 Chapter 14 White-Collar Crime	 727
Introduction	728
Environmental Crimes	730
Occupational Health and Safety	733
Securities Fraud	735
<i>Insider Trading</i>	736
Mail and Wire Fraud	738
The Travel Act	740
Health Care Fraud	740
Money Laundering	743

Antitrust Violations	747
Public Corruption	748
Chapter Summary	753
Chapter Review Questions	754
Legal Terminology	755
Test Your Knowledge Answers	755
Chapter 15 Crimes Against Public Order and Morality	757
Introduction	758
Disorderly Conduct	759
Riot	765
Public Indecencies: Quality-of-Life Crimes	770
Vagrancy and Loitering	771
Homelessness	773
Gangs	784
The Overreach of Criminal Law	793
Prostitution and Solicitation	795
The Crime of Prostitution	796
Legal Regulation of Prostitution	798
Obscenity	806
Cruelty to Animals	813
Chapter Summary	815
Chapter Review Questions	816
Legal Terminology	817
Test Your Knowledge Answers	817
Chapter 16 Crimes Against the State	819
Introduction	820
Treason	821
Criminal Act and Criminal Intent	821
Prosecuting Treason	822
Sedition	823
Sabotage	825
Espionage	827
Terrorism	829
Definition of Terrorism	829
Terrorism Outside the United States	830
Terrorism Transcending National Boundaries	830
Weapons of Mass Destruction	831
Mass Transportation Systems	832

Harboring or Concealing Terrorists	833
Material Support for Terrorism	833
Combat Immunity	835
State Terrorism Statutes	836
International Criminal Law	840
Chapter Summary	843
Chapter Review Questions	844
Legal Terminology	845
Test Your Knowledge Answers	845
Notes	847
Glossary	870
Case Index	884
Subject Index	897
About the Author	919

PREFACE

This book reflects the insights and ideas developed over the course of more than 30 years of teaching criminal law and criminal procedure to undergraduate criminal justice students. The volume combines the concepts and learning tools found in undergraduate texts with the types of challenging cases and issues that are characteristic of law school casebooks. Each chapter incorporates several features:

- ***Essays.*** Essays introduce and summarize the chapters and topics.
- ***Cases.*** Edited cases are accompanied by “Questions for Discussion.”
- ***Case Notes.*** Following the edited case decisions, “Cases and Comments” and “You Decide” review exercises are provided. In the “You Decide” sections, actual cases are discussed, and readers are asked to act as judges.
- ***The Model Penal Code and Discussion Boxes.*** In these sections, selected statutes and the provisions of the Model Penal Code are reprinted and analyzed. Discussion boxes and graphs supplement the coverage in most chapters.
- ***Learning Tools.*** Learning tools summarize and reinforce the material. These include introductory vignettes, chapter outlines, the test your knowledge and criminal law in the news features, questions for discussion following each case, legal equations, chapter review questions, and legal terminology lists.

The book provides a contemporary perspective on criminal law that encourages students to actively read and analyze the text. I hope that at the conclusion of the course, students will have mastered the substance of criminal law and have developed the ability to understand and to creatively apply legal rules. My aspiration is that students come to appreciate that criminal law is dynamic and evolutionary and is not merely a static and mechanical set of rules.

THE CASE METHOD

One of my aims is to provide a book that students find interesting and instructors consider educationally valuable. I have found that undergraduates enjoy and easily absorb material taught through the case method. In my experience, learning is encouraged when students are presented with concrete factual situations that illustrate legal rules. The case method also lends itself to an interactive educational environment in which students engage in role-playing or apply legal precedents to novel factual scenarios. The case method has the additional benefit of assisting students to refine their skills in critical reading and analysis and in logical thinking.

The cases in the text are organized to enhance learning and comprehension. The decisions have been edited to emphasize the core components of the judgments, and technicalities have been kept to a minimum. Each case is divided into **Facts, Issue, Reasoning, and Holding**. I strongly believe in the educational value of factual analysis and have included a fairly full description of the facts. The textbook highlights the following:

- **Classic Cases.** The book includes various classic cases that are fundamental to the study of criminal law as well as cases that provide a clear statement of the law.
- **Contemporary Cases.** I have incorporated contemporary cases that reflect our increasingly diverse and urbanized society. This includes cases that address the issues of drugs, gangs, stalking, terrorism, cybercrime, white-collar crime, cultural diversity, and animal rights. Attention is also devoted to gender, race, domestic violence, and hate crimes.
- **Legal Issues.** The vast majority of the decisions have been selected to raise important and provocative legal issues. For instance, students are asked to consider whether the law should be expanded to provide that a vicious verbal attack constitutes adequate provocation for voluntary manslaughter.
- **Facts.** In other instances, the cases illustrate the challenge of applying legal rules. For example, decisions present the difficulty of distinguishing between various grades of homicide and the complexity of determining whether an act constitutes a criminal attempt.
- **Public Policy.** I have found that among the most engaging aspects of teaching criminal law are the questions of public policy, law, and morality that arise in various cases. The book constantly encourages students to reflect on the impact and social context of legal rules and raises issues throughout, such as whether we are justified in taking a life to preserve several other lives under the law of necessity.

CHAPTER ORGANIZATION

Each chapter is introduced by a **vignette**. This is preceded by the **Test Your Knowledge** feature, which is intended to interest students in the material and to help students focus on the important points. The **Introduction** to the chapter then provides an overview of the discussion.

The cases are introduced by **essays**. These discussions clearly present the development and elements of the relevant defense, concept, or crime and also include material on public policy considerations. Learning objectives are included to highlight what students should know. Each case is introduced by a **question** that directs students to the relevant issue.

At the conclusion of the case, **Questions for Discussion** ask students to summarize and analyze the facts and legal rule. These questions, in many instances, are followed by **Cases and Comments** that expand on the issues raised by the edited case in the textbook. There is also a

feature titled **You Decide** that provides students with the opportunity to respond to the facts of an actual case.

The essays are often accompanied by an analysis of the **Model Penal Code**. This provides students with an appreciation of the diverse approaches to criminal statutes. The discussion of each defense or crime concludes with a **legal equation** that clearly presents the elements of the defense or crime.

The chapters close with a **Chapter Summary** that outlines the important points. This is followed by **Chapter Review Questions** and **Legal Terminology**. A **Glossary** appears at the end of the book.

Most of the chapters also include **Crime in the News**. This is a brief discussion of legal developments and cases that students have likely encountered in the media. The purpose is to highlight contemporary issues and debates and to encourage students to consider the impact of the media in shaping our perceptions. Several chapters also include **Crime on the Streets**, which employs graphs to illustrate the frequency of various criminal offenses or other pertinent information. This is intended to give students a sense of the extent of crime in the United States and to connect the study of criminal law to the field of criminal justice.

ORGANIZATION OF THE TEXT

The textbook provides broad coverage. This enables instructors to select from a range of alternative topics. You will also find that subjects are included that are not typically addressed. The discussion of rape, for instance, includes “withdrawal of consent” and “rape shield statutes.” Expanded coverage is provided on topics such as sentencing, homicide, white-collar crime, and terrorism.

The textbook begins with the nature, purpose, and constitutional context of criminal law as well as sentencing and then covers the basic elements of criminal responsibility and offenses. The next parts of the textbook discuss crimes against the person and crimes against property and business. The book concludes with discussions of crimes against public morality and crimes against the state.

- ***The Nature, Purpose, and Constitutional Context of Criminal Law.*** Chapter 1 discusses the nature, purpose, and function of criminal law. Chapter 2 covers the constitutional limits on criminal law, including due process, equal protection, freedom of speech, and the right to privacy. Chapter 3 provides an overview of punishment and sentencing and discusses the Eighth Amendment prohibition on cruel and unusual punishment.
- ***Principles of Criminal Responsibility.*** This part covers the foundation elements of a crime. Chapter 4 discusses criminal acts, and Chapter 5 is concerned with criminal intent, concurrence, and causation.
- ***Parties, Vicarious Liability, and Inchoate Crimes.*** The third part of the textbook discusses the scope of criminal responsibility. Chapter 6 discusses parties to crime and

vicarious liability. Chapter 7 covers the inchoate crimes of attempt, conspiracy, and solicitation.

- **Criminal Defenses.** The fourth part of the text discusses defenses to criminal liability. Chapter 8 outlines justifications, and Chapter 9 encompasses excuses.
- **Crimes Against the Person.** The fifth part focuses on crimes against the person. Chapter 10 provides a lengthy treatment of homicide. Chapter 11 is concerned with criminal sexual conduct, assault and battery, kidnapping, and false imprisonment.
- **Crimes Against Habitation and Property, and White-Collar Crime.** Chapter 12 covers burglary, trespass, arson, and mischief. These crimes against property were originally conceived as protecting the safety and security of the home. Chapter 13 centers on other crimes against property, including larceny, embezzlement, identity theft, and carjacking. Chapter 14 provides an overview of white-collar crime, commercial offenses that are designed to illegally enhance an individual's income or corporate profits. This chapter covers a range of topics, including environmental crimes, securities fraud, mail and wire fraud, and public corruption.
- **Crimes Against Public Order, Morality, and the State.** Chapter 15 focuses on crimes against public order and morality that threaten the order and stability of the community. The chapter covers a number of topics including disorderly conduct, riot, vagrancy, and efforts to combat homelessness, gangs, and prostitution. Chapter 16 discusses crimes against the state, stressing counterterrorism.

NEW TO THE SIXTH EDITION

In writing the sixth edition I have drawn on my experience in teaching the text. The changes to the book were adopted following a thorough review of contemporary court decisions and developments. I focused my efforts on sharpening topics that caused students particular problems in previous editions. The standard was whether a modification assisted in teaching and learning. The primary changes to the text include the following:

- **Cases.** New cases have been added that illuminate important concepts. This includes decisions on constitutional rights, criminal acts, attempt, necessity, consent, age, intoxication, stalking, kidnapping, arson, the unhoused, identity theft, and terrorism. Several cases from the fifth edition have been edited to highlight important aspects of the decision.
- **New Material.** Chapters have been updated to maintain the contemporary content and theme of the book and to clarify concepts discussed in the book. The text references a number of recent U.S. Supreme Court decisions and other legal

developments of interest. There are a number of additions to the Cases and Comments feature.

- **You Decide.** Most chapters include a new “You Decide” feature. These problems clarify concepts, illustrate the complexity of legal analysis, and enhance the interactive character of the text.
- **Crime in the News.** Several chapters have new or updated “Crime in the News” features.
- **Reorganization.** The book has undergone some reorganization to streamline the text.

ACKNOWLEDGMENTS

I am hopeful that the textbook conveys my passion and enthusiasm for the teaching of criminal law and contributes to the teaching and learning of this most fascinating and vital topic. The book has been the product of the efforts and commitment of countless individuals who deserve much of the credit.

The people at SAGE Publishing are among the most skilled professionals that an author is likely to encounter. An author is fortunate to publish with SAGE, a company that is committed to quality books. Sponsoring Editor Jessica Miller provided intelligent suggestions and expert direction. Content Development Editor Darcy Scelsi is responsible for supervising the construction of the online version of the book. Senior Project Editor Tracy Buyan once again proved to be a superb professional and supervised the preparation of the lengthy manuscript and was responsible for monitoring a myriad of details associated with publication of the text. A special thanks as well to Acquisitions Editor Joshua Perigo. I would also like to thank all the expert professionals at SAGE in production and design, and in marketing and sales, who contributed their talent. The text was immensely improved by the meticulous and intelligent copyediting and expertise of Copy Editor Melinda Masson. The book could not have been produced without Melinda's extraordinary efforts.

I must mention colleagues at the University of Illinois at Chicago: Greg Matoesian, Dennis Judd, John Hagedorn, Lisa Frohmann, Evan McKenzie, the late Gordon Misner, Beth Richie, Laurie Schaffner, the late Gene Scaramella, Ana Petrovic, Louis Robles, Dave Williams, Dean Bette Bottoms, Dagmar Lorenz, Amie Schuck, Peter Ibarra, and Dennis Rosenbaum, who first proposed that I write this textbook. A great debt of gratitude, of course, is owed to my students, who constantly provide new and creative insights.

I am fortunate to have loyal friends who have provided inspiration and encouragement. These include my dear friends Wayne Kerstetter, Deborah Allen-Baber, and Agata Fijalkowski, as well as Nan Kamen-Judd, Sharon Savinski, Mindie Lazarus-Black, Bill Black, Donna Dorney, the late Leanne Lobravico, Jess Maghan, Sean McConville, Oneida Mascarenas, Sheldon Rosing, Maeve Barrett Burke, Bryan Burke, Bill Lane, Annamarie Pastore, the late Kerry Petersen, Robin Wagner, Donna Dorney, Ken Janda, Kris Clark, Wendy Chamberlin, Jennifer Woodard, Tom Morante, and Marianne Splitter. I also must thank the late Ralph Semsker and Isadora Semsker and their family. Dr. Mary Hallberg has been an important person in my life, and the late Lidia Janus remains my true north, love, and source of inspiration.

I have two members of my family living in Chicago. My sister, Dr. Jessica Lippman, and niece, Professor Amelia Barrett, remain a source of encouragement and generous assistance. Finally, the book is dedicated to my late parents, Mr. and Mrs. S. G. Lippman, who provided me with a love of learning. My late father, S. G. Lippman, practiced law for 70 years in the service of

the most vulnerable members of society. He believed that law was the highest calling and never turned away a person in need. Law, for him, was a passionate calling to pursue justice and an endless source of discussion, debate, and fascination.

My source for the Model Penal Code excerpts throughout the text is Model Penal Code © 1985 by the American Law Institute. Reprinted with permission. All rights reserved.

1

THE NATURE, PURPOSE, AND FUNCTION OF CRIMINAL LAW

TEST YOUR KNOWLEDGE: TRUE/FALSE

1. The only difference in the enforcement of criminal and civil law is that violation of a criminal law may result in imprisonment.
2. Criminal law defines what is punished, and criminal procedure sets forth the rules on how crimes are investigated and prosecuted.
3. The only difference between felonies and misdemeanors is that felonies result in incarceration.
4. The best source to consult to find a comprehensive and relatively easy statement of the criminal law in a state is the criminal code rather than the decisions of the state supreme court.

Check your answers at the end of the chapter on page 20.

Can Police Officers Be Subjected to Prosecution in Both State and Federal Court?

As the videotape begins, it shows that [Rodney] King rose from the ground and charged toward Officer Powell. Powell took a step and used his baton to strike King on the side of his head. King fell to the ground. From the 18th to the 30th second on the videotape, King attempted to rise, but Powell and [Officer] Wind each struck him with their batons to prevent him from doing so. From the 35th to the 51st second, Powell administered repeated blows to King's lower extremities; one of the blows fractured King's leg. At the 55th second, Powell struck King on the chest, and King rolled over and lay prone. At that point, the officers stepped back and observed King for about 10 seconds. . . . At one-minute-five-seconds (1:05) on the videotape, [Officer] Briseno, in the District Court's words,

"stomped" on King's upper back or neck. King's body writhed in response. At 1:07, Powell and Wind again began to strike King with a series of baton blows, and Wind kicked him in the upper thoracic or cervical area six times until 1:26. At about 1:29, King put his hands behind his back and was handcuffed. (*Koon v. United States*, 518 U.S. 81 [1996])

INTRODUCTION

Criminal law is the foundation of the criminal justice system. The law defines the conduct that may lead to an arrest by the police, trial before the courts, and incarceration in prison. When we think about criminal law, we typically focus on offenses such as rape, robbery, and murder. States, however, condemn a range of acts in their criminal codes, some of which may surprise you. In Alabama, it is a criminal offense to promote or engage in a wrestling match with a bear or to train a bear to fight in such a match.¹ A Florida law states that it is unlawful to possess "any ignited tobacco product" in an elevator.² Rhode Island declares that an individual shall be imprisoned for seven years who voluntarily engages in a duel with a dangerous weapon or who challenges an individual to a duel.³ In Wyoming, you can be arrested for skiing while being impaired by alcohol⁴ or for opening and failing to close a gate in a fence that "crosses a private road or river."⁵ You can find criminal laws on the books in various states punishing activities such as playing dominos on Sunday, feeding an alcoholic beverage to a moose, cursing on a miniature golf course, making love in a car, or performing a wedding ceremony when either the bride or groom is drunk.⁶ In Louisiana, you risk being sentenced to 10 years in prison for stealing an alligator, whether dead or alive, valued at \$1,000.⁷

THE NATURE OF CRIMINAL LAW

Are there common characteristics of acts that are labeled as crimes? How do we define a **crime**? The easy answer is that a crime is whatever the law declares to be a criminal offense and punishes with a penalty. The difficulty with this approach is that not all criminal convictions result in a fine or imprisonment. Rather than punishing a **defendant**, the judge may merely warn them not to repeat the criminal act. Most commentators stress that the important feature of a crime is that it is an act that is officially condemned by the community and carries a sense of shame and humiliation. Professor Henry M. Hart Jr. defines crime as "conduct which, if . . . shown to have taken place," will result in the "formal and solemn pronouncement of the moral condemnation of the community."⁸

The central point of Professor Hart's definition is that a crime is subject to formal condemnation by a judge and jury representing the people in a court of law. This distinguishes a crime from acts most people would find objectionable that typically are not subject to state prosecution and official punishment. We might, for instance, criticize someone who cheats on their spouse, but we generally leave the solution to the *individuals involved*. Other matters are left to

institutions to settle; schools generally discipline students who cheat or disrupt classes, but this rarely results in a criminal charge. Professional baseball, basketball, and football leagues have their own private procedures for disciplining players. Most states leave the decision whether to recycle trash to the *individual* and look to *peer pressure* to enforce this obligation.

CRIMINAL AND CIVIL LAW

How does criminal law differ from **civil law**? Civil law is that branch of the law that protects the individual rather than the public interest. A legal action for a civil wrong is brought by an individual rather than by a state prosecutor. You may sue a mechanic who breaches a contract to repair your car or bring an action against a landlord who fails to adequately heat your apartment. The injury is primarily to you as an individual, and there is relatively little harm to society. A mechanic who intentionally misleads and harms a number of innocent consumers, however, may be charged with criminal fraud.

Civil and criminal actions are characterized by different legal procedures. For instance, conviction of a crime requires the high standard of proof beyond a reasonable doubt, although responsibility for a civil wrong is established by the much lower standard of proof by a preponderance of the evidence or roughly 51% certainty. The high standard of proof in criminal cases reflects the fact that a criminal conviction may result in a loss of liberty and significant damage to an individual's reputation and standing in the community.⁹

The famous 18th-century English jurist William Blackstone summarizes the distinction between civil and criminal law by observing that civil injuries are “an infringement . . . of the civil rights which belong to individuals. . . . [P]ublic wrongs, or crimes . . . are a breach and violation of the public rights and duties, due to the whole community . . . in its social aggregate capacity.” Blackstone illustrates this difference by pointing out that society has little interest in whether someone sues a neighbor or emerges victorious in a land dispute. On the other hand, society has a substantial investment in the arrest, prosecution, and conviction of individuals responsible for espionage, murder, and robbery.¹⁰

The difference between a civil and criminal action is not always clear, particularly with regard to an action for a **tort**, which is an injury to a person or to their property. Consider the drunken driver who runs a red light and hits your car. The driver may be sued in tort for negligently damaging you and your property as well as criminally prosecuted for reckless driving. The purpose of the civil action is to compensate you with money for the damage to your car and for the physical and emotional injuries you have suffered. In contrast, the criminal action punishes the driver for endangering society. Civil liability is based on a preponderance of the evidence standard, while a criminal conviction carries a possible loss of liberty and is based on the higher standard of guilt beyond a reasonable doubt. You may recall that former football star O. J. Simpson was acquitted of murdering Nicole Brown Simpson and Ron Goldman but was later found guilty of wrongful death in a civil court and ordered to compensate the victims' families in the amount of \$33.5 million.

The distinction between criminal and civil law proved immensely significant for Kansas inmate Leroy Hendricks. Hendricks was about to be released after serving 10 years in prison for

molesting two 13-year-old boys. This was only the latest episode in Hendricks's almost 30-year history of indecent exposure and molestation of young children. Hendricks freely conceded that when not confined, the only way to control his sexual urge was to "die."

Upon learning that Hendricks was about to be released, Kansas authorities invoked the Sexually Violent Predator Act of 1994, which authorized the institutional confinement of individuals who, due to a "mental abnormality" or a "personality disorder," are likely to engage in "predatory acts of sexual violence." Following a hearing, a jury found Hendricks to be a "sexual predator." The U.S. Supreme Court ruled that Hendricks's continued commitment was a civil rather than criminal penalty, and that Hendricks was not being unconstitutionally punished twice for the same criminal act of molestation. The Court explained that the purpose of the commitment procedure was to detain and to treat Hendricks in order to prevent him from harming others in the future rather than to punish him.¹¹ Do you think that the decision of the U.S. Supreme Court makes sense?

THE PURPOSE OF CRIMINAL LAW

We have seen that criminal law primarily protects the interests of society, and civil law protects the interests of the individual. The primary purpose or function of criminal law is to help maintain social order and stability. The Texas Criminal Code proclaims that the purpose of criminal law is to "establish a system of prohibitions, penalties, and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests for which state protection is appropriate."¹² The New York Criminal Code sets out the basic purposes of criminal law as follows¹³:

- *Harm.* To prohibit conduct that unjustifiably or inexcusably causes or threatens substantial harm to individuals as well as to society
- *Warning.* To warn people both of conduct that is subject to criminal punishment and of the severity of the punishment
- *Definition.* To define the act and intent that is required for each offense
- *Seriousness.* To distinguish between serious and minor offenses and to assign the appropriate punishments
- *Punishment.* To impose punishments that satisfy the demands for revenge, rehabilitation, and deterrence of future crimes
- *Victims.* To ensure that the victim, the victim's family, and the community interests are represented at trial and in imposing punishments

The next step is to understand the characteristics of a criminal act.

THE PRINCIPLES OF CRIMINAL LAW

The study of **substantive criminal law** involves an analysis of the definition of specific crimes (specific part) and of the general principles that apply to all crimes (general part), such as the defense of insanity. In our study, we will first review the general part of criminal law and then look at specific offenses. Substantive criminal law is distinguished from **criminal procedure**. Criminal procedure involves a study of the legal standards governing the detection, investigation, and prosecution of crime and includes areas such as interrogations, search and seizure, wiretapping, and the trial process. Criminal procedure is concerned with “how the law is enforced”; criminal law involves “what law is enforced.”

Professors Jerome Hall¹⁴ and Wayne R. LaFave¹⁵ identify the basic principles that compose the general part of the criminal law. Think of the general part of the criminal law as the building blocks that are used to construct specific offenses such as rape, murder, and robbery.

- *Criminal Act.* A crime involves an act or failure to act. You cannot be punished for bad thoughts. A criminal act is called *actus reus*.
- *Criminal Intent.* A crime requires a criminal intent or *mens rea*. Criminal punishment is ordinarily directed at individuals who intentionally, knowingly, recklessly, or negligently harm other individuals or property.
- *Concurrence.* The criminal act and criminal intent must coexist or accompany one another.
- *Causation.* The defendant’s act must cause the harm required for criminal guilt, death in the case of homicide, and the burning of a home or other structure in the case of arson.
- *Responsibility.* Individuals must receive reasonable notice of the acts that are criminal so as to make a decision to obey or to violate the law. In other words, the required criminal act and criminal intent must be clearly stated in a statute. This concept is captured by the Latin phrase *nullum crimen sine lege, nulla poena sine lege* (no crime without law, no punishment without law).
- *Defenses.* Criminal guilt is not imposed on an individual who is able to demonstrate that their criminal act is justified (benefits society) or excused (the individual suffered from a disability that prevented them from forming a criminal intent).

We now turn to a specific part of the criminal law to understand the various types of acts that are punished as crimes.

CATEGORIES OF CRIME

Felonies and Misdemeanors

There are a number of approaches to categorizing crimes. The most significant distinction is between a **felony** and a **misdemeanor**. A crime punishable by death or by imprisonment for more than one year is a felony. Misdemeanors are crimes punishable by less than a year in prison. Note that whether a conviction is for a felony or for a misdemeanor is determined by the punishment provided in the statute under which an individual is convicted rather than by the actual punishment imposed. Many states subdivide felonies and misdemeanors into several classes or degrees to distinguish between the seriousness of criminal acts. A **capital felony** is a crime subject either to the death penalty or to life in prison in states that do not have the death penalty. The term **gross misdemeanor** is used in some states to refer to crimes subject to between 6 and 12 months in prison, whereas other misdemeanors are termed **petty misdemeanors**. Several states designate a third category of crimes that are termed **violations** or **infractions**. These tend to be acts that cause only modest social harm and carry fines. These offenses are considered so minor that imprisonment is prohibited. This includes the violation of traffic regulations.

Florida classifies offenses as felonies, misdemeanors, or noncriminal violations. Noncriminal violations are primarily punishable by a fine or forfeiture of property. The following list shows the categories of felonies and misdemeanors and the maximum punishment generally allowable under Florida law:

- *Capital Felony*. Death or life imprisonment without parole
- *Life Felony*. Life in prison and a \$15,000 fine
- *Felony in the First Degree*. Thirty years in prison and a \$10,000 fine
- *Felony in the Second Degree*. Fifteen years in prison and a \$10,000 fine
- *Felony in the Third Degree*. Five years in prison and a \$5,000 fine
- *Misdemeanor in the First Degree*. One year in prison and a \$1,000 fine
- *Misdemeanor in the Second Degree*. Sixty days in prison and a \$500 fine

The severity of the punishment imposed is based on the seriousness of the particular offense. Florida, for example, punishes as a second-degree felony the recruitment of an individual for prostitution knowing that force, fraud, or coercion will be used to cause the person to engage in prostitution. This same act is punished as a first-degree felony in the event that the person recruited is under 14 years old or if death results.¹⁶

Mala in Se* and *Mala Prohibita

Another approach is to classify crime by “moral turpitude” (evil). ***Mala in se*** crimes are considered “inherently evil” and would be evil even if not prohibited by law. This includes murder, rape, robbery, burglary, larceny, and arson. ***Mala prohibita*** offenses are not “inherently evil”

and are considered wrong only because they are prohibited by a statute. This includes offenses ranging from tax evasion to carrying a concealed weapon, leaving the scene of an accident, and being drunk and disorderly in public.

Why should we be concerned with classification schemes? A felony conviction can prevent you from being licensed to practice various professions, bar you from being admitted to the armed forces or joining the police, and prevent you from adopting a child or receiving various forms of federal assistance. In some states, a convicted felon is still prohibited from voting, even following release. The distinction between *mala in se* and *mala prohibita* is also important. For instance, the law provides that individuals convicted of a “crime of moral turpitude” may be deported from the United States.

There are a number of other classification schemes. The law originally categorized as **infamous crimes** those crimes that were considered to be deserving of shame or disgrace. Individuals convicted of infamous offenses such as treason (betrayal of the nation) or offenses involving dishonesty were historically prohibited from appearing as witnesses at a trial.

Subject Matter

This textbook is organized in accordance with the subject matter of crimes, the scheme that is followed in most state criminal codes. There is disagreement, however, concerning the classification of some crimes. Robbery, for instance, involves the theft of property as well as the threat or infliction of harm to the victim, and there is a debate about whether it should be considered a crime against property or against the person. Similar issues arise in regard to burglary. Subject matter offenses in descending order of seriousness are as follows:

- *Crimes Against the State.* Treason, sedition, espionage, terrorism (Chapter 16)
- *Crimes Against the Person: Homicide.* Homicide, murder, manslaughter (Chapter 10)
- *Crimes Against the Person: Sexual Offenses and Other Crimes.* Sexual offenses, assault and battery, false imprisonment, kidnapping (Chapter 11)
- *Crimes Against Habitation.* Burglary, arson, trespassing (Chapter 12)
- *Crimes Against Property.* Larceny, embezzlement, false pretenses, receiving stolen property, robbery, fraud (Chapters 13 and 14)
- *Crimes Against Public Order.* Disorderly conduct, riot (Chapter 15)
- *Crimes Against the Administration of Justice.* Obstruction of justice, perjury, bribery (Chapters 14 and 15)
- *Crimes Against Public Morals.* Prostitution, obscenity (Chapter 15)

The book also covers the general part of criminal law, including the constitutional limits on criminal law (Chapter 2), sentencing (Chapter 3), criminal acts (Chapter 4), criminal intent (Chapter 5), the scope of criminal liability (Chapters 6 and 7), and defenses to criminal liability (Chapters 8 and 9).

Consider the following factual scenario that is from the U.S. Supreme Court's description of the events surrounding the beating of Rodney King. Should the defendants once acquitted in state court have been prosecuted in federal court?¹⁷

YOU DECIDE 1.1

On the evening of March 2, 1991, Rodney King and two of his friends sat in King's wife's car in Altadena, California, a city in Los Angeles County, and drank malt liquor for a number of hours. Then, with King driving, they left Altadena via a major freeway. King was intoxicated. California Highway Patrol [CHP] officers observed King's car traveling at a speed they estimated to be in excess of 100 miles per hour. The officers followed King with red lights and sirens activated and ordered him by loudspeaker to pull over, but he continued to drive. The CHP officers called on the radio for help. Units of the Los Angeles Police Department joined in the pursuit, one of them manned by petitioner Laurence Powell and his trainee, Timothy Wind. [The officers are all Caucasian; King is African American. King later explained that he fled because he feared that he would be returned to prison after having been released four months earlier following a year spent behind bars for robbery.]

King left the freeway and, after a chase of about eight miles, stopped at an entrance to a recreation area. The officers ordered King and his two passengers to exit the car and to assume a felony prone position—that is, to lie on their stomachs with legs spread and arms behind their backs. King's two friends complied. King, too, got out of the car but did not lie down. Petitioner Stacey Koon arrived, at once followed by Ted Briseno and Roland Solano. All were officers of the Los Angeles Police Department, and, as sergeant, Koon took charge. The officers again ordered King to assume the felony prone position. King got on his hands and knees but did not lie down. Officers Powell, Wind, Briseno, and Solano tried to force King down, but King resisted and became combative, so the officers retreated. Koon then fired Taser darts (designed to stun a combative suspect) into King.

The events that occurred next were captured on videotape by a bystander. As the videotape begins, it shows that King rose from the ground and charged toward Officer Powell. Powell took a step and used his baton to strike King on the side of his head. King fell to the ground. From the 18th to the 30th second on the videotape, King attempted to rise, but Powell and Wind each struck him with their batons to prevent him from doing so. From the 35th to the 51st second, Powell administered repeated blows to King's lower extremities; one of the blows fractured King's leg. At the 55th second, Powell struck King on the chest, and King rolled over and lay prone. At that point, the officers stepped back and observed King for about 10 seconds. Powell began to reach for his handcuffs. (At the sentencing phase, the district court found that Powell no longer perceived King to be a threat at this point.) At one-minute-five-seconds (1:05) on the videotape, Briseno, in the district court's words, "stomped" on King's upper back or neck. King's body writhed in response. At 1:07, Powell and Wind again began to strike King with a series of baton blows, and Wind kicked him in the upper thoracic or cervical area six times until 1:26. At about 1:29, King put his hands behind his back and was handcuffed. . . .

Powell radioed for an ambulance. He sent two messages over a communications network to the other officers that said "oops" and "I haven't [sic] beaten anyone this bad in a long time." Koon sent a message to the police station that said, "Unit just had a big time use of force. . . . Tased and beat the suspect of CHP pursuit big time." King was taken to a hospital where he was treated for a fractured leg, multiple facial fractures, and numerous bruises

and contusions. Learning that King worked at Dodger Stadium, Powell said to King, "We played a little ball tonight, didn't we, Rodney? . . . You know, we played a little ball, we played a little hardball tonight, we hit quite a few home runs. . . . Yes, we played a little ball and you lost and we won."

Koon, Powell, Briseno, and Wind were tried in California state court on charges of assault with a deadly weapon and excessive use of force by a police officer. The officers were acquitted of all charges, with the exception of one assault charge against Powell that resulted in a hung jury. [The jury was composed of 10 white, 1 Hispanic, and 1 Asian American.] The verdicts touched off widespread rioting in Los Angeles. More than 40 people were killed in the riots, more than 2,000 were injured, and nearly \$1 billion in property was destroyed. [Los Angeles mayor Tom Bradley acknowledged the dangerous trend, at least in certain sections of the LAPD, toward racially motivated events; and President George H. W. Bush announced in May that the verdict had left him with a deep sense of personal frustration and anger and that he was ordering the Justice Department to initiate a prosecution against the officers.]

On August 4, 1992, a federal grand jury indicted the four officers, charging them with violating King's constitutional rights under color of law. Powell, Briseno, and Wind were charged with willful use of unreasonable force in arresting King. Koon was charged with willfully permitting the other officers to use unreasonable force during the arrest. After a trial in U.S. District Court for the Central District of California, the jury convicted Koon and Powell but acquitted Wind and Briseno. [Koon and Powell were sentenced to 30 months in prison. This jury was composed of nine whites, two African Americans, and one Hispanic American. King later won a \$3.8 million verdict from the City of Los Angeles. He used some of the money to establish a rap record business.] See *Koon v. United States*, 518 U.S. 81 (1996).

The issue to consider is whether individuals may be prosecuted and acquitted in California state court and then prosecuted in federal court. This seems to violate the prohibition on double jeopardy in the Fifth Amendment to the U.S. Constitution, which states that individuals shall not be "twice put in jeopardy of life or limb." Double jeopardy means that an individual should not be prosecuted more than once for the same offense. Without this protection, the government could subject people to a series of trials in an effort to obtain a conviction.

It may surprise you to learn that judges have held that the dual sovereignty doctrine permits the U.S. government to prosecute an individual under federal law who has been acquitted on the state level. The theory is that the state and federal governments are completely different entities and that state government is primarily concerned with punishing police officers and with protecting residents against physical attack, while the federal government is concerned with safeguarding the civil liberties of all Americans. Each of these entities provides a check on the other to ensure fairness for citizens. The evidence introduced in the two prosecutions to establish the police officers' guilt in the King case was virtually identical, and the federal prosecution likely was brought in response to political pressure. On the other hand, the federal government historically has acted to prevent unfair verdicts, such as the acquittal of members of the Ku Klux Klan charged with killing civil rights workers during the 1960s.

Do you believe that it was fair to subject the Los Angeles police officers to the expense and emotional stress of two trials? As the attorney general of the United States, would you have

advised President George H. W. Bush to bring federal charges against the officers following their acquittal by a California jury?

SOURCES OF CRIMINAL LAW

We now have covered the various categories of criminal law. The next questions to consider are these: What are the sources of criminal law? How do we find the requirements of criminal law? There are a number of sources of criminal law in the United States:

- *English and American Common Law.* These are English and American judge-made laws and English acts of Parliament.
- *State Criminal Codes.* Every state has a comprehensive written set of laws on crime and punishment.
- *Municipal Ordinances.* Cities, towns, and counties are typically authorized to enact local criminal laws, generally of a minor nature. These laws regulate the city streets, sidewalks, and buildings and concern areas such as traffic, littering, disorderly conduct, and domestic animals.
- *Federal Criminal Code.* The U.S. government has jurisdiction to enact criminal laws that are based on the federal government's constitutional powers, such as the regulation of interstate commerce.
- *State and Federal Constitutions.* The U.S. Constitution defines treason and together with state constitutions establishes limits on the power of government to enact criminal laws. A criminal statute, for instance, may not interfere with freedom of expression or religion.
- *International Treaties.* International treaties signed by the United States establish crimes such as genocide, torture, and war crimes. These treaties, in turn, form the basis of federal criminal laws punishing acts such as genocide and war crimes when Americans are involved. These cases are prosecuted in U.S. courts.
- *Judicial Decisions.* Judges write decisions explaining the meaning of criminal laws and determining whether criminal laws meet the requirements of state and federal constitutions. Judges typically rely on **precedent** or the decision of other courts in similar cases.

At this point, we turn our attention to the common law origins of American criminal law and to state criminal codes.

The Common Law

The English **common law** is the foundation of American criminal law. The origins of the common law can be traced to the Norman conquest of England in 1066. The Norman king,

William the Conqueror, was determined to provide a uniform law for England and sent royal judges throughout the country to settle disputes in accordance with the common customs and practices of the country. The principles that composed this common law began to be written down in 1300 in an effort to record the judge-made rules that should be used to decide future cases.

By 1600, a number of **common law crimes** had been developed, including arson, burglary, larceny, manslaughter, mayhem, rape, robbery, sodomy, and suicide. These were followed by criminal attempt, conspiracy, blasphemy, forgery, sedition, and solicitation. On occasion, the king and Parliament issued decrees that filled the gaps in the common law, resulting in the development of the crimes of false pretenses and embezzlement. The distinctive characteristic of the common law is that it is for the most part the product of the decisions of judges in actual cases.

The English civil and criminal common law was transported to the new American colonies and formed the foundation of the colonial legal system that in turn was adopted by the 13 original states following the American Revolution. The English common law was also recognized by each state subsequently admitted to the Union; the only exception was Louisiana, which followed the French Napoleonic Code until 1805 when it embraced the common law.¹⁸

State Criminal Codes

States in the 19th century began to adopt comprehensive written criminal codes. This movement was based on the belief that in a democracy, the people should have the opportunity to know the law. Judges in the common law occasionally punished an individual for an act that had never before been subjected to prosecution. A defendant in a Pennsylvania case was convicted of making obscene phone calls despite the absence of a previous prosecution for this offense. The court explained that the “common law is sufficiently broad to punish . . . although there may be no exact precedent, any act which directly injures or tends to injure the public.”¹⁹ There was the additional argument that the power to make laws should reside in the elected legislative representatives of the people rather than in unelected judges. As Americans began to express a sense of independence, there was also a strong reaction against being so clearly connected to the English common law tradition, which was thought to have limited relevance to the challenges facing America. As early as 1812, the U.S. Supreme Court proclaimed that federal courts were required to follow the law established by Congress and were not authorized to apply the common law.

States were somewhat slower than the federal government to abandon the common law. In a Maine case in 1821, the accused was found guilty of dropping the dead body of a child into a river. The defendant was convicted even though there was no statute making this a crime. The court explained that “good morals” and “decency” all forbid this act. State legislatures reacted against these types of decisions and began to abandon the common law in the mid-19th century. The Indiana Revised Statutes of 1852, for example, proclaim that “[c]rimes and misdemeanors shall be defined, and punishment fixed by statutes of this State, and not otherwise.”²⁰

Some states remain **common law states**, meaning that the common law may be applied where the state legislature has not adopted a law in a particular area. The Florida Criminal Code states that the “common law of England in relation to crimes, except so far as the same relates to the

mode and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject.” Florida law further provides that where there is no statute, an offense shall be punished by fine or imprisonment but that the “fine shall not exceed \$500, nor the term of imprisonment 12 months.”²¹ Missouri and Arizona are also examples of common law states. These states’ criminal codes, like that of Florida, contain a **reception statute** that provides that the states “receive” the common law as an unwritten part of their criminal law. California, on the other hand, is an example of a **code jurisdiction**. The California Criminal Code provides that “no act or omission . . . is criminal or punishable, except as prescribed or authorized by this code.”²² Ohio and Utah are also code jurisdiction states. The Utah Criminal Code states that common law crimes “are abolished and no conduct is a crime unless made so by this code . . . or ordinance.”²³

Professor LaFave observes that courts in common law states have recognized a number of crimes that are not part of their criminal codes, including conspiracy, attempt, solicitation, uttering gross obscenities in public, keeping a house of prostitution, cruelly killing a horse, public inebriation, and false imprisonment.²⁴

You also should keep in mind that the common law continues to play a role in the law of code jurisdiction states. Most state statutes are based on the common law, and courts frequently consult the common law to determine the meaning of terms in statutes. In the well-known California case of *Keeler v. Superior Court*, the California Supreme Court looked to the common law and determined that an 1850 state law prohibiting the killing of a “human being” did not cover the “murder of a fetus.” The California state legislature then amended the murder statute to punish “the unlawful killing of a human being, or a fetus.”²⁵ Most important, our entire approach to criminal trials reflects the common law’s commitment to protecting the rights of the individual in the criminal justice process.

State Police Power

Are there limits on a state’s authority to pass criminal laws? Could a state declare that it is a crime to possess fireworks on July Fourth? State governments possess the broad power to promote the public health, safety, and welfare of the residents of the state. This wide-ranging **police power** includes the “duty . . . to protect the well-being and tranquility of a community” and to “prohibit acts or things reasonably thought to bring evil or harm to its people.”²⁶ An example of the far-reaching nature of the state police power is the U.S. Supreme Court’s upholding of the right of a village to prohibit more than two unrelated people from occupying a single home. The Supreme Court proclaimed that the police power includes the right to “lay out zones where family values, youth values, the blessings of quiet seclusion, and clean air make the area a sanctuary for people.”²⁷

State legislatures in formulating the content of criminal codes have been profoundly influenced by the Model Penal Code.

The Model Penal Code

People from other countries often ask how students can study the criminal law of the United States, a country with 50 states and a federal government. The fact that there is a significant degree of agreement in the definition of crimes in state codes is due to a large extent to the **Model Penal Code**.

In 1962, the American Law Institute (ALI), a private group of lawyers, judges, and scholars, concluded after several years of study that despite our common law heritage, state criminal statutes radically varied in their definition of crimes and were difficult to understand and poorly organized. The ALI argued that the quality of justice should not depend on the state in which an individual was facing trial and issued a multivolume set of model criminal laws, *The Proposed Official Draft of the Model Penal Code*. The Model Penal Code is purely advisory and is intended to encourage all 50 states to adopt a single uniform approach to the criminal law. The statutes are accompanied by a commentary that explains how the Model Penal Code differs from existing state statutes. Roughly 37 states have adopted some of the provisions of the Model Penal Code, although no state has adopted every single model law. The states that most closely follow the code are New Jersey, New York, Pennsylvania, and Oregon. As you read this book, you may find it interesting to compare the Model Penal Code to the common law and to state statutes.²⁸

This book primarily discusses state criminal law. It is important to remember that we also have a federal system of criminal law in the United States.

Federal Statutes

The United States has a federal system of government. The states granted various powers to the federal government that are set forth in the U.S. Constitution. This includes the power to regulate interstate commerce, to declare war, to provide for the national defense, to coin money, to collect taxes, to operate the post office, and to regulate immigration. The Congress is entitled to make “all Laws which shall be necessary and proper” for fulfilling these responsibilities. The states retain those powers that are not specifically granted to the federal government. The Tenth Amendment to the Constitution states that the powers “not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

The Constitution specifically authorizes Congress to punish the counterfeiting of U.S. currency, piracy and felonies committed on the high seas, and crimes against the “Law of Nations” as well as to make rules concerning the conduct of warfare. These criminal provisions are to be enforced by a single Supreme Court and by additional courts established by Congress.

The **federal criminal code** compiles the criminal laws adopted by the U.S. Congress. This includes laws punishing acts such as tax evasion, mail and immigration fraud, bribery in obtaining a government contract, and the knowing manufacture of defective military equipment. The **Supremacy Clause** of the U.S. Constitution provides that federal law is superior to a state law within those areas that are the preserve of the national government. This is termed the **preemption doctrine**. In 2012, the Supreme Court held that federal immigration law preempted several sections of an Arizona statute directed at undocumented individuals.

Several recent court decisions have held that federal criminal laws have unconstitutionally encroached on areas reserved for state governments. This reflects a trend toward limiting the federal power to enact criminal laws. For instance, the U.S. government, with the **Interstate Commerce Clause**, has interpreted its power to regulate interstate commerce as providing the authority to criminally punish harmful acts that involve the movement of goods or individuals across state lines. An obvious example is the interstate transportation of stolen automobiles.

In the past few years, the U.S. Supreme Court has ruled several of these federal laws unconstitutional based on the fact that the activities did not clearly affect interstate commerce or involve the use of interstate commerce. In 1995, the Supreme Court ruled in *United States v. Lopez* that Congress violated the Constitution by adopting the Gun-Free School Zones Act of 1990, which made it a crime to have a gun in a local school zone. The fact that the gun may have been transported across state lines was too indirect a connection with interstate commerce on which to base federal jurisdiction.²⁹

In 2000, the Supreme Court also ruled unconstitutional the U.S. government's prosecution of an individual in Indiana who was alleged to have set fire to a private residence. The federal law made it a crime to maliciously damage or destroy, by means of fire or an explosive, any building used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce. The Supreme Court ruled that there must be a direct connection between a building and interstate commerce and rejected the government's contention that it is sufficient that a building is constructed of supplies or serviced by electricity that moved across state lines or that the owner's insurance payments are mailed to a company located in another state. Justice Ruth Bader Ginsburg explained that this would mean that "every building in the land" would fall within the reach of federal laws on arson, trespass, and burglary.³⁰

In 2006, in *Gonzales v. Oregon*, the Supreme Court held that U.S. Attorney General John Ashcroft lacked the authority to prevent Oregon physicians acting under the state's Death With Dignity law from prescribing lethal drugs to terminally ill patients who are within six months of dying.³¹

The sharing of power between the federal and state governments is termed **dual sovereignty**. An interesting aspect of dual sovereignty is that it is constitutionally permissible to prosecute a defendant for the same act at both the state and federal levels. In 2019, in *Gamble v. United States*, the Supreme Court affirmed that this type of double prosecution does not constitute **double jeopardy**.³² You will remember from You Decide 1.1 that in 1991 Rodney King, an African American, was stopped by the Los Angeles police. King resisted and eventually was subdued, wrestled to the ground, beaten, and handcuffed by four officers. The officers were acquitted by an all-Caucasian jury in a state court in Simi Valley, California, leading to widespread protest and disorder in Los Angeles. The federal government responded by bringing the four officers to trial for violating King's civil right to be arrested in a reasonable fashion. Two officers were convicted and sentenced to 30 months in federal prison, and two were acquitted.

We have seen that the state and federal governments possess the power to enact criminal laws. The federal power is restricted by the provisions of the U.S. Constitution that define the limits on governmental power.

Constitutional Limitations

The U.S. Constitution and individual state constitutions establish limits and standards for the criminal law. The U.S. Constitution, as we shall see in Chapter 2, requires the following:

- A state or local law may not regulate an area that is reserved to the federal government. A federal law may not encroach upon state power.

- A law may infringe upon the fundamental civil and political rights of individuals only in compelling circumstances.
- A law must be clearly written and provide notice to citizens and to the police of the conduct that is prohibited.
- A law must be nondiscriminatory and may not impose cruel and unusual punishment. A law also may not be retroactive and punish acts that were not crimes at the time that they were committed.

The ability of legislators to enact criminal laws is also limited by public opinion. The American constitutional system is a democracy. Politicians are fully aware that they must face elections and that they may be removed from office in the event that they support an unpopular law. As we learned during the unsuccessful effort to ban the sale of alcohol during the Prohibition era in the early 20th century, the government will experience difficulties in imposing an unpopular law on the public.

Of course, the democratic will of the majority is subject to constitutional limitations. A classic example is the Supreme Court's rulings that popular federal statutes prohibiting and punishing flag burning and desecration compose an unconstitutional violation of freedom of speech.³³

CRIME IN THE NEWS

In 1996, California became 1 of 23 states at the time to authorize the use of marijuana for medical purposes. (The other states are Alaska, Arizona, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, and the same applies in the District of Columbia. Maryland exempts medical marijuana users from jail sentences.)

California voters passed Proposition 215, the Compassionate Use Act of 1996, which is intended to ensure that "seriously ill" residents of California are able to obtain marijuana. The act provides an exemption from criminal prosecution for doctors who, in turn, may authorize patients and primary caregivers to possess or cultivate marijuana for medical purposes. The California legislation is directly at odds with the federal Controlled Substances Act, which declares it a crime to manufacture, distribute, or possess marijuana. There are more than 100,000 medical marijuana users in California, and roughly one tenth of 1% of the population uses medical marijuana in the states that collect information on medical marijuana users.

Angel Raich and Diane Monson are two California residents who suffer from severe medical disabilities. Their doctors have found that marijuana is the only drug that is able to alleviate their pain and suffering. Raich's doctor goes so far as to claim that Angel's pain is so intense that she might die if deprived of marijuana. Monson cultivates her own marijuana, and Raich relies on two caregivers who provide her with California-grown marijuana at no cost.

On August 15, 2000, agents from the federal Drug Enforcement Administration (DEA) raided Monson's home and destroyed all six of her marijuana plants. The DEA agents disregarded objections from the Butte County Sheriff's Department and the local California District Attorney's Office that Monson's possession of marijuana was perfectly legal.

Monson and Raich, along with several doctors and patients, refused to accept the destruction of the marijuana plants and asked the U.S. Supreme Court to rule on the constitutionality of the federal government's refusal to exempt medical marijuana users from criminal prosecution and punishment. The case was supported by the California Medical Association and the Leukemia and Lymphoma Society. Raich suffers from severe chronic pain stemming from fibromyalgia, endometriosis, scoliosis, uterine fibroid tumors, rotator cuff syndrome, an inoperable brain tumor, seizures, life-threatening wasting syndrome, and constant nausea. She also experiences extreme chemical sensitivities that result in violent allergic reactions to virtually every pharmaceutical drug. Raich was confined to a wheelchair before reluctantly deciding to smoke marijuana, a decision that led to her enjoying a fairly normal life.

A doctor recommended that Monson use marijuana to treat severe chronic back pain and spasms. She alleges that marijuana alleviates the pain that she describes as comparable to an uncontrollable cramp. Monson claims that other drugs have proven ineffective or resulted in nausea and create the risk of severe injuries to her kidneys and liver. The marijuana reportedly reduces the frequency of Monson's spasms and enables her to continue to work.

The U.S. Supreme Court, in *Gonzales v. Raich* in 2005,³⁴ held that the federal prohibition on the possession of marijuana would be undermined by exempting marijuana possession in California and other states from federal criminal enforcement. The Supreme Court explained that the cultivation of marijuana under California's medical marijuana law, although clearly a local activity, frustrated the federal government's effort to control the shipment of marijuana across state lines, because medical marijuana inevitably would find its way into interstate commerce, increase the nationwide supply, and drive down the price of the illegal drug. There was also a risk that completely healthy individuals in California would manage to be fraudulently certified by a doctor to be in need of medical marijuana. Three of the nine Supreme Court judges dissented from the majority opinion. Justice Sandra Day O'Connor observed that the majority judgment "stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently."³⁵

Following the decision, Angel Raich urged the federal government to have some "compassion and have some heart" and not to "use taxpayer dollars to come in and lock us up. . . [W]e are using this medicine because it is saving our lives." She asked why the federal government was trying to kill her. Opponents of medical marijuana defend the Supreme Court's decision and explain that individuals should look to traditional medical treatment rather than being misled into thinking that marijuana is an effective therapy. They also argue that marijuana is a highly addictive drug that could lead individuals to experiment with even more harmful narcotics.

The Obama administration initially did not enforce federal marijuana laws against individuals in medical marijuana states. In 2011, the Department of Justice (DOJ) announced that although individuals could grow and use small amounts of medical marijuana, the DOJ would criminally prosecute growers of more than 100 plants and individuals involved in the commercial marketing and sale of marijuana. In 2013, the Obama administration reversed course and announced that it would not prosecute individuals in medical marijuana states unless the individuals threatened certain federal law enforcement interests. This included the distribution of marijuana to minors, providing revenue to criminal enterprises, diversion of marijuana to states where marijuana remains illegal, and the possession and use of marijuana on federal property.

In 2014, Congress adopted a law prohibiting the DOJ from using resources to prevent states from "implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana."

President Trump, during the presidential election campaign, indicated that marijuana was a state rather than federal issue. In 2017, Attorney General Jeff Sessions, however, wrote a letter to Congress opposing the continued congressional prohibition on the use of federal funds to prosecute medical marijuana. He argued that the law was “unwise,” given America’s drug epidemic, and that the law interfered with federal efforts to combat international drug organizations and crimes of violence associated with drug trafficking. Attorney General Sessions also noted that marijuana use had negative psychological and physical effects. President Trump, on signing an earlier extension of the law in 2016, issued a “signing statement” indicating that he would enforce the law in accordance with his “constitutional responsibility to take care that the laws be faithfully executed.”

Attorney General Sessions, in January 2018, sent a memo to U.S. attorneys rescinding the policy of the Obama administration on marijuana prosecutions. Attorney General Sessions wrote that U.S. attorneys should use their own discretion in determining whether to bring charges for marijuana possession or sale in states where marijuana use for recreational or medical purposes is lawful.

President Biden on assuming office favored decriminalization of possession of marijuana and expungement of criminal convictions, supported medical marijuana and reduction in federal penalties relating to marijuana, and supported allowing states and localities to follow their own policies.

In December 2020, the U.S. House of Representatives passed the Marijuana Opportunity, Reinvestment, and Expungement (MORE) Act. The act would repeal the federal prohibition on the possession, distribution, or production of marijuana; expunge the narcotics conviction of people with prior federal marijuana convictions; and impose a tax on marijuana products, which would fund new programs intended to support “individuals and businesses in communities impacted by the war on drugs.” The legislation has yet to be approved by the Senate.

Where do you stand on the medical marijuana controversy?

Thirty-six states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands at present have approved comprehensive, publicly available medical marijuana/cannabis programs. Eleven states allow use of “low THC, high cannabidiol (CBD)” products for medical reasons in limited situations. Nineteen states, two territories, and the District of Columbia allow recreational use of marijuana.

CHAPTER SUMMARY

Criminal law is the foundation of the criminal justice system. The law defines the acts that may lead to arrest, trial, and incarceration. We typically think about crime as involving violent conduct, but in fact a broad variety of acts are defined as crimes.

Criminal law is best defined as conduct that, if shown to have taken place, will result in the “formal and solemn pronouncement of the moral condemnation of the community.” Civil law is distinguished from criminal law by the fact that it primarily protects the interests of the individual rather than the interests of society.

The purpose of criminal law is to prohibit conduct that causes harm or threatens harm to the individual and to the public interests, to warn people of the acts that are subject to criminal

punishment, to define criminal acts and intent, to distinguish between serious and minor offenses, to punish offenders, and to ensure that the interests of victims and the public are represented at trial and in the punishment of offenders.

In analyzing individual crimes, we will concentrate on several basic issues that comprise the general part of the criminal law. A crime occurs when there is a concurrence between a criminal act (*actus reus*) and criminal intent (*mens rea*) and the causation of a social harm. Individuals must be provided with notice of the acts that are criminally condemned in order to have the opportunity to obey or to violate the law. Individuals must also be given the opportunity at trial to present defenses (justifications and excuses) to a criminal charge.

The criminal law distinguishes between felonies and misdemeanors. A crime punishable by death or by imprisonment for more than one year is a felony. Other offenses are misdemeanors. Offenses are further divided into capital and other grades of felonies and into gross and petty misdemeanors. A third level of offenses includes violations or infractions, acts that are punishable by fines.

Another approach is to classify crime in terms of “moral turpitude.” *Mala in se* crimes are considered “inherently evil,” and *mala prohibita* crimes are not inherently evil and are considered wrong only because they are prohibited by statute.

Our textbook categorizes crimes in accordance with the subject matter of the offense, the scheme that is followed in most state criminal codes. This includes crimes against the person, crimes against habitation, crimes against property, crimes against public order, and crimes against the state.

There are a number of sources of American criminal law. These include the common law, state and federal criminal codes, the U.S. and state constitutions, international treaties, and judicial decisions. The English common law was transported to the United States and formed the foundation for the American criminal statutes adopted in the 19th and 20th centuries. Some states continue to apply the common law in those instances in which the state legislature has not adopted a criminal statute. In code jurisdiction states, however, crimes are punishable only if incorporated into law.

States possess broad police powers to legislate for the public health, safety, and welfare of the residents of the state. The drafting of state criminal statutes has been heavily influenced by the American Law Institute’s Model Penal Code, which has helped ensure a significant uniformity in the content of criminal codes.

The United States has a system of dual sovereignty in which the state governments have provided the federal government with the authority to legislate various areas of criminal law. The Supremacy Clause provides that federal law takes precedence over state law in the areas that the U.S. Constitution explicitly reserves to the national government. There is a trend toward strictly limiting the criminal law power of the federal government. The U.S. Supreme Court, for example, has ruled that the federal government has unconstitutionally employed the Interstate Commerce Clause to extend the reach of federal criminal legislation to the possession of a firearm adjacent to schools.

The authority of the state and federal governments to adopt criminal statutes is limited by the provisions of federal and state constitutions. For instance, laws must be drafted in a clear and nondiscriminatory fashion and must not impose retroactive or cruel or unusual punishment. The federal and state governments possess the authority to enact criminal legislation only within their separate spheres of constitutional power.

CHAPTER REVIEW QUESTIONS

1. Define a crime.
2. Distinguish between criminal and civil law. Distinguish between a criminal act and a tort.
3. What is the purpose of criminal law?
4. Is there a difference between criminal law and criminal procedure? Distinguish between the specific and general part of the criminal law.
5. List the basic principles that compose the general part of criminal law.
6. Distinguish between felonies, misdemeanors, capital felonies, gross and petty misdemeanors, and violations.
7. What is the difference between *mala in se* and *mala prohibita* crimes?
8. Discuss the development of the common law. What do we mean by common law states and code jurisdiction states?
9. Discuss the nature and importance of the state police power.
10. Why is the Model Penal Code significant?
11. What is the legal basis for federal criminal law? Define the preemption doctrine and dual sovereignty. What is the significance of the Interstate Commerce Clause?
12. What are the primary sources of criminal law? How does the U.S. Constitution limit criminal law?
13. Why is understanding criminal law important in the study of the criminal justice system?

LEGAL TERMINOLOGY

capital felony	criminal procedure
civil law	defendant
code jurisdiction	double jeopardy
common law	dual sovereignty
common law crimes	federal criminal code
common law states	felony
crime	gross misdemeanor

infamous crimes	police power
infractions	precedent
Interstate Commerce Clause	preemption doctrine
<i>mala in se</i>	reception statutes
<i>mala prohibita</i>	substantive criminal law
misdemeanor	Supremacy Clause
Model Penal Code	tort
petty misdemeanors	violations

TEST YOUR KNOWLEDGE ANSWERS

1. False.
2. True.
3. False.
4. True.

2

CONSTITUTIONAL LIMITATIONS

TEST YOUR KNOWLEDGE: TRUE/FALSE

1. Bills of attainder prohibit punishing an individual for an act that was not criminal at the time it was committed.
2. One purpose of statutory clarity is to ensure that individuals know what acts are prohibited by a law.
3. Laws that distinguish between individuals based on race or based on gender, in most instances, are held to be constitutional by courts.
4. The courts do not recognize any limitations on expression under the First Amendment.
5. The U.S. Constitution explicitly provides for a right to privacy.
6. The Second Amendment right to bear arms does not protect individuals' right to keep firearms within the home.

Check your answers at the end of the chapter on page 64.

Was the Defendant Discriminated Against Based on Gender?

Gary Simmonds used unlawful violence on [his wife] Tracia Simmonds with the intent to injure her and therefore was guilty of aggravated assault and battery. . . . Under the Virgin Islands Code . . . [a]ssault and battery involves the use of “unlawful violence upon the person of another with intent to injure him, whatever be the means or the degree of violence used. . . .” An assault or battery “unattended with circumstances of aggravation” is simple assault and battery. Assault and battery becomes aggravated if [in part it is] committed . . . [by] an adult male, upon the person of a female or child, or being an adult female, upon the person of a child. . . . Simmonds challenges the constitutionality of the . . . aggravated assault and battery statute as denying equal protection of the law to males based on their gender. (*People of the Virgin Islands v. Simmonds*, 58 V.I. 3 [Super. Ct. 2012])

INTRODUCTION

In the American democratic system, various constitutional provisions limit the power of the federal and state governments to enact criminal statutes. For instance, a statute prohibiting students from criticizing the government during a classroom discussion would likely violate the First Amendment to the U.S. Constitution. A law punishing individuals engaging in “unprotected” sexual activity, however socially desirable, may unconstitutionally violate the right to privacy.

Why did the framers create a **constitutional democracy**, a system of government based on a constitution that limits the powers of the government? The Founding Fathers were profoundly influenced by the harshness of British colonial rule and drafted a constitution designed to protect the rights of the individual against the tyrannical tendencies of government. They wanted to ensure that the police could not freely break down doors and search homes. The framers were also sufficiently wise to realize that individuals required constitutional safeguards against the political passions and intolerance of democratic majorities.

The limitations on government power reflect the framers’ belief that individuals possess natural and inalienable rights, and that these rights may be restricted only when absolutely necessary to ensure social order and stability. The stress on individual freedom was also practical. The framers believed that the fledgling new American democracy would prosper and develop by freeing individuals to passionately pursue their hopes and dreams.

At the same time, the framers were not wide-eyed idealists. They fully appreciated that individual rights and liberties must be balanced against the need for social order and stability. The striking of this delicate balance is not a scientific process. A review of the historical record indicates that the emphasis has been placed at times on the control of crime and at other times on individual rights.

Chapter 2 describes the core constitutional limits on criminal law and examines the balance between order and individual rights. Consider the costs and benefits of constitutionally limiting the government’s authority to enact criminal statutes. Do you believe that greater importance should be placed on guaranteeing order or on protecting rights? You should keep the constitutional limitations discussed in this chapter in mind as you read the cases in subsequent chapters. The topics covered in the chapter are as follows:

- The first principle of American jurisprudence is the rule of legality.
- Constitutional constraints include the following:
 - Bills of attainder and *ex post facto* laws
 - Statutory clarity
 - Equal protection
 - Freedom of speech
 - Privacy
 - The right to bear arms

We will discuss an additional constitutional constraint, the Eighth Amendment prohibition on cruel and unusual punishment, in Chapter 3.

THE RULE OF LEGALITY

The **rule of legality** has been characterized as “the first principle of American criminal law and jurisprudence.”¹ This principle was developed by common law judges and is interpreted today to mean that an individual may not be criminally punished for an act that was not clearly condemned in a statute prior to the time that the individual committed the act.² The doctrine of legality is nicely summarized in the Latin expression ***nullum crimen sine lege, nulla poena sine lege***, meaning “no crime without law, no punishment without law.” The doctrine of legality is reflected in two constitutional principles governing criminal statutes:

- The constitutional prohibition on bills of attainder and *ex post facto* laws
- The constitutional requirement of statutory clarity

BILLS OF ATTAINDER AND EX POST FACTO LAWS

Article I, Sections 9 and 10 of the U.S. Constitution prohibit state and federal legislatures from passing **bills of attainder** and ***ex post facto* laws**. James Madison characterized these provisions as a “bulwark in favor of personal security and personal rights.”³

Bills of Attainder

A bill of attainder is a legislative act that punishes an individual or a group of persons without the benefit of a trial. The constitutional prohibition of bills of attainder was intended to safeguard Americans from the type of arbitrary punishments that the English Parliament directed against opponents of the Crown. Parliament disregarded the legal process and directly ordered that dissidents be imprisoned, executed, or banished and forfeit their property.⁴ The prohibition of a bill of attainder was successfully invoked in 1946 by members of the American Communist Party, who were excluded by Congress from working for the federal government.⁵

Ex Post Facto Laws

Alexander Hamilton explained that the constitutional prohibition on *ex post facto* laws was vital because “subjecting of men to punishment for things which, when they were done were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instrument of tyranny.”⁶ In 1798, Supreme Court Justice Samuel Chase in *Calder v. Bull* listed four categories of *ex post facto* laws⁷:

- Every law that makes an action done before the passing of the law and which was *innocent* when done, criminal and punishes such action
- Every law that *aggravates* a crime, or makes it *greater* than it was when committed
- Every law that *changes the punishment* and inflicts a *greater punishment* than the law annexed to the crime, when committed

- Every law that alters the *legal* rules of *evidence* and receives less or different testimony than the law required at the time of the commission of the offense *in order to convict the offender*

The constitutional rule against *ex post facto* laws is based on the familiar interests in providing individuals notice of criminal conduct and protecting individuals against retroactive “after the fact” statutes. Supreme Court Justice John Paul Stevens noted that all four of Justice Chase’s categories are “mirror images of one another. In each instance, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction.”⁸

In summary, the prohibition on *ex post facto* laws prevents legislation being applied to *acts committed before the statute went into effect*. The legislature is free to declare that in the *future* a previously innocent act will be a crime. Keep in mind that the prohibition on *ex post facto* laws is directed against enactments that disadvantage defendants; legislatures are free to retroactively assist defendants by reducing the punishment for a criminal act.

The distinction between bills of attainder and *ex post facto* laws is summarized as follows:

- A bill of attainder punishes a specific individual or specific individuals. An *ex post facto* law criminalizes an act that was legal at the time the act was committed.
- A bill of attainder is not limited to criminal punishment and may involve any disadvantage imposed on an individual. An *ex post facto* law is limited to criminal punishment.
- A bill of attainder imposes punishment on an individual without trial. An *ex post facto* law is enforced in a criminal trial.

The Supreme Court and *Ex Post Facto* Laws

Determining whether a retroactive application of the law violates the prohibition on *ex post facto* laws has proven more difficult than might be imagined given the seemingly straightforward nature of this constitutional ban.

In *Stogner v. California*, the Supreme Court ruled that a California law authorizing the prosecution of allegations of child abuse that previously were barred by a three-year statute of limitations constituted a prohibited *ex post facto* law.⁹ This law was challenged by Marion Stogner, who found himself indicted for child abuse after having lived the past 19 years without fear of criminal prosecution for an act committed 22 years prior. Justice Stephen Breyer ruled that California acted in an “unfair” and “dishonest” fashion in subjecting Stogner to prosecution many years after the state had assured him that he would not stand trial. Justice Anthony Kennedy argued in dissent that California merely reinstated a prosecution that was previously barred by the three-year statute of limitations. The penalty attached to the crime of child abuse remained unchanged. What is your view?

We now turn our attention to the requirement of statutory clarity.

STATUTORY CLARITY

The Fifth and Fourteenth Amendments to the U.S. Constitution prohibit depriving individuals of “life, liberty or property without due process of law.” Due process requires that criminal statutes should be drafted in a clear and understandable fashion. A statute that fails to meet this standard is unconstitutional on the grounds that it is **void for vagueness**.

- *Due process requires that individuals receive notice of criminal conduct.* Statutes are required to define criminal offenses with sufficient *clarity* so that ordinary individuals are able to understand what conduct is prohibited.
- *Due process requires that the police, prosecutors, judges, and jurors are provided with a reasonably clear statement of prohibited behavior.* The requirement of definite standards ensures the uniform and nondiscriminatory enforcement of the law.

In summary, *due process ensures clarity in criminal statutes. It guards against individuals being deprived of life (the death penalty), liberty (imprisonment), or property (fines) without due process of law.*

Clarity

Would a statute that punishes individuals for being members of a gang satisfy the test of statutory clarity? The U.S. Supreme Court, in *Grayned v. Rockford*, ruled that a law was void for vagueness that punished an individual “known to be a member of any gang consisting of two or more persons.” The Court observed that “no one may be required at peril of life, liberty or property to speculate as to the meaning of [the term *gang* in] penal statutes.”¹⁰

In another example, the Supreme Court ruled in *Coates v. Cincinnati* that an ordinance was unconstitutionally void for vagueness that declared that it was a criminal offense for “three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by.” The Court held that the statute failed to provide individuals with reasonably clear guidance because “conduct that annoys some people does not annoy others,” and that an individual’s arrest may depend on whether the individual happens to “annoy” a “police officer or other person who should happen to pass by.” This did not mean that Cincinnati was helpless to maintain the city sidewalks; the city was free to prohibit people from “blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct.”¹¹

Definite Standards for Law Enforcement

Edward Lawson was detained or arrested on roughly 15 occasions between March and July 1977. Lawson certainly stood out; he was distinguished by his long dreadlocks and habit of wandering the streets of San Diego at all hours. Lawson did not carry any identification, and each of his arrests was undertaken pursuant to a statute that required that an individual detained for

investigation by a police officer present “credible and reliable” identification that carries a “reasonable assurance” of its authenticity and that provides “means for later getting in touch with the person who has identified himself.”¹²

The U.S. Supreme Court explained in *Kolender v. Lawson* that the void-for-vagueness doctrine was aimed at ensuring that statutes clearly inform citizens of prohibited acts and simultaneously provide definite standards for the enforcement of the law. The California statute was clearly void for vagueness, because no standards were provided for determining what constituted “credible and reliable” identification, and “complete discretion” was vested in the police to determine whether a suspect violated the statute. Was a library or credit card or student identification “credible and reliable” identification? A police officer explained at trial that joggers who are not carrying identification might satisfy the statute by providing their running route or name and address. Did this constitute “credible and reliable” identification? The Court was clearly concerned that a lack of definite standards opened the door to the police using the California statute to arrest individuals based on their race, gender, or appearance.

Due process does not require “impossible standards” of clarity, and the Supreme Court stressed that this was not a case in which “further precision” was “either impossible or impractical.” There seemed to be little reason why the legislature could not specify the documents that would satisfy the statutory standard and avoid vesting complete discretion in the “moment-to-moment judgment” of a police officer on the street. Laws were to be made by the legislature and enforced by the police: “To let a policeman’s command become equivalent to a criminal statute comes dangerously near to making our government one of men rather than laws.”¹³

The Supreme Court has stressed that the lack of standards presents the danger that a law will be applied in a discriminatory fashion against minorities and the poor. In *Papachristou v. City of Jacksonville*, the U.S. Supreme Court expressed the concern that a broadly worded vagrancy statute punishing “rogues and vagabonds”; “lewd, wanton and lascivious persons”; “common railers and brawlers”; and “habitual loafers” failed to provide standards for law enforcement and risked that the poor, minority groups, and nonconformists would be targeted for arrest based on the belief that they posed a threat to public safety.¹⁴ The Court humorously noted that middle-class individuals who frequented the local country club were unlikely to be arrested, although they might be guilty under the ordinance of “neglecting all lawful business and habitually spending their time by frequenting . . . places where alcoholic beverages are sold or served.”¹⁵

Broadly worded statutes are a particular threat in a democracy in which we are committed to protecting even the most extreme nonconformist from governmental harassment. The U.S. Supreme Court, in *Coates v. Cincinnati*, expressed concern that the lack of clear standards in the local ordinance might lead to the arrest of individuals who were exercising their constitutionally protected rights. Under the Cincinnati statute, association and assembly on the public streets would be “continually subject” to whether the demonstrators’ “ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens.”¹⁶

Void for Vagueness

Judges are aware that language cannot achieve the precision of a mathematical formula. Legislatures are also unable to anticipate every possible act that may threaten society, and

understandably they resort to broad language. Consider the obvious lack of clarity of a statute punishing a “crime against nature.” In *Horn v. State*, the defendant claimed that a law punishing a “crime against nature” was vague and indefinite and failed to inform him that he was violating the law in raping a 10-year-old boy. An Alabama court ruled that the definition of a “crime against nature” was widely discussed in legal history and was “too disgusting and well known” to require further details or description.¹⁷ Do you agree?

Judges appreciate the difficulty of clearly drafting statutes and typically limit the application of the void-for-vagueness doctrine to cases in which the constitutionally protected rights and liberties of people to meet, greet, congregate in groups, move about, and express themselves are threatened.

A devil’s advocate may persuasively contend that the void-for-vagueness doctrine provides undeserved protection to “wrongdoers.” In *State v. Metzger*, a neighbor spotted Metzger standing naked with his arms at his sides in the large window of his garden apartment for roughly five seconds.¹⁸ The neighbor testified that he saw Metzger’s body from “his thighs on up.” The police were called and observed Metzger standing within a foot of the window eating a bowl of cereal and noted that “his nude body, from the mid-thigh on up, was visible.” The ordinance under which Metzger was charged and convicted made it unlawful to commit an “indecent, immodest or filthy act within the presence of any person, or in such a situation that persons passing might ordinarily see the same.” The Nebraska Supreme Court ruled that this language provided little advance notice as to what is lawful and what is unlawful and could be employed by the police to arrest individuals for entirely lawful acts that some might consider immodest, including holding hands, kissing in public, or wearing a revealing swimsuit. Could Metzger possibly believe that there was no legal prohibition on his standing nude in his window? Keep these points in mind as you read the first case in the textbook, *State v. Stanko*.

DID THE DEFENDANT KNOW THAT HE WAS DRIVING AT AN EXCESSIVE RATE OF SPEED?

STATE V. STANKO, 974 P.2d 1132 (MONT. 1998)

Opinion by Trieweiler, J.

Facts

Kenneth Breidenbach is a member of the Montana Highway Patrol who, at the time of trial and the time of the incident that formed the basis for Stanko’s arrest, was stationed in Jordan, Montana. On March 10, 1996, he was on duty patrolling Montana State Highway 24 and proceeding south from Fort Peck toward Flowing Wells in “extremely light” traffic at about 8 a.m. on a Sunday morning when he observed another vehicle approaching him from behind.

He stopped or slowed, made a right-hand turn, and proceeded west on Highway 200. About one-half mile from that intersection, in the first passing zone, the vehicle that had

been approaching him from behind passed him. He caught up to the vehicle and trailed the vehicle at a constant speed for a distance of approximately eight miles while observing what he referred to as the two- or three-second rule. . . . He testified that he clocked the vehicle ahead of him at a steady 85 miles per hour during the time that he followed it. At that speed, the distance between the two vehicles was from 249 to 374 feet. . . . Officer Breidenbach signaled him to pull over and issued him a ticket for violating Section 61-8-303(1), Montana Code Annotated (MCA). The basis for the ticket was the fact that Stanko had been operating his vehicle at a speed of 85 miles per hour at a location where Officer Breidenbach concluded it was unsafe to do so.

The officer testified that the road at that location was narrow, had no shoulders, and was broken up by an occasional frost heave. He also testified that the portion of the road over which he clocked Stanko included curves and hills that obscured vision of the roadway ahead. However, he acknowledged that at a distance of from 249 to 374 feet behind Stanko, he had never lost sight of Stanko's vehicle. The roadway itself was bare and dry, there were no adverse weather conditions, and the incident occurred during daylight hours. Officer Breidenbach apparently did not inspect the brakes on Stanko's vehicle or make any observation regarding its weight. The only inspection he conducted was of the tires, which appeared to be brand new. He also observed that it was a 1996 Camaro, which was a sports car, and that it had a suspension system designed so that the vehicle could be operated at high speeds. He also testified that while he and Stanko were on Highway 24 there were no other vehicles that he observed, that during the time that he clocked Stanko . . . they approached no other vehicles going in their direction, and that he observed a couple of vehicles approach them in the opposite direction during that eight-mile stretch of highway.

Although Officer Breidenbach expressed the opinion that 85 miles per hour was unreasonable at that location, he gave no opinion about what would have been a reasonable speed, nor did he identify anything about Stanko's operation of his vehicle, other than the speed at which he was traveling, which he considered to be unsafe. Stanko testified that on the date he was arrested he was driving a 1996 Chevrolet Camaro that he had just purchased one to two months earlier and that had been driven fewer than 10,000 miles. He stated that the brakes, tires, and steering were all in perfect operating condition, the highway conditions were perfect, and he felt that he was operating his vehicle in a safe manner. He conceded that after passing Officer Breidenbach's vehicle, he drove at a speed of 85 miles per hour but testified that because he was aware of the officer's presence he was extra careful about the manner in which he operated his vehicle. He felt that he would have had no problem avoiding any collision at the speed that he was traveling. Stanko testified that he was fifty years old at the time of trial, drives an average of 50,000 miles a year, and has never had an accident.

Issue

Is Section 61-8-303(1), MCA, so vague that it violates the Due Process Clause found at Article II, Section 17, of the Montana Constitution? Stanko contends that Section 61-8-303(1), MCA, is unconstitutionally vague because it fails to give a motorist of ordinary intelligence fair notice of the speed at which he or she violates the law, and because it delegates an important public policy matter, such as the appropriate speed on Montana's highways, to policemen, judges, and juries for resolution on a case-by-case basis. . . . Section 61-8-303(1), MCA, provides as follows:

A person operating or driving a vehicle of any character on a public highway of this state shall drive the vehicle in a careful and prudent manner and at a rate of speed

no greater than is reasonable and proper under the conditions existing at the point of operation, taking into account the amount and character of traffic, condition of brakes, weight of vehicle, grade and width of highway, condition of surface, and freedom of obstruction to the view ahead. The person operating or driving the vehicle shall drive the vehicle so as not to unduly or unreasonably endanger the life, limb, property, or other rights of a person entitled to the use of the street or highway.

. . . The question is whether a statute that regulates speed in the terms set forth above gave Stanko reasonable notice of the speed at which his conduct would violate the law.

Reasoning

In Montana, we have established the following test for whether a statute is void on its face for vagueness: "A statute is void on its face if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." . . . No person should be required to speculate as to whether his contemplated course of action may be subject to criminal penalties. We conclude that, as a speed limit, Section 61-8-303(1), MCA, does not meet these requirements of the Due Process Clause of Article II, Section 17, of the Montana Constitution, nor does it further the values that the void-for-vagueness doctrine is intended to protect.

For example, while it was the opinion of Officer Breidenbach that 85 miles per hour was an unreasonable speed at the time and place where Stanko was arrested, he offered no opinion regarding what a reasonable speed at that time and place would have been. Neither was the attorney general, the chief law enforcement officer for the state, able to specify a speed that would have been reasonable for Stanko at the time and place where he was arrested. . . .

The difficulty that Section 61-8-303(1), MCA, presents as a statute to regulate speed on Montana's highways, especially as it concerns those interests that the void-for-vagueness doctrine is intended to protect, was further evident from the following discussion with the attorney general during the argument of this case:

Q. Well how many highway patrol men and women are there in the State of Montana?

A. There are 212 authorized members of the patrol. Of that number, about 190 are officers and on the road.

Q. And I understand there are no specific guidelines provided to them to enable them to know at what point, exact point, a person's speed is a violation of the basic rule?

A. That's correct, Your Honor, because that's not what the statute requires. We do not have a numerical limit. We have a basic rule statute that requires the officer to take into account whether or not the driver is driving in a careful and prudent manner, using the speed.

Q. And it's up to each of their individual judgments to enforce the law?

A. It is, Your Honor, using their judgment applying the standard set forth in the statute. . . .

It is evident from the testimony in this case and the arguments to the court that the average motorist in Montana would have no idea of the speed at which he or she could operate his or her motor vehicle on this state's highways without violating Montana's "basic rule" based simply on the speed at which he or she is traveling. Furthermore, the basic rule not only permits, but requires the kind of arbitrary and discriminatory enforcement that the Due Process Clause in general, and the void-for-vagueness doctrine in particular, are

designed to prevent. It impermissibly delegates the basic public policy of how fast is too fast on Montana's highways to "policemen, judges, and juries for resolution on an ad hoc and subjective basis."

. . . For example, the statute requires that a motor vehicle operator and Montana's law enforcement personnel take into consideration the amount of traffic at the location in question, the condition of the vehicle's brakes, the vehicle's weight, the grade and width of the highway, the condition of its surface, and its freedom from obstruction to the view ahead. However, there is no specification of how these various factors are to be weighted, or whether priority should be given to some factors as opposed to others. This case is a good example of the problems inherent in trying to consistently apply all of these variables in a way that gives motorists notice of the speed at which the operation of their vehicles becomes a violation of the law. . . .

Holding

We do not, however, mean to imply that motorists who lose control of their vehicles or endanger the life, limb, or property of others by the operation of their vehicles on a street or highway cannot be punished for that conduct pursuant to other statutes. . . . We simply hold that Montanans cannot be charged, prosecuted, and punished for speed alone without notifying them of the speed at which their conduct violates the law. . . . The judgment of the district court is reversed. . . .

Dissenting, *Turnage, C.J.*

This important traffic regulation has remained unchanged as the law of Montana . . . since 1955. . . . Apparently for the past forty-three years, other citizens driving upon our highways had no problem in understanding this statutory provision. Section 61-8-303(1), MCA, is not vague and most particularly is not unconstitutional as a denial of due process. . . .

Dissenting, *Regnier, J.*

The arresting officer described in detail the roadway where Stanko was operating his vehicle at 85 miles per hour. The roadway was very narrow with no shoulders. There were frost heaves on the road that caused the officer's vehicle to bounce. The highway had steep hills, sharp curves, and multiple no-passing zones. There were numerous ranch and field access roads in the area, which ranchers use for bringing hay to their cattle. The officer testified that at 85 miles per hour, there was no way for Stanko to stop in the event there had been an obstruction on the road beyond the crest of a hill. In the officer's judgment, driving a vehicle at the speed of 85 miles per hour on the stretch of road in question posed a danger to the rest of the driving public. In my view, Stanko's speed on the roadway where he was arrested clearly falls within the behavior proscribed by the statute. . . .

Questions for Discussion

1. What were the facts the police officer relied on in arresting Stanko for speeding?
Contrast these with the facts recited by Stanko in insisting that he was driving at a reasonable speed.
2. The statute employs a "reasonable person" standard and lists a number of factors to be taken into consideration in determining whether a motorist is driving at a proper rate

of speed. Was the decision of the Montana Supreme Court based on the lack of notice provided to motorists concerning a reasonable speed or based on the failure to provide law enforcement officers with clear standards for enforcement?

3. Why does Chief Justice Turnage refer to Section 61-8-303(1), MCA, as an “important traffic regulation” and stress that this has been the law for 43 years? Can you speculate as to why Montana failed to post speed limits on highways?
4. Do you agree with the majority opinion or with the dissenting judges?
5. The Montana state legislature reacted by establishing speed limits of “75 mph at all times on Federal . . . interstate highways outside an urban area” . . . and “70 mph during the daytime and 65 mph during the nighttime on any other public highway.” Why did the legislature believe that this statute solved the void-for-vagueness issue?

CASES AND COMMENTS

Stanko's Subsequent Arrests. Stanko was arrested for reckless driving on August 13, 1996, and again on October 1, 1996. He was charged on both occasions with operating a vehicle with “willful or wanton disregard for the safety of persons or property.” Two officers cited the fact that Stanko was driving between 117 and 120 miles per hour on narrow, hilly highways with the risk of encountering farm, ranch, tourist, and recreational vehicles and wildlife and placing emergency personnel at risk. Stanko possessed extraordinary confidence in his driving ability and dismissed the suggestion that he was driving in a wanton and reckless fashion.

He pointed out that he drove roughly 6,000 miles a month without an accident and that he had won several stock-car races in Oregon almost 20 years previously. The Montana Supreme Court unanimously ruled that Stanko should have reasonably understood that the manner in which he was driving posed a risk to other motorists who “do not assume the risk of driving in racetrack conditions.” The Montana Supreme Court stressed that Stanko’s conviction was not “based on speed alone” and dismissed his claim that the reckless driving law was unconstitutionally vague. Why did the Montana Supreme Court reach differing results in Stanko’s speeding and reckless driving cases? See *State v. Stanko*, 974 P.2d 1139 (Mont. 1998).

YOU DECIDE 2.1

David C. Bryan was involved in a relationship with a young woman during the fall semester of 1994 at the University of Kansas. The relationship ended, and Bryan allegedly repeatedly contacted the young woman, including personally approaching her in a university building. Bryan subsequently was charged under the Kansas stalking statute. The Kansas statute at the time prohibited an “intentional and malicious following or course of conduct when such following or course of conduct seriously alarms, annoys or harasses the person.” The statute failed to specify whether a “following” that “alarms, annoys or harasses” was to be measured by the standard of a “reasonable person.” Bryan contends that the statute is

unconstitutionally vague. How should the judge rule? How would you suggest the state legislature clarify the law? Consider the perspectives of a female victim and male defendant. See *State v. Bryan*, 910 P.2d 212 (Kan. 1996). Another Kansas case on stalking is *State v. Rucker*, 987 P.2d 1080 (Kan. 1999).

EQUAL PROTECTION

The U.S. Constitution originally did not provide for the **equal protection** of the laws. Professor Erwin Chemerinsky observes that this is not surprising, given that African Americans were enslaved and women were subject to discrimination. Slavery, in fact, was formally embedded in the legal system. Article I, Section 2 of the U.S. Constitution provides for the apportionment of the House of Representatives based on the “whole number of free persons” as well as three fifths of the slaves. This was reinforced by Article IV, Section 2, the Fugitive Slave Clause, which requires the return of a slave escaping into a state that does not recognize slavery.¹⁹

Immediately following the Civil War in 1865, Congress enacted and the states ratified the Thirteenth Amendment, which prohibits slavery and involuntary servitude. Discrimination against African Americans nevertheless continued, and Congress responded by approving the Fourteenth Amendment in 1868. Section 1 provides that “no state shall deprive any person of life, liberty or property without due process of law, or deny any person equal protection of the law.” The Supreme Court declared in 1954 that the Fifth Amendment Due Process Clause imposes an identical obligation to ensure the equal protection of the law on the federal government.²⁰

The Equal Protection Clause was rarely invoked for almost 100 years. Justice Oliver Wendell Holmes Jr., writing in 1927, typified the lack of regard for the Equal Protection Clause when he referred to the amendment as “the last resort of constitutional argument.”²¹ The famous 1954 Supreme Court decision in *Brown v. Board of Education* ordering the desegregation of public schools with “all deliberate speed” ushered in a period of intense litigation over the requirements of the clause.²²

Three Levels of Scrutiny

Criminal statutes typically make distinctions based on various factors, including the age of victims and the seriousness of the offense. For instance, a crime committed with a dangerous weapon may be punished more harshly than a crime committed without a weapon. Courts generally accept the judgment of state legislatures in making differentiations so long as a law is rationally related to a legitimate government purpose. Legitimate government purposes generally include public safety, health, morality, peace and quiet, and law and order. There is a strong presumption that a law is constitutional under this **rational basis test** or **minimum level of scrutiny test**.²³

In *Westbrook v. State*, 19-year-old Nicole M. Westbrook contested her conviction for consuming alcoholic beverages when under the age of 21. Westbrook argued that there was no

basis for distinguishing between a 21-year-old and an individual who was slightly younger. The Alaska Supreme Court recognized that there may be some individuals younger than 21 who possess the judgment and maturity to handle alcoholic beverages and that some individuals over 21 may fail to meet this standard. The court observed that states have established the drinking age at various points and that setting the age between 19 and 21 years of age seemed to be rationally related to the objective of ensuring responsible drinking. As a result, the court concluded that “even if we assume that Westbrook is an exceptionally mature 19-year-old, it is still constitutional for the legislature to require her to wait until she turns 21 before she drinks alcoholic beverages.”²⁴

In contrast, the courts apply a **strict scrutiny test** in examining distinctions based on race and national origin. Racial discrimination is the very evil that the Fourteenth Amendment was intended to prevent, and the history of racism in the United States raises the strong probability that such classifications reflect a discriminatory purpose. In *Strauder v. West Virginia*, the U.S. Supreme Court struck down a West Virginia statute as unconstitutional that limited juries to “white male persons who are twenty-one years of age.”²⁵

Courts are particularly sensitive to racial classifications in criminal statutes and have ruled that such laws are unconstitutional in almost every instance. The Supreme Court observed that “in this context . . . the power of the State weighs most heavily upon the individual or the group.”²⁶ In *Loving v. Virginia*, in 1967, Mildred Jeter, a Black woman, and Richard Loving, a white man, pled guilty to violating Virginia’s ban on interracial marriages and were sentenced to 25 years in prison, a sentence that was suspended on the condition that the Lovings leave Virginia. The Supreme Court stressed that laws containing racial classifications must be subjected to the “most rigid scrutiny” and determined that the statute violated the Equal Protection Clause. The Court failed to find any “legitimate overriding purpose independent of invidious racial discrimination” behind the law. The fact that Virginia “prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their justification, as measures designed to maintain White Supremacy. . . . There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”²⁷ The strict scrutiny test also is used when a law limits the exercise of “fundamental rights” (such as freedom of speech).

The Supreme Court has adopted a third, **intermediate level of scrutiny** for classifications based on gender. The decision to apply this standard rather than strict scrutiny is based on the consideration that although women historically have confronted discrimination, the biological differences between men and women make it more likely that gender classifications are justified. Women, according to the Court, also possess a degree of political power and resources that are generally not found in “isolated and insular minority groups.” Intermediate scrutiny demands that the state provide some meaningful justification for the different treatment of men and women and not rely on stereotypes or classifications that have no basis in fact. Justice Ruth Bader Ginsburg applied intermediate scrutiny in ordering that the Virginia Military Institute admit women and ruled that gender-based government action must be based on “an exceedingly persuasive justification. . . . The burden of justification is demanding and it rests entirely on the State.”²⁸

In *Michael M. v. Superior Court*, the U.S. Supreme Court upheld the constitutionality of California's "statutory rape law" that punished "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years."²⁹ Is it constitutional to limit criminal liability to males?

The Supreme Court noted that California possessed a "strong interest" in preventing illegitimate teenage pregnancies. The Court explained that imposing criminal sanctions solely on males roughly "equalized the deterrents on the sexes," because young men did not face the prospects of pregnancy and child rearing. The Court also deferred to the judgment of the California legislature that extending liability to females would likely make young women reluctant to report violations of the law.³⁰

In summary, there are three different levels of analysis under the Equal Protection Clause:

- *Rational Basis Test.* A classification is *presumed valid* so long as it is rationally related to a constitutionally permissible state interest. An individual challenging the statute must demonstrate that there is no rational basis for the classification. This test is used in regard to the "nonsuspect" categories of the poor, the elderly, and the mentally challenged and to distinctions based on age.
- *Strict Scrutiny Test.* A law singling out a racial or ethnic minority must be strictly necessary, and there must be no alternative approach to advancing a compelling state interest. This test is also used when a law limits fundamental rights.
- *Intermediate Scrutiny.* Distinctions on the grounds of gender must be substantially related to an important government objective. A law singling out women must be based on factual differences and must not rest on overbroad generalizations.

The next case in the textbook, *People of the Virgin Islands v. Simmonds*, asks you to consider whether the defendant was prosecuted and convicted under a statutory provision that constitutes gender discrimination against the male defendant.

DID THE AGGRAVATED ASSAULT STATUTE DISCRIMINATE AGAINST A MALE DEFENDANT?

PEOPLE OF THE VIRGIN ISLANDS V. SIMMONDS, 58 V.I. 3 (SUPER. CT. 2012)

Opinion by Donohue, J.

Issue

Was Simmonds's conviction for aggravated assault and battery based on a statute that denied him equal protection of the law based on his gender?

Facts

Gary Simmonds assaulted his wife, Tracia Simmonds, during an argument in May 2005. Tracia Simmonds immediately went to the Ann Schrader Command precinct on St. Croix to report the assault. Virgin Islands police arrested Gary Simmonds later that day for “slapping his wife in the face, therefore causing visible injuries.” At the time, Gary Simmonds was 33 years old, had a medium build, weighed 197 pounds, and stood 5’9” tall. He was sober and unarmed. Gary Simmonds was charged with one count of aggravated assault and battery as an act of domestic violence. He pled not guilty. On September 22, 2005, Gary Simmonds was tried by this Court in a bench trial. Four witnesses testified on behalf of the People. Gary Simmonds did not put on a case.

Based on the testimony and evidence presented at trial, the Court found that Tracia Simmonds and Gary Simmonds were married. At the time of the assault, Gary Simmonds was an adult male and Tracia Simmonds was an adult female. People’s Exhibits 1 and 2 were photographs that showed a red, swollen area around the eye region on the left side of Tracia Simmonds’s face. Based on Tracia Simmonds’s dark-skinned complexion, the blow to her face could not have been weak in order to cause the degree of redness depicted. Despite her testimony, Tracia Simmonds was not the initial aggressor. The police officers’ testimonies that Gary Simmonds assaulted Tracia Simmonds without provocation were more credible. The People proved beyond a reasonable doubt that . . . Gary Simmonds used unlawful violence on Tracia Simmonds with the intent to injure her and therefore was guilty of aggravated assault and battery.

Gary Simmonds was sentenced to six months incarceration, suspended, and one year of probation. The Court also ordered Simmonds to complete an anger management program for batterers because he was in contact with Tracia Simmonds after the trial. In August 2006, the Office of Probation petitioned to revoke Simmonds’s probation because Tracia Simmonds had obtained a permanent restraining order against him in a . . . domestic violence action. The Court held a hearing and found cause for revoking Simmonds’s probation. The Court sentenced Simmonds to time served and extended his probation for six months. Gary Simmonds was discharged from probation in April 2007.

Simmonds appealed his conviction . . . claiming that the aggravated assault and battery statute denied him equal protection based on his gender.

Reasoning

The Fourteenth Amendment to the United States Constitution prohibits States, and by congressional extension Territories, from denying equal protection of the law to any person within their respective jurisdictions. “‘Equal protection’ . . . emphasizes disparity in treatment by a [government] between classes of individuals whose situations are arguably indistinguishable.” Statutes providing for different treatment on the basis of gender establish a classification subject to intermediate scrutiny under the Equal Protection Clause. The fact that a statute “discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review.” The Government must show that the gender classification at issue “serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’” “If the [government]’s objective is legitimate and important, [the Court] next determine[s] whether the requisite direct, substantial relationship between objective and means is present.” “The purpose of requiring that close relationship is to assure that the validity of a

classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women."

Simmonds challenges the constitutionality of the . . . aggravated assault and battery statute as denying equal protection of the law to males based on their gender. This statute elevates simple assault and battery to aggravated assault and battery if the act is committed by an adult male on a female. Males face harsher punishment than females for the same action. Because on its face the statute contains a classification that distinguishes on the basis of gender, it is subject to scrutiny under the Equal Protection Clause.

Under the Virgin Islands Code . . . [a]ssault and battery involves the use of "unlawful violence upon the person of another with intent to injure him, whatever be the means or the degree of violence used. . . ." An assault or battery "unattended with circumstances of aggravation" is simple assault and battery. Assault and battery becomes aggravated if in part it is committed . . . "[by] an adult male, upon the person of a female or child, or being an adult female, upon the person of a child. . . .

The People proffered [as a basis] to justify the gender-based classification in the aggravated assault and battery statute . . . the prevalence of gender-based domestic violence. "[But], the test for determining the validity of a gender-based classification . . . must be applied free of fixed notions concerning the roles and abilities of males and females." . . .

The People are correct that legislation can serve to discourage and eliminate gender-based domestic violence. . . . Justifications offered in support of gender-based classifications "must be genuine, not hypothesized or invented [after the fact] in response to litigation." They cannot rest "on overbroad generalizations about the different talents, capacities, or preferences of males and females." "Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where . . . the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women."

Unfortunately, domestic violence remains a difficult and disturbing social problem that must be eradicated. But as Simmonds correctly pointed out, "[d]omestic violence is a problem for everybody—men, women, children." It is not a problem unique to the Virgin Islands . . . "[and] until approximately twenty-five years ago, the [American] criminal justice system did not recognize domestic violence as an issue of concern, much less focus on methods to attack it."

Holding

If Section 298's goal is to deter violence, particularly domestic violence . . . then the statute fails to achieve that goal because assault and battery as an act of domestic violence committed against a male by a female or another male . . . can only be prosecuted as simple assault and battery, a misdemeanor offense. The U.S. Constitution guarantees equal protection based on gender. Classifications based on gender must have legitimate objectives that are substantially related to the statute's purpose. Here, there is no legitimate basis for punishing males more severely than females for committing the same criminal act: assault and battery.

"Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection. . . . Here . . . the government's purpose can be just as well "served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the [government] cannot be permitted

to classify on the basis of sex.” Accordingly, the Court finds that the People have failed to show that important government objectives are served by the Virgin Islands aggravated assault statute and have not shown that the statute is substantially related to the achievement of those objectives. Since the statute employs a gender-based classification on its face and does not survive intermediate scrutiny review, the statute violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Questions for Discussion

1. What are the facts in *Simmonds*, and why does Simmonds contend that his conviction for aggravated assault and battery violates the Equal Protection Clause of the U.S. Constitution?
2. What is the legal test applied by the court to determine whether a law constitutes gender discrimination?
3. Explain whether you agree or disagree with the holding of the court in *Simmonds* that the important government objectives of deterring and punishing domestic violence are served by the Virgin Islands aggravated assault statute although the government of the Virgin Islands failed to demonstrate that the statute is substantially related to the achievement of this objective. What of the court’s conclusion that there is no meaningful justification for the differential treatment of men and women under the Virgin Islands statute?
4. Does the law promote gender stereotypes or reflect the fact as argued by the government of the Virgin Islands during oral argument that because men commit domestic violence more frequently than women harsher penalties are required to be imposed on men than on women to deter domestic violence?
5. What of the argument made by the government of the Virgin Islands in a subsequent case that there is a substantial likelihood that because men are “bigger and stronger” than women batteries committed by men against women are likely to result in greater harm than batteries committed by women against men and that as a result batteries committed by men against women are justifiably punished more harshly than batteries committed by women against men? See *People of the Virgin Islands v. Lake*, 59 V.I. 178 (Super. Ct. 2013).
6. In *State v. Houston*, Brian Houston was convicted of an assault upon Amy Stocks. At the sentencing hearing, the judge sentenced Houston to 10 days in jail, in part based on the defendant’s lack of remorse and the unprovoked nature of the attack. The judge also stated, “I generally give a short jail sentence when men are convicted of beating women or hitting women because I take a very dim view of men hitting women,” and ordered jail time so that Houston would know that he “can’t go around hitting women.” Did Houston’s sentence violate the Equal Protection Clause of the U.S. Constitution? See *State v. Houston*, 534 A.2d 1293 (Me. 1987).
7. Was Simmonds’s punishment for aggravated battery proportionate to the crime he committed? Note that the South Carolina Supreme Court in *State v. Wright*, 563 S.E.2d 311 (S.C. 2000), and appellate courts in North Carolina and California have found statutes similar to the statutes in *Simmonds* to be constitutional because of the differential physical sizes and strengths of males and females. As a result, an assault by a male is likely to cause greater harm than an assault by a female. The judges reason that although there are exceptions to this generalization, a statute is not required to adjust the law because of a situation that does not fit the overwhelming number of cases. Do you agree with the decision in *State v. Wright*?

8. How would you draft a domestic violence statute that the court in *Simmonds* would find constitutional?
9. Can you explain why Tracia Simmonds testified that she was the aggressor although the court found the testimony of the police officers that Gary Simmonds was the aggressor more credible?

CASES AND COMMENTS

Detention of Japanese Americans During World War II. In *Korematsu v. United States*, the U.S. Supreme Court upheld the conviction of Fred Korematsu, an American citizen of Japanese descent, for remaining in San Leandro, California, in defiance of Civilian Exclusion Order No. 34 issued by the commanding general of the Western Command, U.S. Army. This prosecution was undertaken pursuant to an act of Congress of March 21, 1942, that declared it was a criminal offense punishable by a fine not to exceed \$5,000 or by imprisonment for not more than a year for a person of Japanese ancestry to remain in "any military area or military zone" established by the president, the secretary of defense, or a military commander. Japanese Americans who were ordered to leave their homes were detained in remote relocation camps. Exclusion Order No. 34 was one of a number of orders and proclamations issued under the authority of President Franklin Delano Roosevelt; it stated that "successful prosecution of the war [World War II] requires every possible protection against espionage and against sabotage to national defense material, national defense premises and national-defense utilities." Justice Hugo Black recognized that legal restrictions that "curtail the civil rights of a single racial group are immediately suspect" and that individuals excluded from the military zone would be subject to relocation and detention without trial in a camp far removed from the West Coast. The Supreme Court nevertheless affirmed the constitutionality of the order by a vote of 6–3. The majority concluded the following:

Korematsu was not excluded from the Military Area because of hostility to him or to his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders, . . . determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—say that at that time these actions were unjustified.

Justice Frank Murphy questioned the constitutionality of this order, which he contended unconstitutionally excluded both citizens and noncitizens of Japanese ancestry from the Pacific Coast. He concluded that the "exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism." Was this a case of racial discrimination or

an effort to safeguard the United States from an attack by Japan? What is the standard of review? See *Korematsu v. United States*, 323 U.S. 214 (1944).

In *Trump v. Hawaii*, the U.S. Supreme Court upheld the constitutionality of President Trump's executive order restricting immigration from certain countries into the United States. Chief Justice Roberts wrote about *Korematsu* that the "forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission." Two justices interpreted this statement as overruling *Korematsu*. See *Trump v. Hawaii*, 585 U.S. ____ (2018).

YOU DECIDE 2.2

Jane Doe cohabited with her former same-sex fiancé between 2010 and 2015 and moved out of their shared apartment when the relationship ended. Doe contacted the police to report that she was assaulted by her ex-fiancé in a hotel parking lot. Following a second confrontation, Doe's petition for an order of protection against her ex-fiancé was denied by a family court judge on the grounds that the South Carolina Protection From Domestic Abuse Act "leaves unmarried, same-sex victims of abuse without the benefit . . . afforded to their heterosexual counterparts." Doe alleged that by purposefully defining household members" as "a male and female who are cohabiting or formerly have cohabited" the South Carolina General Assembly intentionally denied same-sex individuals the protections available to individuals in opposite-sex relationships.

Statistics reveal that "women are far more at risk from domestic violence at the hands of men than vice versa." Thus, the State of South Carolina maintains that the General Assembly defined "household members" as "a male and female who are cohabiting or formerly have cohabited" in a justifiable effort to address the primary problem of domestic violence, which is violence by men against women within opposite-sex couples. As a judge, would you hold that the South Carolina statute does not violate the Equal Protection Clause? See *Doe v. State*, 808 S.E.2d 807 (S.C. 2017).

Now consider the following case. Around 4:30 a.m., Indianapolis police officer Jerry Durham responded to a report of three females exposing themselves to the occupants of other vehicles. Durham observed 16-year-old C.T. and another woman "pulling their bra[s] and their shirt[s] down over their exposed breast[s]." Indiana punishes an individual who "knowingly or intentionally appear[s] in a public place in a state of nudity with the intent to be seen by another person." Indiana Code section 35-45-4-1(d) (2008) defines *nudity* as "the showing of the female breast with less than a fully opaque covering of any part of the nipple[.]". Officer Durham at trial testified that he had seen C.T.'s nipple during the incident. The juvenile court found that C.T. had "committed what would be public nudity if committed by an adult and discharged her to her mother." C.T. claims that her conviction violated equal protection under law because the display of male breasts does not constitute a criminal offense. Do you agree? See *C.T. v. State*, 939 N.E.2d 626 (Ind. Ct. App. 2010).

FREEDOM OF SPEECH

The **First Amendment** to the U.S. Constitution provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” The U.S. Supreme Court extended this prohibition to the states in a 1925 decision in which the Court proclaimed that “freedom of speech and of the press . . . are among the fundamental personal rights and ‘liberties’ protected under the Due Process Clause of the Fourteenth Amendment from impairment by the States.”³¹

The Fourteenth Amendment to the Constitution applies to the states and was adopted following the Civil War in order to protect African Americans against the deprivation of “life, liberty and property without due process” as well as to guarantee former slaves “equal protection of the law.” The Supreme Court has held that the Due Process Clause incorporates various fundamental freedoms that generally correspond to the provisions of the **Bill of Rights** (the first 10 amendments to the U.S. Constitution that create rights against the federal government). This **incorporation theory** has resulted in a fairly uniform national system of individual rights that includes freedom of expression.

The famous, and now deceased, First Amendment scholar Thomas I. Emerson identified four functions central to democracy performed by freedom of expression under the First Amendment³²:

- Freedom of expression contributes to *individual self-fulfillment* by encouraging individuals to express their ideas and creativity.
- Freedom of expression ensures a vigorous “*marketplace of ideas*” in which a diversity of views are expressed and considered in reaching a decision.
- Freedom of expression *promotes social stability* by providing individuals the opportunity to be heard and to influence the political and policy-making process. This promotes the acceptance of decisions and discourages the resort to violence.
- Freedom of expression ensures that there is a steady stream of innovative ideas and enables the *government to identify and address newly arising issues*.

The First Amendment is vital to the United States’ free, open, and democratic society. Justice William Douglas wrote in *Terminiello v. Chicago*³³ that speech

may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with the conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Justice Robert H. Jackson, reflecting on his experience as a prosecutor during the Nuremberg trials of Nazi war criminals, cautioned Justice Douglas that the

choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic

with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.

Justice Jackson is clearly correct that there must be some limit to freedom of speech. But where should the line be drawn? The Supreme Court articulated these limits in *Chaplinsky v. New Hampshire* and observed that there are “certain well-recognized categories of speech which may be permissibly limited under the First Amendment.” The Supreme Court explained that these “utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”³⁴ The main categories of speech for which *content is not protected by the First Amendment* and that may result in the imposition of criminal punishment are as follows:

- *Fighting Words.* Words directed to another individual or individuals that an ordinary and reasonable person should be aware are likely to cause a fight or breach of the peace are prohibited under the **fighting words** doctrine. In *Chaplinsky v. New Hampshire*, the Supreme Court upheld the conviction of a member of the Jehovah’s Witnesses who, when distributing religious pamphlets, attacked a local marshal with the accusation that “you are a God damned racketeer” and “a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.”
- *Incitement to Violent Action.* A speaker, when addressing an audience, is prohibited from **incitement to violent action**. In *Feiner v. New York*, Feiner addressed a racially mixed crowd of 75 or 80 people. He was described as “endeavoring to arouse” the African Americans in the crowd “against the whites, urging that they rise up in arms and fight for equal rights.” The Supreme Court ruled that “when clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.”³⁵ On the other hand, in *Terminiello v. Chicago*, the Supreme Court stressed that a speaker could not be punished for speech that merely “stirs to anger, invites dispute, brings about a condition of unrest, or creates a disturbance.”³⁶
- *Threat.* A developing body of law prohibits threats of bodily harm directed at individuals. Judges must weigh and balance a range of factors in determining whether a statement constitutes a political exaggeration or a **true threat**. In *Watts v. United States*, the defendant proclaimed to a small gathering following a public rally on the grounds of the Washington Monument that if inducted into the army and forced to carry a rifle, “the first man I want to get in my sights is L.B.J. [President Lyndon Johnson]. . . . They are not going to make me kill my black brothers.” The onlookers greeted this statement with laughter. Watts’s conviction was overturned by the U.S. Supreme Court, which ruled that the government had failed to demonstrate that Watts had articulated a true threat, and that these types of bold statements were to be expected in a dynamic and democratic society divided over the Vietnam War.³⁷

- *Obscenity.* Obscene materials are considered to lack “redeeming social importance” and are not accorded constitutional protection. Drawing the line between obscenity and protected speech has proven problematic. The Supreme Court conceded that obscenity cannot be defined with “God-like precision,” and Justice Potter Stewart went so far as to pronounce in frustration that the only viable test seemed to be that he “knew obscenity when he saw it.”³⁸ The U.S. Supreme Court was finally able to agree on a test for obscenity in *Miller v. California*. The Supreme Court declared that obscenity was limited to works that when taken as a whole, in light of contemporary community standards, appeal to the prurient interest in sex; are patently offensive; and lack serious literary, artistic, political, or scientific value. This qualification for scientific works means that a medical textbook portraying individuals engaged in “ultimate sexual acts” likely would not constitute obscenity.³⁹ Child pornography may be limited despite the fact that it does not satisfy the *Miller* standard.⁴⁰ (Obscenity and pornography are discussed in Chapter 15.)
- *Libel.* You should remain aware that the other major limitation on speech, **libel**, is a civil law rather than a criminal action. This enables individuals to recover damages for injury to their reputations. In *New York Times Co. v. Sullivan*, the U.S. Supreme Court severely limited the circumstances in which public officials could recover damages and held that public officials may not recover damages for a defamatory falsehood relating to their official conduct “unless . . . the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”⁴¹ The Court later clarified that this “reckless disregard” or actual knowledge standard applied only to “public figures” and that states were free to apply a more relaxed, simple negligence (lack of reasonable care in verifying the facts) standard in suits for libel brought by private individuals.⁴² Speech lacking First Amendment protection shares several common characteristics:
 - The expression lacks social value.
 - The expression directly causes social harm or injury.
 - The expression is narrowly defined in order to avoid discouraging and deterring individuals from engaging in free and open debate.

Keep in mind that these are narrowly drawn exceptions to the First Amendment’s commitment to a lively and vigorous societal debate. The general rule is that the government may neither require nor substantially interfere with individual expression. The Supreme Court held in *West Virginia State Board of Education v. Barnette* that a student may not be compelled to pledge allegiance to the American flag. The Supreme Court observed that “if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or action their faith therein.” This commitment to a free “marketplace of ideas” is based on the belief that delegating the decision as to what “views shall be voiced largely into the hands of each of us” will “ultimately produce a more capable citizenry and more perfect polity and . . .

that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.²⁴³

Overbreadth

The doctrine of **overbreadth** is an important aspect of First Amendment protection. This provides that a statute is unconstitutional that is so broadly and imprecisely drafted that it encompasses and prohibits a substantial amount of protected speech relative to the coverage of the statute. In *New York v. Ferber*, the U.S. Supreme Court upheld a New York child pornography statute that criminally punished an individual for promoting a “performance which includes sexual conduct by a child less than sixteen years of age.” Sexual conduct was defined to include “lewd exhibition of the genitals.” Justice Byron White was impatient with the concern that although the law was directed at hard-core child pornography, “[s]ome protected expression ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute.” White doubted whether these applications of the statute to protected speech constituted more than a “tiny fraction of the materials” that would be affected by the law, and he expressed confidence that prosecutors would not bring actions against these types of publications. This, in short, is the “paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications.”²⁴⁴

Hate Speech

Hate speech is one of the central challenges confronting the First Amendment. This is defined as speech that denigrates, humiliates, and attacks individuals on account of race, religion, ethnicity, nationality, gender, sexual preference, or other personal characteristics and preferences. Hate speech should be distinguished from hate crimes or penal offenses that are directed against an individual who is a member of one of these “protected groups.”

The United States is an increasingly diverse society in which people inevitably collide, clash, and compete over jobs, housing, and education. Racial, religious, and other insults and denunciations are hurtful, increase social tensions and divisions, and possess limited social value. This type of expression also has little place in a diverse society based on respect and regard for individuals of every race, religion, ethnicity, and nationality.

Regulating this expression, on the other hand, runs the risk that artistic and literary depictions of racial, religious, and ethnic themes may be deterred and denigrated. In addition, there is the consideration that debate on issues of diversity, affirmative action, and public policy may be discouraged. Society benefits when views are forced out of the shadows and compete in the sunlight of public debate.

The most important U.S. Supreme Court ruling on hate speech is *R.A.V. v. St. Paul*. In *R.A.V.*, several white juveniles burned a cross inside the fenced-in yard of a Black family. The young people were charged under two statutes, including the St. Paul Bias-Motivated Crime Ordinance (St. Paul Minn. Legis. Code § 292.02), which provided that “whoever places on public or private property a symbol, object, . . . including and not limited to, a burning cross

or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment . . . on the basis of race, color, creed, religion or gender commits disorderly conduct . . . shall be guilty of a misdemeanor.”⁴⁵ The Supreme Court noted that St. Paul punishes certain fighting words, yet permits other equally harmful expressions. This discriminates against speech based on the content of ideas. For instance, what about symbolic attacks against a greedy real estate developer?

A year later, in *Wisconsin v. Mitchell*, in 1993, the Supreme Court ruled that a Wisconsin statute that enhanced the punishment of individuals convicted of hate crimes did not violate the defendant’s First Amendment rights. Todd Mitchell challenged a group of other young Black males by asking whether they were “hyped up to move on white people.” As a young white male approached the group, Mitchell exclaimed, “There goes a white boy; go get him,” and led a collective assault on the victim. The Wisconsin court increased Mitchell’s prison sentence for aggravated assault from a maximum of two years to a term of four years based on his intentional selection of the person against “whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person.”⁴⁶ Mitchell creatively claimed that he was being punished more severely for harboring and acting on racially discriminatory views in violation of the First Amendment. The Supreme Court, however, ruled that Mitchell was being punished for his harmful act rather than for the fact that his act was motivated by racist views. The enhancement of Mitchell’s sentence was recognition that acts based on discriminatory motives are likely “to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest.” Mitchell also pointed out that the prosecution was free to introduce a defendant’s prior racist comments at trial to prove a discriminatory motive or intent and that this would “chill” racist speech. The Supreme Court held that it was unlikely that citizens would limit the expression of their racist views based on the fear that these statements would be introduced one day against them at a prosecution for a hate crime.

In 2003, in *Virginia v. Black*, the U.S. Supreme Court held unconstitutional a Virginia law prohibiting cross burning with “an intent to intimidate a person or group of persons.”⁴⁷ This law, unlike the St. Paul statute, did not discriminate on the basis of the content of the speech. The Court, however, determined that the statute’s provision that the jury is authorized to infer an intent to intimidate from the act of burning a cross without any additional evidence “permits a jury to convict in every cross burning case in which defendants exercise their constitutional right not to put on a defense.” This provision also makes “it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case.” The Virginia law failed to distinguish between cross burning intended to intimidate individuals and cross burning intended to make a political statement by groups such as the Ku Klux Klan that view the flaming cross as a symbolic representation of their political point of view.

In the next case in the text, *In re George T.*, the California Supreme Court was asked to determine whether a student poem constituted a criminal threat. Do you agree with the court’s judgment?

DID A STUDENT POEM CONSTITUTE A CRIMINAL THREAT?

IN RE GEORGE T., 93 P.3D 1007 (CAL. 2004)

Opinion by Moreno, J.

Issue

We consider in this case whether a high school student made a criminal threat by giving two classmates a poem labeled "Dark Poetry," which read, in part,

I am Dark, Destructive, & Dangerous. I slap on my face of happiness but inside I am evil!! For I can be the next kid to bring guns to kill students at school. So parents watch your children cuz I'm BACK!!

Facts

Fifteen-year-old George T. (minor) had been a student at Santa Teresa High School in Santa Clara County for approximately two weeks when on Friday, March 16, 2001, toward the end of his honors English class, he approached fellow student Mary S. and asked her, "Is there a poetry class here?" Minor then handed Mary three sheets of paper and told her, "Read these." Mary did so. The first sheet of paper contained a note stating, "These poems describe me and my feelings. Tell me if they describe you and your feelings." The two other sheets of paper contained poems. Mary read only one of the poems, which was labeled "Dark Poetry" and entitled "Faces":

Who are these faces around me? Where did they come from? They would probably become the next doctors or loirs [sic] or something. All really intelligent and ahead in their game. I wish I had a choice on what I want to be like they do. All so happy and vagrant. Each original in their own way. They make me want to puke. For I am Dark, Destructive, & Dangerous. I slap on my face of happiness but inside I am evil!! For I can be the next kid to bring guns to kill students at school. So parents watch your children cuz I'm BACK!!

by: Julius AKA Angel 1

Minor had a "straight face," not "show[ing] any emotion, neither happy or sad or angry or upset," when he handed the poems to Mary. Upon reading the "Faces" poem, Mary became frightened, handed the poems back to minor, and immediately left the campus in fear. After she informed her parents about the poem, her father called the school, but it was closed. Mary testified she did not know minor well, but they were on "friendly terms." When asked why she felt minor gave her the poem to read, she responded, "I thought maybe because the first day he came into our class, I approached him because that's the right thing to do" and because she continued to be nice to him.

After Mary handed the poems back to minor, minor approached Erin S. and Natalie P., students minor had met during his two weeks at Santa Teresa High School. Erin had been

introduced to minor a week prior and had subsequently spoken with him on only three or four occasions, whereas Natalie considered herself minor's friend and had come to know him well during their long after-school conversations, which generally lasted [from] an hour to an hour and a half and included discussions of poetry. Minor handed Erin a "folded up" piece of paper and asked her to read it. He also handed a similarly folded piece of paper to Natalie, who was standing with Erin. Because Erin was late for class, she only pretended to read the poem to be polite but did not actually read it. She placed the unread poem in the pocket of her jacket.

The next day, Saturday, Mary e-mailed her English teacher William Rasmussen to report her encounter with minor. [A substitute teacher had been teaching the class on the day that Mary received the note.] She wrote:

I'm sorry to bother you over the weekend, but I don't think this should wait until Monday. During 6th period on Friday, 3/16, the guy in our class called Julius (actually his name is Theodore?) gave me two poems to read. He explained to me that these poems "described him and his feelings," and asked if I "felt the same way." I was surprised to find that the poems were about how he is "nice on the outside," and how he's "going to be the next person to bring a gun to school and kill random people." I told him to bring the poems to Room 315 to Ms. Gonzalez because [she] is in charge of poetry club. He said he would but I don't know for sure if he did.

Mary remained in fear throughout the weekend, because she understood the poem to be personally threatening to her, as a student. Asked why she felt the poem was a threat, Mary responded:

It's obvious he thought of himself as a dark, destructive, and dangerous person. And if he was willing to admit that about himself and then also state that he could be the next person to bring guns and kill students, then I'd say that he was threatening.

She understood the term "dark poetry" to mean "angry threats; any thoughts that aren't positive."

Rasmussen called Mary on Sunday regarding her e-mail. Mary sounded very shaken during the conversation, and based on this and on what she stated about the contents of the poem, Rasmussen contacted the school principal and the police. He read "Faces" for the first time during the jurisdictional hearing and, upon reading it, felt personally threatened by it, because, according to Rasmussen, "He's saying he's going to come randomly shoot." His understanding of "dark poetry" was that it entailed "the concept of death and causing and inflicting a major bodily pain and suffering. There is something foreboding about it."

On Sunday, March 18, 2001, officers from the San Jose Police Department went to minor's uncle's house, where minor and his father were residing. An officer asked minor, who opened the door when the officers arrived, whether there were any guns in the house. Minor "nodded." Minor's uncle was surprised that minor was aware of his guns, and handed the officers a .38-caliber handgun and a rifle. When asked about the poems disseminated at school, minor handed an officer a piece of paper he took from his pocket. The paper contained a poem entitled, "Faces in My Head," [which read as follows]:

Look at all these faces around me.

They look so vacant.

They have their whole lives ahead of them.

They have their own individuality.

Those kind of people make me wanna puke.
For I am a slave to very evil masters.
I have no future that I choose for myself.
I feel as if I am going to go crazy.
Probably I would be the next high school killer.
A little song keeps playing in my head.
My daddy is worth a dollar not even 100 cents.
As I look at these faces around me
I wonder why r they so happy.
What do they have that I don't.
Am I the only one with the messed up mind.
Then I realize, I'm cursed!

As with the poem titled "Faces," this poem was labeled "dark poetry," but it was not shown or given to anyone at school. Minor had drafted "Faces in My Head" that morning in an attempt to capture what he had written in "Faces," because he wanted a copy for his poetry collection. Minor was taken into custody.

Police officers went to the school the following Monday to investigate the dissemination of the poem. Erin was summoned to the vice-principal's office and asked whether minor had given her any notes. She responded in the affirmative, realized that the poem was still in the pocket of her jacket, and retrieved it. The paper contained a poem entitled "Faces," which was the same poem given to Mary. Upon reading the poem for the first time in the vice-principal's office, Erin became terrified and broke down in tears, finding the poem to be a personal threat to her life. She testified that she was not in the poetry club and had no interest in the subject.

Natalie, who testified on behalf of minor, recalled that minor said, "Read this" as he handed her and Erin the pieces of paper. The folded-up sheet of paper Natalie received contained a poem entitled, "Who Am I." When a police officer went to Natalie's home to inquire about the poem minor had given her on Friday, Natalie was not completely cooperative and truthful, telling the officer that the poem was about water and dolphins and that she believed it was a love poem. The police retrieved the poem from Natalie's trash can and although it was torn, some of it could still be deciphered:

... I created? ... cause it really ... feel as if ... stolen from ... of peace ... Taken to a place that you hate. Your locked up and when your let out of your cage it is to perform. Not able to be yourself and always hiding & thinking would people like me if I behaved differently? by Julius AKA Angel.

Natalie did not feel threatened by the poem; rather it made her "feel sad" because "it was kind of lonely." She testified that "dark poetry is . . . relevant to like pure emotions, like sadness, loneliness, hate or just like pure emotions. Sometimes it tells a story, like a dark story." Based on her extended conversations with minor, Natalie found him to be "mild and calm and very serene" and did not consider him to be violent.

Minor testified the poem "Faces" was not intended to be a threat, and because Erin and Natalie were his friends, he did not think they would have taken his poems as such. He thought of poetry as art and stated that he was very much interested in the subject, particularly as

a medium to describe “emotions instead of acting them out.” He wrote “Faces” during his honors English class on the day he showed it to Mary and Erin. Minor was having a bad day as a consequence of having forgotten to ask his parents for lunch money and having to forgo lunch that day, and because he was unable to locate something in his backpack. He had many thoughts going through his head, so he decided to write them down as a way of getting them out. The poem “Who Am I,” which was given to Natalie, was written the same day as “Faces,” but was written during the lunch period. Neither poem was intended to be a threat. Instead they were “just creativity.”

Minor and his friends frequently joked about the school shootings at Columbine High School in Colorado (where, in 1999, 2 students killed 12 fellow students and one faculty member). They would jokingly say, “I’m going to be the next Columbine kid.” Minor testified that Natalie and Erin had been present when he and some of his friends had joked about Columbine, with someone stating that “I’ll probably be the next Columbine killer,” and indicating who would be killed and who would be spared. Given this history, minor believed Natalie and Erin would understand the poems as jokes.

The poems were labeled “dark poetry” to inform readers that they were exactly that, and minor testified,

If anybody was supposed to read this poem, or let’s say if my mom ever found my poem or something of that nature, I would like them to know that it was dark poetry. Dark poetry is usually just an expression. It’s creativity. It is not like you’re actually going to do something like that, basically.

Asked why he wrote, “For I can be the next kid to bring guns to school and kill students,” minor responded:

The San Diego killing [on March 5, 2001, a student at Santana High School shot and killed 2 students and wounded 13 others] was about right around this time. So since I put the three Ds—dark, destructive, and dangerous—and since I said—“I am evil,” and since I was talking about people around me—faces—how I said, like, how they would make me want to—did I say that?—well, even if I didn’t—yeah, I did say that. Okay. So, um, I said from all these things, it sounds like, for I can be the next Columbine kid, basically. So why not add that in? And so, “Parents, watch your children, because I’m back,” um, I just wanted to—kind of like a dangerous ending, like a—um, just like ending a poem that would kind of get you, like,—like, whoa, that’s really something.

Minor stated that he did not know Mary and did not give her any poems. However, he was unable to explain how Mary was able to recount the contents of the “Faces” poem.

On cross-examination, minor conceded that he had had difficulties in his two previous schools, including being disciplined for urinating on a wall at his first school, and had been asked to leave his second school for plagiarizing from the internet. He explained that the urination incident was caused by a doctor-verified bladder problem. He denied having any ill will toward the school district, but he conceded when pressed by the prosecutor that he felt the schools “had it in for me.”

An amended petition under Welfare and Institutions Code section 602 was filed against minor, alleging minor made three criminal threats in violation of Penal Code section 422. The victims of the alleged threats were Mary (count 1), Erin (count 3), and Rasmussen (count 2).

Following a contested jurisdictional hearing, the juvenile court found true the allegations with respect to Mary and Erin but dismissed the allegation with respect to Rasmussen. At the hearing, the court adjudicated minor a ward of the court and ordered a 100-day

commitment in juvenile hall. Minor appealed, challenging the sufficiency of the evidence to support the juvenile court's finding that he made criminal threats. Over a dissent, the court of appeal affirmed the juvenile court in all respects with the exception of remanding the matter for the sole purpose of having that court declare the offenses to be either felonies or misdemeanors. We granted review and now reverse.

Holding

For the foregoing reasons, we hold the poem entitled "Faces" and the circumstances surrounding its dissemination fail to establish that it was a criminal threat, because the text of the poem, understood in light of the surrounding circumstances, was not "so unequivocal, unconditional, immediate, and specific as to convey to [the two students] a gravity of purpose and an immediate prospect of execution of the threat." Our conclusion that the poem was not an unequivocal threat disposes of the matter and we need not, and do not, discuss minor's contention that he did not harbor the specific intent to threaten the students, as required by section 422.

This case implicates two apparently competing interests: a school administration's interest in ensuring the safety of its students and faculty versus students' right to engage in creative expression. Following Columbine, Santee, and other notorious school shootings, there is a heightened sensitivity on school campuses to latent signs that a student may undertake to bring guns to school and embark on a shooting rampage. Such signs may include violence-laden student writings. For example, the two student killers at Columbine had written poems for their English classes containing "extremely violent imagery." Ensuring a safe school environment and protecting freedom of expression, however, are not necessarily antagonistic goals.

Minor's reference to school shootings and his dissemination of his poem in close proximity to the Santee school shooting no doubt reasonably heightened the school's concern that minor might emulate the actions of previous school shooters. Certainly, school personnel were amply justified in taking action following Mary's e-mail and telephone conversation with her English teacher, but that is not the issue before us. We decide here only that minor's poem did not constitute a criminal threat.

For the foregoing reasons, we reverse the judgment of the court of appeal.

Concurring, Baxter, J.

I agree the evidence does not establish this specific element. The writing, in the form of a poem, that defendant handed to Mary S. and Erin S. said that the protagonist, "Julius AKA Angel," "can be the next kid to bring guns to kill students at school." It did not say, in so many words, that defendant presently intended to do so. And the surrounding circumstances did not lend unconditional meaning to this conditional language. That said, there is no question that defendant's ill-chosen words were menacing by any common understanding, both on their face and in context. The terror they elicited in Mary S., and the concern they evoked in the school authorities, were real and entirely reasonable. It is safe to say that fears arising from a raft of high school shooting rampages, including those in Colorado and Santee, California, are prevalent among American high school students, teachers, and administrators. Certainly this was so on March 16, 2001, only eleven days after the Santee incident had occurred. That is the day defendant selected to press his violent writing on two vulnerable

and impressionable young schoolmates who hardly knew him. Defendant admitted at trial that he intentionally combined the subject matter and the timing for maximum shock value. Indeed, he acknowledged, his words would be interpreted as threats by “kids who didn’t know [he was] just kidding.”

Under these circumstances, as the majority observe, school and law enforcement officials had every reason to worry that defendant, deeply troubled, was contemplating his own campus killing spree. The important interest that underlies the criminal-threat law—protection against the trauma of verbal terrorism—was also at stake. Accordingly, the authorities were fully justified, and should be commended, insofar as they made a prompt, full, and vigorous response to the incident. They would have been remiss had they not done so. Nothing in our very narrow holding today should be construed as suggesting otherwise.

Questions for Discussion

1. Summarize the facts in *George T.*
2. Describe the responses of Mary, Erin, and Natalie to George T.’s poem. What occurred when the police confronted George T. at his home? How does George T. explain his intent in writing and disseminating the poem?
3. What are the elements of the crime of a “true threat” under Section 422 of the California Penal Code?
4. Why did the California Supreme Court conclude that George T.’s poem did not constitute a criminal threat? Did the court fully consider the content of the note and the circumstances surrounding the alleged threat?
5. Do you think that the California Supreme Court’s decision was influenced by the fact that George T. was a juvenile and that the alleged threat was contained in a “poem”? Note that a number of prominent writers viewed George T.’s prosecution as a violation of artistic freedom and urged the court to dismiss the charges against George T. They argued that there should be a presumption that a poem does not constitute a “true threat.” Would the court have ruled differently if the poem had stated clearly that George T. planned to return to school with a gun? What if George T. had expressed the sentiments in the letter directly to various students and teachers?
6. What facts were crucial in the court finding George T. not guilty?
7. Do you agree with the California Supreme Court’s ruling that George T.’s poem is protected speech under the First Amendment?
8. When does the poem “Roses are red. Violets are blue. I’m going to kill you, and your family too” constitute a “true threat”?

CASES AND COMMENTS

1. **Facebook.** In 2015, in *Elonis v. United States*, Anthony Douglas Elonis adopted the online name “Tone Dougie” and posted vicious and violent rap lyrics on Facebook against a former employer, his soon-to-be ex-wife, a kindergarten class, and an FBI agent. Elonis was convicted under a federal statute that prohibits the transmission in interstate commerce of any “threat . . . to injure another.” The Supreme Court held that Elonis could not be convicted based solely on the reaction of a reasonable person to his posts

and that the government was required to establish a criminal intent. *Elonis* claimed he was acting under his online persona and lacked a specific intent to threaten individuals. The Supreme Court asked the lower court to decide whether it was sufficient for a conviction under the federal law that *Elonis* may have been reckless. See *Elonis v. United States*, 575 U.S. ___, 135 S. Ct. 2001 (2015).

- 2. Flag Burning.** In *Texas v. Johnson*, the U.S. Supreme Court addressed the constitutionality of Texas Penal Code Annotated section 42.09 (1989), which punished the intentional or knowing desecration of a “state or national flag.” Desecration under the statute was interpreted as to “efface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.”

Johnson participated in a political demonstration during the Republican National Convention in Dallas in 1984. The purpose was to protest the policies of the Reagan administration and certain Dallas-based corporations and to dramatize the consequences of nuclear war. The demonstrators gathered in front of Dallas City Hall, where Johnson unfurled an American flag, doused the flag with kerosene, and set it on fire. The demonstrators chanted, “America, the red, white, and blue, we spit on you,” as the flag burned. None of the participants were injured or threatened retribution.

Justice Brennan observed that the Supreme Court had recognized that conduct may be protected under the First Amendment where there is an intent to convey a particularized message and there is a strong likelihood that this message will be understood by observers. Justice Brennan observed that the circumstances surrounding Johnson’s burning of the flag resulted in his message being “both intentional and overwhelmingly apparent.” In those instances in which an act contains both communicative and noncommunicative elements, the standard in judging the constitutionality of governmental regulation of *symbolic speech* is whether the government has a substantial interest in limiting the nonspeech element (the burning).

The Supreme Court rejected Texas’s argument that the statute was a justified effort to preserve the flag as a symbol of nationhood and national unity. This would permit Texas to “prescribe what is orthodox by saying that one may burn the flag . . . only if one does not endanger the flag’s representation of nationhood and national unity.” In the view of the majority, Johnson was being unconstitutionally punished based on the ideas he communicated when he burned the flag. See *Texas v. Johnson*, 491 U.S. 397 (1989).

In 1989, the U.S. Congress adopted the Flag Protection Act, 19 U.S.C. § 700. The act provided that anyone who “knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon” a U.S. flag shall be subject to both a fine and imprisonment for not more than one year. This law exempted the disposal of a worn or soiled flag. The U.S. government asserted an interest in preserving the flag as “emblematic of the Nation as a sovereign entity.” In *United States v. Eichman*, Justice Brennan failed to find that this law was significantly different from the Texas statute in *Johnson* and ruled that the law “suppresses expression out of concern for its likely communicative impact.” Justice Stevens, in a dissent joined by Justices Rehnquist, White, and O’Connor, argued that the government may protect the symbolic value of the flag and that this does not interfere with speakers’ freedom to express their ideas by other means. He noted that various types of expression are subject to regulation. For example, an individual would not be free to draw attention to a cause through a “gigantic fireworks display or a parade of nude models in a public park.” See *United States v. Eichman*, 496 U.S. 310 (1990).

3. Picketing Military Funerals. The American embrace of freedom of speech was tested in the 2011 case of *Snyder v. Phelps*, where the U.S. Supreme Court overturned a judgment against the Westboro Baptist Church for the civil tort of the intentional infliction of emotional distress. The case was brought by Al Snyder, the father of Lance Corporal Matthew Snyder who had been killed in the line of duty in Iraq.

Members of the Westboro Baptist Church picketed Lance Corporal Snyder's funeral on public land adjacent to the burial site. The picketing was designed to call attention to the belief of church members that the United States had angered God by tolerating homosexuality and that God had retaliated by allowing the killing of American soldiers. The church had picketed more than 600 military funerals over the last six years. Chief Justice Roberts, writing for the eight-judge majority, overturned the verdict against Westboro Baptist Church, reasoning that the members of the congregation

[had] addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. The speech . . . did not itself disrupt that funeral, and Westboro's choice to conduct its picketing at that time and place did not alter the nature of its speech.

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case. See *Snyder v. Phelps*, 562 U.S. 443 (2011).

In reaction to the picketing of military funerals, the U.S. Congress passed the Respect for America's Fallen Heroes Act (RAFHA). Roughly 29 states have adopted antipicketing statutes or have broadened their laws to impose restrictions on the picketing of funerals. These laws regulate the time, place, and manner of demonstrations at funerals and do not restrict the content of the demonstration.

4. Sex Offenders and Social Media. In *Packingham v. North Carolina*, 582 U.S. ___, 137 S. Ct. 1730 (2017), the issue before the Supreme Court was whether the North Carolina statute impermissibly restricts lawful speech in violation of the First Amendment. In 2002, Lester Gerard Packingham—then a 21-year-old college student—had sex with a 13-year-old female. He pled guilty to taking indecent liberties with a child, and he was required to register as a sex offender. As a registered sex offender, under North Carolina law, Packingham was barred from gaining access to commercial social networking sites.

Justice Kennedy, writing for the Supreme Court majority, held that the North Carolina law was unconstitutional that made it a felony for a registered sex offender “to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages.” N.C. Gen. Stat. Ann. §§ 14–202.5(a), (e) (2015). The law did not extend to websites that “[p]rovid[e] only one of the following services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform.” The law also did not encompass websites that have as their “primary purpose the facilitation of commercial transactions involving goods or services between [their] members or visitors.” The North Carolina statute applied to roughly 20,000 individuals, and an estimated 1,000 individuals had thus far been prosecuted for violating the law.

Justice Kennedy noted that social media is the most important place for the exchange of ideas and information in modern society. “North Carolina with one broad

stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.” Seven in 10 American adults use at least one internet social networking service. One of the most popular of these sites is Facebook, the site used by Packingham, which was the basis of his criminal conviction. Justice Kennedy clarified that North Carolina would be justified in enacting a narrowly drafted law that prohibited sex offenders from engaging in conduct that may be the first step in a sexual crime, like contacting a minor or using a website to gather information regarding a minor.

YOU DECIDE 2.3

Lori MacPhail, a peace officer in Chico, California, assigned to a high school, observed Ryan D. with some other students off campus during school hours. She conducted a pat-down, discovered that Ryan possessed marijuana, and issued him a citation.

Roughly a month later, Ryan turned in an art project for a painting class at the high school. The projects generally are displayed in the classroom for as long as two weeks. Ryan’s painting pictured an individual who appeared to be a juvenile wearing a green hooded sweatshirt discharging a handgun at the back of the head of a female peace officer with badge No. 67 (Officer MacPhail’s number) and the initials CPD (Chico Police Department). The officer had blood on her hair, and pieces of her flesh and face were blown away. An art teacher saw the painting and found it to be “disturbing” and “scary,” and an administrator at the school informed Officer MacPhail.

An assistant principal confronted Ryan, who stated the picture depicted his “anger at police officers” and that he was angry with MacPhail and agreed that it was “reasonable to expect that Officer MacPhail would eventually see the picture.” Ryan was charged with a violation of Section 422 and brought before juvenile court.

How would you rule? See *In re Ryan D.*, 123 Cal. Rptr. 2d 193 (Cal. Ct. App. 2002).

PRIVACY

The idea that there should be a legal right to **privacy** was first expressed in an 1890 article in the *Harvard Law Review* written by Samuel D. Warren and Louis D. Brandeis, who was later appointed to the U.S. Supreme Court. The two authors argued that the threats to privacy associated with the dawning of the 20th century could be combated through recognition of a civil action (legal suit for damages) against individuals who intrude into others’ personal affairs.⁴⁸

In 1905, the Supreme Court of Georgia became the first court to recognize an individual’s right to privacy when it ruled that the New England Life Insurance Company illegally used the image of artist Paolo Pavesich in an advertisement that falsely claimed that Pavesich endorsed the company.⁴⁹ This decision served as a precedent for the recognition of privacy by courts in other states.

The Constitutional Right to Privacy

A constitutional right to privacy was first recognized in *Griswold v. Connecticut* in 1965. The U.S. Supreme Court proclaimed that although privacy was not explicitly mentioned in the U.S. Constitution, it was implicitly incorporated into the text. The case arose when Griswold, along with Professor Buxton of Yale Medical School, provided advice to married couples on the prevention of procreation through contraceptives. Griswold was convicted of being an accessory to the violation of a Connecticut law that provided that any person who uses a contraceptive shall be fined not less than \$50 or imprisoned not less than 60 days or more than one year or be both fined and imprisoned.⁵⁰

Justice William Douglas noted that although the right to privacy was not explicitly set forth in the Constitution, this right was “created by several fundamental constitutional guarantees.” According to Justice Douglas, these fundamental rights create a “zone of privacy” for individuals. In a famous phrase, Justice Douglas noted that the various provisions of the Bill of Rights possess “penumbras, formed by emanations from those guarantees . . . [that] create zones of privacy.” Justice Douglas cited a number of constitutional provisions that together create the right to privacy.

The right of association contained in the penumbra of the First Amendment is one; the Third Amendment in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment’s Self-Incrimination Clause “enables the citizen to create a zone of privacy that Government may not force him to surrender to his detriment.” The Ninth Amendment provides that “[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”

In contrast, Justice Arthur Goldberg argued that privacy was found within the Ninth Amendment, and Justice John Marshall Harlan contended that privacy is a fundamental aspect of individual “liberty” within the Fourteenth Amendment.

We nevertheless should take note of Justice Hugo Black’s dissent in *Griswold* questioning whether the Constitution provides a right to privacy, a view that continues to attract significant support. Justice Black observed that “I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade [my privacy] unless prohibited by some specific constitutional provision.”

The right to privacy recognized in *Griswold* guarantees that we are free to make the day-to-day decisions that define our unique personality: what we eat, read, and watch; where we live and how we spend our time, dress, and act; and with whom we associate and work. In a totalitarian society, these choices are made by the government, but in the U.S. democracy, these choices are made by the individual. The courts have held that the right to privacy protects several core concerns:

- *Sanctity of the Home.* Freedom of the home and other personal spaces from arbitrary governmental intrusion

- *Intimate Activities.* Freedom to make choices concerning personal lifestyle and an individual's body and reproduction
- *Information.* The right to prevent the collection and disclosure of intimate or incriminating information to private industry, the public, and governmental authorities
- *Public Portrayal.* The right to prevent your picture or endorsement from being used in an advertisement without permission or to prevent the details of your life from being falsely portrayed in the media⁵¹

In short, as noted by Justice Brandeis, “The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”⁵²

There are several key Supreme Court decisions on privacy.

In *Eisenstadt v. Baird*, in 1972, the Supreme Court extended *Griswold* and ruled that a Massachusetts statute that punished individuals who provided contraceptives to unmarried individuals violated the right to privacy. Justice William Brennan wrote that “if the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁵³

The Supreme Court, in *Carey v. Population Services International*, next declared a New York law unconstitutional that made it a crime to provide contraceptives to minors and for anyone other than a licensed pharmacist to distribute contraceptives to persons over 15. Justice Brennan noted that this imposed a significant burden on access to contraceptives and impeded the “decision whether or not to beget or bear a child” that was at the “very heart” of the “right to privacy.”⁵⁴

In 1973, in *Roe v. Wade*, the U.S. Supreme Court ruled unconstitutional a Texas statute that made it a crime to “procure an abortion.” Justice Harry Blackmun wrote that the “right to privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”⁵⁵ The Supreme Court later ruled that Pennsylvania’s requirement that a woman obtain her husband’s consent unduly interfered with her access to an abortion.⁵⁶

The zone of privacy also was extended to an individual’s intellectual life in the home in 1969 in *Stanley v. Georgia*. A search of Stanley’s home for bookmaking paraphernalia led to the seizure of three reels of film portraying obscene scenes. Justice Thurgood Marshall concluded that “whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts.”⁵⁷

YOU DECIDE 2.4

The plaintiffs allege that the Florida law requiring motorcyclists to wear helmets violates their right to privacy under the U.S. Constitution. Are they correct? See *Picou v. Gillum*, 874 F.2d 1519 (11th Cir. 1989).

The Constitutional Right to Privacy and Same-Sex Relations Between Consenting Adults in the Home

Privacy, however appealing, lacks a clear meaning. Precisely what activities are within the right of privacy in the home? In answering this question, we must balance the freedom to be let alone against the need for law and order. The issue of sodomy confronted judges with the question of whether laws upholding sexual morality must yield to the demands of sexual freedom within the home.

In 1986, in *Bowers v. Hardwick*, the Supreme Court affirmed Hardwick's sodomy conviction under a Georgia statute. Justice White failed to find a fundamental right deeply rooted in the nation's history and tradition to engage in acts of consensual sodomy, even when committed in the privacy of the home. He pointed out that sodomy was prohibited by all 13 colonies at the time the Constitution was ratified, and 25 states and the District of Columbia continued to criminally condemn this conduct.⁵⁸

Bowers v. Hardwick was reconsidered in 2003, in *Lawrence v. Texas*. In *Lawrence*, the Supreme Court called in doubt the historical analysis in *Bowers* and noted that only 13 states currently prohibited sodomy and that in these states, there is a "pattern of nonenforcement with respect to consenting adults in private." The Court held that the right to privacy includes the fundamental right of two consenting adults to engage in sodomy within the privacy of the home.⁵⁹

CASES AND COMMENTS

1. **Voyeurism.** On April 26, 1999, Sean Glas used a camera to take pictures underneath the skirts of two women working at the Valley Mall in Union Gap, Washington. In one instance, Inez Mosier was working in the women's department at Sears and saw a light flash out of the corner of her eye. She turned around to discover Glas squatting on the floor a few feet behind her. She noticed a small, silver camera in his hand. The police later confiscated the film and discovered photos of the undergarments of Mosier and another woman. Richard Sorrells, in a separate case, was apprehended after using a video camera to film the undergarments of women and young girls at the Bite of Seattle food festival at the Seattle Center. Both Glas and Sorrells were convicted of voyeurism for taking photos underneath women's skirts ("upskirt" voyeurism). The Washington voyeurism statute (Wash. Rev. Code § 9A.44.115(2)(a)) reads,

A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views, photographs, or films: another person without that person's knowledge and consent while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy.

The statute defines a place in which a person would have a reasonable expectation of privacy as a place where a "reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her undressing was being filmed by another," or as a "place where one may reasonably expect to be safe from casual

or hostile intrusion or surveillance.” The Washington Supreme Court interpreted a location where an individual may “disrobe in privacy” to include the bedroom, bathroom, dressing room, or tanning salon. A location in which an individual may reasonably expect to be safe from intrusion or surveillance includes the other rooms in an individual’s home as well as locations where someone would not normally disrobe, but would not expect others to intrude, such as a private suite or office.

The court acquitted the two defendants, ruling that although Glas and Sorrells engaged in “disgusting and reprehensible behavior,” Washington’s voyeurism statute “does not apply to actions taken in purely public places and hence does not prohibit the ‘upskirt’ photographs” taken by Glas and Sorrells. Do you agree that the women had no expectation of privacy? See *State v. Glas*, 54 P.3d 147 (Wash. 2002).

In a Minnesota case, Tony O. Morris carried a bag into a department store and positioned a hidden camera under the skirt of a sales clerk and photographed her underwear. A Minnesota appellate court held that Morris had unlawfully violated the sales clerk’s “reasonable expectation of privacy” by intentionally photographing the “intimate parts of her body.” See *State v. Morris*, 644 N.W.2d 114 (Minn. App. 2002).

2. **Cell-Site Location.** In *Carpenter v. United States*, Chief Justice Roberts in a 5–4 decision held that Carpenter possessed an expectation of privacy under the Fourth Amendment in his historic cell-site location information (CSLI). The government accordingly is required to meet a probable cause warrant standard to “access historical cell phone records [from a private wireless carrier] that provides a comprehensive chronicle of the user’s past movements.” Justice Roberts in his majority decision reasoned that individuals retain an expectation of privacy in CSLI because the information is “unique” in the detail, nature, amount of information revealed, and historical character. The information cannot be said to be voluntarily turned over to an internet provider because individuals’ phones are subjected to continuous monitoring without any affirmative act on their part. Justice Roberts concluded that in “light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection.” See *Carpenter v. United States*, 585 U.S. ___ (2017). How does CSLI differ from continuous GPS monitoring or surveillance using facial recognition technology?

THE RIGHT TO BEAR ARMS

The American people historically have considered the handgun to be the quintessential self-defense weapon. Handguns are easily accessible in an emergency and require only a modest degree of physical strength to use and cannot easily be wrestled away by an attacker. In the past several decades, various cities and suburbs have placed restrictions on the right of Americans to possess handguns, even for self-defense. The constitutionality of these limitations on the possession of handguns was addressed by two recent U.S. Supreme Court decisions.

The Second Amendment to the U.S. Constitution provides that “a well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.”

The meaning of the Second Amendment has been the topic of considerable debate. Courts historically focused on the first clause of the amendment that recognizes the importance of

a “well regulated Militia” and held that the amendment protects the right of individuals to possess arms in conjunction with service in an organized government militia. In 1939 in *United States v. Miller*, the U.S. Supreme Court upheld the constitutionality of a federal law prohibiting the interstate shipment of sawed-off shotguns, reasoning that the Second Amendment protections are limited to gun ownership that has “some reasonable relationship to the preservation or efficiency of a well regulated militia.”⁶⁰

Gun rights activists contended that the Second Amendment protection of the “right of the people to keep and bear Arms” is not limited to members of the militia. They argued that the Second Amendment also protects individuals’ right to possess firearms “unconnected” with service in a militia. The Founding Fathers, according to gun activists, viewed gun ownership as essential to the preservation of individual liberty. A state or federal government could abolish the state national guard and leave citizens unarmed and vulnerable. The framers concluded that the best way to safeguard and to protect the people was to guarantee individuals’ right to bear arms.

In 2008, in *District of Columbia v. Heller*, the U.S. Supreme Court adopted the view of gun rights activists. The Court majority held that the Second Amendment protects the right of individuals to possess firearms.⁶¹ Dick Heller, a special police officer, was authorized to carry a handgun while on duty at the federal courthouse in the District of Columbia (D.C.) and applied for a registration certificate from the D.C. government for a handgun that he planned to keep at home for self-defense. A D.C. ordinance prohibited the possession of handguns and declared that it was a crime to carry an unregistered firearm. A separate portion of the D.C. ordinance authorized the chief of police to issue licenses for one-year periods. Lawfully registered handguns were required to be kept “unloaded and disassembled or bound by a trigger lock or similar device” when not “located” in a place of business or used for lawful recreational activities.

Justice Antonin Scalia, writing for a five-judge majority, held that the D.C. ordinance was unconstitutional because the regulations interfered with the ability of law-abiding citizens to use a firearm for self-defense in the home, the “core lawful purpose” of the right to bear arms. “Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct.”

The Court decision noted that while D.C. could not constitutionally ban the possession of firearms in the home, the right to bear arms is subject to limitations. The Court did not limit the ability of states to prohibit possession of firearms by felons and the mentally challenged, to prohibit the carrying of firearms in “sensitive places” such as schools and government buildings, to regulate the commercial sale of arms, to ban the possession of dangerous and unusual weapons, or to require the safe storage of weapons.

Heller, although important for defining the meaning of the Second Amendment, applied only to D.C. and to other federal jurisdictions. In 2010, in *McDonald v. Chicago*, residents of Chicago and the Chicago suburb of Oak Park, Illinois, challenged local ordinances that were almost identical to the law that the Court struck down as unconstitutional in the federal enclave of Washington, D.C. The Supreme Court addressed whether the Second Amendment right of individuals to bear arms extended to state as well as to the federal government.⁶²

The Fourteenth Amendment had been adopted following the Civil War to ensure former African American slaves' equal rights, and the Supreme Court in a series of cases had ruled that most of the Bill of Rights was applicable to the states and protected individuals against the state as well as the federal government. The Second Amendment was one of the few amendments in the Bill of Rights that had not been incorporated into the Fourteenth Amendment and made applicable to the states. The result was that even after *Heller*, the right to possess firearms was not considered a fundamental right protected by the Fourteenth Amendment, and state governments were free to restrict or even to prohibit the possession of firearms.

The Fourteenth Amendment prohibits a state from denying an individual life, liberty, or property without due process of law. The question in *McDonald v. Chicago* was whether the right to keep and to bear arms was a liberty interest protected under the Due Process Clause of the Fourteenth Amendment. Justice Samuel Alito wrote that self-defense is a "basic right, recognized by many legal systems from ancient times to the present day." He concluded that the Second Amendment right to possess firearms in the home for the purpose of self-defense is incorporated into the Fourteenth Amendment and is applicable to the states. The right to keep and bear arms for purposes of self-defense is "among the fundamental rights necessary to our system of ordered liberty," which is "deeply rooted in this Nation's history and tradition." A number of state constitutions already protected the right to own and to carry arms. The incorporation of the Second Amendment into the Fourteenth Amendment clearly established that the right to bear arms for the purpose of self-defense is a fundamental right that may not be infringed by state governments.

In 2016, the U.S. Supreme Court in *Caetano v. Massachusetts* held that the Second Amendment protects Tasers and held that the Second Amendment is not limited to weapons in existence at the time the Second Amendment was drafted and that the amendment's protection is not limited to "weapons of war."⁶³

The precise meaning of the decisions in *Heller* and *McDonald* will not be clear until various state gun control laws are reviewed by the courts. There have been over 1,000 state and federal court decisions addressing the Second Amendment since the decision in *Heller*. State and federal courts in accordance with *Heller* have upheld laws prohibiting the possession of firearms by juveniles, by undocumented individuals, by "dangerous persons" including individuals convicted of felonies and of domestic violence, and by individuals who have been involuntarily committed to mental institutions. Laws also have been held constitutional that prohibit individuals from possessing firearms in "sensitive places" such as schools and government buildings; and courts also have affirmed the right of private institutions such as churches and businesses to prohibit the possession of firearms on their property. In addition, laws have been affirmed that prohibit the possession of machine guns, assault weapons, and large-capacity ammunition magazines. A number of states require that an applicant for a handgun permit demonstrate competence in handling firearms, on the grounds that people who are not well trained in the use of firearms are a menace to themselves and to others, and/or require a waiting period before completing the sale of a firearm. Other statutes require that individuals in homes with children take precautions to prevent juveniles from gaining access to the weapons. Several states impose taxes on the commercial sale of firearms and ammunition.

In 2013, in *Moore v. Madigan*, the Seventh Circuit Court of Appeals held unconstitutional an Illinois flat ban on carrying a loaded firearm within accessible reach outside the home. The only exceptions to this prohibition under Illinois law were police officers and other security personnel, hunters, and members of target shooting clubs. The Seventh Circuit Court of Appeals stated that although both *Heller* and *McDonald* held that “the need for defense of self, family, and property is most acute’ in the home,” this does not mean “it is not acute outside the home.” The court pointed out that *Heller* recognized a broader Second Amendment right than the right to have a gun in one’s home when the decision noted that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.” Confrontations are not limited to the home, and the Illinois law therefore is in violation of individuals’ Second Amendment rights.⁶⁴ In July 2013, the Illinois legislature passed a statute permitting individuals to obtain a license to carry a loaded or unloaded concealed weapon on their person or within a vehicle (430 ILCS 66).

New York has one of the most restrictive laws and limits possession of firearms outside the home to individuals with a “proper cause.” A “proper cause” includes individuals in specific professions, those in specific locations such as a bank guard, and those desiring a firearm for target practice or hunting or self-defense. Individuals desiring a weapon for self-defense are required to demonstrate a “special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.” In other words, only individuals with a real and approved reason to possess handguns may bring a firearm into the “public sphere.”⁶⁵

In 2020, in *New York State Rifle and Pistol Association v. New York City*, the U.S. Supreme Court held that a legal challenge to a New York City law was moot because there was no remaining issue for the Court to decide at the time. The New York City law provided that lawful gun owners could only transport their pistol outside the home to one of the seven shooting ranges within the city. New York City in anticipation of the Supreme Court review amended the law to allow individuals to transport a firearm to a second home or to a gun range outside the city. Justice Samuel Alito in dissent argued that this was not a “closed case” because there were remaining restrictions in the revised New York City law that needed to be addressed. The revised regulations for example required handgun owners to directly travel to their destination, required official written permission to take a weapon to a gunsmith, and did not authorize transporting a weapon to a summer rental home.⁶⁶

In 2017, the U.S. Court of Appeals for the District of Columbia held a D.C. Code provision unconstitutional that required applicants for a concealed carry permit for handguns to demonstrate a “good reason to fear injury to their person or property” or to demonstrate “any other proper reason for carrying a pistol” such as transporting cash or valuables as part of their job. Judge Thomas Griffith writing for a two-judge majority held that the requirements of the D.C. law by “the law’s very design” made it impossible for most residents to exercise their Second Amendment rights. “In this way, the District’s regulation completely prohibits most residents from exercising the constitutional rights to bear arms. . . . The good-reason law is necessarily a total ban on exercise of [the Second Amendment] for most D.C. residents.”⁶⁷

In 2018, in *Young v. State of Hawaii*, the Ninth Circuit Court of Appeals in a 2–1 decision held unconstitutional Hawaii’s “place to keep” statute, which generally required that gun owners

keep their firearms at the place of “business or residence.” Individuals were able to obtain a license from the police for concealed carry based on a “reason to fear injury to person or property” and were able to obtain a license for open carry based on the “urgency” or “need” to protect life or property. The two-judge majority held that the right to self-protection was at the core of the Second Amendment and the Hawaii law was unconstitutional because it restricted the right to openly carry a firearm to a “small and insulated subset of law-abiding citizens.” The decision, in effect, recognized that individuals have an equal right to possess firearms both inside and outside the home.⁶⁸

The Supreme Court in the past has declined to rule on the constitutionality of “good reason” concealed carry laws. What is your view of whether the requirement that individuals demonstrate a “good reason” for the concealed carry of firearms is a violation of the Second Amendment?

State laws on open carry of firearms are an area of continued disagreement. The laws on open carry are complicated.

According to the Giffords Law Center, five states (California, Florida, Illinois, New York, and South Carolina), as well as the District of Columbia, generally prohibit the open carry of handguns in public places. Thirty-one states allow the open carry of a handgun without any license or permit, although in some jurisdictions the gun must be unloaded. The remaining states require some form of license or permit in order to openly carry a handgun.

Six states (California, Florida, Illinois, Massachusetts, Minnesota, and New Jersey), as well as the District of Columbia, in general prohibit the open carry of long guns (rifles and shotguns). In the 44 remaining states, the open carry of a long gun is legal, although in three of these states (Iowa, Tennessee, and Utah) the long gun must be unloaded. Virginia and Pennsylvania limit the open carry of long guns to certain local jurisdictions.

Federal law does not restrict the open carry of firearms in public. Specific rules, however, may apply to various properties owned or operated by the federal government.⁶⁹

Another area of continued controversy is assault rifles, which are prohibited in roughly seven states and the District of Columbia. A number of states following the February 2018 Florida school shootings adopted “extreme risk” or “red flag” laws, which allow for the removal of guns from people considered an extreme risk to themselves or to others.

YOU DECIDE 2.5

George Mason University (GMU) prohibited the possession or carrying of any weapon by any person except a police officer on university property in academic buildings, administrative office buildings, student residence buildings, or dining facilities or while attending sporting, entertainment, or educational events. Rudolph DiGiacinto was not a student at GMU, although he made use of university resources, including the libraries. He argued that his inability to carry a firearm onto university property violated his Second Amendment right to carry a firearm. What is your view? Note that eight states—either as a result of state law or as a result of judicial decision—have “Campus Carry” laws that authorize individuals to carry concealed firearms on some or all areas of college and university campuses. Twenty-one

states, in effect, leave this decision to the governing bodies of colleges and universities in the state or leave this decision to individual campuses. See *DiGiacinto v. Rector and Visitors of George Mason University*, 704 S.E.2d 365 (Va. 2011).

CHAPTER SUMMARY

The United States is a constitutional democracy. The government's power to enact laws is constrained by the Constitution. These limits are intended to safeguard the individual against the passions of the majority and the tyrannical tendencies of government. The restrictions on government also are designed to maximize individual freedom, which is the foundation of an energetic and creative society and dynamic economy. Individual freedom, of course, must be balanced against the need for social order and stability. We all have been reminded that "you cannot yell 'fire' in a crowded theater." This chapter challenges you to locate the proper balances among freedom, order, and stability.

The rule of legality requires that individuals receive notice of prohibited acts. The ability to live your life without fear of unpredictable criminal punishment is fundamental to a free society. The rule of legality provides the philosophical basis for the constitutional prohibition on bills of attainder and *ex post facto* laws. Bills of attainder prohibit the legislative punishment of individuals without trial. *Ex post facto* laws prevent the government from criminally punishing acts that were innocent when committed. The constitutional provision for due process ensures that individuals are informed of acts that are criminally condemned and that definite standards are established that limit the discretion of the police. An additional restriction on criminal statutes is the Equal Protection Clause. This prevents the government from creating classifications that unjustifiably disadvantage or discriminate against individuals; a particularly heavy burden is imposed on the government to justify distinctions based on race or ethnicity. Classifications on gender are subject to intermediate scrutiny. Other differentiations are required only to meet a rational basis test.

Freedom of expression is of vital importance in American democracy, and the Constitution protects speech that some may view as offensive and disruptive. Courts may limit speech only in isolated situations that threaten social harm and instability. The right to privacy protects individuals from governmental intrusion into the intimate aspects of life and creates "space" for individuality and social diversity to flourish. The U.S. Supreme Court has held that the Second Amendment protects the right of individuals to possess handguns for the purpose of self-defense in the home. Federal appellate courts have extended this right to bear arms beyond the home in certain circumstances. The full extent of the Second Amendment "right to bear arms" has yet to be determined.

This chapter provided you with the constitutional foundation of American criminal law. Keep this material in mind as you read about criminal offenses and defenses in the remainder of the

textbook. We will look at the Eighth Amendment prohibition on cruel and unusual punishment in Chapter 3.

CHAPTER REVIEW QUESTIONS

1. Explain the philosophy underlying the United States' constitutional democracy. What are the reasons for limiting the powers of state and federal government to enact criminal legislation? Are there costs as well as benefits in restricting governmental powers?
2. Define the rule of legality. What is the reason for this rule?
3. Define and compare bills of attainder and *ex post facto* laws. List the various types of *ex post facto* laws. What is the reason that the U.S. Constitution prohibits retroactive legislation?
4. Explain void for vagueness and the significance of this concept.
5. Why does the U.S. Constitution protect freedom of expression? Is this freedom subject to any limitations?
6. What is the difference between the “rational basis,” “intermediate scrutiny,” and “strict scrutiny” tests under the Equal Protection Clause?
7. Where is the right to privacy found in the U.S. Constitution? What activities are protected within this right?
8. Write a short essay on the constitutional restrictions on the drafting and enforcement of criminal statutes.
9. As a final exercise, consider life in a country that does not provide safeguards for civil liberties. How would your life be changed?

LEGAL TERMINOLOGY

Bill of Rights	libel
bills of attainder	minimum level of scrutiny test
constitutional democracy	<i>nullum crimen sine lege, nulla poena sine lege</i>
equal protection	overbreadth
<i>ex post facto</i> laws	privacy
fighting words	rational basis test
First Amendment	rule of legality
hate speech	strict scrutiny test
incitement to violent action	true threat
incorporation theory	void for vagueness
intermediate level of scrutiny	

TEST YOUR KNOWLEDGE ANSWERS

1. False.
2. True.
3. False.
4. False.
5. False.
6. False.

3

PUNISHMENT AND SENTENCING

TEST YOUR KNOWLEDGE: TRUE/FALSE

1. There is little practical difference between a criminal law and a civil law.
2. One purpose of criminal punishment is retribution or punishment that individuals should receive based on the seriousness of their criminal acts.
3. An important purpose of sentencing guidelines is to ensure uniform, proportionate, and predictable sentences.
4. Truth in sentencing laws are intended to ensure that offenders serve a significant percentage of their sentences.
5. The death penalty for crimes other than homicide or treason constitutes cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution.
6. Courts carefully examine the criminal punishment imposed by state legislatures to ensure that the penalty is precisely proportionate to the seriousness of the crime.
7. The Equal Protection Clause of the Constitution plays no role in sentencing because there is no need to ensure that judges do not consider an offender's race, ethnicity, or gender in handing down a criminal sentence.

Check your answers at the end of the chapter on page 115.

May Missouri Legally Execute 17-Year-Old Murderer Christopher Simmons?

[Christopher] Simmons and [Charles] Benjamin entered the home of the victim, Shirley Crook, after reaching through an open window and unlocking the back door. Simmons turned on a hallway light. Awakened, Mrs. Crook called out, "Who's there?" In response, Simmons entered Mrs. Crook's bedroom, where he

recognized her from a previous car accident involving them both. Simmons later admitted this confirmed his resolve to murder her.

Using duct tape to cover her eyes and mouth and bind her hands, the two perpetrators put Mrs. Crook in her minivan and drove to a state park. They reinforced the bindings, covered her head with a towel, and walked her to a railroad trestle spanning the Meramec River. There they tied her hands and feet together with electrical wire, wrapped her whole face in duct tape and threw her from the bridge, drowning her in the waters below. . . . Simmons, meanwhile, was bragging about the killing, telling friends he had killed a woman “because the bitch seen my face.” (*Roper v. Simmons*, 543 U.S. 551 [2005])

INTRODUCTION

One of the primary challenges confronting any society is to ensure that people follow the legal rules that protect public safety and security. This is partially achieved through the influence of families, friends, teachers, the media, and religion. Perhaps the most powerful method to persuade people to obey legal rules is through the threat of criminal punishment. Following a defendant’s conviction, the judge must determine the appropriate type and length of the sentence. The sentence typically reflects the purpose of the punishment. A penalty intended to exact revenge will result in a harsher punishment than a penalty designed to assist an offender to turn their life around.

An American judge in colonial times and during the early American republic was able to select from a wide array of punishments, most of which were intended to inflict intense pain and public shame. A Virginia statute of 1748 punished the stealing of a hog with 25 lashes and a fine. The second offense resulted in two hours of pillory (public ridicule) or public branding. A third theft resulted in a penalty of death. False testimony during a trial might result in mutilation of the ears or banishment from the colony. These penalties were often combined with imprisonment in a jail or workhouse and hard labor. You should keep in mind that minor acts of insubordination by African American slaves resulted in swift and harsh punishment without trial. Between 1706 and 1784, 550 African slaves were sentenced to death in Virginia alone.¹

We have slowly moved away from most of these physically painful sanctions. The majority of states followed the example of the U.S. Congress, which in 1788 prohibited federal courts from imposing whipping and standing in the pillory. Maryland retained corporal punishment until 1953, and Delaware repealed this punishment only in 1972. Delaware, in fact, subjected more than 1,600 individuals to whippings in the 20th century.² This practice was effectively ended in 1968, when the Eighth Circuit Court of Appeals ruled that the use of the strap “offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess.”³ In 1994, President Bill Clinton and 24 U.S. senators wrote the president of Singapore in an unsuccessful effort to persuade him to make an “enlightened decision” and to halt plans to subject an American teenager charged with vandalism to four lashings with a rattan rod.⁴

In the United States, courts have attempted to balance the need for swift and forceful punishment with the recognition that individuals are constitutionally entitled to fair procedures and are to be free from cruel and unusual punishments. You should be familiar with several central concerns when you complete the study of this chapter:

- The definition of punishment
- Justifications for punishment
- The types of sentences that may be imposed by judges
- The considerations employed to evaluate the merits of sentencing schemes
- The approaches to sentencing in federal and state courts
- The constitutional standards that must be met by criminal sentences

You should also come away from this chapter with an understanding that sentencing policies have evolved over time. Disillusionment with flexible sentences and rehabilitation led to the development of sentencing guidelines and determinate sentences that are intended to ensure uniform and fixed sentences that fit the crime. The federal and state governments also adopted **truth in sentencing laws** that assure the public that defendants are serving a significant portion of their prison terms. These developments have been accompanied by a growing concern for victims.

The central point that you should appreciate is that the United States is witnessing a revolution in sentencing. Keep the following points in mind:

- *Purpose of Punishment.* The emphasis is on deterrence, retribution, incapacitation, education, and treatment of offenders rather than on rehabilitation.
- *Judicial Discretion.* Judicial discretion in sentencing is greatly reduced. The federal government and states have introduced sentencing guidelines and mandatory minimum sentences, illustrated by Three Strikes and You're Out legislation and drug laws.
- *Plea Bargaining.* A significant number of criminal cases are plea bargained and are not brought to trial.
- *Truth in Sentencing.* The authority of parole boards to release prisoners prior to the completion of their sentences and the ability of incarcerated individuals to accumulate “good time” is vastly reduced as a result of truth in sentencing legislation. As a consequence, offenders are serving a greater percentage of their sentences.
- *Victims.* Victims are being provided a greater role and more protections in the criminal justice process.
- *Death Penalty.* The death penalty does not violate the Eighth Amendment. Capital punishment, however, is subject to a number of constitutional limitations under the

Eighth Amendment intended to ensure that death is a penalty proportionate to the offender's crime.

- *Terms of Years.* Courts have deferred to the decisions of state legislatures and the Congress in regard to sentencing decisions and generally have held that prison sentences are proportionate to the offender's crime.
- *Equal Protection.* Courts have ruled that sentencing decisions and statutes based on race or gender violate the Equal Protection Clause.

The larger point to consider as you read this chapter is whether we have struck an appropriate balance among the interests of society, defendants, and victims in the sentencing process. You should make an effort to develop your own theory of punishment.

PUNISHMENT

Professor George P. Fletcher writes that the central characteristic of a criminal law is that a violation of the rule results in punishment before a court. Whether an act is categorized as a criminal as opposed to a civil violation is important, because a criminal charge triggers various constitutional rights, such as the right against double jeopardy, the right to a lawyer, the right not to testify at trial, and the right to a trial by a jury.⁵ Would the quarantine of individuals during a flu pandemic be considered a civil disability or a criminal penalty? The U.S. Supreme Court has listed various considerations that determine whether a law is criminal.⁶

- Does the legislature characterize the penalty as civil or criminal?
- Has the type of penalty imposed historically been viewed as criminal?
- Does the penalty involve a significant disability or restraint on personal freedom?
- Does the penalty promote a purpose traditionally associated with criminal punishment?
- Is the imposition of the penalty based on an individual's intentional wrongdoing, a requirement that is central to criminal liability?
- Has the prohibited conduct traditionally been viewed as criminal?

Whether a law is considered to impose criminal punishment can have important consequences for a defendant. For instance, in *Smith v. Doe*, the U.S. Supreme Court was asked to decide whether Alaska's sex offender registration law constituted *ex post facto* criminal punishment.

In 1994, the U.S. Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act that makes certain federal criminal justice funding dependent on a state's adoption of a sex offender registration law. By 1996, every state, the District of Columbia, and the federal government had enacted some type of [Megan's Law](#).

These statutes were named in memory and honor of Megan Kanka, a 7-year-old New Jersey child who had been sexually assaulted and murdered in 1994 by a neighbor who, unknown to Megan's family, had prior convictions for sexual offenses against children.⁷

Alaska adopted a retroactive law that required both convicted sex offenders and child kidnappers to register and keep in contact with local law enforcement authorities. Alaska provided nonconfidential information to the public on the internet, including an offender's crime, address, place of employment, and photograph.

Supreme Court Justice Anthony Kennedy, in his majority opinion in *Smith v. Doe*, agreed with Alaska that this statute was intended to protect the public from the danger posed by sex offenders through the dissemination of information, and that the law was not intended to constitute and did not constitute unconstitutional *ex post facto* (retroactive) criminal punishment.⁸

Justice Ruth Bader Ginsburg dissented from the majority judgment affirming the constitutionality of the Alaska statute. She observed that placing a registrant's face on a website under the label "Registered Sex Offender" was reminiscent of the shaming punishment that was employed during the colonial era when individuals were branded or placed in stocks and subjected to public ridicule.

Justice Ginsburg pointed out that John Doe I, one of the individuals bringing this case, had been sentenced to prison for sexual abuse nine years before the passage of the Alaska statute. He successfully completed a rehabilitation program and gained early release on supervised probation. Doe subsequently remarried, established a business, and gained custody of one of his daughters based on a judicial determination that he no longer posed a threat. The Alaska version of Megan's Law now required Doe "to report personal information to the State four times per year," and permitted the state publicly to label him a registered sex offender for the rest of his life.

Justice Ginsburg's argument that Megan's Law constitutes *ex post facto* punishment would render Alaska helpless to alert citizens to the continuing danger posed by sex offenders convicted prior to the passage of Megan's Law. What of the argument that Justice Ginsburg overlooked the fact that, although registrants must inform authorities of changes in appearance, employment, and address, these individuals remain free to live their lives without restraint or restriction and cannot easily claim to have been punished? On the other hand, there was evidence that registrants were scorned by the community, experienced difficulties in employment and housing, and encountered hostility. However, this resulted from the acts of members of the public rather than the government.

The next section briefly outlines the purposes or goals that are the basis of sentencing in the criminal justice system. These purposes include retribution, deterrence, rehabilitation, incapacitation, and restoration.

PURPOSES OF PUNISHMENT

In the United States, we have experienced various phases in our approach to criminal punishment. We continue to debate whether the primary goal of punishment should be to assist offenders to turn their lives around or whether the goal of punishment should be to safeguard

society by locking up offenders. Some rightly point out that we should not lose sight of the need to require offenders to compensate crime victims. In considering theories of punishment, ask yourself what goals should guide our criminal justice system.

Retribution

Retribution imposes punishment based on **just deserts**. Offenders should receive the punishment that they deserve based on the seriousness of their criminal acts. The retributive philosophy is based on the familiar biblical injunction of “an eye for an eye, a tooth for a tooth.” Retribution assumes that we all know right from wrong and are morally responsible for our conduct and should be held accountable. The question is what punishment is “deserved”: a prison term, a fine, or confinement? How do we determine the appropriate length of a prison sentence and in what type of institution the sentence should be served? This is not always clear, because what an individual “deserves” may depend on the circumstances of the crime, the background of the victim, and the offender’s personal history.

Deterrence

The theory of **specific deterrence** imposes punishment to deter or discourage a defendant from committing a crime in the future. Critics note that the recidivism rate indicates that punishment rarely deters crime. Also, we once again confront the challenge of determining the precise punishment required to achieve the desired result, in this case to deter an individual from returning to a life of crime. **General deterrence** punishes an offender as an example to deter others from violating the law. Critics contend that offenders have little concern or awareness of the punishment imposed on other individuals and that even harsh punishments have little general deterrent effect. Others reply that swift and certain punishment sends a powerful message, and that a credible threat of punishment constitutes a deterrent. There are also objections to punishing an individual as an example to others, because this may result in a harsher punishment than is required to deter the defendant from committing another crime.

Rehabilitation

The original goal of punishment in the United States was to reform offenders and to transform them into law-abiding and productive members of society. **Rehabilitation** appeals to the idealistic notion that people are essentially good and can transform their lives when encouraged and given support. However, studies cast doubts on whether prison educational and vocational programs are able to rehabilitate inmates. Reformers, on the other hand, point out that rehabilitation has never been seriously pursued and requires a radically new approach to imprisonment.

Incapacitation

The aim of **incapacitation** is to remove offenders from society to prevent them from continuing to menace others. This approach accepts that there are criminally inclined individuals who cannot be deterred or rehabilitated. The difficulty with this approach is that we lack the ability to accurately predict whether an individual poses a continuing danger to society. As a result,

we may incapacitate individuals based on a faulty prediction of what they may do in the future rather than for what they did in the past. **Selective incapacitation** singles out offenders who have committed designated offenses for lengthy incarceration. In many states, a conviction for a drug offense or a second or third felony under a Three Strikes and You're Out law results in a lengthy prison sentence or life imprisonment. There is continuing debate over the types of offenses that merit selective incapacitation.

Restoration

Restoration stresses the harm caused to victims of crime and requires offenders to engage in financial restitution and community service to compensate the victims and the community and to “make them whole once again.” The restorative justice approach recognizes that the needs of victims are often overlooked in the criminal justice system. This approach is also designed to encourage offenders to develop a sense of individual responsibility and to become responsible members of society.

The discussion of the purposes of punishment is not mere academic theorizing. Judges, when provided with the opportunity to exercise discretion, are guided by these purposes in determining the appropriate punishment. For example, in a New York case, the court described Dr. Bernard Bergman as a man of “unimpeachably high character, attainments and distinction” who is respected by people around the world for his work in religion, charity, and education. Bergman’s desire for money apparently drove him to fraudulently request payment from the U.S. government for medical treatment that he had not provided to nursing home patients. He entered guilty pleas to fraud charges in both New York and federal courts and argued that he should not be imprisoned, because he did not require “specific deterrence.”

Judge Marvin Frankel recognized in his judgment that there was little need for incapacitation and doubted whether imprisonment could provide useful rehabilitation. Nevertheless, he imposed a four-month prison sentence, explaining that this is “a stern sentence. For people like Dr. Bergman who might be disposed to engage in similar wrongdoing, it should be sufficiently frightening to serve the . . . [purpose] of general deterrence.” Judge Frankel also explained that the four-month sentence served the interest in retribution and that “for all but the profoundly vengeful, [the sentence] should not depreciate the seriousness of his offenses.”⁹ Do you agree with Judge Frankel’s reasoning and sentence?

SENTENCING

Various types of punishments are available to judges. These punishments often are used in combination with one another:

- *Imprisonment.* Individuals sentenced to a year or less are generally sentenced to local jails. Sentences for longer periods are typically served in state or federal prisons.
- *Fines.* State statutes usually provide for fines as an alternative to incarceration or in addition to incarceration.

- *Probation.* Probation involves the suspension of a prison sentence so long as an individual continues to report to a probation officer and to adhere to certain required standards of personal conduct. For instance, this may entail psychiatric treatment or a program of counseling for alcohol or drug abuse. The conditions of probation are required to be reasonably related to the rehabilitation of the offender and the protection of the public.
- *Intermediate Sanctions.* This includes house arrest with electronic monitoring, short-term “shock” incarceration, community service, and restitution. Intermediate sanctions may be imposed as a criminal sentence, as a condition of probation, following imprisonment, or in combination with a fine.
- *Death.* Twenty-eight states and the federal government provide the death penalty for homicide. The 19 other states and Washington, D.C., provide life without parole.

We should also note that the federal government and most states provide for **assets forfeiture** or seizure pursuant to a court order of the fruits of illegal narcotics transactions (along with certain other crimes) or of the instrumentalities that were used in such activity. The burden rests on the government to prove by a preponderance of the evidence that instrumentalities (vehicles), profits (money), or property are linked to an illegal transaction. In *United States v. Ursery*, the U.S. Supreme Court held that the seizure of money and property did not constitute double jeopardy, because forfeitures do not constitute punishment.¹⁰ In 2019, the U.S. Supreme Court in *Timbs v. Indiana* held that the Eighth Amendment Excessive Fines Clause was applicable to the states under the Fourteenth Amendment Due Process Clause and held that the clause prohibited the imposition by states of excessive assets forfeiture judgments. The significance of the decision is illustrated by the facts in *Timbs*. Tyson Timbs pled guilty to dealing in a controlled substance and conspiracy to commit theft. He was sentenced to one year of home detention, five years of probation, and a fee of \$1,203. At the time of Timbs’s arrest, the police seized a Land Rover SUV Timbs had used to transport heroin. He purchased the car for \$42,000 with money from an insurance policy he received when his father passed away. The Supreme Court returned the case to the lower court to determine whether the forfeiture of the SUV constituted an excessive fine.¹¹

Approaches to Sentencing

The approach to sentencing in states historically has shifted in response to the prevailing criminal justice thought and philosophy. The federal and state governments generally follow four different approaches to sentencing offenders. Criminal codes may incorporate more than a single approach.

- *Determinate Sentence.* The state legislature provides judges with little discretion in sentencing and specifies that the offender is to receive a specific sentence. A shorter or longer sentence may be given to an offender, but this must be justified by the judge.

- **Mandatory Minimum Sentence.** The legislature requires judges to sentence an offender to a minimum sentence, regardless of mitigating factors. Prison sentences in some jurisdictions may be reduced by good-time credits earned by the individual while incarcerated.
- **Indeterminate Sentence.** The state legislature provides judges with the ability to set a minimum and maximum sentence within defined limits. In some jurisdictions, the judge possesses discretion to establish only a maximum sentence. The decision to release an inmate prior to fully serving a sentence is vested in a parole board.
- **Presumptive Sentencing Guidelines.** A legislatively established commission provides a sentencing formula based on various factors, stressing the nature of the crime and the offender's criminal history. Judges may be strictly limited in terms of discretion or may be provided with some flexibility within established limits. The judge must justify departures from the presumptive sentence on the basis of various aggravating and mitigating factors that are listed in the guidelines. Appeals are provided in order to maintain reasonable sentencing practices in those instances in which a judge departs from the presumptive sentence in the guidelines.

An individual convicted of multiple crimes may be given **consecutive sentences**, meaning that the sentences for each criminal act are served one after another. In the alternative, **concurrent sentences** are served at the same time.

Governors and, in the case of federal offenses, the president of the United States may grant an offender **clemency**, resulting in a reduction of an individual's sentence or in a commutation of a death sentence to life in prison. A **pardon** exempts an individual from additional punishment. The U.S. Constitution, in Article II, Section 2, authorizes the president to pardon "offenses against the United States." In 2004, former Illinois governor George Ryan concluded that the problems in the administration of the death penalty risked the execution of an innocent person and responded by pardoning 4 individuals on death row and commuting the sentences of over 100 individuals to life in prison. In another example, in 2010 Florida governor Charlie Crist pardoned the deceased lead singer of the Doors, Jim Morrison, who had been convicted in 1970 for lewd behavior during a Miami concert.

Sentencing Guidelines

At the turn of the 20th century, most states and the federal government employed indeterminate sentencing. The legislature established the outer limits of the penalty, and parole boards were provided with the authority to release individuals prior to the completion of their sentence in the event they demonstrated that they had been rehabilitated. This approach is based on the belief that individuals who are incarcerated will be inspired to demonstrate that they no longer pose a threat to society and deserve an early release. The disillusionment with the notion of rehabilitation and the uncertain length and extreme variation in the time served by offenders led to the introduction of determinate sentences.

In 1980, Minnesota adopted sentencing guidelines in an effort to provide for uniform proportionate and predictable sentences. Currently, over a dozen states employ guidelines. In 1984, the U.S. Congress responded by passing the Sentencing Reform Act. The law went into effect in 1987 and established the U.S. Sentencing Commission, which drafted binding guidelines to be followed by federal judges in sentencing offenders. The Sentencing Commission is composed of seven members appointed by the president with the approval of the U.S. Senate. At least three of the members must be federal judges. The Sentencing Commission has the responsibility to monitor the impact of the guidelines on sentencing and to propose needed modifications.¹²

The Sentencing Reform Act abandoned rehabilitation as a purpose of imprisonment. The goals are retribution, deterrence, incapacitation, and the education and treatment of offenders. All sentences are determinate, and an offender's term of imprisonment is reduced only by any good-behavior credit earned while in custody.

Sentences under the federal guidelines are based on a complicated formula that reflects the seriousness and characteristics of the offense and the criminal history of the offender. The judge employs a sentencing grid and is required to provide a sentence within the narrow range where the offender's criminal offense and criminal history intersect on the grid.

Judges are required to document the reasons for criminal sentences and are obligated to provide a specific reason for an upward or downward departure. The prosecution may appeal a sentence below the presumed range and the defense any sentence above the presumed range. This process can be incredibly complicated and requires the judge to undertake as many as seven separate steps. The federal guidelines also specify that any plea bargain (a negotiated agreement, discussed in the next section, between defense and prosecuting attorneys) must be approved by a judge to ensure that any sentence agreed upon is within the range established by the guidelines. The impact of the guidelines is difficult to measure, but studies suggest that the guidelines have increased the percentage of defendants who receive prison terms.

The federal guidelines are much more complicated than most state guidelines and provide judges with much less discretion in sentencing. Experts conclude that as a result of several recent Supreme Court cases, federal as well as state sentencing guidelines should now be considered merely advisory rather than binding on judges. These complicated and confusing legal decisions, outlined as follows, hold that it is unconstitutional to enhance a sentence based on facts found by the judge to exist by a **preponderance of the evidence** (a probability) rather than **beyond a reasonable doubt** by a jury. According to the Supreme Court, excluding the jury from the fact-finding process constitutes a violation of defendants' Sixth Amendment right to trial by a jury of their peers. In *Apprendi v. New Jersey*, the U.S. Supreme Court explained that to "guard against . . . oppression and tyranny on the part of rulers, and as the great bulwark of [our] . . . liberties, trial by jury has been understood to require that 'the truth of every accusation . . . should . . . be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors.'"¹³

In *Blakely v. Washington*, decided in 2004, Blakely pled guilty to kidnapping his wife. The judge followed Washington's sentencing guidelines and found that Blakely had acted with "deliberate cruelty" and imposed an "exceptional" sentence of 90 months rather than the standard sentence of 53 months. The U.S. Supreme Court ruled that a judge's sentence is required

to be based on “the facts reflected in the jury verdict or admitted by the defendant” and that a judge may not enhance a sentence based on facts that were not determined by the jury to exist.¹⁴

The decisions in *Apprendi* and in *Blakely* were relied on by the Supreme Court in *Cunningham v. California* to hold unconstitutional California’s determinate sentencing law (DSL). Cunningham was tried and convicted of the continuous sexual abuse of a child under the age of 14. Under the DSL, the offense is punishable by imprisonment for a lower term of 6 years, a middle term of 12 years, or an upper term of 16 years. The judge was obligated to sentence Cunningham to the 12-year middle term unless the judge found one or more additional facts in aggravation. The trial judge found six aggravating circumstances by a preponderance of the evidence that outweighed the single mitigating factor, and Cunningham was sentenced to 16 years. The Supreme Court held that “fact finding to elevate a sentence . . . falls within the province of the jury employing a beyond-a-reasonable-doubt standard. . . . [B]ecause the DSL allocates to judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment.”¹⁵

In 2005, in *United States v. Booker*, the U.S. Supreme Court held that the enhancement of sentences by a judge under the federal sentencing guidelines unconstitutionally deprives defendants of their right to have facts determined by a jury of their peers. Booker was convicted of possession with intent to distribute at least 50 grams of crack cocaine. His criminal history and the quantity of drugs in his possession required a sentence of between 210 and 262 months in prison. The judge, however, concluded by a preponderance of the evidence that Booker had possessed an additional 556 grams of cocaine and that he also was guilty of obstructing justice. These findings required the judge to select a sentence of between 360 months and life. The judge sentenced Booker to 30 years in prison. The Supreme Court ruled that the trial judge had acted unconstitutionally and explained that Booker had, in effect, been convicted of possessing a greater quantity of drugs than was charged in the indictment and that the determination of facts was a matter for the jury rather than for the judge. Justice Stephen Breyer concluded that the best course under the circumstances was for judges to view the guidelines as advisory rather than as requiring the selection of a particular sentence. Why? An advisory system enables judges to formulate a sentence without consulting with a jury. On the other hand, mandatory guidelines under the Supreme Court’s decisions require the jury to find each fact on which a sentence is based beyond a reasonable doubt. The Court later held that because judges may exercise broad discretion in sentencing under the guidelines, the guidelines are not subject to a challenge based on the fact that they are void for vagueness.¹⁶ A number of federal judges had publicly criticized the guidelines as unduly complicated and as limiting their discretion to impose more lenient sentences on deserving defendants and likely silently rejoiced over the Supreme Court’s pronouncement that the guidelines should be considered as advisory rather than as binding.¹⁷

In *Rita v. United States*, *Gall v. United States*, and *Kimbrough v. United States*, the U.S. Supreme Court once again addressed the federal guidelines and explicitly held that the guidelines are advisory.¹⁸ In these judgments, the Court held that an appellate court should examine whether a judge’s sentencing decision, whether inside or outside the sentencing range in the guidelines, is reasonable. In other words, a trial court judge does not have to satisfy an extraordinarily high standard on appeal to justify a sentence that departs from the guidelines.

More recently, the U.S. Supreme Court in *Alleyne v. United States* held by a vote of 5–4 that a fact that triggers a *mandatory minimum sentence* (defined earlier) is an “element” of the crime and must be found by a jury beyond a reasonable doubt.

The jury convicted Alleyne of carrying a firearm during the perpetration of a violent crime, carrying a mandatory minimum sentence of five years. The judge determined that Alleyne had “brandished” the weapon, increasing the mandatory minimum sentence to seven years. The Supreme Court held that whether the defendant “brandished” the weapon was an element of the crime that must be found by the jury beyond a reasonable doubt. In other words, an “ingredient of a crime” that increases a mandatory minimum sentence must be determined by the jury rather than by the judge.¹⁹

In *Peugh v. United States*, Peugh was convicted of bank fraud to finance his faltering farm-related businesses. Peugh argued that the Ex Post Facto Clause of the U.S. Constitution required that he be sentenced under the 1998 version of the Federal Sentencing Guidelines in effect at the time of his crime rather than the 2009 version in effect at the time of sentencing because the 2009 guidelines call for a greater punishment than attached to bank fraud in 2000 when his crimes were committed. His sentencing range under the 1998 guidelines was 30 to 37 months. The 2009 guidelines in effect when Peugh was sentenced in May 2010 increased the sentencing range to 70 to 87 months. The U.S. Supreme Court held that although the guidelines are purely advisory, they remain a starting point of analysis, and the retroactive increase in the guidelines range applicable to a defendant creates a “sufficient risk of a higher sentence to constitute an *ex post facto* violation.” Although the guidelines are advisory, the Court noted that “Sentencing Commission’s data indicate that when a Guidelines range moves up or down, offenders’ sentences move with it.”²⁰

The next year, in *Molina-Martinez v. United States*, a sentencing report prepared by the Probation Office incorrectly calculated Molina-Martinez’s guideline range as 77 to 87 months rather than the correct range from 70 to 87 months. The trial court sentenced Molina-Martinez to a prison term of 77 months. Justice Anthony Kennedy noted that the district court had offered no explanation for Molina-Martinez’s sentence, and he held that there was a “reasonable probability” that the trial court would have imposed a different sentence had the judge been aware that 70 months rather than 77 months was the lowest sentence considered appropriate under the guidelines. Justice Kennedy held that when a defendant is “sentenced under an incorrect Guidelines range [the defendant] should be able to rely on that fact to show a reasonable probability that the district court would have imposed a different sentence under the correct range. That probability is all that is needed to establish an effect on substantial rights for purposes of obtaining relief.”²¹

In a related 2018 decision in *Rosales-Mireles v. United States*, the U.S. Supreme Court held that a defendant on appeal may raise the miscalculation of the guidelines range that the defendant did not raise at the time of sentencing. The Supreme Court stressed the importance of sentencing that is “neutral, accurate, consistent, trustworthy, and fair” and that “provide[s] opportunities for error correction.” Absent a correction, a defendant may spend more time in prison than is merited.²²

The Supreme Court has decided several other cases that address defendants' rights in the administration of the guidelines. A trial court before accepting a plea bargain is required to determine whether the sentence is consistent with the guidelines. On the other hand, in those instances in which a prosecution is brought under a congressional statute providing for a mandatory minimum sentence that requires the court to impose a higher sentence than provided in the guidelines, the trial court is not required to consult the guidelines.²³ A judge is required to adequately explain the sentence that is selected to allow for meaningful appellate review. This requires that the record as a whole indicates that the judge "considered the parties' arguments and had a reasoned basis for exercising his own legal decisionmaking authority." The appellate panel may return a case to the trial court for clarification.²⁴

In another significant decision, in 2016 the U.S. Supreme Court determined that the Sixth Amendment right to a speedy trial does not apply to the sentencing of a defendant who has pled guilty. Brandon T. Bettermann, following a guilty plea, spent 14 months in a county jail in Montana awaiting sentencing and subsequently was sentenced to seven years in prison, with four years suspended. The Court, while indicating that Bettermann might seek a remedy under another constitutional provision, rejected Bettermann's argument that holding him in the county jail for 14 months violated his constitutional rights.²⁵

YOU DECIDE 3.1

In *United States v. Gementera*, Shawn Gementera stole letters from several mailboxes in San Francisco. He entered a plea agreement and pled guilty to mail theft. The 24-year-old Gementera already had an extensive arrest record including criminal mischief, driving with a suspended license, misdemeanor battery, possession of drug paraphernalia, and taking a vehicle without the owner's consent. U.S. District Court judge Vaughn Walker sentenced Gementera to two months' imprisonment and three years' supervised release. Several conditions were placed on the supervised release including requiring Gementera to perform one day of community service consisting of either wearing a two-sided sandwich-board-style sign or carrying a large two-sided sign stating, "I stole mail; this is my punishment." Gementera was required to display the sign for eight hours while standing in front of a San Francisco postal facility. The prosecution and the defense attorneys jointly agreed that Gementera also would lecture at a high school and write apologies to any identifiable victims. Do "shaming punishments" promote rehabilitation? Deter criminal conduct? Unnecessarily shame and humiliate defendants? See *United States v. Gementera*, 379 F.3d 596 (9th Cir. 2004).

PLEA BARGAINING

The vast number of federal and state criminal cases are not brought to trial and instead are disposed of by a guilty plea as part of a **plea bargain**. In a plea bargain, the defendant agrees to plead guilty (or, in some instances, *nolo contendere*). The Federal Rules of Criminal Procedure adopted by the U.S. Congress establish the procedures for the prosecution of cases in federal courts. The Federal Rules identify three types of plea bargaining.

1. *Charges.* The prosecutor dismisses some of the charges against the defendant or charges the defendant with a less serious offense. This results in a less severe prison sentence, and the defendant avoids a conviction for a more serious offense.
2. *Sentence.* The prosecutor agrees to request that the judge issue a specific sentence. This may involve the length of the sentence, a request that sentences for multiple crimes run concurrently rather than consecutively, or a request that the defendant be given probation rather than a prison sentence.
3. *Sentence Recommendation.* The prosecutor agrees not to oppose the defendant's request for a specific sentence with the understanding that the judge is free to impose whatever sentence is viewed as appropriate.

The U.S. Supreme Court has upheld the constitutionality of plea bargaining and has ruled that the standard for entering a guilty plea is "whether the plea is a voluntary and intelligent choice among the alternative courses of action available to the defendant."²⁶ The Court noted that plea bargaining is essential to the administration of justice, and "[p]roperly administered, it is to be encouraged."²⁷

Plea bargaining allows the efficient disposal of criminal cases and enables prosecutors to focus resources on those cases in which there is a strong public interest in bringing defendants to trial. Guilty pleas also are favored because defendants accept responsibility for their actions and take an important step toward rehabilitation.

Critics assert that defendants who plead guilty invariably receive less severe sentences than defendants who are convicted at trial, which, in effect, punishes individuals for exercising their constitutional rights. Innocent defendants confronting lengthy prison sentences may plead guilty rather than risk a conviction at trial and a longer sentence. There also is a concern that plea bargaining vests too much power in prosecutors to decide a defendant's punishment.

There have been efforts to abolish or to reform plea bargaining, most recently in Alaska, and more modest efforts in Connecticut, North Carolina, Texas, and Pennsylvania. In the last several years, the U.S. Supreme Court has begun to assert control over plea bargaining by establishing constitutionally required procedures to be followed in plea bargaining. The Court has recognized that plea bargaining is a critical aspect of the criminal justice system and has stated that plea bargaining is not an "adjunct" to the criminal justice system; plea bargaining is "the criminal justice system."²⁸ The Court, for example, has held that defense attorneys have an obligation to communicate prosecutors' offers of plea bargains to defendants²⁹ and has held that federal judges should not participate in plea negotiations to avoid influencing a defendant's decision whether to accept a plea bargain.³⁰

YOU DECIDE 3.2

Paul Lewis Hayes was indicted by a Fayette County, Kentucky, grand jury for uttering a forged instrument in the amount of \$88.30, an offense punishable by a term of 2 to 10 years in prison. During plea negotiations, the prosecutor offered to recommend a sentence of 5

years in prison if Hayes would plead guilty. He stated that if Hayes did not plead guilty and “save the court the inconvenience and necessity of a trial,” he would return to the grand jury to obtain indictment under the Kentucky Habitual Criminal Act. This would subject Hayes to a mandatory sentence of life imprisonment by reason of his two prior felony convictions. Hayes chose not to plead guilty; the prosecutor responded by obtaining a new indictment under the habitual offender statute. A jury found Hayes guilty on the principal charge of uttering a forged instrument and, in a separate proceeding, further found that he had twice before been convicted of felonies. Hayes, as required by the habitual offender statute, was sentenced to a life term in the penitentiary. Hayes at age 17 had pled guilty to “detaining a female” after initially being charged with rape and was sentenced to 5 years in a juvenile facility. He later was found guilty of robbery and was sentenced to 5 years in prison, although he was placed on probation. Did the prosecutor in *Hayes* violate due process of law in charging and convicting Hayes as a habitual offender? See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

TRUTH IN SENTENCING

Whatever the fate of federal sentencing guidelines is, keep in mind that in 1984 the U.S. government moved from indeterminate to determinate sentencing. This was part of a general trend away from rehabilitation. Federal prisoners currently serve their complete sentence, reduced only by good-time credits earned while incarcerated. This replaces a system in which good-time credits and parole reduced a defendant’s incarceration to roughly one third of the sentence. Crime victims complained in frustration that the criminal justice system favored offenders over victims.

As part of this more open and honest approach to sentencing, the U.S. Congress championed truth in sentencing laws. What does this mean? The indeterminate sentencing model resulted in the release of prisoners prior to the completion of their sentences who succeeded in persuading parole boards that they had been rehabilitated. Truth in sentencing ensures that offenders serve a significant portion of the sentence. In the Violent Crime Control and Law Enforcement Act of 1994, Congress authorized the federal government to provide additional funds for prison construction and renovation to states that guarantee violent offenders serve 85% of their prison sentences. Roughly 41 states have some form of truth in sentencing legislation, and the vast majority have qualified for funding. The result is that over 70% of violent offenders are serving longer sentences than they did prior to truth in sentencing.

VICTIMS’ RIGHTS

Early tribal codes viewed criminal attacks as offenses against the victim’s family or tribe. The family had the right to revenge or compensation. By the late Middle Ages, crime came to be viewed as an offense against the “King’s Peace,” which is the right of the monarch to insist on social order and stability within his realm. Government officials now assumed the responsibility to apprehend, prosecute, and punish offenders. The victim’s interest was no longer of major consequence. In 1964, California passed legislation to assist victims, and today every state as

well as the District of Columbia provides monetary payments to various categories of crime victims. The plans typically cover compensation for physical and emotional injuries and also provide restitution for medical care, lost wages, and living and burial expenses. Most states have statutes that authorize courts to require offenders to provide this restitution as part of their criminal sentence. Forty-three states have adopted so-called **Son of Sam laws**, named after a New York law directed at serial killer David Berkowitz. These laws prohibit convicted felons from profiting from books, films, or television programs that recount their crimes; instead, these laws make such funds available to victims.³¹

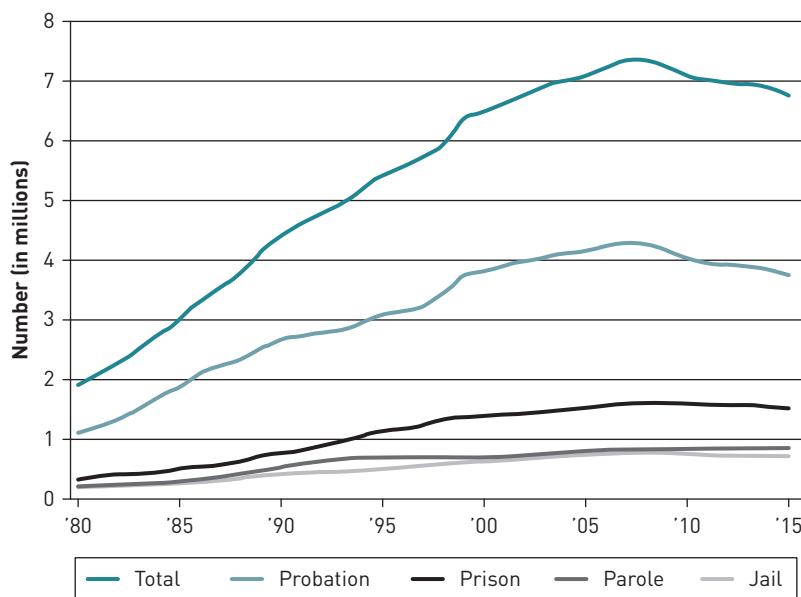
In 1986, the U.S. Congress passed the Victims of Crime Act (VOCA). This provided for a compensation fund and established the Office for Victims of Crime (OVC), which is responsible for coordinating all victim-related federal programs. President George W. Bush also signed the Crime Victims' Rights Act of 2004, which proclaims various rights for crime victims, including the right to be informed of all relevant information involving the prosecution, imprisonment, and release of an offender as well as the right to compensation and return of property. California, along with 19 other states, has adopted constitutional amendments protecting victims.

Another important development is the U.S. Supreme Court's approval of **victim impact statements** in death penalty cases. In *Payne v. Tennessee*, the defendant stabbed to death Charisse Christopher and her 2-year-old daughter in front of Charisse's 3-year-old son Nicholas. This was a particularly brutal crime; Charisse suffered 84 knife wounds and was left helplessly bleeding on the floor. The Supreme Court ruled that the trial court had acted properly in permitting Charisse's mother to testify during the sentencing phase of the trial that Nicholas continued to cry for his mother. The Court explained that the jury should be reminded that "just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." The federal government and an estimated 20 states have laws that authorize direct victim involvement at sentencing for criminal offenses, and all 50 states and the District of Columbia provide for some form of written submissions.³² In 2016, in *Bosse v. Oklahoma*, the U.S. Supreme Court reaffirmed that victim impact statements are limited to a discussion of the victim and the consequences of the victim's death for the family and that victim impact statements may not comment on the crime, the defendant, or the appropriate sentence.³³

There also is concern with the threat to the public from recidivist criminal behavior. The Second Chance Act, 42 U.S.C. § 17511, was signed into law by George W. Bush in 2008 to provide funds and training for states, local governments, and nonprofit organizations to assist prisoners with making the transition from incarceration to the community (see Figure 3.1). These services include drug treatment, psychological counseling, housing, and job skills. The act, though in need of additional funding, has a significant impact in reducing recidivism.

In the next portion of the chapter, we will see that criminal sentences must satisfy the constitutional requirements of the Cruel and Unusual Punishment Clause of the Eighth Amendment and meet the requirements of equal protection that we discussed in Chapter 2.

FIGURE 3.1 ■ Crime on the Streets: Rising Incarceration Rates for Adults



Source: Bureau of Justice Statistics, Key Statistics, *Total Adult Correctional Population, 1980–2015*, at www.bjs.gov (visited 11/13/2017).

YOU DECIDE 3.3

Charmaine Hines told her husband she wanted a divorce. They argued as their four children played outside. Hines told Charmaine, “If I can’t have you, nobody will.” He placed his hands around Charmaine’s neck and choked her. Charmaine managed to escape and flee to a neighbor’s house across the street and cried for help. Hines followed Charmaine to the neighbor’s house, pulled a knife out of his pocket, and held it up to her neck. He grabbed her hair, pulled her off the porch and onto the ground, and cut Charmaine’s neck with the knife from side to side. Two of the children witnessed the attack. Hines entered into a plea bargain and pled guilty to attempted second-degree murder and attempted second-degree intentional murder and aggravated battery in return for the prosecution dropping charges. “Prior to sentencing, a presentence investigation was conducted which determined that Hines’ criminal history score resulted in an applicable sentencing range of 61–66–71 months’ imprisonment for the primary offense of attempted second-degree murder. . . . For aggravated battery, . . . the applicable sentencing range was 38–41–43 months’ imprisonment.”

Charmaine made a statement in support of Hines’s request for probation:

“I’m asking the Court to please, you know, as far as my husband, if he could get probation. I’m not saying that what he did wasn’t wrong, but I feel like he really wasn’t trying to harm me. And I just ask the Court to think about his children, as far as his sentencing. He’s really

not a—as far as what people are trying to make him out to be. He's a loving father, a loving husband. And I'm just asking the Court, please, to give him probation, to think of his kids."

The defense counsel noted that Charmaine and Hines were currently separated and thus, this was "not a situation where . . . the victim wants to get back together with the defendant and pretend this didn't happen, these individuals are not going to be back together." Defense counsel also noted Hines did not have any prior convictions for violent offenses and that he pled guilty to the two crimes in order to take responsibility for his actions and to have the opportunity to request probation. Hines was "currently attending counseling for anger management, had the support of his family, and his domestic violence was an isolated event that was explained by the fact that Charmaine had told him she was having an affair and wanted a divorce."

After hearing statements from all the parties, the sentencing judge stated that "I can't simply ignore the fact that Mr. Hines, on this day, tried to kill Mrs. Hines. And in fact, is charged with two counts, not just the attempted second degree murder, but also the aggravated battery." The judge imposed downward departure sentences of 24 months' imprisonment for the attempted second-degree murder and aggravated battery convictions and ordered the sentences to run concurrently with one another. Do you agree with the judge's sentence? See *State v. Hines*, 29 P.3d 270 (Kan. 2013).

CRUEL AND UNUSUAL PUNISHMENT

The **Eighth Amendment** to the U.S. Constitution is the primary constitutional check on sentencing. The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The prohibition on cruel and unusual punishment received widespread acceptance in the new American nation. In fact, the language in the U.S. Bill of Rights is taken directly from the Virginia Declaration of Rights of 1776, which in turn was inspired by the English Bill of Rights of 1689. The English document significantly limited the powers and prerogatives of the British monarchy and recognized certain basic rights of the English people.³⁴

The U.S. Supreme Court has ruled that the prohibition against cruel and unusual punishment applies to the states as well as to the federal government, and virtually every state constitution contains similar language. Professor Wayne LaFave lists three approaches to interpreting the clause: (1) It limits the *methods* employed to inflict punishment, (2) it restricts the *amount of punishment* that may be imposed, and (3) it *prohibits* the criminal punishment of certain acts.³⁵

Methods of Punishment

Patrick Henry expressed concern during Virginia's consideration of the proposed federal Constitution that the absence of a prohibition on cruel and unusual punishment would open the door to the use of torture to extract confessions. In fact, during the debate in the First Congress on the adoption of a Bill of Rights, one representative objected to the Eighth Amendment on the grounds that "villains often deserve whipping, and perhaps having their ears cut off."³⁶

There is agreement that the Eighth Amendment prohibits punishment that was considered cruel at the time of the amendment's ratification, including burning at the stake, crucifixion,

breaking on the wheel, drawing and quartering, the rack, and the thumbscrew.³⁷ The Supreme Court observed as early as 1890 that “if the punishment prescribed for an offense against the laws of the state were manifestly cruel and unusual as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition.”³⁸ In 1963, the Supreme Court of Delaware held that whipping was constitutionally permissible on the grounds that the practice was recognized in the state in 1776.³⁹

The vast majority of courts have not limited cruel and unusual punishment to acts condemned at the time of passage of the Eighth Amendment and have viewed this as an evolving concept. The U.S. Supreme Court in *Trop v. Dulles* stressed that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁴⁰ *Trop* is an example of the application of the prohibition on cruel and unusual punishment to new situations. In *Trop*, the U.S. Supreme Court held that it was unconstitutional to deprive Trop and roughly 7,000 others convicted of military desertion of their American citizenship. Chief Justice Earl Warren wrote that depriving deserters of citizenship, although involving “no physical mistreatment,” was more “primitive than torture” in that individuals are transformed into “stateless persons without the right to live, work or enjoy the freedoms accorded to citizens in the United States or in any other nation.”

The death penalty historically has been viewed as a constitutionally acceptable form of punishment.⁴¹ The Supreme Court noted that punishments are “cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. [Cruelty] implies there is something inhuman and barbarous—something more than the mere extinguishment of life.”⁴²

The Supreme Court has rejected the contention that death by shooting⁴³ or electrocution is cruel and barbarous, noting in 1890 that the newly developed technique of electricity was a “more humane method of reaching the result.”⁴⁴ In *Louisiana ex rel. Francis v. Resweber*, Francis was strapped in the electric chair and received a bolt of electricity before the machine malfunctioned. The U.S. Supreme Court rejected the claim that subjecting the petitioner to the electric chair a second time constituted cruel and unusual punishment. The Court observed that there was no intent to inflict unnecessary pain, and the fact that “an unforeseeable accident prevented the prompt consummation of the sentence cannot . . . add an element of cruelty to a subsequent execution.”⁴⁵

Judges have actively intervened to prevent barbarous methods of discipline in prison. In *Hope v. Pelzer*, in 2002, the U.S. Supreme Court ruled that Alabama’s use of a “hitching post” to discipline inmates constituted “wanton and unnecessary pain.” During Hope’s seven-hour ordeal on the hitching post in the hot sun, he was painfully handcuffed at shoulder level to a horizontal bar without a shirt, taunted, and provided with water only once or twice and denied bathroom breaks. There was no effort to monitor the petitioner’s condition despite the risks of dehydration and sun damage. The ordeal continued despite the fact that Hope expressed a willingness to return to work. The Supreme Court determined that the use of the hitching post was painful and punitive retribution that served no legitimate and necessary penal purpose.⁴⁶

In 2011, in *Brown v. Plata*, Justice Anthony Kennedy affirmed a lower court judgment requiring California prisons to release roughly 46,000 inmates to relieve prison overcrowding. The California system housed twice as many prisoners as the institutions were designed to hold. Justice Kennedy concluded that the overcrowding of California prisons constituted unconstitutional cruel treatment because the prison system lacked the resources to provide adequate health and mental health care to the large prison population. Overcrowding also had led to rising tension and to violence. The Supreme Court held that “[a] prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.”⁴⁷

In judging whether a method of criminal punishment or prison discipline is cruel and unusual, courts consider the following:

- *Prevailing Social Values.* The punishment must be acceptable to society.
- *Penological Purpose.* The punishment must be strictly necessary to the achievement of a valid correctional goal, such as deterrence, rehabilitation, or incapacitation.
- *Human Dignity.* Individuals subject to the punishment must be treated with human respect and dignity.

There is an argument that individuals convicted of crimes have forfeited claims to humane treatment and that courts have gone too far in coddling criminals and in handcuffing state and local criminal justice professionals. According to individuals who adhere to this position, judges are too far removed from the realities of crime to appreciate that harsh penalties are required to deter crime and to control inmates. The debate over appropriate forms of punishment will likely continue as society moves toward utilizing alternative forms of social control. A number of states already authorize the chemical castration of individuals convicted of sexual battery, and some statutes also provide individuals with the option of surgically removing their testes.⁴⁸

The next section explores whether capital punishment constitutes cruel and unusual punishment.

The Amount of Punishment: Capital Punishment

The prohibition on cruel and unusual punishment has also been interpreted to require that punishment is proportionate to the crime. In other words, the “punishment must not be excessive”; it must “fit the crime.” Judges have been particularly concerned with the **proportionality** of the death penalty. This reflects an understandable concern that a penalty that is so “unusual in its pain, in its finality and in its enormity” is imposed in an “evenhanded, nonselective, and nonarbitrary” manner against individuals who have committed crimes deserving of death.⁴⁹

In *Furman v. Georgia*, five Supreme Court judges wrote separate opinions condemning the cruel and unusual application of the death penalty against some defendants while others convicted of equally serious homicides were sentenced to life imprisonment. Justice Byron White reviewed the cases before the Supreme Court and concluded that there was “no meaningful basis for distinguishing the few cases in which it [the death penalty] is imposed from the many

cases in which it is not.” Justice Potter Stewart observed in a concurring opinion that “these death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”⁵⁰

Justice William O. Douglas controversially concluded in *Furman* that the death penalty was being selectively applied against the poor, the uneducated, and other underrepresented groups at the same time privileged individuals convicted of comparable crimes were being sentenced to life in prison. Justice Douglas argued that the United States’ system of capital punishment operated in practice to exempt anyone making over \$50,000 from execution, although “[B]lacks, those who never went beyond the fifth grade in school, those who make less than \$3,000 a year or those who were unpopular or unstable [were] the only people executed.”

States reacted to this criticism by adopting mandatory death penalty laws that required that defendants convicted of intentional homicide receive the death penalty. The U.S. Supreme Court ruled in *Woodson v. North Carolina* that treating all homicides alike resulted in death being cruelly inflicted on undeserving defendants. The Court held that a jury “fitting the punishment to the crime” must consider the “character and record of the individual offender” as well as the “circumstances of the particular offense.” The uniform system adopted in North Carolina treated “all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subject to the blind infliction of the penalty of death.”⁵¹

In *Gregg v. Georgia*, in 1976, the U.S. Supreme Court approved a Georgia statute designed to ensure the proportionate application of capital punishment. The Georgia law limited the discretion of jurors to impose the death penalty by requiring jurors to find that a murder had been accompanied by one of several aggravating circumstances. This evidence was to be presented at a separate sentencing hearing and was to be weighed against any and all mitigating considerations. Death sentences were to be automatically reviewed by the state supreme court, which was charged with ensuring that the verdict was supported by the facts and that capital punishment was imposed in a consistent fashion. This system was intended to ensure that the death penalty was reserved for the most severe homicides and was not “cruelly imposed on undeserving defendants.”⁵²

Are there offenses other than aggravated and intentional murder and the crime of treason under federal law that have been held to merit the death penalty? What of aggravated rape? In *Coker v. Georgia*, in 1977, the U.S. Supreme Court ruled that death was a grossly disproportionate and excessive punishment for the aggravated rape of an adult and constituted cruel and unusual punishment.⁵³ Thirty-one years later, in *Kennedy v. Louisiana*, the Supreme Court held that imposition of capital punishment for the rape of a child constituted cruel and unusual punishment.⁵⁴

In 2008, the U.S. Supreme Court addressed the constitutionality of the execution of individuals through the use of lethal injection. In *Baze v. Rees*, the Court upheld the constitutionality of Kentucky’s lethal injection protocol.⁵⁵ In June 2015, in *Glossip v. Gross*, Justice Samuel A. Alito Jr. writing in a 5–4 decision held that the inmates challenging Oklahoma’s use of

midazolam as the first drug in a three-drug protocol were unable to establish that the challenged drug created a substantial risk of severe pain and that the inmates had failed to identify a less severe alternative.⁵⁶

Federal statutes authorize the death penalty for murder that is committed by various methods along with espionage and treason (discussed in Chapter 16). In July 2019, U.S. Attorney General William Barr announced that the federal government would end its moratorium on executions and subsequently announced and carried out the execution of 11 individuals convicted of crimes resulting in murder. Since 1988, prior to these executions, the federal government had executed 79 individuals, the last of which had taken place in 2001 when Timothy McVeigh, the Oklahoma City terrorist bomber, was executed. There currently are 49 individuals on federal death row (see Crime in the News later in the chapter for a discussion of women on death row).

Lethal Injection

In 1977, Oklahoma passed the first lethal injection law. The law was motivated by the desire to find a less expensive and more humane method of execution. All of the 27 death penalty states along with the federal government and military presently provide for lethal injection as the primary method of execution (with the exception of South Carolina, which offers electrocution as a primary option and lethal injection as an alternative). Fifteen of these states provide for other methods (e.g., electrocution, lethal gas, hanging, nitrogen hypoxia, and firing squad) in the event that the drugs required to execute an individual by lethal injection are unavailable. Between 1976 and 2017, 1,294 of the 1,459 executions in the United States were carried out by lethal injection. Three were carried out by the federal government and the remainder by the states. In recent years, lethal injection has been the sole method of execution. Until recently, most state correctional agencies employed the identical three-drug sequence of sodium thiopental, pancuronium bromide, and potassium chloride.

European manufacturers of drugs like pentobarbital and sodium thiopental in the past several years decided to stop selling drugs to American states for use in executions. A shortage of these drugs led correctional authorities to experiment with new combinations of drug cocktails. Defense attorneys petitioned courts to require correctional authorities to reveal the name and source of the drugs used in executions. Lawyers argued that the use of unreliable drugs exposed inmates to the risk of painful executions in violation of the Eighth Amendment. Appellate courts, however, held that state correctional authorities are not required to reveal the chemicals in their drug protocols or the supplier of the drugs and noted that some degree of pain is inherent in the use of capital punishment.

The executions of Dennis McGuire in January 2014 in Ohio, Clayton D. Lockett in Oklahoma in April 2014, and Joseph R. Wood III in Arizona in July 2014 led to a questioning of the use of executions through lethal injection. McGuire's execution was carried out with a new and untested combination of drugs and took about 25 minutes, although death normally should occur within 10 minutes. Witnesses reported that McGuire appeared to be gasping for air and appeared to be conscious of the pain associated with the execution. Lockett's execution took 43 minutes. Lockett reportedly was moaning in pain because an improperly placed

intravenous line prevented the drugs from flowing directly into his bloodstream. Wood also was executed using an experimental drug cocktail and, according to observers, gasped for air continually over the course of the nearly two hours it took for him to die.

The three inmates all had been convicted of brutal crimes, and the families of the victims pointed out that their loved ones had suffered to a much greater extent than their assailants. Lockett, for example, had been convicted of shooting a 19-year-old woman and burying her alive.

President Obama declared that the execution in Oklahoma was “deeply disturbing” and directed the Department of Justice to undertake a study of the application of the death penalty by the federal government and by state governments. The federal government, for several years, had imposed a moratorium on the application of the death penalty pending a decision on the appropriate drug cocktail to be used in executions.

In 2015, the Supreme Court again approved of lethal injection. The events in Ohio, Oklahoma, and Arizona were followed by what appears to have been an excruciatingly painful execution of Ronald Bert Smith in Alabama in December 2016. In 2017, Florida executed Mark James Asay using the drug etomidate as a substitute for midazolam despite the manufacturer’s objection to the use of the drug.

Not only was this the first execution in Florida since the reinstatement of the death penalty in 1977; it was also the first-ever Florida execution of a white person for killing a Black person.

In 2017, the Supreme Court denied *certiorari* in *Arthur v. Dunn*. Thomas Arthur petitioned to be executed by firing squad rather than by lethal injection. A federal appellate court rejected Arthur’s petition because Alabama law did not expressly authorize execution by firing squad and thus execution by firing squad did not provide a “known and available” alternative under *Glossip*. Justice Sonia Sotomayor, in a dissent joined by Justice Stephen Breyer, wrote that “[s]cience and experience are now revealing that, at least with respect to midazolam-centered protocols, prisoners executed by lethal injection are suffering horrifying deaths beneath a ‘medically sterile aura of peace.’ . . . [W]e should not blind ourselves to the mounting . . . evidence [that] midazolam is simply unable to render prisoners insenate to the pain of execution.”⁵⁷

The Death Penalty Information Center has recorded 1,534 executions since 1976. More than 180 of the individuals sentenced to death since 1973 were found to have been wrongfully convicted and were subsequently released from prison.⁵⁸

The Trump administration in 2019 resumed executions through the use of lethal injections.

The Juvenile Death Penalty

The next case in the book involves the issue of whether the capital punishment of juvenile offenders constitutes cruel and unusual punishment.

In 1966, in *Kent v. United States*, the U.S. Supreme Court limited the broad authority exercised by state and local judges in waiving juveniles over for criminal prosecution as adults.⁵⁹ The U.S. Supreme Court was next asked and refused on several occasions during the 1980s to rule on the constitutionality of the juvenile death penalty. In *Eddings v. Oklahoma*, in 1982, the Supreme Court declined to rule on the constitutionality of the death penalty against juveniles, but held that a defendant’s youth and psychological and social background must be considered in mitigation of punishment.⁶⁰

In *Thompson v. Oklahoma*, in 1988, the U.S. Supreme Court ruled that the execution of a young person who was under the age of 16 at the time of the offense constituted cruel and unusual punishment. Justice John Paul Stevens wrote that “inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or pressure than is an adult.”⁶¹

In *Stanford v. Kentucky*, in 1989, the U.S. Supreme Court finally addressed the issue of the application of the death penalty against individuals under the age of 18 and ruled that there was no national consensus against the execution of individuals 16 or 17 years of age and that the imposition of capital punishment could not be considered either cruel or unusual. Justice Antonin Scalia relied on the objective fact that of the 37 states that provided for capital punishment, only 15 declined to impose it on 16-year-olds and 12 did not extend the death penalty to 17-year-old defendants.⁶²

The petitioners in *Stanford* pointed to the fact that of the 2,106 sentences of death handed out between 1982 and 1988, only 15 were imposed against individuals who were under 16 at the time of their crimes and only 30 against individuals who were 17 at the time of the crime. Actual executions for crimes committed by individuals under age 18 constituted only about 2% of the total number of executions between 1642 and 1986. Justice Scalia explained that the statistics merely indicated that prosecutors and juries shared the view that there was a select but dangerous group of juveniles deserving of death.

In *Roper v. Simmons*, the U.S. Supreme Court once again considered whether the execution of individuals who are 16 or 17 years of age constitutes cruel and unusual punishment.

DID SENTENCING 17-YEAR-OLD CHRISTOPHER SIMMONS TO DEATH FOR MURDER CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT?

ROPER V. SIMMONS, 543 U.S. 551 (2005)

Opinion by Kennedy, J.

This case requires us to address... whether it is permissible under the Eighth and Fourteenth Amendments to the Constitution of the United States to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime.

Facts

At the age of 17, when he was still a junior in high school, Christopher Simmons, the respondent here, committed murder. About nine months later, after he had turned 18, he was tried and sentenced to death. There is little doubt that Simmons was the instigator of the crime. Before its commission Simmons said he wanted to murder someone. In chilling, callous terms he talked about his plan, discussing it for the most part with two friends, Charles Benjamin and John Tessmer, then aged 15 and 16 respectively. Simmons proposed to

commit burglary and murder by breaking and entering, tying up a victim, and throwing the victim off a bridge. Simmons assured his friends they could “get away with it” because they were minors.

The three met at about 2 a.m. on the night of the murder, but Tessmer left before the other two set out. (The state later charged Tessmer with conspiracy, but dropped the charge in exchange for his testimony against Simmons.) Simmons and Benjamin entered the home of the victim, Shirley Crook, after reaching through an open window and unlocking the back door. Simmons turned on a hallway light. Awakened, Mrs. Crook called out, “Who’s there?” In response Simmons entered Mrs. Crook’s bedroom, where he recognized her from a previous car accident involving them both. Simmons later admitted this confirmed his resolve to murder her.

Using duct tape to cover her eyes and mouth and bind her hands, the two perpetrators put Mrs. Crook in her minivan and drove to a state park. They reinforced the bindings, covered her head with a towel, and walked her to a railroad trestle spanning the Meramec River. There they tied her hands and feet together with electrical wire, wrapped her whole face in duct tape and threw her from the bridge, drowning her in the waters below.

By the afternoon of September 9, Steven Crook had returned home from an overnight trip, found his bedroom in disarray, and reported his wife missing. On the same afternoon fishermen recovered the victim’s body from the river. Simmons, meanwhile, was bragging about the killing, telling friends he had killed a woman “because the bitch seen my face.” The next day, after receiving information of Simmons’ involvement, police arrested him at his high school and took him to the police station in Fenton, Missouri. They read him his *Miranda* rights. Simmons waived his right to an attorney and agreed to answer questions. After less than two hours of interrogation, Simmons confessed to the murder and agreed to perform a videotaped reenactment at the crime scene.

The state charged Simmons with burglary, kidnapping, stealing, and murder in the first degree. As Simmons was 17 at the time of the crime, he was outside the criminal jurisdiction of Missouri’s juvenile court system. He was tried as an adult. At trial the state introduced Simmons’ confession and the videotaped reenactment of the crime, along with testimony that Simmons discussed the crime in advance and bragged about it later. The defense called no witnesses in the guilt phase. The jury having returned a verdict of murder, the trial proceeded to the penalty phase.

The state sought the death penalty. As aggravating factors, the state submitted that the murder was committed for the purpose of receiving money; was committed for the purpose of avoiding, interfering with, or preventing lawful arrest of the defendant; and involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman. The state called Shirley Crook’s husband, daughter, and two sisters, who presented moving evidence of the devastation her death had brought to their lives.

In mitigation Simmons’ attorneys first called an officer of the Missouri juvenile justice system, who testified that Simmons had no prior convictions and that no previous charges had been filed against him. Simmons’ mother, father, two younger half brothers, a neighbor, and a friend took the stand to tell the jurors of the close relationships they had formed with Simmons and to plead for mercy on his behalf. Simmons’ mother, in particular, testified to the responsibility Simmons demonstrated in taking care of his two younger half brothers and of his grandmother and to his capacity to show love for them.

During closing arguments, both the prosecutor and defense counsel addressed Simmons’ age, which the trial judge had instructed the jurors they could consider as a mitigating factor. Defense counsel reminded the jurors that juveniles of Simmons’ age cannot

drink, serve on juries, or even see certain movies, because “the legislatures have wisely decided that individuals of a certain age aren’t responsible enough.” Defense counsel argued that Simmons’ age should make “a huge difference to [the jurors] in deciding just exactly what sort of punishment to make.” In rebuttal, the prosecutor gave the following response: “Age, he says. Think about age. Seventeen years old. Isn’t that scary? Doesn’t that scare you? Mitigating? Quite the contrary I submit. Quite the contrary.”

The jury recommended the death penalty after finding the state had proved each of the three aggravating factors submitted to it. Accepting the jury’s recommendation, the trial judge imposed the death penalty. . . . After these proceedings in Simmons’ case had run their course, the Supreme Court held that the Eighth and Fourteenth Amendments prohibit the execution of a [person with intellectual disabilities]. *Atkins v. Virginia*, 536 U.S. 304 (2002). Simmons filed a new petition for state postconviction relief, arguing that the reasoning of *Atkins* established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed. The Missouri Supreme Court agreed that “a national consensus has developed against the execution of juvenile offenders.” . . . On this reasoning it set aside Simmons’s death sentence and resentenced him to “life imprisonment without eligibility for probation, parole, or release except by act of the Governor.”

Issue

The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The provision is applicable to the States through the Fourteenth Amendment. As the court has explained, the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic “precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.

. . . To implement this framework we have established the propriety and affirmed the necessity of referring to “the evolving standards of decency that mark the progress of a maturing society” to determine which punishments are so disproportionate as to be cruel and unusual. . . . We now reconsider the issue . . . whether the death penalty is a disproportionate punishment for juveniles.

Reasoning

The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence *Atkins* held sufficient to demonstrate a national consensus against the death penalty for [individuals with intellectual disabilities]. When *Atkins* was decided, 30 States prohibited the death penalty for [individuals with intellectual disabilities]. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded [individuals with intellectual disabilities] from its reach. By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach. *Atkins* emphasized that even in the 20 States without formal prohibition, the practice of executing [individuals with intellectual disabilities] was infrequent. . . . In the present case, too, even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent. . . . Since

Stanford [v. Kentucky, 492 U.S. 361 (1989)], six states have executed prisoners for crimes committed as juveniles. In the past 10 years, only three have done so: Oklahoma, Texas, and Virginia. In December 2003 the Governor of Kentucky decided to spare the life of Kevin Stanford, and commuted his sentence to one of life imprisonment without parole, with the declaration that “we ought not to be executing people who, legally, were children.” . . . By this act the Governor ensured Kentucky would not add itself to the list of States that have executed juveniles within the last 10 years even by the execution of the very defendant whose death sentence the Court had upheld in *Stanford v. Kentucky*.

There is, to be sure, at least one difference between the evidence of consensus in *Atkins* and in this case. Impressive in *Atkins* was the rate of abolition of the death penalty for [individuals with intellectual disabilities]. Sixteen States that permitted the execution of [individuals with intellectual disabilities] at the time of *Penry [v. Lynaugh, 492 U.S. 302 (1989)]*, finding no national consensus against execution of mentally challenged individuals, had prohibited the practice by the time we heard *Atkins*. By contrast, the rate of change in reducing the incidence of the juvenile death penalty, or in taking specific steps to abolish it, has been slower. Five States that allowed the juvenile death penalty at the time of *Stanford* have abandoned it in the intervening 15 years—four through legislative enactments and one through judicial decision.

Though less dramatic than the change from *Penry* to *Atkins* . . . we still consider the change from *Stanford* to this case to be significant. As noted in *Atkins*, with respect to the States that had abandoned the death penalty for [individuals with intellectual disabilities] . . . “it is not so much the number of these States that is significant, but the consistency of the direction of change.” In particular we found it significant that, in the wake of *Penry*, no state that had already prohibited the execution of [individuals with intellectual disabilities] had passed legislation to reinstate the penalty. The number of States that have abandoned capital punishment for juvenile offenders since *Stanford* is smaller than the number of States that abandoned capital punishment for [individuals with intellectual disabilities] after *Penry*; yet we think the same consistency of direction of change has been demonstrated. Since *Stanford*, no State that previously prohibited capital punishment for juveniles has reinstated it. This fact, coupled with the trend toward abolition of the juvenile death penalty, carries special force in light of the general popularity of anticrime legislation, and in light of the particular trend in recent years toward cracking down on juvenile crime in other respects. Any difference between this case and *Atkins* with respect to the pace of abolition is thus counterbalanced by the consistent direction of the change.

The slower pace of abolition of the juvenile death penalty over the past 15 years, moreover, may have a simple explanation. When we heard *Penry*, only two death penalty states had already prohibited the execution of [individuals with intellectual disabilities]. When we heard *Stanford*, by contrast, 12 death penalty States had already prohibited the execution of any juvenile under 18, and 15 had prohibited the execution of any juvenile under 17. If anything, this shows that the impropriety of executing juveniles between 16 and 18 years of age gained wide recognition earlier than the impropriety of executing [individuals with intellectual disabilities]. In the words of the Missouri Supreme Court: “It would be the ultimate in irony if the very fact that the inappropriateness of the death penalty for juveniles was broadly recognized sooner than it was recognized for [individuals with intellectual disabilities] were to become a reason to continue the execution of juveniles now that the execution of [individuals with intellectual disabilities] has been barred.” . . . Congress considered the issue when enacting the Federal Death Penalty Act in 1994, and determined that the death penalty should not extend to juveniles. . . .

As in *Atkins*, the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting [individuals with intellectual disabilities], as “categorically less culpable than the average criminal.”

A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment. . . . Capital punishment must be limited to those offenders who commit “a narrow category of the most serious crimes” and whose extreme culpability makes them “the most deserving of execution.” This principle is implemented throughout the capital sentencing process. States must give narrow and precise definition to the aggravating factors that can result in a capital sentence. In any capital case a defendant has wide latitude to raise as a mitigating factor “any aspect of [their] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” There are a number of crimes that beyond question are severe in absolute terms, yet the death penalty may not be imposed for their commission. These rules vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders. . . .

Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies . . . tend to confirm, “A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. . . .” In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. (“Youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.”) This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.

These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means “their irresponsible conduct is not as morally reprehensible as that of an adult.” Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed. Indeed, “the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.” . . .

Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults. We have held there are two distinct social purposes served by the death penalty: “retribution and deterrence of capital crimes by prospective offenders.” As for retribution, . . . [w]hether viewed as an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.

As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles. . . . Here . . . the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. . . . To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.

. . . Certainly it can be argued, although we by no means concede the point, that a rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a sentence of death. . . . The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or coldblooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. . . .

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under eighteen have already attained a level of maturity some adults will never reach. . . .

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. Yet . . . the laws of other countries and . . . international authorities are instructive in interpreting the Eighth Amendment’s prohibition of “cruel and unusual punishments.” Respondent . . . does not contest, that only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty. . . .

Holding

The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. The judgment of the Missouri Supreme Court setting aside the sentence of death imposed upon Christopher Simmons is affirmed.

Dissenting, O'Connor, J.

The Court's decision today establishes a categorical rule forbidding the execution of any offender for any crime committed before his 18th birthday, no matter how deliberate, wanton, or cruel the offense. . . . The rule decreed by the Court rests, ultimately, on its independent moral judgment that death is a disproportionately severe punishment for any 17-year-old offender. I do not subscribe to this judgment. Adolescents as a class are undoubtedly less mature, and therefore less culpable for their misconduct, than adults. But the Court has adduced no evidence impeaching the seemingly reasonable conclusion reached by many state legislatures: that at least some 17-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case. Nor has it been shown that capital sentencing juries are incapable of accurately assessing a youthful defendant's maturity or of giving due weight to the mitigating characteristics associated with youth.

Questions for Discussion

1. Summarize the data Justice Kennedy reviews in concluding that capital punishment for juveniles is disproportionate punishment.
2. What are the similarities and differences in statistics relating to the execution of individuals with intellectual disabilities compared to the data concerning juveniles? Is there a clear consensus against capital punishment for individuals under 18?
3. Why does Justice Kennedy conclude that juveniles are not among the "worst offenders who merit capital punishment"? What does Justice Kennedy write about the interests in retribution and deterrence in regard to juveniles?
4. Explain why Justice Kennedy refers to other countries. Is this relevant to a decision of the U.S. Supreme Court?
5. The jurors at trial concluded that Simmons deserved the death penalty. Would it be a better approach to permit each state to remain free to determine whether to impose the death penalty for juveniles under 18? Is life imprisonment without parole a proportionate penalty for a juvenile convicted of the intentional killing of another person?
6. How would you rule in *Simmons*?

CASES AND COMMENTS

1. **Juveniles and Life Without Parole.** In 2010, in *Graham v. Florida*, the U.S. Supreme Court held that sentencing a juvenile to life imprisonment without parole for a nonhomicide offense violated the Eighth Amendment prohibition on cruel and unusual punishment. Terrance Jamar Graham's parents were addicted to crack cocaine, and in elementary school he was diagnosed with attention deficit hyperactivity disorder. He began drinking alcohol and using tobacco at age 9 and smoked marijuana at age 13. At age 16, Graham was arrested and charged as an adult with armed burglary and with attempted armed robbery. He pled guilty and received a three-year term of probation, the first six months of which he served in the county jail. Roughly six months following Graham's release, he

was arrested along with two accomplices for home invasion robbery following a high-speed chase. Three firearms were found in his automobile.

The trial court judge found that Graham had violated his probation by committing a home invasion robbery, possessing a firearm, and associating with individuals involved in criminal activity. The court sentenced Graham to life imprisonment without parole for the earlier armed burglary and 15 years for the armed robbery. The judge explained that “[g]iven your escalating pattern of criminal conduct, it is apparent to the court that you have decided that is the way you are going to live your life and that the only thing I can do now is to try and protect the community from your actions.”

The U.S. Supreme Court considered Graham’s claim that his sentence of life without parole constituted cruel and unusual punishment. The Court determined that there was a national consensus against life imprisonment for juveniles convicted of nonhomicide offenses.

There were 129 juvenile nonhomicide offenders serving life without parole sentences. Seventy-seven of these offenders were incarcerated in Texas, and the other 52 inmates were imprisoned in 10 states and in the federal system. Twenty-six states and the District of Columbia had not imposed life imprisonment without parole despite statutory authorization. The Court concluded that considering the large number of juveniles who may be eligible for life imprisonment based on having committed aggravated assault, forcible rape, robbery, burglary, and arson, the sentence of life imprisonment without parole for nonhomicide offenses is infrequently imposed.

The Court stressed that “community consensus,” although entitled to great weight, is not determinative whether life imprisonment for juveniles constitutes cruel and unusual punishment. The important step is to evaluate the degree of responsibility of juvenile offenders for their crimes. An additional consideration is whether the sentence serves legitimate penological goals.

Offenders. *Roper v. Simmons* established that juveniles lack maturity, have an underdeveloped sense of responsibility, and are susceptible to outside pressures. As a consequence, juvenile offenders cannot be considered to be the “worst of the worst” and cannot be considered as morally responsible as an adult.

Nature of crime. The taking of the life of another person results in the loss of human life and is more serious than a nonhomicide felony.

Nature of punishment. Life without parole is the second most severe punishment authorized under law. Offenders are deprived of basic liberties and incarcerated for the remainder of their life. A juvenile offender will serve more years in prison than an adult offender.

Penological justification. The interest in retribution does not justify the imposition of life imprisonment on juveniles because they are not as responsible for their actions as are adults. Juveniles are impulsive and emotional and are unlikely to be deterred by the threat of punishment. The protection of society in most instances does not require the incapacitation of juvenile offenders for the remainder of their lives, and there is no justification for dismissing the possibility of rehabilitation.

The Supreme Court held that a state is required to provide defendants like Graham “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” The Eighth Amendment, however, does not “foreclose the possibility that juveniles convicted of nonhomicide crimes “will remain behind bars for life.” See *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011 (2010).

Do you agree with the Supreme Court’s ruling? In light of *Graham*, will life imprisonment for juveniles for homicide offenses be upheld as constitutional?

- 2. Life Imprisonment for Juveniles for Homicide Offenses.** In June 2012, in *Miller v. Alabama*, the Supreme Court in a 5–4 decision held that the Eighth Amendment prohibits mandatory sentencing schemes that require life in prison without the possibility for parole for juvenile offenders under the age of 18 convicted of homicide. Justice Elena Kagan noted that “youth matters” and mandatory sentencing schemes by making “age irrelevant” pose “too great a risk of disproportionate punishment.”

States are not precluded from sentencing juveniles to life imprisonment without parole in homicide cases, although given juveniles’ “diminished culpability” and “capacity for change,” this “harshest possible penalty [should be] uncommon.” A “sentencer” before imposing life imprisonment on a juvenile is required to consider mitigating factors, and the sentence is to be based on “individualized consideration[s],” such as the juvenile’s age, the juvenile’s background, the juvenile’s development, the nature of the juvenile’s involvement in the crime, the juvenile’s capacity to assist his or her attorney, and the potential for rehabilitation. Would you sentence the two 14-year-old offenders in *Miller* to life imprisonment? See *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455 (2012).

In 2016, in *Montgomery v. Louisiana*, the Supreme Court held that *Miller v. Alabama* applied retroactively and that juveniles incarcerated for life with no opportunity of parole are required to have their cases reviewed for resentencing or be considered for parole. Justice Kennedy wrote that “prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and if it did not, their hope for some years of life outside prison walls must be restored.” See *Montgomery v. Louisiana*, 577 U.S. ____ (2016).

Roughly 29 states and the District of Columbia have changed their laws for juvenile offenders convicted of homicide and provide mandatory minimums ranging from an opportunity for parole after 15 years (as in Nevada and West Virginia) to an opportunity for parole after 40 years in prison. The other states continue to provide life without parole for juvenile offenders convicted of homicide. In February 2018, the Louisiana parole board voted 2-to-1 to deny 71-year-old Henry Montgomery, the plaintiff in *Montgomery v. Louisiana*, release from Angola prison. He is once again eligible for parole in 2 years.

In 2021, in *Jones v. Mississippi*, Justice Brett Kavanaugh writing for a 6–3 majority held that a sentencing judge is required to consider a juvenile’s age and the surrounding circumstances of the crime but is not required to make a finding of “incorrigibility” meaning that a juvenile is incapable of rehabilitation before sentencing the juvenile to life without parole. See *Jones v. Mississippi*, 593 U.S. ____ (2021).

- 3. Mental Disability.** Freddie Lee Hall and his accomplice Mark Ruffin kidnapped, beat and raped, and murdered Karol Hurst, a pregnant 21-year-old newlywed. Hall and Ruffin next planned to rob a convenience store. In the parking lot, they encountered sheriff’s deputy Lonnie Coburn, whom they shot and killed. Hall received the death penalty.

Hall’s former teachers identified him as having an intellectual disability, and various medical clinicians found that he possessed the level of understanding of a “toddler.” The abuse he suffered at the hands of his mother further impeded his development of basic skills. Hall was beaten “ten or fifteen times a week sometimes.” His mother tied him “in a ‘croaker’ sack, swung it over a fire, and beat him,” “buried him in the sand up to his neck to ‘strengthen his legs,’” and “held a gun on Hall . . . while she poked [him] with sticks.”

The U.S. Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002), held that the Eighth and Fourteenth Amendments to the Constitution prohibit the execution of individuals with an intellectual disability. Florida law provided that if an individual possesses an IQ of 70 or more, all further exploration of intellectual disability is foreclosed. In 2014, in *Hall v. Florida*, the U.S. Supreme Court held that the Florida law was unconstitutional because it created an unacceptable risk that persons with intellectual disabilities will be executed. The reliance on IQ score to measure intellectual disability prevents courts from considering "evidence of intellectual disability as measured . . . by the defendant's failure or inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances. This is so even though the medical community accepts that all of this evidence can be probative of intellectual disability, including for individuals who have an IQ test score above 70." The Supreme Court stressed that no legitimate penological purpose is served by executing a person with intellectual disability. "To do so contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being." Do you agree? Is the question of intellectual disability too complicated for legal determination? See *Hall v. Florida*, 572 U.S. 701 (2014).

In *Moore v. Texas*, the Court affirmed that the U.S. Constitution prohibits the execution of individuals with intellectual disability. Justice Ruth Bader Ginsburg held that Texas is required to apply contemporary medical standards in determining mental ability and rejected the unscientific standard employed by a Texas appellate court to find that Bobby James Moore was eligible for the death penalty. Justice Ginsburg specifically held that Texas did not focus sufficiently on Moore's intellectual deficits. The Texas analytical framework had not been adopted by other states in the past 12 years and created an unacceptable risk that an "intellectually disabled" individual would be executed. She noted that Moore at age 13 "lacked basic understanding of the days of the week, the months of the year, and the seasons; he could scarcely tell time or comprehend the standards of measure or the basic principle that subtraction is the reverse of addition." A year later his father threw him out of the home because he was "stupid," resulting in Moore spending his early years living on the streets and searching for food in garbage cans and working at menial jobs before participating at age 20 in an armed robbery in which he shot and killed a store clerk. See *Moore v. Texas*, 581 U.S. ___ (2017).

In 2018, in *Madison v. Alabama*, Justice Elena Kagan in her majority decision held that the Eighth Amendment does not prohibit the execution of an inmate who suffers from dementia and who does not remember his killing of a police officer in 1985 during a domestic dispute. Justice Kagan affirmed that it "offends humanity" and has no "retributive value" to execute an individual so "wracked by mental illness that he cannot comprehend the 'meaning and purpose of punishment.'" The Eighth Amendment, however, does not prohibit the execution of an individual who "can no longer remember a crime" who nonetheless understands the "retributive message society intends to convey with a death sentence." See *Madison v. Alabama*, 586 U.S. ___ (2019).

The Amount of Punishment: Sentences for a Term of Years

The U.S. Supreme Court has remained sharply divided over whether the federal judicial branch is constitutionally entitled to extend its proportionality analysis beyond the death penalty to imprisonment for a “term of years.” The Court appears to have accepted that the length of a criminal sentence is the province of elected state legislators and that judicial intervention should be “extremely rare” and limited to sentences that are “grossly disproportionate” to the seriousness of the offense. Excessively severe sentences are not considered to advance any of the accepted goals of criminal punishment and constitute the purposeless and needless imposition of pain and suffering.

The implications of this approach were illustrated by Justice Sandra Day O’Connor’s opinion in *Lockyer v. Andrade*, in 2003, in which the Supreme Court affirmed two consecutive 25-year-to-life sentences for a defendant who, on two occasions in 1995, stole videotapes with an aggregate value of roughly \$150 from two stores.⁶³ These two convictions, when combined with Andrade’s arrest 13 years earlier for three counts of residential burglary, triggered two separate mandatory sentences under California’s **Three Strikes and You’re Out law**. This statute provides a mandatory sentence for individuals who commit a third felony after being previously convicted for two serious or violent felonies. Stringent penalties also are provided for a second felony. Justice O’Connor held that the “gross disproportionality principle reserves a constitutional violation for only the extraordinary case” and that the sentence in *Andrade* was not “an unreasonable application of our clearly established law.”⁶⁴

In *Ewing v. California*, decided on the same day as *Lockyer*, Justice O’Connor affirmed a 25-year sentence for Daniel Ewing under California’s Three Strikes and You’re Out law. Ewing while on parole was adjudged guilty of the grand theft of three golf clubs worth \$399 apiece and had previously been convicted of several serious or violent felonies. As required by the Three Strikes law, the prosecutor formally alleged, and the trial court found, that Ewing had been convicted previously of four serious or violent felonies. Justice O’Connor ruled that the Supreme Court was required to respect California’s determination that it possessed a public-safety interest in incapacitating and deterring recidivist felons like Ewing, whose previous offenses included robbery and three residential burglaries.⁶⁵

Weems v. United States is an example of the rare case in which the Supreme Court has ruled that a punishment is grossly disproportionate to the crime and is unconstitutional. Weems was convicted under the local criminal law in the Philippines of forging a public document. He was sentenced to 12 years at hard labor as well as to manacling at the wrist and ankle. During Weems’s 12-year imprisonment, he was deprived of all legal rights, and upon his release, he lost all political rights (such as the right to vote) and was monitored by the Court. The U.S. Supreme Court ruled that Weems’s sentence was “cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the Bill of Rights, both on account of their degree and kind.”⁶⁶

Another example of a punishment that was determined to be grossly disproportionate to a defendant’s crime is *Humphrey v. Wilson*. In *Humphrey*, Humphrey’s 15-year-old girlfriend performed oral sex on 17-year-old Genarlow Wilson. He was convicted in 2005 of aggravated child molestation and was sentenced to a mandatory minimum term of 10 years in prison and 1 year

of probation and upon his release was subject to registration as a sex offender. The maximum sentence for aggravated child molestation was 30 years in prison. In 2006, the Georgia legislature modified the law to provide that (1) if a person engages in sodomy with a victim who is at least 13 but less than 16 years of age and (2) the person who engages in the conduct is 18 years of age or younger and (3) is no more than four years older than the victim, (4) the individual is guilty of the new crime of misdemeanor child abuse. At the same time, the Georgia legislature increased the penalties for adults guilty of child molestation.

Wilson claimed that the modification of Georgia law was a recognition that the criminal statute under which he had been sentenced that imposed the same punishment on juveniles as on adults constituted cruel punishment in violation of the U.S. Constitution. The Georgia Supreme Court agreed with Wilson and held that the legislature by modifying the penalties imposed on individuals 18 years of age or younger recognized that although society has an interest in protecting children from premature sexual activity, Wilson's actions did not involve the same depravity displayed by an adult who preys on children. Ten-year prison sentences in Georgia are otherwise reserved for crimes that are far more harmful to society than oral sex between teenagers. Finally, other states either did not punish individuals for the act engaged in by Wilson or treated Wilson's actions as a misdemeanor. The Georgia court as a result held that sentencing Humphrey to "extraordinarily harsh punishment" of 10 years in prison constituted cruel and unusual punishment. Keep in mind in thinking about the decision in *Humphrey v. Wilson* that the Georgia legislature had changed the law following Humphrey's conviction and thereby recognized the unfairness of the penalty imposed for sodomy between consenting young adults.⁶⁷

In summary, courts in most instances defer to the legislative branch and are reluctant to find that sentences for a term of years constitute cruel and unusual punishment under the Eighth Amendment. Courts in "rare instances" have recognized that some lengthy sentences are clearly disproportionate to the harm caused by a defendant's act.

The Amount of Punishment: Drug Offenses

Three Strikes and You're Out legislation is an example of determinate sentencing. Determinate sentences possess the advantage of ensuring predictable, definite, and uniform sentences. On the other hand, this "one size fits all" approach may prevent judges from handing out sentences that reflect the circumstances of each individual case.

A particularly controversial area of determinate sentencing is mandatory minimum sentences for drug offenses. In 1975, New York governor Nelson Rockefeller initiated the controversial "Rockefeller drug laws" that required that an individual convicted of selling 2 ounces or possessing 8 ounces of a narcotic substance receive a sentence of between 8 and 20 years, regardless of the individual's criminal history. This approach in which a judge must sentence a defendant to a minimum sentence was followed by other states. The federal government joined this trend and introduced mandatory minimums in the Anti-Drug Abuse Act of 1986 and the 1988 amendments. The most debated aspect of federal law is the punishment of individuals based on the type and amount of drugs in their possession, regardless of their criminal history.

The Fair Sentencing Act of 2010 constituted a major reform of U.S. narcotics laws. Under the previous federal law, a conviction for possession with intent to distribute 5 grams of crack cocaine and 500 grams of powder cocaine resulted in the same 5-year sentence. Fifty grams of crack cocaine and 5 grams of powder cocaine triggered the same 10-year sentence. The thinking behind the law was that crack is sold in small, relatively inexpensive amounts on the street, ravages communities, and leads to street violence between street gangs competing for control of the drug trade. The law was criticized for resulting in the disproportionate arrest and imprisonment of Black Americans for lengthy prison terms while white sellers and users of powder cocaine received much less severe prison terms. The sentencing reform law reduced the 100:1 ratio between crack and powder cocaine to an 18:1 ratio.

The following quantities are punishable by 5 years in prison under federal law:

- 100 grams of heroin
- 500 grams of powder cocaine
- 28 grams of crack cocaine
- 100 kilograms of marijuana

The following quantities are punishable by 10 years in prison under federal law:

- 1 kilogram of heroin
- 5 kilograms of powder cocaine
- 280 grams of crack cocaine
- 1,000 kilograms of marijuana

Congress softened the impact of the mandatory minimum drug sentences by providing that a judge may issue a lesser sentence in those instances in which prosecutors certify that a defendant has provided “substantial assistance” in convicting other drug offenders. There also is a “safety valve” that permits a reduced sentence for defendants determined by the judge to be low-level, nonviolent, first-time offenders.

In June 2012, the U.S. Supreme Court held that the new more lenient penalty provisions of the Fair Sentencing Act of 2010 apply to offenders who committed a crack cocaine offense before the law went into effect and are sentenced after the date that the law went into effect. The Court reasoned that sentencing these offenders under the old sentencing scheme would “seriously undermine . . . uniformity and proportionality in sentencing.”⁶⁸

Prosecutors argue that the mandatory minimum sentences are required to deter individuals from entering into the lucrative drug trade. The threat of a lengthy sentence is also necessary in order to gain the cooperation of defendants. Prosecutors also point out that individuals who are convicted and sentenced are fully aware of the consequences of their criminal actions.

Mandatory minimum laws, nevertheless, have come under attack by both conservative and liberal politicians and by the American Bar Association, a justice of the U.S. Supreme Court,

and the Judicial Conference, which is the organization of federal judges. Virtually every state has recently modified or is considering amending its mandatory minimum narcotics laws, including California, Connecticut, Delaware, Georgia, Hawaii, Louisiana, Massachusetts, Michigan, North Dakota, Ohio, and Pennsylvania. New York also has modified its Rockefeller drug laws. This trend is encouraged by studies that indicate that these laws have several flaws:

- *Inflexibility.* They fail to take into account the differences between defendants.
- *Disparities in Enforcement.* Drug kingpins are able to trade information for reduced sentences, and some prosecutors who object to harsh drug laws charge defendants with the possession of a lesser quantity of drugs to avoid the mandatory sentencing provisions.
- *Increasing Prison Population.* These laws are thought to be responsible for the growth of the state and federal prison population.
- *Disproportionate Effect on Minorities and Women.* A significant percentage of individuals sentenced under these laws are African Americans or Hispanics involved in street-level drug activity. The increase in the number of women who are incarcerated is attributed to the fact that women find themselves arrested for assisting their husbands or lovers who are involved in the drug trade.

Mandatory minimum state drug laws have been held to be constitutional by the U.S. Supreme Court. In *Hutto v. Davis*, the Supreme Court ruled that Hutto's 40-year prison sentence and \$20,000 fine was not disproportionate to his conviction on two counts of possession with intent to distribute and on distribution of a total of 9 ounces of marijuana with a street value of roughly \$200. The Court held that the determination of the proper sentence for this offense was a matter that was appropriately determined by the Virginia legislature.⁶⁹

The Tenth Circuit Court of Appeals upheld the 55-year sentence given to rap music producer Weldon Angelos. The 26-year-old Angelos, who did not possess an adult criminal history, was convicted of three counts of dealing 24 ounces of marijuana while in possession of a firearm. The federal statute provides that a first offense carries a mandatory minimum 5-year sentence and each subsequent conviction carries a mandatory minimum of 25 years. Twenty-nine former federal judges and U.S. attorneys protested that Angelos's punishment violated the Eighth Amendment and that his sentence was longer than he likely would have received for various forms of murder or rape. Paul Cassell, the former federal judge who sentenced Angelos, also wrote a letter to President Barack Obama stating that the sentence he was required to hand down to Angelos was unjust and asking that Angelos be granted clemency. In May 2016, a federal district court judge in Utah ordered Angelos's release from prison, and he was set free in May 2016 after serving 13 years behind bars.⁷⁰

In 2012, now retired federal district court judge John Gleeson stated in *United States v. Dossie* that mandatory minimum drug sentences were intended to be used against high-level "masterminds" and "managers" and that prosecutors were abusing the law by asking judges to impose harsh mandatory minimum sentences on low-level street dealers. Dossie was convicted

as a drug courier in “four hand-to-hand crack sales for which he made a total of about \$140.” Judge Gleeson explained that his “hands were tied” and that he was required to impose an “unjust” prison term on Dossie. “Just as baseball is a game of inches,” Judge Gleeson complained, “our drug-offense mandatory minimum provisions create a serious game of grams.”⁷¹

President Obama indicated his concern for mandatory minimum sentences for drug offenses when, in December 2013, he commuted the sentences of eight federal prisoners convicted of crack cocaine offenses. All of these individuals had served at least 15 years in prison; six were sentenced to life imprisonment. The defendants had been sentenced under the 100:1 sentencing **disparity** between powder and crack cocaine, and President Obama noted that the inmates would have received significantly shorter sentences under current, reformed drug laws and already would have completed their sentences. Clarence Aaron, for example, was sentenced to three life terms for a drug crime committed when he was 22 years old. Stephanie George received a life sentence in 1997 at age 27 based on her allowing her boyfriend to store crack in a box in her home.

In April 2014, Attorney General Eric Holder announced Clemency Project 2014, providing that nonviolent, low-level incarcerated felons who had served at least 10 years and would have received a lesser sentence under current reformed federal laws would be considered for clemency. Individuals were eligible for clemency who had no significant criminal history or history of violence, a record of good behavior in prison, and no ties to gangs. The primary beneficiaries were drug offenders sentenced before Congress’s 2010 reform of the punishment for crack cocaine offenses. The Pew Research Center reports that by the time President Obama left office, he had granted clemency to 1,927 individuals, the most of any president in 64 years. This was a small percentage of the over 12,000 inmates who applied for clemency.⁷²

The Obama administration and states such as Texas, New York, California, Maryland, Michigan, North Dakota, and Kansas took other steps to minimize the impact of mandatory minimum sentences on low-level, nonviolent drug offenders and on other nonviolent offenders.⁷³ Attorney General Holder also encouraged prosecutors to place less emphasis on the sentencing guidelines in prosecuting drug offenders. Severe sentences were to be reserved for “serious, high-level, or violent drug traffickers.”⁷⁴

In May 2017, Attorney General Jeff Sessions reversed Holder’s guidelines for federal prosecutors that were intended to avoid harsh sentences for low-level drug offenses. Attorney General Sessions instructed federal prosecutors to charge defendants with the highest possible sentence consistent with the evidence. He wrote that “[i]t is a core principle that prosecutors should charge and pursue the most serious, readily provable offense. This policy affirms our responsibility to enforce the law, is moral and just, and produces consistency.” Prosecutors seeking to make an exception to this policy must “get approval” and “should carefully consider whether an exception may be justified.” Attorney General Sessions explained that this policy “fully utilizes the tools” Congress has provided to federal prosecutors. He concluded by noting that this “maximalist” approach is a recognition that “the most serious offenses” were intended to “carry the most substantial guidelines sentence, including mandatory minimum sentences.” Attorney General Sessions justified this return to the policy that essentially had been followed by the Bush administration because drug trafficking is associated with crimes of violence and must be harshly punished to deter serious criminality.⁷⁵

In 2018, President Donald Trump commuted and later pardoned Alice Marie Johnson, a first-time nonviolent drug offender. Johnson, who had been convicted of conspiracy to possess cocaine and of attempted possession of cocaine, had served 21 years of a life sentence. As President Trump left office, he pardoned a number of other nonviolent drug offenders serving lengthy sentences. In December 2018, a bipartisan congressional majority passed and President Trump signed the First Step Act, which instituted several reforms for federal prisoners. The act among other reforms retroactively applied the Fair Sentencing Act, which reduced the disparity in sentencing for crack and powder cocaine to prisoners convicted before 2010. The legislation also provided federal judges with the authority to decide against imposing mandatory minimum sentences for individuals convicted of narcotics offenses with limited criminal histories, reduced the length of incarceration under the federal Three Strikes law of individuals convicted of qualifying felonies, and expanded the amount of “good-time credit” available to federal inmates. In July 2019, the act resulted in the release of more than 3,000 inmates from federal prison, an overwhelming number of whom are African American. The Congressional Budget Office estimates that the First Step Act will take a total of 53,000 years off the sentences of federal prisoners over the next 10 years.⁷⁶

What do you think about the argument that mandatory minimum sentences are so disproportionate and impose such hardship that jurors should refuse to convict defendants charged with quantities of narcotics carrying mandatory minimum sentences?⁷⁷ What about the impact of mandatory minimum sentences on prison overcrowding?

Criminal Punishment and Status Offenses

In *Robinson v. California*, the U.S. Supreme Court overturned Robinson’s conviction under a California law that declared it was a criminal offense “to be addicted to the use of narcotics.” The Supreme Court ruled that it was cruel and unusual punishment to impose criminal penalties on Robinson based on his conviction of the status offense of narcotics addiction, which a majority of the judges considered an addictive illness. Justice Potter Stewart noted that “even one day in prison would be cruel and unusual punishment for the ‘crime’ of having a common cold. . . . It is unlikely that any state would . . . make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with venereal disease. . . . [Such a] law . . . would . . . be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth amendments.”⁷⁸

The Amount of Punishment: Marijuana Legalization

In November 2012, 55% of Colorado voters approved Amendment 64 legalizing the personal use of marijuana by individuals who are at least 21 years of age. The state legislature subsequently enacted regulations licensing the commercial production and sale of cannabis. Private possession of up to one ounce of marijuana is legal, and private cultivation of up to six marijuana plants is lawful. Individuals are free to transfer one ounce so long as no money changes hands. Cannabis is prohibited from being smoked in public, and there are restrictions on driving while under the influence of marijuana. The sale of marijuana is strictly regulated, and consumers

may purchase up to an ounce of “pot.” Individuals who grow and traffic in marijuana in violation of Colorado law are subject to federal arrest and prosecution. In the same November election, voters in Washington approved Initiative 502, whose provisions are similar to the provisions of the Colorado law.

Voters in Alaska, Oregon, and the District of Columbia in November 2014 overwhelmingly approved ballot measures legalizing marijuana for adults age 21 and over subject to restrictions that are similar to Colorado’s. Two years later, California, Maine, Massachusetts, and Nevada legalized recreational marijuana. California’s Prop. 64 allows adults 21 and older to possess up to one ounce of marijuana and to grow up to six plants in their homes. Thirty-six states, four U.S. territories, and the District of Columbia have medical marijuana laws.

In July 2014, the influential *New York Times* endorsed legalization of marijuana and pointed out that a majority of adults favor legalization and that there are considerable social costs associated with continuing to criminalize marijuana. For instance:

Arrests. From 2001 to 2010, there were 8.2 million marijuana arrests. Roughly 9 out of 10 were for possession. In 2010, there were 750,000 arrests involving marijuana; and in 2011, there were more arrests for marijuana than for all violent crimes. The police made 643,122 arrests for marijuana-related offenses in 2015; 574,641 (89% of all marijuana-related arrests) were for marijuana possession rather than for the cultivation of marijuana or for trafficking. The 2015 arrest total represents a 25% decline since 2007, when the police made 872,721 arrests for violating marijuana laws.

Racial disparity. White and Black Americans use marijuana at comparable rates, although Black Americans are 3.7 times more likely to be arrested than whites.

Economics. The estimated cost of enforcing laws on marijuana possession is \$3.6 billion.

Public safety. Arresting individuals for marijuana possession does not remove dangerous individuals from society. Nine out of 10 individuals convicted for possession of marijuana have no history of violence.

Disabilities. Most marijuana arrests are misdemeanors, and individuals are not imprisoned. A conviction, however, may result in the revocation of a professional license or suspension of a driver’s license, and may prevent an individual from obtaining a mortgage to buy a home or obtaining a student loan.

In 2020, Oregon voters endorsed the decriminalization of possession of small amounts of all narcotics for personal consumption. Possession will be subject to a civil fine rather than to a criminal penalty.

Opponents of legalization of medical or recreational marijuana argue that marijuana is a gateway drug that leads to serious forms of drug abuse, is a health risk, and will jeopardize road safety. Should marijuana be legalized? What is your view?

EQUAL PROTECTION

Judicial decisions have consistently held that it is unconstitutional for a judge to base a sentence on a defendant's race, gender, ethnicity, or nationality. In other words, a sentence should be based on a defendant's act rather than on a defendant's identity. A federal district court judge's sentence of 30 years in prison and lifetime supervision for two first-time offenders convicted of a weapons offense and two narcotics offenses was rejected by the Second Circuit Court of Appeals based on the trial court judge's observation that the South American defendants "should have stayed where they were. . . . Nobody tells them to come and get involved in cocaine. . . . My father came over with \$3 in his pocket." The appellate court noted that it appeared that "ethnic prejudice somehow had infected the judicial process in the instant case." The appellate court observed that one of the defendant's "plaintive requests that she be sentenced 'as for my person, not for my nationality,'" was completely understandable under the circumstances.⁷⁹ Could the trial court judge have constitutionally handed down the same sentence in order to deter Colombian drug gangs from operating in the United States?

Statutes that provide different sentences based on gender also have been held to be in violation of the Equal Protection Clause. In *State v. Chambers*, the New Jersey Supreme Court struck down a statute providing indeterminate sentences not to exceed five years (or the maximum provided in a statute) for women, although men convicted of the same crime received a minimum and maximum sentence, which could be reduced by good behavior and work credits.⁸⁰

This complicated scheme resulted in men receiving significantly shorter prison sentences than women convicted of the same crime. For instance, while a female might be held on a gambling conviction "for as long as five years, . . . [a] first offender male, convicted of the same crime, would likely receive a state prison sentence of not less than one or more than two years." The female offender was required to serve the complete sentence, although the male would "quite likely" receive parole in four months and 28 days. The New Jersey Supreme Court dismissed the argument that the "potentially longer period of detention" for females was justified on the grounds that women were good candidates for rehabilitation who could turn their lives around in prison. The court pointed out that there "are no innate differences [between men and women] in capacity for intellectual achievement, self-perception or self-control or the ability to change attitude and behavior, adjust to social norms and accept responsibility." What was the New Jersey legislature thinking when it adopted this sentencing scheme? Can you think of a crime for which the legislature might constitutionally impose differential sentences based on gender? At least one appellate court in Illinois has upheld a statute that punished a man convicted of incest with his daughter more severely than a woman convicted of incest with her son, reasoning that this furthered the interest in preventing pregnancy.

What about seemingly neutral laws that possess a discriminatory impact? *The general rule is that a defendant must demonstrate both a discriminatory impact and a discriminatory intent.* The difficulty of this task is illustrated by the Supreme Court's consideration of the discriminatory application of the death penalty in *McCleskey v. Kemp*.⁸¹

Warren McCleskey, a Black American, was convicted of two counts of armed robbery and one count of the murder of a white police officer. He was sentenced to death on the homicide

count and to consecutive life sentences on the robbery. McCleskey claimed that the Georgia capital punishment statute violated the Equal Protection Clause in that Black defendants facing trial for the murder of white people were more likely to be sentenced to death. McCleskey relied on a sophisticated statistical study of 2,000 Georgia murder cases involving 230 variables that had been conducted by Professors David C. Baldus, Charles Pulaski, and George Woodworth. This led to a number of important findings, including that defendants charged with killing white victims were over 4 times as likely to receive the death penalty as defendants charged with killing Black Americans, and that Black defendants were 1.1 times as likely to receive the death sentence as other defendants.

The Supreme Court ruled that McCleskey had failed to meet the burden of clearly establishing that the decision makers in his specific case acted with a discriminatory intent to disadvantage McCleskey on account of his race. What of McCleskey's statistical evidence? The Supreme Court majority observed that the statistical pattern in Georgia reflected the decisions of a number of prosecutors in cases with different fact patterns, various defense counsel, and different jurors and did not establish that the prosecutor or jury in McCleskey's specific case or in other cases was biased. McCleskey killed a police officer, a charge that clearly permitted the imposition of capital punishment under Georgia law. Where was the discrimination?

Justice William Brennan, in dissent, criticized the five-judge majority for approving a system in which "lawyers must tell their clients that race casts a large shadow on the sentencing process." Justice Brennan noted that a lawyer, when asked by McCleskey whether McCleskey was likely to receive the death sentence, would be forced to reply that 6 of every 11 defendants convicted of killing a white person would not have received the death penalty if their victim had been Black. At the same time, among defendants with aggravating and mitigating factors comparable to McCleskey's, 20 of every 34 would not have been sentenced to die if their victims had been Black. This pattern of racial bias was particularly significant given the history of injustice against Black Americans in the Georgia criminal justice system. The Death Penalty Information Center reports that in 2014, 775 white, 482 Black, and 11 Latinx offenders were on death row. (Twenty-four additional individuals classified as "other" were also on death row.) Whites accounted for 1,556 victims, Blacks 311, and Latinos 137.

The following facts were presented to a California judge at sentencing. What punishment would you impose?

YOU DECIDE 3.4

Defendant Soon Ja Du was convicted of voluntary manslaughter in the killing of Latasha Harlins, a customer in defendant's store. Defendant was sentenced to ten years in state prison. The sentence was suspended [not enforced] and defendant was placed on probation under certain terms and conditions. Petitioner (District Attorney) contends the court abused

its discretion in granting probation and seeks a . . . "legal sentence of an appropriate term in state prison."

Defendant had observed many shoplifters in the store, and it was her experience that people who were shoplifting would take the merchandise, "place it inside the bra or any place where the owner would not notice," and then approach the counter, buy some small items and leave. Defendant saw [15-year-old] Latasha [Harlins] enter the store, take a bottle of orange juice from the refrigerator, place it in her backpack and proceed to the counter. Although the orange juice was in the backpack, it was partially visible. Defendant testified that she was suspicious because she expected if the victim were going to pay for the orange juice, she would have had it in her hand. Defendant's son, Joseph Du, testified that there were at least 40 shoplifting incidents a week at the store.

Thirteen-year-old Lakeshia Combs and her brother, nine-year-old Ismail Ali, testified that Latasha approached the counter with money ("about two or three dollars") in her hand. According to these witnesses, defendant confronted Latasha, called her a "bitch," and accused her of trying to steal the orange juice; Latasha stated she intended to pay for it. According to defendant, she asked Latasha to pay for the orange juice, and Latasha replied, "What orange juice?" Defendant concluded that Latasha was trying to steal the juice.

Defendant testified that it was Latasha's statement "What orange juice?" that changed defendant's attitude toward the situation, since prior to that time defendant was not afraid of Latasha. Defendant also thought Latasha might be a gang member. Defendant had asked her son, Joseph Du, what gang members in America look like, and he replied that "either they wear some pants and some jackets, and they wear light sneakers, and they either wear a cap or a headband. And they either have some kind of satchel, and there were some thick jackets. And he told me to be careful with those jackets sticking out." Latasha was wearing a sweater and a Bruins baseball cap.

Defendant began pulling on Latasha's sweater in an attempt to retrieve the orange juice from the backpack. Latasha resisted and the two struggled. Latasha hit defendant in the eye with her fist twice. With the second blow, defendant fell to the floor behind the counter, taking the backpack with her. During the scuffle, the orange juice fell out of the backpack and onto the floor in front of the counter. Defendant testified that she thought if she were hit one more time, she would die. Defendant also testified that Latasha threatened to kill her. Defendant picked up a stool from behind the counter and threw it at Latasha, but it did not hit her.

After throwing the stool, defendant reached under the counter, pulled out a holstered .38-caliber revolver, and, with some difficulty, removed the gun from the holster. As defendant was removing the gun from the holster, Latasha picked up the orange juice and put it back on the counter, but defendant knocked it away. As Latasha turned to leave, defendant shot her in the back of the head from a distance of approximately three feet, killing her instantly. Latasha had \$2 in her hand when she died.

Defendant's husband entered the store upon hearing defendant's calls for help. . . . Defendant then passed out behind the counter. Defendant's husband attempted to revive her and also dialed 911 and reported a holdup. Defendant, still unconscious, was transported to the hospital by ambulance, where she was treated for facial bruises and evaluated for possible neurological damage.

At defendant's trial, she testified that she had never held a gun before, did not know how it worked, did not remember firing the gun, and did not intend to kill Latasha.

Defendant's husband testified that he had purchased the .38-caliber handgun from a friend in 1981 for self-protection. He had never fired the gun, however, and had never taught defendant how to use it. In 1988, the gun was stolen during a robbery of the family's store in Saugus. Defendant's husband took the gun to the Empire store after he got it back from the police in 1990.

David Butler, a Los Angeles Police Department ballistics expert, testified extensively about the gun, a Smith & Wesson .38-caliber revolver with a two-inch barrel. In summary, he testified that the gun had been altered crudely and that the trigger pull necessary to fire the gun had been drastically reduced. Also, both the locking mechanism of the hammer and the main spring tension screw of the gun had been altered so that the hammer could be released without putting much pressure on the trigger. In addition, the safety mechanism did not function properly. The jury found defendant guilty of voluntary manslaughter (murder in the heat of passion). By convicting defendant of voluntary manslaughter, the jury impliedly found that defendant had the intent to kill and . . . rejected the defenses that the killing was unintentional and that defendant killed in self-defense.

After defendant's conviction, the case was evaluated by a Los Angeles County probation officer, who prepared a presentence probation report. That report reveals the following about defendant.

At the time the report was prepared, defendant was a 51-year-old Korean-born naturalized American citizen, having arrived in the United States in 1976. For the first ten years of their residence in the United States, defendant worked in a garment factory and her husband worked as a repairman. Eventually, the couple saved enough to purchase their first liquor store in San Fernando. They sold this store and purchased the one in Saugus. In 1989, they purchased the Empire Liquor Market, despite being warned by friends that it was in a "bad area."

These warnings proved prophetic, as the store was plagued with problems from the beginning. The area surrounding the store was frequented by narcotics dealers and gang members, specifically the Main Street Crips. Defendant's son, Joseph Du, described the situation as "having to conduct business in a war zone." In December 1990, defendant's son was robbed while working at the store, and he incurred the wrath of local gang members when he agreed to testify against one of their number who he believed had committed the robbery. Soon thereafter, the family closed the store for two weeks while defendant's husband formulated a plan (which he later realized was "naïve") to meet with gang members and achieve a form of truce. The store had only recently been reopened when the incident giving rise to this case occurred.

Joseph Du testified at trial that on December 19, 1990, approximately 10 to 14 [B]lack persons entered the store, threatened him, and robbed him again. The store was burglarized over 30 times, and shoplifting incidents occurred approximately 40 times per week. If Joseph tried to stop the shoplifters, "they show me their guns." Joseph further testified that his life had been threatened over 30 times, and more than 20 times people had come into the store and threatened to burn it down. Joseph told his mother about these threats every day, because he wanted to emphasize how dangerous the area was and that he could not do business there much longer.

The probation officer concluded "it is true that this defendant would be most unlikely to repeat this or any other crime if she were allowed to remain free. She is not a person who would actively seek to harm another." However, she went on to state that although defendant

expressed concern for the victim and her family, this remorse was centered largely on the effect of the incident on defendant and her own family. The respondent court found, however, that defendant's "failure to verbalize her remorse to the Probation Department [was] much more likely a result of cultural and language barriers rather than an indication of a lack of true remorse."

The probation report also reveals that Latasha had suffered many painful experiences during her life, including the violent death of her mother. Latasha lived with her extended family (her grandmother, younger brother and sister, aunt, uncle, and niece) in what the probation officer described as "a clean, attractively furnished three-bedroom apartment" in South Central Los Angeles. Latasha had been an honor student at Bret Hart Junior High School, from which she had graduated the previous spring. Although she was making only average grades in high school, she had promised that she would bring her grades up to her former standard. Latasha was involved in activities at a youth center as an assistant cheerleader, member of the drill team, and summer junior camp counselor. She was a good athlete and an active church member.

The probation officer's ultimate conclusion and recommendation was that probation be denied and defendant sentenced to state prison. The court sentenced defendant to ten years in state prison (six years for the base term and four for the gun use). The sentence was suspended (not enforced), and defendant was placed on probation for a period of five years with the usual terms and conditions and on the condition that she pay \$500 to the restitution fund and reimburse Latasha's family for any out-of-pocket medical expenses and expenses related to Latasha's funeral. Defendant was also ordered to perform 400 hours of community service. The court did not impose any jail time as a condition of probation. [The trial judge had the option of sentencing Du to prison for 3, 6, or 11 years and an additional 4 years for the use of a gun.]

What are the objectives of sentencing? Were these goals achieved by a sentence of probation? Under California law, probation is not to be granted for an offense involving the use of a firearm other than under certain conditions. These include whether the crime was committed under unusual circumstances, such as great provocation. Other conditions are whether the carrying out of the crime indicated criminal sophistication and whether the defendant will be a danger to others in the event the defendant is not incarcerated. See *People v. Superior Court*, 7 Cal. Rptr. 2d 177 (Cal. Ct. App. 1992).

CRIME IN THE NEWS

Lisa M. Montgomery, 52, was executed in the early hours of January 12, 2021, by lethal injection. Montgomery at the time of her execution was the only woman on federal death row. This was the first execution of a woman by the federal government in nearly 70 years. The last women executed by the federal government (both in 1953) were Bonnie Brown Heady, who was convicted of kidnapping and murder, and Ethel Rosenberg, who was convicted of espionage. Montgomery was the 11th of the 13 federal inmates executed by the Trump administration between July 2020 and President Trump's leaving office in January 2021, the first federal executions in the past 17 years. Only 2% of individuals on death row across the country are

women, and since 1976, 17 women have been executed for state crimes. The last woman executed by a state was Kelly Gissendaner, 47, who was executed in 2015 by Georgia for the 1997 murder conspiracy of her husband.

Montgomery in 2007 was convicted of kidnapping resulting in death and received a sentence of capital punishment. Montgomery, who had four children and had undergone a tubal ligation, nonetheless reportedly had recurrent fantasies that she was pregnant. She used the alias Darlene Fischer and drove from Kansas to Skidmore, Missouri, to purchase a puppy from Bobbie Joe Stinnett, 23, a pregnant dog breeder whom she had met online. At some point during the visit, Montgomery strangled Stinnett with a rope, used a knife to remove the eight-month-old infant from the womb, and abducted the child. At the time of Montgomery's arrest she claimed that she was the biological mother of the child. The prosecution noted that Montgomery had conducted internet searches on the crime and had premeditated and planned the attack and was motivated to seize the infant to rebut the charge in a child custody dispute that she had fantasies of being pregnant. The jurors deliberated for under five hours and rejected the claim that Montgomery was delusional. The jurors following Montgomery's conviction considered and rejected the defense argument that Montgomery should be sentenced to life imprisonment rather than death. The primary argument relied on by the defense in mitigation was that Montgomery suffered from a controversial and disputed disorder called pseudocyesis, a rare disorder involving delusions of pregnancy. This theory along with other psychiatric testimony was challenged at trial by the prosecution's expert witness and by the prosecutor, who dismissed the mitigation evidence as an "abuse excuse." The Eighth Circuit Court of Appeals subsequently affirmed Montgomery's conviction finding that the jury could have reasonably found beyond a reasonable doubt that she committed the murder in an especially heinous or depraved manner.

In October 2020, the Department of Justice announced an execution date for Montgomery. Montgomery's lawyers responded by filing several petitions in an effort to delay the execution so as to provide the federal courts with the opportunity to fully consider the claim that she lacked a rational understanding of the government's reasons for executing her and that the Eighth Amendment prohibition on cruel and unusual punishment barred her execution. The execution of individuals determined to be currently insane historically has been considered to be inhumane and to serve no retributive purpose and has been barred by the U.S. Supreme Court. Montgomery's lawyers also filed a petition with President Trump to commute her sentence to life imprisonment, arguing that he could highlight the plight of women who had been the victims of abuse. The execution date subsequently was rescheduled for roughly a month later due to the coronavirus pandemic.

Montgomery's lawyers highlighted the cruel and unusual nature of Montgomery's sentence of death by noting that researchers had found that of the roughly 16 women who had been convicted of fetal abductions only Montgomery had been sentenced to death. The decision not to seek the death penalty against these women was alleged to be based on the understanding by prosecutors that the women who committed these abductions suffered from a mental disease.

Federal prosecutors in responding to Montgomery's appeal noted that a jury at Montgomery's trial had determined that she fully understood her crime and the reasons for her punishment, and that courts should not continue to delay the imposition of the death penalty, which had been handed down 13 years ago. Roy Strong, the detective who investigated the murder of Ms. Stinnett, recalled that at the time of the crime Montgomery had not expressed remorse. He observed that in his opinion Ms. Montgomery's lawyers had not been

truthful about her past and noted that Montgomery's appeal was "a terrible insult" to sexual assault survivors who had worked to overcome their trauma.

Several years following Montgomery's conviction a social worker, Janet Vogelsang, began talking to Montgomery in anticipation of an appeal. Vogelsang was shocked by what she heard and solicited the assistance of various mental health experts, including Katherine Porterfield, a psychological expert on abuse and torture. Vogelsang produced a report documenting what she concluded was Montgomery's mental illness. An usual aspect of the case was that a number of individuals had been aware of Montgomery's severe childhood abuse. Her mother forced her to "pay the bills" by engaging in sex acts with multiple men, and her stepfather and his friends sexually abused her in a specially constructed "rape shack." When Montgomery resisted, her stepfather would slam her head against the concrete. She also witnessed the rape of her half-sister. Montgomery's mother regularly covered her daughter's mouth with duct tape to keep her quiet, threatened her with a firearm, and told investigators that Montgomery's first words were "Don't spank me. It hurts."

Montgomery, when she was 18, was forced to marry her 25-year-old stepbrother, Carl Boman, the son of her mother's fourth husband. Montgomery claimed that Boman sexually assaulted her, both physically and using objects; tied her in stress positions; and threatened her with a knife to her throat. One of Montgomery's half-brothers told investigators that he viewed a video of Mr. Boman raping and beating her. Montgomery later divorced Boman and married Kevin Montgomery who supported her throughout her prosecution and appeal although Montgomery noted that he was sexually violent but not as "violent or hurtful as Carl."

Montgomery had given birth to four young children by age 23 and was an abusive and neglectful mother, and at trial the prosecutor stressed her inability to feed and bathe her children and her own lack of hygiene. She allegedly increasingly began to lose her sense of reality. In one instance, she placed a diaper on a goat, gathered her kids in the middle of the night, and drove the children and the goat to the Alamo in Texas for an "educational trip."

Doctors who examined Montgomery found that she inherited mental illness from both sides of her family; suffered from bipolar disorder, temporal lobe epilepsy, complex post-traumatic stress disorder, dissociative disorder, psychosis, traumatic brain injury, and possible fetal alcohol syndrome; and believed that God spoke to her through connect-the-dots puzzles. She had attempted to commit suicide in prison by swallowing Tylenol pills and was on suicide watch. Montgomery's scores on various psychological tests were consistent with her having been subjected to severe abuse, and one test found "severe impairment" in daily activities, such as making a bed or cleaning. Assistant federal public defender Kelley Henry argued that society had failed Montgomery, claiming that if she had "received treatment and medication . . . this crime would never have happened."

As Montgomery's execution date approached, a federal district court judge in Indiana, the site of the federal institution where Montgomery was temporarily housed while awaiting execution, issued a stay to enable the court to conduct a hearing to determine whether Montgomery's mental illness and history of sexual abuse as a child prevented her from being put to death under the Eighth Amendment prohibition on cruel and unusual punishment. The Seventh Circuit Court of Appeals vacated that stay the next day finding that Ms. Montgomery's claim appeared to have been filed at the last minute as part of a strategic effort to obtain a stay of execution. The Seventh Circuit noted that the petition could have been brought at an earlier date, which would have allowed the court to fully consider her claims without issuing a stay. The three-judge panel cited Supreme Court precedent that

last-minute stays of execution “should be the extreme exception, not the norm.” A stay was particularly inappropriate because Montgomery had not made a sufficiently strong showing that she ultimately would succeed in her insanity plea. The Seventh Circuit noted that the expert declarations submitted on Montgomery’s behalf were “outdated”; two had been conducted 4 years ago and another 10 years ago. These “stale observations cannot support a claim about her current mental state.” The Bureau of Prisons responded by scheduling the execution later in the day.

The U.S. Court of Appeals for the District of Columbia Circuit and the Eighth Circuit Court of Appeals in St. Louis issued separate last-minute stays of execution on the grounds that the scheduling of the execution under the Federal Death Penalty Act was required to follow applicable state law, which in this instance required that an execution only can take place 90 days or more from the day of the execution. This would have postponed Montgomery’s execution until President Trump had left office. The Supreme Court in a 6–3 ruling without issuing an opinion overturned the stays and removed the remaining legal barriers to Montgomery’s execution.

Kelley Henry responded that “[o]ur Constitution forbids the execution of a person who is unable to rationally understand her execution. The current administration knows this. And they killed her anyway. Violating the Constitution, federal law, its own regulations, and longstanding norms along the way.”

President Joe Biden pledged during the presidential campaign to work to eliminate the federal death penalty and at a minimum to place a moratorium on executions. Commentators have pointed to the *Montgomery* case as an example of how the abuse of young people, particularly women, shapes their entire lives, and in some circumstances can lead to brain damage and to crime and to destructive behavior. Montgomery prior to her trial had offered to plead guilty in return for a sentence of life imprisonment. The federal government, however, decided to seek the death penalty and to bring the case to trial. Was this the correct decision?

CHAPTER SUMMARY

The distinguishing characteristic of a criminal offense is that it is subject to punishment. Categorizing a law as criminal or civil has consequences for the protections afforded to a defendant, such as the prohibition against double jeopardy. Punishment is intended to accomplish various goals, including retribution, deterrence, rehabilitation, incapacitation, and restoration. Judges seek to accomplish the purposes of punishment through penalties ranging from imprisonment, fines, probation, and intermediate sanctions to capital punishment. Assets forfeiture may be pursued in a separate proceeding.

The federal government and the states have initiated a major shift in their approach to sentencing. The historical commitment to indeterminate sentencing and to the rehabilitation of offenders has been replaced by an emphasis on deterrence, retribution, and incapacitation. This primarily involves presumptive sentencing guidelines and mandatory minimum sentences. Several recent U.S. Supreme Court cases appear to have resulted in sentencing guidelines that are advisory rather than binding on judges. A sentence, whether inside or outside the guidelines, is required only to be “reasonable.”

Truth in sentencing laws are an effort to ensure that offenders serve a significant portion of their sentences and are intended to prevent offenders from being released by parole boards who determine that offenders have exhibited progress toward rehabilitation. We also have seen the development of a greater sensitivity to victims' rights.

Constitutional attacks on sentences are typically based on the Eighth Amendment prohibition on the imposition of cruel and unusual punishment. The U.S. Supreme Court has ruled that the prohibition against cruel and unusual punishment applies to the federal government as well as to the states, and virtually every state constitution contains similar language. Professor Wayne LaFave lists three approaches to interpreting the clause: (1) It limits the *methods* employed to inflict punishment, (2) it restricts the *amount of punishment* that may be imposed, and (3) it *prohibits* the criminal punishment of certain acts. The Equal Protection Clause provides an avenue to challenge statutes and sentencing practices that result in different penalties for individuals based on their race, religion, gender, and ethnicity.

The effort to ensure uniform approaches to sentencing is exemplified by the procedural protections that surround the death penalty. Legal rulings under the Eighth Amendment have limited the application of capital punishment to a narrow range of aggravated homicides committed by adult offenders. The imposition of capital punishment on juveniles was held disproportionate in *Roper v. Simmons*. Constitutional challenges under the Eighth Amendment have proven unsuccessful against mandatory minimum sentences, as illustrated by the federal court's upholding of Three Strikes and You're Out laws and determinate penalties for drug possession. Judges have generally deferred to the decision of legislators and have ruled that penalties for terms of years are proportionate to the offenders' criminal acts. The U.S. Supreme Court has stressed that such challenges should be upheld on "extremely rare" occasions where the sentence is "grossly disproportionate" to the seriousness of the offense. The reconsideration of the disparity in treatment between crack and powder cocaine is a significant step in lessening the harshness of drug laws.

Criminal sentences may not be based on the "suspect categories" of race, gender, religion, ethnicity, and nationality. Despite the condemnation of racial practices in the criminal justice system, the due process procedures surrounding the death penalty do not appear to have eliminated racial disparities in capital punishment. An equal protection challenge to the application of capital punishment, however, proved unsuccessful in *McCleskey v. Kemp*.

As you read the cases in the next chapters of the textbook, pay attention to the sentences handed down to defendants by the trial court. Consider what sentence you believe the defendant deserved.

CHAPTER REVIEW QUESTIONS

1. Distinguish between civil disabilities and criminal punishments. Why did the Supreme Court rule that the sanction provided for in Megan's Law was not a criminal punishment?
2. Discuss the purposes of punishment. Which do you believe should be the primary reason for criminal punishment?

3. What are some types of sentences that a court may impose?
4. List several of the criteria that are used to evaluate approaches to sentencing. Which do you believe is most important?
5. Describe the various approaches to sentencing. Contrast indeterminate and determinate sentencing. What approach do you favor?
6. Why were sentencing guidelines introduced? How were the guidelines affected by recent Supreme Court decisions?
7. Describe truth in sentencing laws.
8. What types of protections are included within victims' rights?
9. Define plea bargaining. What are the benefits and costs of plea bargaining? Describe the recent approach of the U.S. Supreme Court to plea bargaining.
10. How do courts determine whether a method of punishment is prohibited under the Eighth Amendment? Does lethal injection constitute cruel and unusual punishment?
11. Discuss the efforts of the Supreme Court to ensure that the death penalty is applied in a proportionate fashion.
12. Why did the Supreme Court rule that it is cruel and unusual punishment to execute juveniles?
13. What is the approach of courts that are asked to decide whether a sentence for a "term of years" is proportionate to the crime? Why do judges take such a hands-off approach in this area?
14. Why is it a violation of equal protection for race, gender, religion, ethnicity, or nationality to play a role in sentencing?
15. What is the legal test for determining whether a law that is neutral on its face is in violation of the Equal Protection Clause?
16. Outline the debate over whether the possession of crack cocaine should be punished more severely than the possession of powder cocaine. Are mandatory minimum sentences a good approach to deterring and to punishing drug offenses?

LEGAL TERMINOLOGY

assets forfeiture	disparity
beyond a reasonable doubt	Eighth Amendment
clemency	general deterrence
concurrent sentences	incapacitation
consecutive sentences	indeterminate sentence
determinate sentence	just deserts

mandatory minimum sentence	restoration
Megan's Law	retribution
pardon	selective incapacitation
plea bargain	Son of Sam laws
preponderance of the evidence	specific deterrence
presumptive sentencing guidelines	Three Strikes and You're Out law
proportionality	truth in sentencing laws
rehabilitation	victim impact statements

TEST YOUR KNOWLEDGE ANSWERS

1. False.
2. True.
3. True.
4. True.
5. True.
6. False.
7. False.

4

ACTUS REUS

TEST YOUR KNOWLEDGE: TRUE/FALSE

1. The criminal law punishes voluntary criminal acts and does not penalize involuntary acts or thoughts about committing a crime.
2. Individuals may be held criminally liable for using or selling narcotics although they may not be held criminally liable for the status of being a drug addict.
3. An individual who is an expert swimmer is criminally liable for failing to attempt to rescue a child who is drowning.
4. When narcotics are seized by the police in an apartment, all of the individuals living in the apartment are guilty of narcotics possession.

Check your answers at the end of the chapter on page 160.

Did the Defendant Have a Duty to Care for Anthony Lee Green?

Anthony Lee [Green] was diagnosed as suffering from severe malnutrition and lesions over large portions of his body, apparently caused by severe diaper rash. Following admission, he was fed repeatedly, apparently with no difficulty, and was described as being very hungry. His death, 34 hours after admission, was attributed without dispute to malnutrition. At birth, Anthony Lee weighed six pounds, fifteen ounces—at death at age ten months, he weighed seven pounds, thirteen ounces. Normal weight at this age would have been approximately 14 pounds. (*Jones v. United States*, 308 F.2d 307 [D.C. Cir. 1962])

INTRODUCTION

A crime comprises an *actus reus*, or a criminal act or omission, and a *mens rea*, or a criminal intent. Conviction of a criminal charge requires evidence establishing beyond a reasonable doubt that the accused possessed the required mental state and performed a voluntary act that caused the social harm condemned in the statute.¹

There must be a concurrence between the *actus reus* and *mens rea*. For instance, common law burglary is the breaking and entering of the dwelling house of another at night with the intent to commit a felony. Backpackers may force their way into a cabin to escape the sweltering summer heat and, once having entered, find it impossible to resist the temptation to steal hiking equipment. The requisite intent to steal developed following the breaking and entering, and our backpackers are not guilty of common law burglary.² The requirement of concurrence is illustrated by the California Penal Code, which provides that “in every crime . . . there must exist a union or joint operation of act and intent.”³

Actus reus generally involves three elements or components: (1) a voluntary act or failure to perform an act (2) that causes (3) a social harm condemned under a criminal statute. Homicide, for instance, involves the voluntary shooting or stabbing (act) of another human being that results in (causation) death (social harm).⁴ The Indiana Criminal Code provides that a “person commits an offense only if he voluntarily engages in conduct in violation of the statute defining the offense. . . . [A] person who omits to perform an act commits an offense only if he has a statutory, common law, or contractual duty to perform the act.”⁵

First, keep in mind that an act may be innocent or criminal depending on the context or **attendant circumstances**. Entering an automobile, turning the key, and driving down the highway may be innocent or criminal depending on whether the driver is the owner or a thief. Second, crimes require differing attendant circumstances. An assault on a police officer requires an attack on a law enforcement official; an assault with a dangerous weapon involves the employment of an instrument capable of inflicting serious injury, such as a knife or firearm. A third point is that some offenses require that an act cause a specific harm. Homicide, for instance, involves an act that directly causes the death of the victim, while false pretenses require that an individual obtain title to property through the false representation of a fact or facts. In the case of a so-called **result crime**, the defendant’s act must be the “actual cause” of the resulting harm. An individual who dangerously assaults a victim who subsequently dies may not be guilty of homicide in the event that the victim would have lived had the victim’s death not been caused by the gross negligence of an ambulance driver.

This chapter covers *actus reus*. We first discuss the requirement of an act and then turn our attention to status offenses, omissions, and possession. Chapter 5 addresses criminal intent, concurrence, and causality, and we will apply these concepts to specific crimes in Chapters 10 through 16. At this point, merely appreciate that a crime consists of various “elements” or components that the prosecution must prove beyond a reasonable doubt.

CRIMINAL ACTS

Scholars have engaged in a lengthy and largely philosophical debate over the definition of an “act.” It is sufficient to note that the modern view is that an act involves a bodily movement, whether voluntary or involuntary.⁶ The significant point is that *criminal law punishes voluntary acts and does not penalize thoughts*. Why?

1. This would involve an unacceptable degree of governmental intrusion into individual privacy.
2. It would be difficult to distinguish between criminal thoughts that reflect momentary anger, frustration, or fantasy and thoughts involving the serious consideration of criminal conduct.
3. Individuals should be punished only for conduct that creates a social harm or imminent threat of social harm and should not be penalized for thoughts that are not translated into action.
4. The social harm created by an act can be measured and a proportionate punishment imposed. The harm resulting from thoughts is much more difficult to determine.

An exception to this rule was the historical English crime of “imagining the King’s death.” How should we balance the interest in freedom of thought and imagination against the social interest in the early detection and prevention of social harm in the case of an individual who records dreams of child molestation in a private diary?

In 2014, an interesting case raised this very issue. Federal district court judge Paul Gardephe overturned the conviction and potential life sentence of the so-called cannibal cop, former New York City police officer Gilberto Valle, for conspiracy to kidnap. Valle used online identities like “Girlmeat Hunter” and searched for methods of kidnapping, subduing, torturing, and killing women and information about his victims. Valle also conducted internet searches on topics such as “how to chloroform a girl.”

Valle’s wife discovered his postings about women on fetish chat rooms. In one email Valle described hanging a victim by her feet and “cutting her throat” and “[l]etting her bleed . . . [and] butcher[ing] her while she hangs.” Other messages stated that “part of me wants to put her in the oven while she is still alive, but at a very low heat,” and another message expressed a desire to “make some bacon strips off her belly.” Judge Barrington D. Parker in affirming the reversal of Valle’s conviction observed that despite Valle’s misogynistic postings he was reluctant to “give the government the power to punish us for our thoughts and not our action.” Judge Parker stressed that “fantasizing about committing a crime, even a crime of violence against a real person whom you know, is not a crime.”⁷ Do you agree that the kidnapping and abuse existed only in the minds and thoughts of Valle and of the individuals with whom he corresponded?

YOU DECIDE 4.1

Thomas F. Martino and his wife, Carmen Keenon, got into an argument. Martino shoved his wife down the front stairs of the home. He fell on Keenon and began choking her. The police arrived and observed Martino on top of Keenon on the stair landing outside the couple's apartment. The officers ordered Martino to get off Keenon. Martino replied in a combative tone, "[Y]ou ain't going to —ing do anything." After the police repeated these orders several more times, threatened to tase Martino, and began moving up the stairs, Martino stood up, moved to the front of the landing, and "'squared off' against the police in a way that indicated that he wanted to fight." Martino yelled at the police, "Come on." One of the officers tased Martino, who dropped to the ground, having lost control of his muscles because of being tased. He fell backward on top of Keenon, breaking her arm. The trial court found Martino guilty of aggravated domestic battery, aggravated battery, unlawful restraint, and two counts of resisting or obstructing a police officer. The defendant was sentenced to concurrent terms totaling 180 days in jail and four years of probation. Martino claims that his breaking of Keenon's arm was an involuntary act and that he may not be held criminally liable for a battery. Do you agree? See *People v. Martino*, 970 N.E.2d 123 (Ill. App. Ct. 2012).

VOLUNTARY CRIMINAL ACTS

A more problematic issue is the requirement that a crime consist of a **voluntary act**. The Indiana Criminal Law Study Commission, which assisted in writing the Indiana statute on criminal conduct, explains that *voluntary* simply means a conscious choice by an individual to commit or not to commit an act.⁸ In an often-cited statement, Supreme Court Justice Oliver Wendell Holmes Jr. observed that a "spasm is not an act. The contraction of the muscles must be willed."⁹ Professor Joshua Dressler compares an involuntary movement to the branch of a tree that is blown by the wind into a passerby.¹⁰

The requirement of a voluntary act is based on the belief that it would be fundamentally unfair to punish individuals who do not consciously choose to engage in criminal activity and who therefore cannot be considered morally blameworthy. There also is the practical consideration that there is no need to deter, incapacitate, or rehabilitate individuals who involuntarily engage in criminal conduct.¹¹

A North Carolina court of appeals ruled that a jury hearing the case of a defendant charged with taking indecent liberties with his girlfriend's 8-year-old daughter should have been instructed that "if they found that defendant was unconscious or, more specifically, asleep, they must find the defendant not guilty."¹² In another case, the Kentucky Supreme Court ruled that a defendant, who claimed that he was a "sleepwalker," should not be convicted in the event that he was "unconscious when he killed the deceased."¹³

The criminal defense of involuntariness has been unsuccessfully invoked by individuals charged with criminal negligence while operating a motor vehicle. In the frequently cited case of *People v. Decina*, the defendant's automobile jumped a curb and killed four children. The appellate court affirmed Decina's conviction despite the fact that the accident resulted from an

epileptic seizure. The judges reasoned that the statute “does not necessarily contemplate that the driver be conscious at the time of the accident” and that it is sufficient that the defendant knew of his medical disability and knew that it would interfere with the operation of a motor vehicle when he made the “conscious choice of a course of action” to operate the vehicle. In other words, Decina acted voluntarily when he turned the key, pressed on the accelerator, and drove the automobile.¹⁴

Some defendants have actually managed to be acquitted by persuading judges or juries that their crime was an **involuntary act**. A California court of appeals concluded that the evidence supported the “inference” that a defendant who had been wounded in the abdomen had shot and killed a police officer as a reflex action and was in a “state of unconsciousness.”¹⁵

In the well-known case of *Martin v. State*, the police removed Martin, who had been drinking, from his home, left him on the road, and arrested him for appearing in public while “intoxicated or drunk” in a “loud and boisterous fashion.” The Alabama Supreme Court overturned Martin’s conviction and explained that “an accusation of drunkenness in a . . . public place cannot be established by proof that the accused, while in an intoxicated condition, was involuntarily and forcibly carried to that place by the arresting officer.” In other words, Martin did not voluntarily appear in public in a drunken condition.¹⁶

The next case in the textbook, *State v. Fields*, challenges you to determine whether the defendant’s act should be considered involuntary or voluntary.

MODEL PENAL CODE

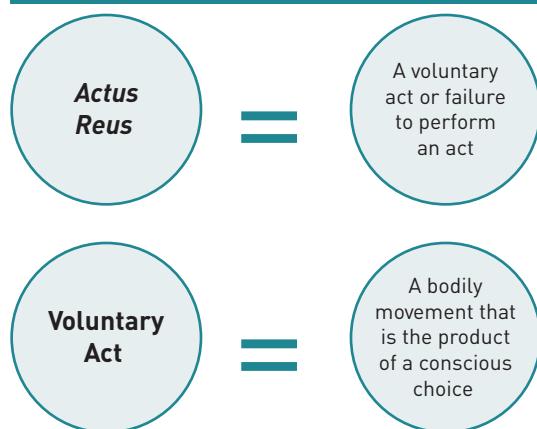
The Model Penal Code section 2.01 defines the Requirement of Voluntary Act as follows:

1. A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.
2. The following are not voluntary acts within the meaning of this Section:
 - a. reflex or convulsion;
 - b. a bodily movement during unconsciousness or sleep;
 - c. conduct during hypnosis or resulting from hypnotic suggestion;
 - d. a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

Analysis

The Model Penal Code requires that the guilt of a defendant should be based on conduct that includes a voluntary act or omission. An individual who is aware of a serious heart defect who voluntarily drives an automobile may be liable for harm resulting from an accident they cause while having a heart attack, based on the fact that they voluntarily drove the automobile or failed to stop as they began to feel ill. The Model Penal Code avoids the difficulties involved in defining voluntary conduct and, instead, lists the type of conditions that are not voluntary. Section 2(d) encompasses a range of unspecified conditions.

FIGURE 4.1 ■ The Legal Equation: *Actus Reus*



WAS THE DEFENDANT ENTITLED TO A JURY INSTRUCTION ON UNCONSCIOUSNESS?

STATE V. FIELDS, 376 S.E.2d 740 (N.C. 1989)

Opinion by Whichard, J.

Defendant was convicted of first degree murder . . . The trial court sentenced him to life imprisonment. We award a new trial for error in refusing a requested jury instruction.

Facts

The State's evidence, in pertinent summary, showed the following:

Connie Williams, defendant's half-sister, testified that she had been dating Isaiah Barnes, the victim, for two years at the time of his death. On September 18, 1986, the couple was drinking liquor at Robert Cobb's house. . . .

Cobb testified that defendant and his girl friend were at his house when Williams and Barnes arrived. Defendant offered Williams a drink and left soon thereafter. Before leaving, defendant "played some numbers" with Cobb. Williams and Barnes also left Cobb's house, but returned later that evening. Williams and Barnes were sitting on a trunk in Cobb's bedroom, drinking and talking. Cobb and his friend, Joyce Ann Pettaway, also were talking in the bedroom. Defendant entered the bedroom about midnight. He called Cobb by a nickname, "Snow." Defendant asked Cobb to keep the ticket for the numbers he had played, saying, "If I hit, I want you to get the money and keep it until you see me." Cobb asked why defendant could not keep it himself, and defendant answered, "You'll see."

Defendant and Barnes had not spoken to one another. Defendant then walked around the foot of the bed, pulled a gun out of his belt, and shot Barnes. Barnes fell on the floor. Pettaway cried, "Oh, Lord have mercy. Please don't shoot that man anymore." Defendant

turned toward her and said, "Shut up," then shot Barnes again as he lay on the floor gasping for breath. Cobb told defendant to get out of his house because he was calling "the law." Defendant said, "Okay, Snow," and walked out.

Wallace Fields, defendant's brother, testified on defendant's behalf. He recounted the difficult circumstances of their childhood. Their stepfather, called "Dump," drank regularly and beat the children and their mother. They had little money and were often hungry. When Dump was on a rampage, the mother and children would often sleep outside to avoid him.

One night when defendant was fourteen, Dump held a knife to defendant's mother's throat and threatened to kill her. Defendant grabbed a gun and shot Dump, killing him. Wallace Fields testified that up to the time of this incident, defendant was a normal boy who liked to play and go to school. After the shooting, defendant had nightmares and became "a different person," acting as if he were "in his own world." Defendant was extremely devoted to his mother, helping her cook and clean and giving her money.

Wallace Fields further testified that his sister, Connie Williams, had become a different person since beginning her relationship with Barnes. She often appeared bruised and beaten and cared little for her appearance.

Willard Mills, defendant's stepbrother, also testified regarding defendant's devotion to his mother. Mills stated that Connie Williams became dependent on alcohol or drugs and lost all interest in her family and appearance after she became involved with Barnes. Defendant and his brothers were worried about Connie and frequently discussed how to help her.

Mills reported that defendant had become very morose after the childhood shooting incident. As defendant grew older, Mills advised him to put it all behind him and join the service. While in service, another soldier performed a trick in which the soldier put lighter fluid in his mouth, lit it, and blew out the flames. Defendant saw his stepfather's face in the flames and ran away. He was hospitalized for several months following this episode.

Mills testified that defendant was concerned about Barnes's drinking and tried to persuade him to stop, but that defendant bore Barnes no malice. Ten days after shooting Barnes, defendant called Mills. Mills picked up defendant at the bus station and took him to the Tarboro police station to turn himself in.

Agnes Williams, defendant's mother, testified that defendant's nerves had been bad ever since the incident with Dump. Defendant had a nervous breakdown in the service and was never the same afterward. Defendant's nerves were "just racked all to pieces" over Connie Williams's problems.

Dr. Evans Harrell, a psychologist, testified on defendant's behalf. . . He stated that after defendant killed Dump he felt very protective toward his mother and sisters. Defendant felt guilty about the family being left without a father figure, and he tried to assume that role. Defendant suffered from frequent nightmares featuring Dump and often felt Dump's presence even when awake. In Dr. Harrell's opinion, defendant suffered from post-traumatic stress disorder, and certain of his behavior was characteristic of a disassociative state. Dr. Harrell described a disassociative state as a sudden temporary alteration in the state of consciousness, during which defendant would not remember what happened and did not intend to do anything, "like his mind and his body weren't connected."

Dr. Harrell recounted what defendant related to him about the killing of Isaiah Barnes. Defendant told Dr. Harrell he had tried to get his sister Connie to leave Cobb's house that night because he was worried about her drinking. Connie's arm was bandaged from a burn which she attributed to an accident but which defendant and the family suspected Barnes inflicted. Defendant saw Barnes reach out and grab Connie, and Connie grimaced in pain. At

this point defendant pulled out the gun and shot Barnes. Defendant told Dr. Harrell he had not planned to kill Barnes, had not thought of killing Barnes, and even as he shot him, was not thinking of killing Barnes. Defendant denied any memory of firing a second shot. Instead, defendant was seeing Dump and his mother “and all of these things flashing before [him] in a blur.” . . .

Dr. Harrell testified that defendant perceived Barnes to be treating Connie the same way Dump had treated defendant’s mother. . . . In Dr. Harrell’s opinion, defendant did not plan or intend to shoot Barnes and was unable to exercise conscious control of his physical actions at that moment. Dr. Harrell concluded, “I think he was acting sort of like a robot. He was acting like an automaton.”

Dr. Harrell testified that defendant told him he had been drinking on the night of the shooting but did not tell him how much he had had to drink.

Issue

Defendant assigns error to the trial court’s refusal to instruct the jury on the defense of unconsciousness. This defense, also called automatism, has been defined as

connoting the state of a person who, though capable of action, is not conscious of what he is doing. It is to be equated with unconsciousness, involuntary action [and] implies that there must be some attendant disturbance of conscious awareness. Undoubtedly automatic states exist, and medically they may be defined as conditions in which the patient may perform simple or complex actions in a more or less skilled or uncoordinated fashion without having full awareness of what he is doing.

Reasoning

Defendant’s evidence tended to show that immediately preceding and during the killing of his victim, he was unconscious. Family members testified to a substantial history going back to defendant’s childhood of defendant’s acting as if he were “in his own world.” In the context of this testimony, and on the basis of a personal and family history obtained from defendant and members of his family, Dr. Harrell testified that in his opinion defendant suffered from post-traumatic stress disorder and was prone to experiencing disassociative states. In Dr. Harrell’s opinion, defendant was in a disassociative state when he shot the victim. Dr. Harrell testified . . . [that the defendant] “was acting sort of like a robot. He was acting like an automaton.” . . . “When Isaiah reached out and grabs Connie’s arm and Connie grimaces, and his whole past life and material that is so similar in his mind to what he’s seen, flashes before him, then he engages in a motor action. . . .”

This testimony, if believed, permits a jury finding that defendant was unable to exercise conscious control of his physical actions when he shot the victim. . . . Defendant thus was entitled to the unconsciousness or automatism jury instruction . . . stating that the defense of unconsciousness does not apply to a case in which the mental state of the person in question is due to insanity, mental defect or voluntary intoxication resulting from the use of drugs or intoxicating liquor, but applies only to cases of the unconsciousness of persons of sound mind as, for example, sleepwalkers or persons suffering from the delirium of fever, epilepsy, a blow on the head or the involuntary taking of drugs or intoxicating liquor, and other cases in which there is no functioning of the conscious mind and the person’s acts are controlled solely by the subconscious mind.

Holding

[The] defendant's evidence . . . merited the requested instruction on unconsciousness or automatism. . . . As noted above, family members testified to a substantial history going back to defendant's childhood of defendant's acting as if he were "in his own world." . . . Dr. Harrell clearly testified that in his opinion defendant was unable to exercise conscious control of his physical actions at the moment of the fatal shooting. He stated further: "I think he was acting sort of like a robot. He was acting like an automaton. . . . [W]hen he goes into the altered state of consciousness, . . . then he engages in a motor action." This testimony, combined with the family members' testimony, if accepted by the jury, "exclude[d] the possibility of a voluntary act without which there can be no criminal liability." . . . Therefore, an instruction on the legal principles applicable to the unconsciousness or automatism defense was required.

Questions for Discussion

1. Why is unconsciousness or automatism a criminal defense? What facts support the defendant's contention that the killing of Barnes was an unconscious automatic act?
2. What facts undermine the contention that Fields shot Barnes as an act of unconsciousness or automatism? Why, for instance, was Fields carrying a pistol? Did he have a motive for killing Barnes? Was his conduct consistent with an individual displaying "disassociation"? Are the witnesses cited by the court neutral and objective or biased? Were you persuaded by Dr. Harrell's testimony?
3. Should unconsciousness or automatism reduce the seriousness of an offense rather than constitute an absolute defense? What about holding Fields guilty for reckless homicide based on the fact that he was irresponsible for not seeking medical treatment for his severe emotional problems?
4. The North Carolina Supreme Court distinguishes unconsciousness or automatism from insanity. What is the difference between these two concepts? Under what circumstances is a defendant entitled to the jury receiving an unconsciousness or automatism jury instruction?
5. Professor Dressler has suggested that courts use "time framing" to reach the result they desire. For example, a court may take a broad view and find that Fields's bringing a gun to Cobb's house constituted the required voluntary act, or a court could focus on the moment in which Fields fired the gun and killed Barnes. Was Fields's decision to arm himself too far removed from the actual shooting to find that this satisfied the requirement of a voluntary criminal act?

CASES AND COMMENTS

The cases that follow are examples of cases in which judges were asked to decide whether acts were voluntary or involuntary.

1. **Sleepwalking.** The first American case to recognize the defense of sleepwalking or somnambulism involved the acquittal in 1846 of Albert Tirrell for the murder of his mistress and the arson of her Boston brothel. This was followed in 1879 by the Kentucky case *Fain v. Commonwealth*, 78 Ky. 183, in which sleepwalking was recognized as a

defense for homicide. Over 120 years later, Adam Kieczykowski, age 19, was acquitted of the burglary of a number of dorm rooms at the University of Massachusetts Amherst and of sexual assault. In 2003, 24-year-old Marc Reider was acquitted of aggravated manslaughter based on a jury's determination that he was "sleep-driving." An even more startling case was an English jury's 2005 acquittal of British bartender James Bilton for raping a woman three times.¹⁷

In 2002, a California appellate court upheld the conviction of Timothy Stowell, who had been found guilty of digital penetration and of lewd actions "upon a four-year-old female." Stowell was found in bed with Tracie and her daughter Taylor, who were spending the night with Stowell and his girlfriend LeeAnne. Stowell and LeeAnne were sleeping in the living room while Tracie and Taylor slept in the bedroom. At trial, Stowell testified that he did not know "how he came to be in bed" with Taylor and that the last thing that he recalled from that evening was watching a film on television and then "waking up to Tracie yelling, 'What the hell is going on?'"

The appellate court affirmed the trial court judge's refusal to instruct the jury that they should acquit Stowell if after reviewing the evidence "you have a reasonable doubt that the defendant was conscious at the time the alleged crime was committed." The appellate court noted that while Stowell and LeeAnne had testified that Stowell had walked in his sleep on various occasions, he did not claim that he had been sleepwalking on the night of the molestation. There also was no testimony that he had engaged in similar types of sexual behavior when he previously had been sleepwalking. At the time of his arrest, Stowell did not explain to the police that he had been sleepwalking, and he raised the sleepwalking defense for the first time at trial. The last point made by the appellate court was that while studies indicate that sleepwalkers are able to unlock doors and operate machinery, there was no expert testimony presented at trial documenting that a sleepwalker could have undressed and sexually molested a 4-year-old. The appellate court concluded that Stowell's claim that he had been sleepwalking and had unconsciously molested Taylor simply was not supported by substantial evidence. Should the criminal law recognize the "involuntariness" defense of sleepwalking?¹⁸

In another case, *State v. Newman*, the Oregon Supreme Court held that the trial court should have allowed the defendant to present evidence of "sleep driving" as a defense to a charge of driving under the influence of intoxicants (DUII).¹⁹

2. **Medical Condition.** Robert Nelson, 37, since he was 10 years old suffered from Tourette's syndrome with obsessive compulsive tendencies. In the period of a month in 2010 he made three obscene phone calls to Lois Miller, an 84-year-old woman whose name he selected at random from the phone book. Nelson was aware that the statements he made would "scare or offend" an elderly woman. His treating psychiatrist testified that Nelson suffered from uncontrollable physical and verbal tics and was obsessed with the phone. It was not uncommon for Nelson to continually repeat the same actions although the doctor could not offer a medical explanation for this behavior. An Illinois appellate court held that the "phone calls were not acts done under Nelson's conscious control. . . . Nelson's behaviour of selecting a number, dialing it, and saying lewd or offensive things were all part of a complex tic resulting from his Tourette's." What of the fact that Nelson apparently had failed to take the medication to control his Tourette's?²⁰

In *People v. Wesley*, Wesley was convicted of aggravated battery and was sentenced to four years and six months in prison. He made suggestive sexual remarks to a female mail carrier on several occasions and subsequently "touched" her without her consent while she was delivering the mail. The medical evidence indicated that Wesley had suffered a traumatic brain injury roughly 20 years ago, and a neuropsychologist

testified that "if there's a stimulus in front of [defendant] and he has an urge or a desire to touch it, he's bound to that stimulus and will very likely touch it regardless of the fact that someone has said, 'Don't touch it.'" Although Wesley "understands that he shouldn't [engage in the behavior], . . . he would be very likely to do so anyway," and he has "limited ability" to "delay gratification and to control his impulses." An Illinois court found that the jury may have reasonably concluded that Wesley had acted in a voluntary fashion. Unlike Nelson (see previous paragraph) who lacked the capacity to control his conduct, the testimony was that there are "times when [defendant] can control his behavior after he's been stimulated." Although it was "unlikely" that Wesley "would control his behavior," he was capable of controlling himself under "some circumstances even after being triggered by stimulus." The court noted that he had interacted with the mail carrier on multiple prior occasions without having touched her.²¹

3. **Seizure.** Michael Chmilenko had an epileptic seizure, slipped out of his handcuffs and escaped, and when he awoke possessed the mental clarity to take a taxi to his mother's house. An Illinois appellate court found that he was incapable of forming a specific intent to escape custody. Chmilenko testified that he was suffering a seizure at the time of arrest and again at the time of escape. He explained that during the second seizure he was able to pull out of the handcuffs, walk across the street in a partially dazed condition, and regain consciousness a short time later. Chmilenko further testified that finding himself no longer in custody and still dazed he went home to seek help from his father. The appellate court found that a doctor's testimony that Chmilenko's epilepsy could have created in defendant a "seizure during which he would not be conscious but could remain ambulatory, coupled with defendant's uncontradicted testimony that he suffered from such a seizure at the time of his escape, raised . . . a reasonable doubt that defendant possessed the necessary 'conscious objective' to escape."²²
4. **Reflex Action.** Jonathan Nunes attacked Kerry Sanders and hit Sanders four times in the head. The evidence indicated that Sanders was holding a knife and that his arm was extended by his side. Sanders claimed that when he was hit by Nunes, his arm involuntarily extended upwards, stabbing and killing Nunes. An eyewitness testified that she did not see Sanders swing the knife at Nunes. A Hawaii appellate court held that the trial court was in error in failing to instruct the jury that they should acquit Sanders if they found that the stabbing of Nunes was an involuntary act.²³
5. **Drugs in Jail.** On September 22, 2005, Vancouver (Washington) Police Department officer Jeff Starks stopped Eaton for driving with his headlights turned off and made a traffic stop. After performing field sobriety tests, Officer Starks concluded that Eaton was impaired, arrested him for DUI, and took him to the county jail. He was searched, and the officers seized "what appeared to be a plastic bag taped to the top of [Eaton's] sock." Eaton was charged with one count of DUI and one count of possession of a controlled substance. The state sought a sentence enhancement because the narcotics were discovered in the county jail. The jury found Eaton guilty of both counts and found that Eaton possessed methamphetamine in a county jail. Eaton's standard sentencing range would have been 0 to 6 months, but with the sentence enhancement, his range was increased to 12 to 18 months. The trial court sentenced Eaton to 12 months and 1 day. Eaton claimed that the prosecution failed to prove that he acted voluntarily in bringing the narcotics into the jail and that the sentencing enhancement could not be imposed for an involuntary act.

The Washington Supreme Court held that once Eaton was arrested, he no longer had control over his location. "From the time of arrest, his movement from street to jail became involuntary: involuntary not because he did not wish to enter the jail, but because

he was forcibly taken there by State authority. He no longer had the ability to choose his own course of action. Nor did he have the ability through some other course of action to avoid entering the area that would increase the penalty for the underlying crime.”²⁴

In contrast, an Arizona appellate court based on similar facts held that the defendant’s possession of a controlled substance was “voluntary in that, after being advised of the consequences of bringing drugs into the jail, the Appellant consciously chose to ignore the officers’ warnings, choosing instead to enter the jail in possession of cocaine. Under these circumstances, the [defendant] was the author of his own fate.”²⁵ The same decision was reached by the California Supreme Court in *People v. Low*, 232 P.3d 635 (Cal. 2010).

6. **Disassociative Identity Disorder (DID).** Robin Grimsley suffered from a multiple personality disorder. She was arrested for driving under the influence of alcohol and at trial introduced psychiatric evidence that when arrested she was inhabiting her secondary personality of Jennifer, who suffered from a drinking problem. Grimsley contended that as a result she (Robin) was unconscious during the period that Jennifer was driving and was unaware of Jennifer’s conduct. As a result, Robin argued that she should be acquitted because she had not engaged in a voluntary act. An Ohio appellate court held that it was “immaterial whether she was in one state of consciousness or another, so long as in the personality then controlling her behavior, she was conscious and her actions were a product of her own volition.”²⁶

YOU DECIDE 4.2

Alfred E. Brown, while drinking beer and talking with friends in the parking lot of an apartment complex, became involved in an argument with James McLean. One week earlier, Brown had been badly beaten in a fight with McLean. Brown purchased a .25-caliber handgun to protect himself and his friends from McLean, who was known to “possess and discharge firearms in the vicinity of the apartment complex” where Brown lived. Brown, on the day in question, got into a heated exchange with McLean. Brown, who is right-handed, testified that he held the firearm in his left hand because of an injury that he had experienced to his right hand. He testified that while raising the handgun, the gun accidentally fired when he was bumped from behind by another person, Coleman. The shot fatally wounded one of Brown’s friends, Joseph Caraballo. Did Brown involuntarily fire the shot that killed Caraballo? What is your opinion? See *Brown v. State*, 955 S.W.2d 276 (Tex. 1997).

STATUS OFFENSES

Can you be criminally convicted of being a drunk or drug addict or a common thief? Or for a violent personality? The commentary to Model Penal Code section 2.01 stresses that a crime requires an act and that individuals may not be punished based on a mere status or condition. The code cites as an example the 1962 U.S. Supreme Court decision in *Robinson v. California*, which, as you might recall from Chapter 3, held that it was cruel and unusual punishment under the Eighth and Fourteenth Amendments to convict Robinson of the **status offense** of being “addicted to the use of narcotics.”²⁷

In *Robinson*, Los Angeles police officers observed scar tissue and discoloration on Robinson's arms that was consistent with the injection of drugs. Robinson was convicted by a jury under a statute that declared it a misdemeanor for a person "either to use narcotics or to be addicted to the use of narcotics." The verdict was based on Robinson's status as a narcotics addict rather than for the act of using narcotics or for other illegal acts such as the manufacture, selling, transport, or purchase of narcotics. The Supreme Court reversed Robinson's criminal conviction and condemned the fact that Robinson could be held "continuously guilty . . . whether or not he ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior [in California]."

Holding Robinson liable for his status as an addict seemed particularly unfair given that four judges viewed narcotics addiction as a disease. Justice Potter Stewart explained that it was "cruel and unusual punishment to condemn Robinson for an illness, which like being mentally or physically challenged or leprosy, may be contracted innocently or involuntarily."

Six years later, the U.S. Supreme Court issued a decision in *Powell v. Texas*. Powell was arrested for "being found in a state of intoxication in a public place."²⁸ The Texas law was aimed at preventing the disruptive behavior accompanying public drunkenness. Powell claimed that his conviction was based on his status as a chronic alcoholic and that the law constituted cruel and unusual punishment. The Supreme Court rejected this argument and ruled in a 5-4 decision that Powell was convicted not for being a chronic alcoholic, but for his public behavior that posed "substantial health and safety hazards, both to himself and for members of the general public." Justice White was the fifth justice in the *Powell* majority. White agreed with the dissent that alcoholism was a disease but concurred in the majority decision based on his determination that Powell was capable of "making plans to avoid his being found drunk in public." Justice White cautioned that he believed that it would constitute cruel and unusual punishment to convict and punish chronic alcoholics who were homeless, because such individuals "have no place else to go and no place else to be when they are drinking."

The Supreme Court majority in *Powell* dismissed the argument that alcoholism was a disease similar to drug addiction and that Robinson's condemnation of status offenses should be expanded to encompass Powell's irresistible compulsion to appear drunk in public. A shift of Justice White's vote would have resulted in a different outcome. Would this prove a dangerous doctrine? The next step might involve sex offenders claiming that their criminal acts are an expression of a sexually dysfunctional personality or violent offenders contending that their behavior resulted from their antisocial personalities.

In 1969, in *Wheeler v. Goodman*, a federal district court held that the defendants had been improperly arrested and punished because they were unemployed "hippies."

A man is free to be a hippie, a Methodist, a Jew, a Black Panther, a Kiwanian, or even a Communist, so long as his conduct does not imperil others, or infringe upon their rights. In short, it is no crime to be a hippie. . . .

Status—even that of a gambler or prostitute—may not be made criminal. . . . The acts of gambling, prostitution, and operating bawdy houses are criminally punishable, of course, but the states cannot create the special status of vagrant for person[s] who commit those illegal acts and then punish the status instead of the act.²⁹

In *State v. Adams*, the Alabama Supreme Court found that a statute that required sex offenders to provide a “physical address” where they could be contacted following their release from prison unconstitutionally punished Adams, an indigent and homeless sex offender. Adams was an indigent with no family or friends with whom he could live, and despite his efforts he had not been accepted to any homeless shelter or halfway house. There were only four facilities in Alabama that accepted sex offenders, and those shelters/halfway houses were “virtually always full to capacity.” The court held that Adams’s failure to provide an actual address at which he would reside or live was “inseparable from his status of homelessness and, thus, . . . constitute[d] cruel and unusual punishment.” Did the court too broadly interpret what constitutes a status offense?³⁰

In *People v. Kellogg*, the Superior Court of San Diego, California, confronted an appellant who contended that his criminal convictions for public intoxication unconstitutionally punished him for his status as a homeless, chronic alcoholic. Is Kellogg’s claim persuasive? After reading this section, consider whether courts have provided a clear definition of a status offense that constitutes cruel and unusual punishment.

WAS KELLOGG CONVICTED FOR THE STATUS OF BEING A HOMELESS, CHRONIC ALCOHOLIC?

PEOPLE V. KELLOGG, 14 CAL. Rptr. 3d 507 (CAL. APP. 2004)

Opinion by Haller, J.

Facts

On January 10, 2002, Officer Heidi Hawley, a member of the Homeless Outreach Team, responded to a citizen’s complaint of homeless persons camping under bridges and along State Route 163. She found Kellogg sitting on the ground in some bushes on the embankment off the freeway. Kellogg appeared inebriated and was largely incoherent. He was rocking back and forth, talking to himself, and gesturing. Officer Hawley arrested Kellogg for public intoxication. He had \$445 in his pocket from disability income.

In February 2001, Kellogg had accepted an offer from the Homeless Outreach Team to take him to Mercy Hospital. However, on three other occasions when Officer Hawley had offered Kellogg assistance from the Homeless Outreach Team, he had refused.

After his arrest on January 10, 2002, Kellogg posted \$104 cash bail and was released. Because he was homeless, he was not notified of his court date, and he did not appear for his January 31 arraignment. A warrant for his arrest was issued on February 11, 2002; he was arrested again for public intoxication on February 19 and 27 and subsequently charged with three violations of section 647, subdivision (f) [prohibiting public intoxication].

After a pretrial discussion in chambers about Kellogg’s physical and psychological problems, the trial court conditionally released Kellogg on his own recognizance and ordered that he be escorted to the Department of Veterans Affairs Hospital [VA] by Officer Hawley. He was not accepted for admission at the hospital and accordingly was returned to county jail.

Kellogg pleaded not guilty and filed a motion to dismiss the charges based on his constitutional right to be free of cruel and unusual punishment.

Psychologist Gregg Michel and psychiatrist Terry Schwartz testified on behalf of Kellogg. These experts explained that Kellogg had a dual diagnosis. In addition to his severe alcohol dependence, which causes him to suffer withdrawal symptoms if he stops drinking, he suffers from dementia, long-term cognitive impairment, schizoid personality disorder, and symptoms of posttraumatic stress disorder. He has a history of seizure disorder and a closed head injury, and [he] reported anxiety, depressive symptoms and chronic pain. He is estranged from his family. Physically, he has peripheral edema, gastritis, acute liver damage, and ulcerative colitis requiring him to wear a colostomy bag. To treat his various conditions and symptoms, he had been prescribed Klonopin and Vicodin and may suffer from addiction to medication.

Dr. Michel opined that Kellogg was gravely disabled and incapable of providing for his basic needs, and that his degree of dysfunction was life-threatening. His mental deficits impeded his executive functioning (planning, making judgments) and memory. . . . Drs. Michel and Schwartz opined that Kellogg's homelessness was not a matter of choice but a result of his gravely disabled mental condition. His chronic alcoholism and cognitive impairment made it nearly impossible for him to obtain and maintain an apartment without significant help and support. . . . Dr. Schwartz explained that for a person with Kellogg's conditions, crowded homeless shelters can be psychologically disturbing and trigger posttraumatic stress or anxiety symptoms, causing the person to prefer to hide in a bush where minimal interactions with people would occur. Additionally, a homeless person such as Kellogg, particularly when intoxicated, might refuse offers of assistance from authorities because he has difficulty trusting people and fears his situation, although bad at present, will worsen.

In Dr. Michel's view, Kellogg's incarceration provided some limited benefit in that he obtained medication for seizures, did not have access to alcohol, received some treatment, and was more stable during incarceration than he was when homeless on the streets. However, such treatment was insufficient to be therapeutic, and medications prescribed for inmate management purposes can be highly addictive and might not be medically appropriate. . . .

Testifying for the prosecution, Physician James Dunford stated that at the jail facility, medical staff assess the arrestee's condition and provide treatment as needed, including vitamins for nutritional needs and medication to control alcohol withdrawal symptoms or other diseases such as hypertension, seizure disorders, and diabetes. . . . Dr. Dunford opined that between March 2 and 7, Kellogg's condition had improved because his seizure medicine was restarted, his alcohol withdrawal was treated, his vital signs were stable, his colostomy bag was clean and intact, his overall cleanliness was restored, and he was interacting with people in a normal way.

After the presentation of evidence, the trial court found that Kellogg suffers from both chronic alcohol dependence and a mental disorder and was homeless at the time of his arrests. Further, his alcohol dependence is both physical and psychological and causes him to be unable to stop drinking or to engage in rational choice-making. Finding that before his arrest Kellogg was offered assistance on at least three occasions and that his medical condition improved while in custody, the court denied the motion to dismiss the charges.

On April 2, 2002, the court found Kellogg guilty of one charge of violating section 647, subdivision (f) arising from his conduct on January 10, 2002. At sentencing on April 30, the probation officer requested that the hearing be continued for another month so Kellogg could be evaluated for a possible conservatorship. . . .

After expressing the difficult "Hobson's choice" whereby there were no clear prospects presented to effectively assist Kellogg, the court sentenced him to 180 days in jail, with execution of sentence suspended for three years on the condition that he complete an alcohol treatment program and return to court on June 4, 2002, for a progress review. . . .

After [Kellogg's] release from jail, defense counsel made extensive, but unsuccessful, efforts to place Kellogg in an appropriate program and to find a permanent residence for him. On May 25 and 28, 2002, he was again arrested for public intoxication. After he failed to appear at his June 4 review hearing, his probation was summarily revoked. Kellogg was rearrested on June 12. After a probation revocation hearing, Kellogg's probation was formally revoked and he was ordered to serve the 180-day jail sentence. The court authorized that his sentence be served in a residential rehabilitation program. However, no such program was found. According to defense counsel, the VA concluded Kellogg could not benefit from its residential treatment program due to his cognitive defects. Further, his use of prescribed, addictive narcotics precluded placement in other residential treatment programs, and his ileostomy precluded placement in board and care facilities.

On July 11, 2003, the appellate division of the superior court affirmed the trial court's denial of Kellogg's motion to dismiss on Eighth Amendment grounds. We granted Kellogg's request to have the matter transferred to this court for review.

Issue

Section 647, subdivision (f) defines the misdemeanor offense of disorderly conduct by public intoxication as occurring when a person

is found in any public place under the influence of intoxicating liquor . . . in such a condition that he or she is unable to exercise care for his or her own safety or the safety of others, or by reason of his or her being under the influence of intoxicating liquor . . . interferes with or obstructs or prevents the free use of any street, sidewalk, or other public way.

Kellogg argues that this statute, as applied to him, constitutes cruel and/or unusual punishment prohibited by the Eighth Amendment to the U.S. Constitution and article 1, section 17 of the California Constitution. He asserts that his chronic alcoholism and mental condition have rendered him involuntarily homeless and that it is impossible for him to avoid being in public while intoxicated. He argues because his public intoxication is a result of his illness and beyond his control, it is inhumane for the state to respond to his condition by subjecting him to penal sanctions.

Reasoning

It is well settled that it is cruel and unusual punishment to impose criminal liability on a person merely for having the disease of addiction. In *Robinson v. California*, 370 U.S. 660, 666–667 (1962), the United States Supreme Court invalidated a California statute that made it a misdemeanor to "be addicted to the use of narcotics." The *Robinson* Court recognized that a state's broad power to provide for the public health and welfare made it constitutionally permissible for it to regulate the use and sale of narcotics, including, for example, such measures as penal sanctions for addicts who refuse to cooperate with compulsory treatment programs. But the court found the California penal statute unconstitutional because it did not require possession or use of narcotics, or disorderly behavior resulting from narcotics, but rather imposed criminal liability for the mere status of being addicted. *Robinson*

concluded that just as it would be cruel and unusual punishment to make it a criminal offense to be mentally ill or a leper, it was likewise cruel and unusual to allow a criminal conviction for the disease of addiction without requiring proof of narcotics possession or use or antisocial behavior.

In *Powell v. Texas*, 392 U.S. 514 (1968), the United States Supreme Court, in a five-to-four decision, declined to extend Robinson's holding to circumstances where a chronic alcoholic was convicted of public intoxication, reasoning that the defendant was not convicted merely for being a chronic alcoholic, but rather for being in public while drunk. That is, the state was not punishing the defendant for his mere status, but rather was imposing "a criminal sanction for public behavior which may create substantial health and safety hazards, both for [the defendant] and for members of the general public." In the plurality decision, four justices rejected the proposition set forth by four dissenting justices that it was unconstitutional to punish conduct that was "involuntary" or "occurred by a compulsion."

The fifth justice in the *Powell* plurality, Justice White, concurred in the result only, concluding that the issue of involuntary or compulsive behavior could be pivotal to the determination of cruel and unusual punishment, but the record did not show the defendant (who had a home) suffered from any inability to refrain from drinking in public. Justice White opined that punishing a homeless alcoholic for public drunkenness could constitute unconstitutional punishment if it was impossible for the person to resist drunkenness in a public place. Relying on Justice White's concurring opinion, Kellogg argues that Justice White, who was the deciding vote in *Powell*, would have sided with the dissenting justices had the circumstances of his case (i.e., an involuntarily homeless chronic alcoholic) been presented, thus resulting in a finding of cruel and unusual punishment by a plurality of the Supreme Court.

We are not persuaded. Although in *Robinson* the United States Supreme Court held it was constitutionally impermissible to punish for the mere condition of addiction, the court was careful to limit the scope of its decision by pointing out that a state may permissibly punish disorderly conduct resulting from the use of narcotics. This limitation was recognized and refined by the plurality opinion in *Powell*, where the Court held it was permissible for a state to impose criminal punishment when the addict engages in conduct that spills into public areas....

Here, the reason Kellogg was subjected to misdemeanor culpability for being intoxicated in public was not because of his condition of being a homeless alcoholic, but rather because of his conduct that posed a safety hazard. If Kellogg had merely been drunk in public in a manner that did not pose a safety hazard (i.e., if he were able to exercise care for his own and the public's safety and was not blocking a public way), he could not have been adjudicated guilty under section 647(f). The state has a legitimate need to control public drunkenness when [such drunkenness] creates a safety hazard. It would be neither safe nor humane to allow intoxicated persons to stumble into busy streets or to lie unchecked on sidewalks, driveways, parking lots, streets, and other such public areas where they could be trampled upon, tripped over, or run over by cars. The facts of Kellogg's public intoxication in the instant case show a clear potential for such harm. He was found sitting in bushes on a freeway embankment in an inebriated state. It is not difficult to imagine the serious possibility of danger to himself or others had he wandered off the embankment onto the freeway....

Holding

We conclude that the California Legislature's decision to allow misdemeanor culpability for public intoxication, even as applied to a homeless chronic alcoholic such as Kellogg, is neither disproportionate to the offense nor inhumane. In deciding whether punishment is

unconstitutionally excessive, we consider the degree of the individual's personal culpability as compared to the amount of punishment imposed. To the extent Kellogg has no choice but to be drunk in public given the nature of his impairments, his culpability is low; however, the penal sanctions imposed on him under section 647(f) are correspondingly low. Given the state's interest in providing for the safety of its citizens, including Kellogg, imposition of low-level criminal sanctions for Kellogg's conduct does not tread on the federal or state constitutional proscriptions against cruel and/or unusual punishment. . . .

In presenting his argument, Kellogg points to the various impediments to his ability to obtain shelter and effective treatment, apparently caused by a myriad of factors including the nature of his condition and governmental policies and resources, and asserts that these impediments do not justify criminally prosecuting him. He posits that the Eighth Amendment "mandates that society do more for [him] than prosecute him criminally and repeatedly incarcerate him for circumstances which are beyond his control."

We are sympathetic to Kellogg's plight; however, we are not in a position to serve as policy maker to evaluate societal deficiencies and amelioration strategies. . . . The judgment is affirmed.

Dissenting, McDonald, J.

Because Kellogg is involuntarily homeless and a chronic alcoholic with a past head injury who suffers from dementia, severe cognitive impairment, and a schizoid personality disorder, and there is no evidence he was unable by reason of his intoxication to care for himself or others, other than inability inherent in intoxication, or interfered in any manner with a public way, his section 647, subdivision (f) conviction solely for being intoxicated in public constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. . . . As Justice Fortas stated in his dissenting opinion in *Powell*:

It is entirely clear that the jailing of chronic alcoholics is punishment. It is not defended as therapeutic, nor is there any basis for claiming that it is therapeutic (or indeed a deterrent). The alcoholic offender is caught in a "revolving door"—leading from arrest on the street through a brief, unprofitable sojourn in jail, back to the street and, eventually, another arrest. The jails, overcrowded and put to a use for which they are not suitable, have a destructive effect upon alcoholic inmates. . . .

The scope of the California Constitution's prohibition of cruel or unusual punishment is not well-defined. . . . Nevertheless, the California Supreme Court has consistently followed the principle that "a sentence is cruel or unusual as applied to a particular defendant . . . [when] the punishment shocks the conscience and offends fundamental notions of human dignity." . . .

A section 647, subdivision (f) public intoxication offense, both in the abstract and as committed by Kellogg, is a nonviolent, fairly innocuous offense. . . . It is a nonviolent offense, does not require a victim, and poses little, if any, danger to society in general. As committed by Kellogg, the offense was nonviolent, victimless, and posed no danger to society. Kellogg was found intoxicated sitting under a bush in a public area. He was rocking back and forth, talking to himself and gesturing. The record does not show that Kellogg's public intoxication posed a danger to other persons or society in general. His motive in drinking presumably was merely to fulfill his physical and psychological compulsion as an alcoholic to become intoxicated. Because Kellogg is involuntarily homeless and did not have the alternative of being intoxicated in private, he did not have any specific purpose or motive to be intoxicated in a public place. Rather, it was his only option. . . . As an involuntarily homeless person,

Kellogg cannot avoid appearing in public. As a chronic alcoholic, he cannot stop drinking and being intoxicated. Therefore, Kellogg cannot avoid being intoxicated in a public place.

Based on the nature of the offense and the offender, Kellogg's section 647, subdivision (f) public intoxication conviction "shocks the conscience and offends fundamental notions of human dignity," and therefore constitutes cruel or unusual punishment in violation of . . . [both] the Eighth Amendment of the United States Constitution and article I, section 17 of the California Constitution.

I would reverse the judgment.

Questions for Discussion

1. Summarize the opinions of the U.S. Supreme Court in *Robinson v. California* and in *Powell v. Texas*.
2. Why does Kellogg argue that his arrest and incarceration constitute unconstitutional cruel and unusual punishment? How does the California court respond to this argument? What is the basis for Judge McDonald's dissent? Is the majority or the dissent more consistent with Supreme Court precedents?
3. What would be the impact of Judge McDonald's approach to public policy on the treatment of individuals like Fields?

YOU DECIDE 4.3

Raymond Moore was arrested and convicted for heroin possession. At the time Moore was arrested, he was sitting in a chair in a hotel room adjacent to a bed where the police found 1,854.5 milligrams of a mixture containing 4%–7% heroin and another pile of 1,824 milligrams of a mixture containing 4%–7% heroin. The police also found gelatin capsules, some of which were partially filled with the heroin mixture, and a firearm. Moore had 50 capsules of heroin in his possession. He claimed that he had been an addict for 25 years and claimed that he was in the hotel room to purchase heroin for his own use.

The government stipulated that Moore was a drug addict. He claimed that he was a "hopelessly dependent" addict with an overwhelming compulsion to use narcotics and should not be held responsible for possession of narcotics for personal use. The arresting officer testified on cross-examination at trial that it requires 50 to 100 capsules of heroin per day to satisfy the drug habit of some addicts and that Moore's possession of the capsules in his pockets was not necessarily inconsistent with being a nontrafficking addict.

There was a lack of evidence connecting Moore to the drugs in the hotel room, and he was prosecuted and convicted for possession of the 50 capsules of heroin in his possession.

The District of Columbia Court of Appeals affirmed Moore's conviction and noted that even if Moore was a nontrafficking addict, he had been criminally convicted for drug possession rather for his status as a narcotics addict. The fact that Moore could restrain himself from committing drug-related crimes like theft or robbery indicated that he was able to exercise self-control over his drug habit. The court noted that recognizing an "addict defense" based on Moore's lack of self-control would mean that Moore could not be held responsible for any and all narcotics and narcotics-related crimes.

The court further reasoned that the notion that addicts could not control their drug habit was problematic. Addicts differed in the extent of their “craving” for drugs and in their ability to control their craving for drugs, and the law should not presume that every addict was unable to control their addictive impulses.

Judge J. Skelly Wright, in dissent, argued that the trial court had improperly refused to instruct the jury that an addict who “by reason of his use of drugs lacks the substantial capacity to conform his conduct to the requirements of the law may not be held criminally responsible for mere possession of drugs for his own use.” Judge Wright explained that whatever the circumstances that resulted in an individual’s addiction, once an individual had become addicted the individual clearly was “sick” and should not be held criminally responsible for drug possession. Holding Moore criminally liable for drug possession, in Judge Wright’s view, was contrary to the interest in treating and rehabilitating narcotics addicts.

Do you believe that there should be an “addiction defense” and that Moore as an alleged nontrafficking addict should not be held criminally liable for narcotics possession? If so, what amount of drugs would be a reasonable amount for an addict to possess? Is Moore being held criminally liable based on his status as a narcotics addict? See *United States v. Moore*, 486 F.2d 1139 (D.C. Cir. 1973).

What of an individual arrested for possession of computer images of child pornography who claims that his possession of child pornography is a “pathological symptom” of pedophilia [attraction to children]? See *United States v. Black*, 116 F.3d 198 (7th Cir. 1997).

OMISSIONS

Can you be held criminally liable for a failure to act? For casually stepping over the body of a dying person who is blocking the entrance to your favorite coffee shop? The Model Penal Code, as we have seen, requires that criminal conduct be based on a “voluntary act or omission to perform an act of which [an individual] is physically capable.” An **omission** is a failure to act or a “negative act.”

The criminal law is generally concerned with punishing individuals who engage in voluntary acts that violate the law. The law, on occasion, imposes a duty or obligation on individuals to act and punishes a failure to act. For example, we are obliged to pay taxes, register for the draft, serve on juries, and report an accident. These duties are required in the interests of society and are limited exceptions to the requirement that a crime requires a voluntary act.

The American and European Bystander Rules

The basic rule in the United States is that an individual is not legally required to assist a person who is in peril. This principle was clearly established in 1907 in *People v. Beardsley*. The Michigan Supreme Court ruled that the married Beardsley was not liable for failing to take steps to ensure the safety of Blanche Burns, a woman with whom he was spending the weekend. The court explained that the fact that Burns was in Beardsley’s house at the time she overdosed on drugs and alcohol did not create a legal duty to assist her.³¹ The Michigan judges cited in support of this verdict the statement of U.S. Supreme Court Justice Joseph Stephen Field that it is “undoubtedly the moral duty of every person to extend to others

assistance when in danger . . . and, if such efforts should be omitted, . . . he would by his conduct draw upon himself the just censure and reproach of good men; but this is the only punishment to which he would be subjected by society.”³² Chief Justice Carpenter of the New Hampshire Supreme Court earlier had recognized that an individual did not possess a duty to rescue a child standing in the path of an oncoming train. Justice Carpenter noted that “if he does not, he may . . . justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child’s injury, or indictable under the statute for its death.”³³

This so-called **American bystander rule** contrasts with the **European bystander rule** common in Europe that obligates individuals to intervene. Most Americans would likely agree that an Olympic swimmer is morally obligated to rescue a young child drowning in a swimming pool. Why then is this not recognized as a legal duty in the United States? There are several reasons for the American bystander rule³⁴:

- Individuals intervening may be placed in jeopardy.
- Bystanders may misperceive a situation, unnecessarily interfere, and create needless complications.
- Individuals may lack the physical capacity and expertise to subdue an assailant or to rescue a hostage and place themselves in danger. This is the role of criminal justice professionals.
- The circumstances under which individuals should intervene and the acts required to satisfy the obligation to assist another would be difficult to clearly define.
- Criminal prosecutions for a failure to intervene would burden the criminal justice system.
- Individuals in a capitalist society are responsible for their own welfare and should not expect assistance from others.
- Most people will assist others out of a sense of moral responsibility, and there is no need for the law to require intervention.

Critics of the American bystander rule contend that there is little difference between pushing a child onto the railroad tracks and failing to intervene to ensure the child’s safety and that criminal liability should extend to both acts and omissions. This also would deter crime, because offenders may be reluctant to commit crimes in situations in which they anticipate that citizens will intervene. We can see how the readiness of passengers to confront terrorists on airplanes has prevented several attacks, most notably in the case of the “shoe bomber,” Richard Reid. The Good Samaritan rule also assists in promoting a sense of community and regard for others.³⁵

The conflict between law and morality was starkly presented in 1964 when 38 residents of New York City were awakened by the desperate screams of Kitty Genovese, a 28-year-old woman returning home from work. Kitty parked her car in a lot roughly 100 feet from her apartment and was confronted by Winston Moseley, a married father of two young

children, who later would testify that he received emotional gratification from stalking women. The 38 residents of the building turned on their lights and opened their windows and watched as Moseley returned on three separate occasions over a period of 35 minutes to stab Kitty 17 times. The third time Moseley returned, he found that Kitty had crawled to safety inside a nearby apartment house, and he stabbed her in the throat to prevent her from screaming, attempted to rape her, and took \$49 from her wallet. One person found the courage to persuade a neighbor to call the police, who arrived in two minutes to find Kitty's dead body. This event profoundly impacted the United States. Commentators asked whether we had become a society of passive bystanders who were concerned only with our own welfare.³⁶

The Duty to Intervene

American criminal law did not impose a general duty on the individuals witnessing the murder of Kitty Genovese to intervene. There is a duty, however, to assist another under certain limited conditions.³⁷ The primary requirement is that a duty must be recognized under either the common law or a statute.

- *Status.* The common law recognized that individuals possess an obligation to assist their child, spouse, or employee. In *State v. Mally*, the defendant was convicted of “hastening” the death of his wife who had fallen and broken both of her arms, precipitating severe shock and the degeneration of her kidneys. Michael Mally left his wife, Kay, alone in bed for two days, bothering only to provide her with a single glass of water. A Montana district court held that “the failure to obtain medical aid for one who is owed a duty is a sufficient degree of negligence to constitute involuntary manslaughter provided death results from the failure to act.”³⁸ A number of state courts have imposed a duty on an adult living with a child who has assumed a “parent-like role” and “substantial responsibility” for necessities such as “food, shelter, and protection.”³⁹ Other state courts have found that the standard for holding a nonbiologically related adult criminally liable for the injury to a child is too indefinite and that the extension of criminal liability to these individuals will discourage adults from taking an interest in children.⁴⁰
- *Statute.* A **duty to intervene** may be created by a statute that imposes a duty of care. This may be a criminal statute requiring that a doctor report child abuse or a statute that sets forth the obligations of parents. In *Craig v. State*, the defendants followed the dictates of their religion and treated their child’s fatal illness with prayer rather than medicine and were subsequently convicted of failing to obtain medical care for their now-deceased 6-year-old daughter. The court ruled that the parents had breached their duty under a statute that provided that a father and mother are jointly and individually responsible for the “support, care, nurture, welfare and education of their minor children.” The statute failed to mention medical care, but the court had “no hesitancy in holding that it is embraced within the scope of the broad language used.”⁴¹

In *State v. Lenihan*, 18-year-old Kirby Lenihan was held criminally liable for failing to ensure that her 16-year-old passenger K.G., who died when the car went off the road and crashed, was wearing a seat belt. There was evidence that Lenihan prior to the accident had inhaled diflouroethane to get high. Lenihan was found to have violated a law that punishes an individual who knowingly fails to fulfill a statutory duty to protect public health and safety and recklessly causes bodily injury while operating a motor vehicle.⁴²

In 2017, former Penn State president Graham Spanier was convicted and two university administrators pled guilty for failing to adhere to their statutory duty to report “suspected” child abuse committed by former Penn State University assistant football coach Jerry Sandusky to the Department of Public Welfare.

- *Contract.* An obligation may be created by an agreement. An obvious example is a babysitter who agrees to care for children or a lifeguard employed to safeguard swimmers. In *Commonwealth v. Pestinikas*, Walter and Helen Pestinikas verbally agreed to provide shelter, food, and medicine to 92-year-old Joseph Kly, who had been hospitalized with a severe weakness of the esophagus. Kly agreed to pay the Pestinikases \$300 a month in return for food, shelter, care, and medicine. Kly was found dead of dehydration and starvation roughly 19 months later. A Pennsylvania Superior Court ruled that although failure to provide food and medicine could not have been the basis for prosecuting a stranger who learned of Kly’s condition, a “duty to act imposed by contract is legally enforceable and, therefore, creates a legal duty.”⁴³
- *Assumption of a Duty.* An individual who voluntarily intervenes to assist another is charged with a duty of care. In *People v. Oliver*, Oliver, knowing that Cornejo was extremely drunk, drove him from a bar to Oliver’s home, where she assisted him in injecting drugs. Cornejo collapsed on the floor, and Oliver instructed her daughter to drag Cornejo’s body outside and hide him behind a shed. The next morning Cornejo was discovered dead. A California Superior Court ruled that by taking Cornejo into her home, Oliver “took charge of a person unable to prevent harm to himself,” and she “owed Cornejo a duty” that she breached by failing to summon medical assistance.⁴⁴

Katherine Saintil-Brown moved into her mother’s trailer to act as a caregiver. Saintil-Brown was determined to have criminally neglected her 76-year-old mother by allowing the morbidly obese woman to lie helplessly on the floor in a thin, web nightgown for five days adjacent to a hole in the floor that caused cold air to flow into the trailer. As a result, her mother suffered severe hypothermia. The pressure from being on the floor in her own urine caused the elderly victim’s skin to break down, creating a large ulcer on her leg, and her fecal matter caused the ulcer to become infected. This led to a necrotizing soft tissue infection, which subsequently caused her death after she finally was hospitalized.⁴⁶

In *State v. Gargus*, Gargus, a trained nurse, assumed care for her 81-year-old bedbound mother who was suffering from diabetes. Her mother passed away within two months, and her autopsy indicated that the cause of death was multiple-organ failure as a result of multiple bedsores and gangrene. She also was suffering from

malnourishment and dehydration and had been isolated in a mobile home infested with mice that had feces on the floor, molding food in the kitchen, and a nonworking bathroom. A Missouri court found that Gargus failed to act to “prevent injury to the victim.”⁴⁵

- *Creation of Peril.* An individual who intentionally or negligently places another in danger has a duty of rescue. In *Jones v. State*, the defendant raped a 12-year-old girl who almost immediately jumped or fell off a bridge into a stream. The defendant waded into the water, but neglected to rescue the young woman. The court asked, “Can it be doubted that one who by his own overpowering criminal act has put another in danger of drowning has the duty to preserve her life?”⁴⁷

Jason Voss was found to have “created and/or increased the risk of injury to the victim” by providing the victim with heroin, suggesting how much heroin the victim should inject, helping to prepare the heroin for ingestion, and leaving the hotel room after the victim exhibited signs of an overdose, “which [Voss] recognized as such.” A Missouri appellate court found that the “law imposed a duty on Voss to preserve the Victim’s life, and a reasonable juror could have found [Voss] breached that duty by failing to go back to the hotel and check on Victim and by failing to obtain medical help for Victim.”⁴⁸

- *Control.* Individuals have a duty to direct and to care for those under their supervision and command, including employees or members of the military. A California criminal statute provides that parents or legal guardians of any person under 18 “shall have the duty to exercise reasonable care, supervision, protection, and control over their minor child.”⁴⁹ The California Supreme Court noted that this act was part of an effort to combat gangs and that the law applies to parents who intentionally or with criminal negligence fail to fulfill their duty to control their child and, as a result, contribute to child delinquency.⁵⁰
- *Property Owner.* Property owners owe a duty of care to those invited onto their land. The defendants, in *Commonwealth v. Karetny*, operated a nightclub on a pier in Philadelphia, knowing that the pier was in imminent danger of collapse. The pier subsequently collapsed, killing three persons, and the Pennsylvania Supreme Court held that there was sufficient evidence to warrant a jury in finding the appellees’ “reckless creation of a risk of catastrophe.”⁵¹

In addition to establishing a duty, the prosecutor must demonstrate a number of other facts beyond a reasonable doubt:

- *Possession of Knowledge of the Peril.* The prosecution must establish that an individual was actually aware or should have been aware that another person was in danger. A mother cannot be held liable for her boyfriend’s molestation of her child unless she knew or ought to have known that her child was being sexually mistreated.⁵²

- *Acted With the Required Intent.* Most omission cases involve death and are prosecuted as either murder or manslaughter (reckless disregard).⁵³ As we will see in Chapter 10, homicide requires a specific intent to kill, while manslaughter requires knowledge that death is substantially certain to result. Poor judgment, a reasonable mistake, or a debatable decision is generally not sufficient to establish criminal guilt.⁵⁴
- *Caused the Harm to the Victim.* The defendant's failure to assist the victim must have caused the harm.⁵⁵

We can see the interrelationship between these three factors in *Craig v. State*. In *Craig*, two parents were held not to be *grossly negligent* in causing their daughter's death because they were found not to have possessed *knowledge* of her serious illness, which was not apparent until two or three days prior to her death. The evidence indicated at this point that medical assistance would not have saved her life. As a result, the parents *were held not to have caused* the child's death.⁵⁶

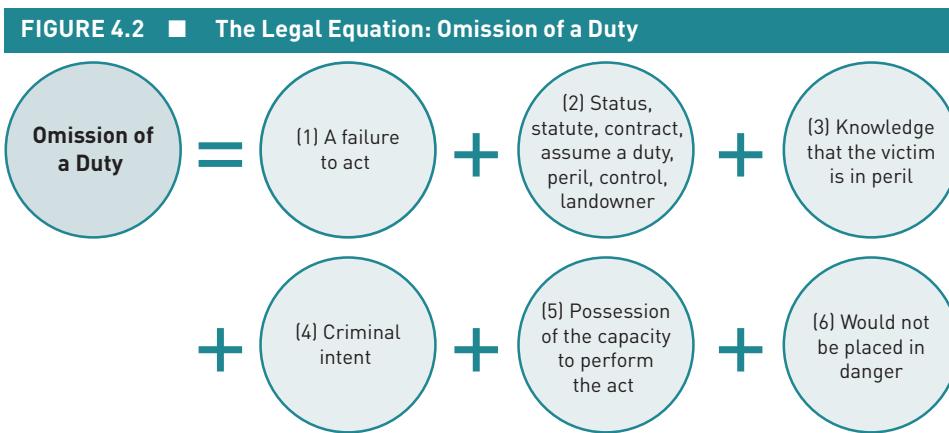
Last, individuals are not expected to "accomplish the impossible." *The law excuses persons from fulfilling their duty in those instances in which they would be placed in peril.* Individuals, however, must take whatever action is feasible under the circumstances. In *State v. Walden*, the defendant observed the beating of her infant son by his biological father. The North Carolina Supreme Court recognized that parents cannot be expected or required to exhibit unreasonable courage and heroism in protecting their children. However, the defendant was convicted based on the fact that she neglected to take every reasonable step under the circumstances to avert the harm, such as protesting, alerting authorities, or seeking assistance.⁵⁷

In serious cases of family abuse, duty, knowledge, intent, causality, and a failure to intervene are easily established. In *People v. Burton*, the defendants Sharon Burton and Leroy Locke were convicted of first-degree murder. On January 22, 1996, Burton passively watched Locke chase her daughter Dominique with a belt while shouting, "The little bitch pissed," after learning that she had a "toilet training accident" on the carpet. Locke then filled the bathtub with water and forced Dominique's head under the water three times for 15 seconds at a time. Dominique's body reportedly went limp in the water, and Locke and Burton left the 3-year-old unattended in the bathtub for 30 minutes while they played cards. Burton, after discovering Dominique's lifeless body, called her mother rather than authorities and later falsely reported to investigators that the child had fallen off the toilet. An Illinois appellate court found that Burton possessed knowledge that Dominique was being subjected to an ongoing pattern of abuse and that there was a substantial likelihood that Dominique would suffer death or great bodily harm.⁵⁸

In six states, a statute imposes criminal misdemeanor liability on individuals who fail to assist individuals in peril. A Vermont law, Title 12, Chapter 23, § 519, requires individuals who know that another is exposed to "grave physical harm" to provide "reasonable assistance" to "the extent that the assistance can be rendered without danger or peril" to the individuals assisting. The Vermont law, in return, relieves individuals of liability for civil damages unless their actions constitute gross negligence. Willful violation of the statute is punishable by a fine of not more than \$100. Most states have a **Good Samaritan statute** that, although it does not require individuals to intervene to assist another, provides some degree of protection from civil liability to individuals who decide to assist individuals in peril. Separate provisions typically provide

a greater degree of protection from civil liability to qualified medical professionals and to the police and to first responders.

The next case in the textbook, *Jones v. United States*, challenges you to determine whether the defendant possessed a duty of care to the children in her home.



MODEL PENAL CODE

Section 2.01. Requirement of a Voluntary Act, Omission as Basis of Liability

1. A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.
2. ...
3. Liability for the commission of an offense may not be based on an omission unaccompanied by action unless:
 - a. the omission is expressly made sufficient by the law defining the offense; or
 - b. a duty to perform the omitted act is otherwise imposed by law.

Analysis

The Model Penal Code adopts the conventional position and does not generally impose criminal liability for omissions.

Section (1) excuses an individual from liability when the intervention is beyond his or her physical capacities or would place him or her in peril.

Section (3)(a) recognizes that the definition of some crimes requires an omission. This would encompass a doctor who fails to fulfill the duty to report child abuse. Section (3)(b) provides that an omission may be committed by a failure to fulfill a legal duty. This may arise from statute or the common law. A duty, however, may not arise under a moral or religious code.

DID THE APPELLANT BREACH A LEGAL DUTY TO ROBERT LEE GREEN AND ANTHONY LEE GREEN?

JONES V. UNITED STATES, 308 F.2D 307 (D.C. CIR. 1962)

Opinion by Wright, J.

Appellant, together with one Shirley Green, was tried on a three-count indictment charging them jointly with (1) abusing and maltreating Robert Lee Green, (2) abusing and maltreating Anthony Lee Green, and (3) involuntary manslaughter through failure to perform their legal duty of care for Anthony Lee Green, which failure resulted in his death. At the close of evidence, after a trial before a jury, the first two counts were dismissed as to both defendants. On the third count, appellant was convicted of involuntary manslaughter. Shirley Green was found not guilty. . . .

[A]ppellant argues that there was insufficient evidence as a matter of law to warrant a jury finding of breach of duty in the care she rendered Anthony Lee. Alternatively, appellant argues that the trial court committed plain error in failing to instruct the jury that it must first find that appellant was under a legal obligation to provide food and necessities to Anthony Lee before finding her guilty of manslaughter in failing to provide them. The first argument is without merit. Upon the latter we reverse.

Facts

A summary of the evidence, which is in conflict upon almost every significant issue, is necessary for the disposition of both arguments. In late 1957, Shirley Green became pregnant, out of wedlock, with a child, Robert Lee, subsequently born August 17, 1958. Apparently to avoid the embarrassment of the presence of the child in the Green home, it was arranged that appellant, a family friend, would take the child to her home after birth. Appellant did so, and the child remained there continuously until removed by the police on August 5, 1960. Initially appellant made some motions toward the adoption of Robert Lee, but these came to nought, and shortly thereafter it was agreed that Shirley Green was to pay appellant \$72 a month for his care. According to appellant, these payments were made for only five months. According to Shirley Green, they were made up to July, 1960.

Early in 1959 Shirley Green again became pregnant, this time with the child Anthony Lee, whose death is the basis of appellant's conviction. This child was born October 21, 1959. Soon after birth, Anthony Lee developed a mild jaundice condition. . . . The jaundice resulted in his retention in the hospital for three days beyond the usual time, or until October 26, 1959, when, on authorization signed by Shirley Green, Anthony Lee was released by the hospital to appellant's custody. Shirley Green, after a two or three day stay in the hospital, also lived with appellant for three weeks, after which she returned to her parents' home, leaving the children with appellant. She testified she did not see them again, except for one visit in March, until August 5, 1960. Consequently, though there does not seem to have been any specific monetary agreement with Shirley Green covering Anthony Lee's support, appellant had complete custody of both children until they were rescued by the police.

With regard to medical care, the evidence is undisputed. In March, 1960, appellant called a Dr. Turner to her home to treat Anthony Lee for a bronchial condition. Appellant also telephoned the doctor at various times to consult with him concerning Anthony Lee's diet and

health. In early July, 1960, appellant took Anthony Lee to Dr. Turner's office where he was treated for "simple diarrhea." At this time the doctor noted the "wizened" appearance of the child and told appellant to tell the mother of the child that he should be taken to a hospital. This was not done.

On August 2, 1960, two collectors for the local gas company had occasion to go to the basement of appellant's home, and there saw the two children. Robert Lee and Anthony Lee at this time were age two years and ten months respectively. Robert Lee was in a "crib" consisting of a framework of wood, covered with a fine wire screening, including the top which was hinged. The "crib" was lined with newspaper, which was stained, apparently with feces, and crawling with roaches. Anthony Lee was lying in a bassinet and was described as having the appearance of a "small baby monkey." One collector testified to seeing roaches on Anthony Lee.

On August 5, 1960, the collectors returned to appellant's home in the company of several police officers and personnel of the Women's Bureau. At this time, Anthony Lee was upstairs in the dining room in the bassinet, but Robert Lee was still downstairs in his "crib." The officers removed the children to the D.C. General Hospital where Anthony Lee was diagnosed as suffering from severe malnutrition and lesions over large portions of his body, apparently caused by severe diaper rash. Following admission, he was fed repeatedly, apparently with no difficulty, and was described as being very hungry. His death, 34 hours after admission, was attributed without dispute to malnutrition. At birth, Anthony Lee weighed six pounds, fifteen ounces—at death at age ten months, he weighed seven pounds, thirteen ounces. Normal weight at this age would have been approximately fourteen pounds.

Appellant argues that nothing in the evidence establishes that she failed to provide food to Anthony Lee. She cites her own testimony and the testimony of a lodger, Mr. Wills, that she did in fact feed the baby regularly. At trial, the defense made repeated attempts to extract from the medical witnesses opinions that the jaundice, or the condition which caused it, might have prevented the baby from assimilating food. The doctors conceded this was possible but not probable since the autopsy revealed no condition which would support the defense theory. It was also shown by the disinterested medical witnesses that the child had no difficulty in ingesting food immediately after birth, and that Anthony Lee, in the last hours before his death, was able to take several bottles, apparently without difficulty, and seemed very hungry. This evidence, combined with the absence of any physical cause for nonassimilation, taken in the context of the condition in which these children were kept, presents a jury question on the feeding issue.

Moreover, there is substantial evidence from which the jury could have found that appellant failed to obtain proper medical care for the child. Appellant relies upon the evidence showing that on one occasion she summoned a doctor for the child, on another took the child to the doctor's office, and that she telephoned the doctor on several occasions about the baby's formula. However, the last time a doctor saw the child was a month before his death, and appellant admitted that on that occasion the doctor recommended hospitalization. Appellant did not hospitalize the child, nor did she take any other steps to obtain medical care in the last crucial month. Thus there was sufficient evidence to go to the jury on the issue of medical care, as well as failure to feed.

Issue

Appellant also takes exception to the failure of the trial court to charge that the jury must find beyond a reasonable doubt, as an element of the crime, that appellant was under a legal duty to supply food and necessities to Anthony Lee. . . .

Reasoning

The problem of establishing the duty to take action which would preserve the life of another has not often arisen in the case law of this country. The most commonly cited statement of the rule is found in *People v. Beardsley*, 150 Mich. 206, 113 N.W. 1128, 1129 (1907):

The law recognizes that . . . the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, will make the other chargeable with manslaughter. . . . It must be a duty imposed by law or by contract, and the omission to perform the duty must be the immediate and direct cause of death.

There are at least four situations in which the failure to act may constitute breach of a legal duty. One can be held criminally liable first, where a statute imposes a duty to care for another; second, where one stands in a certain status relationship to another; third, where one has assumed a contractual duty to care for another; and fourth, where one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.

It is the contention of the government that either the third or the fourth ground is applicable here. However, it is obvious that in any of the four situations, there are critical issues of fact that must be passed on by the jury—specifically in this case, whether appellant had entered into a contract with the mother for the care of Anthony Lee or, alternatively, whether she assumed the care of the child and secluded him from the care of his mother, his natural protector. On both of these issues, the evidence is in direct conflict, appellant insisting that the mother was actually living with appellant and Anthony Lee, and hence should have been taking care of the child herself, while Shirley Green testified she was living with her parents and was paying appellant to care for both children.

Holding

In spite of this conflict, the instructions given in the case failed even to suggest the necessity for finding a legal duty of care. The only reference to duty in the instructions was the reading of the indictment which charged, *inter alia*, that the defendants “failed to perform their legal duty.” A finding of legal duty is the critical element of the crime charged and failure to instruct the jury concerning it was plain error. . . .

Reversed and remanded.

Questions for Discussion

1. Why was this case remanded to the trial court?
2. Did both Jones and Shirley Green breach a duty of care?
3. Would you acquit Jones in the event that she informed Shirley Green that she no longer desired to take care of Robert and Anthony, and Shirley Green made no effort to remove the children from Jones's home?
4. Is it significant that Jones did not call Shirley Green as suggested by the doctor? Did the doctor breach a duty in this case?
5. What if Shirley Green left Anthony on Ms. Jones's porch with a note asking Ms. Jones to care for him, and Ms. Jones ignored Anthony? In the event that Anthony froze to death, would both Green and Jones be criminally liable?
6. In *Pope v. State*,⁶⁰ Joyce Lillian Pope invited Melissa Norris and her three-month-old child Demiko, who were homeless, to live with her. A day later Melissa went into a

frenzy, claiming that she was God and that Satan had hidden himself in Demiko's body. Melissa savagely beat Demiko, and Pope made no effort to protect Demiko. Later in the evening, Demiko died from the beating. A Maryland court of appeals reversed Pope's conviction for child abuse, finding that she was neither Demiko's parent nor his guardian and that she had not assumed "permanent or temporary care or custody" for Demiko.

CASES AND COMMENTS

1. On February 24, 2018, Nikolas Cruz entered Marjory Stoneman Douglas High School and killed 17 and wounded 17 others. Scot Peterson, a former police officer and the school resource officer, was arrested and based on his failure to confront Cruz was charged with child neglect. A 15-month investigation by the Florida Department of Law Enforcement and the Broward County State Attorney's Office found that Peterson did "absolutely nothing to mitigate the shooting" and that "there can be no excuse for his complete inaction and no question that his inaction cost lives."

During the time Mr. Peterson remained outside the building, the gunman shot and killed six individuals, including five students, and wounded four others. According to Florida law, prosecutors to convict Officer Peterson are required to establish that Peterson acted as a "legal caregiver" to the juvenile victims, that his inaction exposed them to harm, and that he demonstrated a "reckless disregard for human life." A "caregiver" is defined as a parent, adult household member, or other person responsible for a child's welfare. Peterson claimed that as a police officer he did not have a "special relationship" to the victims and that as a result he was not required to protect them and therefore could not be held legally responsible for a failure to intervene to protect the students. Would you hold Officer Peterson criminally liable for a failure to intervene to protect the students and teachers?⁵⁹

2. Bonnie Kuntz and Warren Becker had lived together for approximately six years and were in the final stages of ending their "stormy relationship." Kuntz on arriving at the mobile home the couple formerly had shared found that many of her personal belongings had been destroyed, the interior of the home "trashed," and the phone ripped from the wall. Kuntz went into the kitchen where she was physically attacked by Becker and in protecting herself stabbed Becker in the chest. Kuntz fled the scene in Becker's car to a friend's house, and her sister-in-law within an hour subsequently called for assistance. Kuntz was charged with negligent homicide by stabbing Becker and "placing him in peril" and failing to summon medical assistance.

The Montana Supreme Court held that "[t]he person who acts justifiably in self-defense is temporarily afforded the same status as the innocent bystander under the American rule." The duty of the victim who acted in justifiable self-defense to summon assistance after "creating a peril" to another may be "revived" after the victim of the aggression has exercised the right to "seek and to secure safety from personal harm." At this point, there is a legal duty to summon aid for the aggressor who was "placed in peril by the victim's act of self-defense. The imposition of a duty on the victim to seek assistance requires that the victim is aware of the injury to the assailant and is physically and emotionally capable of seeking assistance." Do you agree with this

ruling? How would Kuntz's duty to summon assistance be different if the court found that she had not acted in justifiable self-defense? See *State ex rel. Kuntz v. Thirteenth Judicial District*, 995 P.2d 951 (Mont. 2000).

Madeline Kara Neumann (Kara), an 11-year-old girl, died in 2008 from diabetic ketoacidosis, which occurs when an individual lacks insulin to break down sugar in the blood. Her symptoms, which included dehydration and exhaustion, gradually worsened over several weeks. Dale and Leilani Neumann are Pentecostals who believe in the power of prayer to heal illness, and when Kara became unresponsive the night before her death, they prayed for her rather than taking Kara to a doctor. According to experts, Kara would have had a 100% certainty of recovery if treated by medicine up until the day of her death. The Neumanns explained that they believed that Kara had the flu. Under the Wisconsin prayer treatment exception an individual is not guilty of child abuse "solely because he or she provides a child with treatment by spiritual means through prayer alone." The Neumanns were charged with reckless homicide and argued that they were immune from prosecution under the prayer treatment exception. The Wisconsin Supreme Court by a vote of 7-1 held that the statute clearly communicated that the prayer exemption does not provide a defense to charges of homicide. Should the law recognize a prayer treatment exception? If Kara had survived, would the Neumanns have been subject to criminal liability? At least two thirds of the states recognize some form of the "prayer treatment" exception. See *State v. Neumann*, 2013 WI 58 (2015).

YOU DECIDE 4.4

In May 1997, 19-year-old Jeremy Strohmeyer, together with his friend David Cash, played video games at a Las Vegas casino while Strohmeyer's father gambled. Seven-year-old Sherrice Iverson threw a wet paper towel at Strohmeyer, and a paper towel fight ensued. He followed her into the restroom to continue the game. The 46-pound Iverson threw a yellow floor sign at Strohmeyer and then began screaming. Strohmeyer covered her mouth and forced her into a bathroom stall. David Cash wandered into the restroom to look for Strohmeyer. He peered over the stall and viewed Strohmeyer gripping and threatening to kill Sherrice. Cash allegedly made an unsuccessful effort to get Strohmeyer's attention and left the bathroom. Strohmeyer then molested Sherrice and strangled her to suffocate the screams. As he was about to leave, Strohmeyer decided to relieve Sherrice's suffering and twisted her head and broke her neck. He placed the limp body in a sitting position on the toilet with Sherrice's feet in the bowl.

Strohmeyer confessed to Cash and, after being apprehended by the police three days later, explained that he wanted to experience death. His lawyer argued that Strohmeyer was in a "dream-like state" as a result of a combination of alcohol, drugs, and stress. In order to avoid the death penalty, Strohmeyer pled guilty to first-degree murder, first-degree kidnapping, and the sexual assault of a minor, all of which carry a life sentence in Nevada.

Iverson's mother called for Cash to be criminally charged, but Nevada law neither required him to intervene nor to report the crime to the police. The administration at the University of California, Berkeley responded to a student demonstration calling for Cash's dismissal by explaining that there were no grounds to expel him from the institution, because he had

not committed a crime. Cash, who was studying nuclear engineering, refused to express remorse, explaining that he was concerned about himself and was not going to become upset over other people's problems, particularly a little girl whom he did not know.

Should David Cash be held criminally liable for a failure to rescue Sherrice Iverson? See Joshua Dressler, *Cases and Materials on Criminal Law*, 3rd ed. (St. Paul, MN: West, 2003), pp. 133–134.

POSSESSION

Possession is a **preparatory offense**. The thinking is that punishing possession deters and prevents the next step—a burglary, the sale of narcotics, or the use of a weapon in a robbery. The possession of contraband such as drugs and guns may also provoke conflict and violence.⁶¹

How does the possession of contraband meet the requirement that a crime involve a voluntary act or omission? This difficulty is overcome by requiring proof that the accused knowingly obtained or received the contraband (a voluntary act) or failed to immediately dispose of the property (failure to fulfill a duty).⁶² The challenge in the crime of possession is to balance the competing values of punishing the guilty while at the same time protecting the innocent. There is little difficulty in convicting individuals who are found to have drugs in their pockets. Complications are created when drugs are discovered in the glove compartment of a car or in the living room of a house with four occupants. There is a temptation to charge all four with drug possession. On the other hand, there is the risk that individuals who had no knowledge of the contraband will be convicted.

Possession is typically defined as the ability to exercise “dominion and control over an object.” This means that a drug dealer has the ability to move, sell, or transfer the contraband. There are several other central concepts to keep in mind.

- **Actual possession** refers to drugs and other contraband within an individual's physical possession or immediate reach.
- **Constructive possession** refers to contraband that is outside of an individual's actual physical control but over which the individual exercises control through access to the location where the contraband is stored or through the ability to control an individual who has physical control over the contraband. A drug dealer has constructive possession over narcotics stored in the home or under the physical control of a member of the dealer's gang.
- **Joint possession** refers to a situation in which a number of individuals exercise control over contraband. Several members of a gang may all live in the home where drugs are stored. There must be specific proof connecting each individual to the drugs. The fact that a gang member lives in the house is not sufficient.
- **Knowing possession** refers to an individuals' awareness that they are in possession of contraband. Drug dealers, for instance, are aware that marijuana is in their pockets.

- **Mere possession** refers to physical control without awareness of contraband. An individual may be paid by a drug dealer to carry a suitcase across international borders and lack awareness that the luggage contains drugs.

Criminal statutes punishing possession are typically interpreted to require that an individual (1) know of the presence of the item, (2) exercise actual or constructive possession, and (3) know the general character of the material. There may be individual or joint possession. An individual is required to know that the material is contraband but is not required to know the precise type of contraband involved.⁶³

Hawkins v. State is an example of conviction for actual possession of a firearm by a felon. The case illustrates how courts use circumstantial, or indirect, evidence to find possession. The defendant was apprehended following a high-speed chase, and the police seized a loaded shotgun in the back seat within reach of the driver. The Texas District Court stated that possession is a voluntary act if the possessor “knowingly obtains or receives the thing possessed or is aware of his control of the thing for a sufficient time to permit him to terminate his control.” The court concluded that the prosecution affirmatively established Hawkins’s knowledge and control over the firearm. The gun was in plain view in the back seat and was within easy reach, and Hawkins was the sole occupant of the vehicle. His guilty state of mind was indicated by his effort to escape.⁶⁴

The **fleeting possession** rule is a limited exception to criminal possession. This permits an innocent individual to momentarily possess and dispose of an illegal object. In *People v. Mijares*, the defendant removed and disposed of narcotics that he took from an unconscious friend whom he was driving to the hospital. The California Supreme Court, citing a fleeting possession exception, ruled that to hold Mijares liable would “result in manifest injustice to admittedly innocent individuals.”⁶⁵

The concept of constructive possession is illustrated by the federal appellate court decision in *United States v. Byfield*. Byfield traveled from New York to Washington, D.C., with a young female who carried a tote bag. The two separated after arriving at the train station, and Byfield was alleged to have directed her movements through hand signals. The police detained and searched the young woman’s bag and found that it contained men’s clothing in Byfield’s size and a shoe box for the brand of athletic shoes worn by Byfield, along with 60 grams of crack cocaine.

Byfield carried no luggage and yet, when questioned by the police, explained that he planned to stay in Washington, D.C., for several days. The appellate court affirmed that there was sufficient evidence establishing that Byfield had previous contact with the young woman in New York and that Byfield possessed “some stake,” “power,” and “dominion and control” over the crack cocaine either personally or through his female companion. The court noted that it was not unusual for juveniles to be employed as drug couriers.⁶⁶

The most difficult issue for courts undoubtedly is joint possession. For example, the police searched an apartment shared by Jason Stansbury, Crissee Moore, and Anthony Webb and discovered marijuana. Only Moore and his son were present at the time. Webb arrived during the course of the search. The police seized \$336 from Webb; he explained that he had been paid for babysitting Moore’s son. The officers were justifiably suspicious of Webb’s explanation, because he had earlier pled guilty to possession of drugs found in another apartment that he had shared

with Moore. The Iowa Supreme Court ruled that where an accused such as Webb is not the only person occupying the apartment, but one of several individuals in joint possession, the knowledge and ability to maintain control over narcotics must be demonstrated by direct proof. The fact that Webb occupied the apartment was insufficient to establish possession absent additional evidence. There were no fingerprints linking Webb to the narcotics, drug paraphernalia, or firearms or bullets found on the premises, and none of these items were near or among Webb's personal belongings or in a location subject to Webb's exclusive control. A search of Webb failed to find drugs on his person, and there was no evidence that he was under the influence of narcotics.⁶⁷

Webb starkly presents the conflict between broadly interpreting possession in order to combat narcotics traffic and the due process requirement that possession should be established beyond a reasonable doubt. Courts are clearly concerned that the "war on drugs" and "war on terrorism" will result in the conviction of individuals who have not been clearly demonstrated to have exercised control over contraband. On the other hand, requiring an unrealistic standard of proof can result in the guilty escaping criminal liability.

We should note that although Washington and North Dakota do not require knowing possession, in practice these courts have imposed a knowledge requirement to ensure fair results.⁶⁸ The importance of the knowledge requirement is illustrated by the Maryland case of *Dawkins v. State*. Dawkins was arrested in a hotel room in which the police found a tote bag containing narcotics paraphernalia and a bottle cap containing heroin residue. He claimed that the bag belonged to his girlfriend, who had asked him to carry the bag to her hotel room. Dawkins claimed to have had no idea what was in the bag and explained that he only arrived a few minutes before the police. The Maryland Supreme Court reversed the defendant's conviction and explained that in order to be guilty of possession of a controlled substance, the accused "must know of both the presence and . . . general character or illicit nature of the substance. Of course, such knowledge may be proven by circumstantial evidence, and by inferences."⁶⁹

In *State v. Toups*, the Louisiana Supreme Court decided whether the defendant was in constructive possession of crack cocaine.

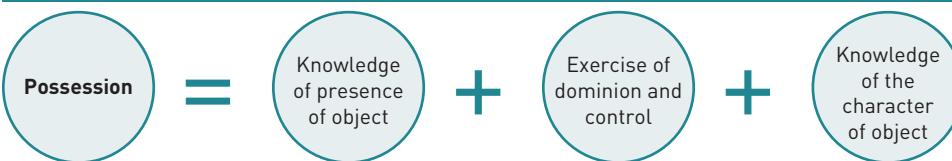
MODEL PENAL CODE

Section 2.01 Possession as an Act

1. . . .
2. Possession is an act, within the meaning of this Section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

Analysis

The Model Penal Code establishes that the voluntary procurement of contraband or knowing possession of contraband for a "sufficient period" satisfies the standard for possession. The code also clarifies that individuals are required only to be aware of the nature (e.g., drugs) of an item in their possession and need not be informed of the item's illegal character.

FIGURE 4.3 ■ The Legal Equation: Possession

WAS THE DEFENDANT IN CONSTRUCTIVE POSSESSION OF THE DRUGS?

STATE V. TOUPS, 815 SO.2D 815 (LA. 2002)

Opinion by Victory, J.

[Toups was charged with possession of cocaine, a violation of La. R.S. 40:967, which makes it unlawful for any person to knowingly or intentionally possess a controlled dangerous substance.] We . . . determine whether the court of appeal erred in vacating defendant's conviction for possession of cocaine, finding that the State failed to prove the element of possession.

Facts

After receiving confidential information that a person named "Stan" was selling drugs from a residence at 633 North Scott Street and conducting a controlled purchase of drugs from that address on the afternoon of October 18, 1999, on that evening, New Orleans Police Department Officer Dennis Bush and five other officers executed a search warrant at that residence. Before executing the warrant, the officers conducted a surveillance of the residence for approximately thirty minutes. After receiving no response at the front door, Bush entered the shotgun residence. He observed defendant Mary Toups and Stanley Williams, the known resident of that address, seated on a sofa in the front living room, facing one another and apparently engaged in conversation. Two pieces of crack cocaine, three clear glass crack pipes and a razor blade were found on a coffee table positioned directly in front of defendant and Williams. Defendant was approximately three feet from the drugs on the table, which were directly in front of her. Another 16 rocks of cocaine found at the home were located in a plastic container that was next to Williams. Police also seized \$304.00 in cash from the same area. . . . The officers did not see defendant enter the residence during their 30-minute surveillance, indicating she was in the residence for at least that long, but were unable to find any indication that defendant resided there. Defendant falsely gave her name as "Mary Billiot" at the time of her arrest. While defendant was not charged with any offense with regard to the cocaine in the container, the State filed a bill of information charging defendant with possession of the two pieces of cocaine found on the coffee table.

At trial, in addition to the above testimony, a criminologist with the New Orleans Police Department Crime Laboratory testified that the rocks in the container, the two additional rocks, and the pipes all tested positive for cocaine. None of the items were submitted for fingerprint analysis.

Defendant was found guilty as charged . . . and was sentenced as a multiple offender to serve four years in the department of corrections.

Reasoning

Toups was charged with possession of cocaine, a violation of La. R.S. 40:967, which makes it unlawful for any person to knowingly or intentionally possess a controlled dangerous substance. The State need not prove that the defendant was in physical possession of the narcotics found; constructive possession of a controlled dangerous substance is sufficient to support a conviction. The law on constructive possession is as follows:

A person may be in constructive possession of a drug even though it is not in his physical dominion and control. Also, a person may be deemed to be in joint possession of a drug which is in the physical custody of a companion, if he willfully and knowingly shares with the other the right to control it. Guilty knowledge is an essential ingredient of the crime of unlawful possession of an illegal drug.

However, it is well settled that the mere presence in an area where drugs are located or the mere association with one possessing drugs does not constitute constructive possession.

A determination of whether there is "possession" sufficient to convict depends on the peculiar facts of each case. Factors to be considered in determining whether a defendant exercised dominion and control sufficient to constitute constructive possession include his knowledge that drugs were in the area, his relationship with the person found to be in actual possession, his access to the area where the drugs were found, evidence of recent drug use, and his physical proximity to the drugs. . . . (listing above factors as well as a sixth factor: "evidence that the area was frequented by drug users."

Toups argued to the jury that the only evidence connecting her with the drugs was her mere presence in the area where the drugs were found. However, most, if not all, of the factors used to determine whether a defendant exercised dominion and control sufficient to constitute constructive possession have been met in this case: (1) Toups inevitably had knowledge that drugs were in the area in that they were in plain view directly in front of her; (2) Toups had access to the area where the drugs were found; (3) Toups was in very close physical proximity to the drugs; and (4) the area was frequented by drug users, as the police received confidential information on the morning of October 18, 1999 that Williams was conducting drug transactions and the police did a controlled purchase of drugs from Williams that afternoon, and another 16 rocks of cocaine were on the sofa next to Williams. While there was no evidence presented of any specific relationship between Toups and Stanley Williams, it is reasonable to conclude that they were not strangers given that she was with Williams for at least 30 minutes prior to their arrest and that Williams would not sit at his coffee table with crack cocaine in plain view ready to be smoked with someone he did know personally or someone who he did not know would be amenable to using the drugs. Further, although there was no evidence presented of recent drug use, the fact that the drugs and paraphernalia were on the table in front of them and that the paraphernalia contained drug residue suggests that they were preparing to use, or had already used, drugs. Finally, it is important to note that the jury was presented with evidence that Toups gave a false name, "Mary Billiot," to the police upon her arrest, indicating consciousness of guilt (evidence of flight, concealment, and attempt to avoid apprehension indicate consciousness of guilt and is one of the circumstances from which the jury may infer guilt). The jury was presented with all this evidence and determined that Toups exercised dominion and control

over the drugs sufficient to constitute constructive possession. We find that this evidence was sufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt.

We disagree with the court of appeal's view that "[c]onsidering the evidence adduced at trial, one can only speculate as to what the defendant was doing in the residence," suggesting that "[s]he could have been a non-drug using member of a neighborhood church proselytizing." The jury rejected the "innocent" hypothesis that Toups was merely present at the sofa in front of illegal drugs, for the obvious reasons that there was no evidence presented to lead the jury to that conclusion and that any hypothesis other than possessing drugs was unreasonable. . . .

Further, the cases relied upon by the court of appeal in reversing defendant's conviction are distinguishable. In *State v. Bell*, this Court held that a rational fact finder could not have concluded from the mere presence of narcotics in a wrapped package among cassette tapes on the console of a car that the defendant, a passenger in the vehicle, was in possession of the contraband. This Court stated that even assuming the defendant was "aware of the contents" of the package, no rational fact finder could have concluded that he "exercised control and dominion over the package, or that he willfully and knowingly shared with [the co-defendant] the right to control it. However, contrary to the facts in *Bell* where the drugs were wrapped in a package with no accompanying paraphernalia and therefore not susceptible of immediate use, in this case the drugs and necessary paraphernalia were placed directly in front of Toups ready for use.

This case is also distinguishable from the other case cited by the court of appeal. In *State v. Jackson*, the court of appeal reversed the jury's verdict finding the defendant guilty of attempted possession of cocaine. [T]he defendant was found standing in front of a home-made bar in a co-defendant's residence, on which were displayed a mirror with cocaine residue, two cocaine pipes (one of which was positive for cocaine residue), and one razor blade. The court of appeal found that although the defendant was standing next to drug paraphernalia, there was no evidence that the pipe with residue was warm or that the defendant was anything other than a guest in the house. In the instant case, Toups was not only near paraphernalia which had been used at some unknown time, she was seated in front of two rocks of cocaine, not mere residue, in plain view and within arms length.

This case is more in line with *State v. Harris*, which is similar in every respect except that the defendant in that case was the brother of the person who rented the apartment, whereas Toups' relationship to Williams is unknown. In *Harris*, the court of appeal found that where the defendant was sitting at his brother's kitchen table where cocaine was easily accessible and openly displayed along with drug paraphernalia, and the defendant's brother was nearby free basing cocaine, the evidence was sufficient to establish that the defendant knowingly possessed the drugs on the kitchen [table]. Although the defendant claimed he was only at his brother's house to eat a chicken dinner, the jury did not accept this hypothesis of innocence and the court of appeal confirmed the conviction.

Holding

We find that the evidence presented in this case, viewed in the light most favorable to the prosecution, was sufficient to convince a rational trier of fact that the State proved that defendant exercised dominion and control over the cocaine sufficient to constitute constructive possession beyond a reasonable doubt. Most, if not all, of the factors used to help make this determination were present in this case. In addition, defendant gave police a false

name upon her arrest. While certainly one could speculate about other reasons for defendant's presence at the residence, given the facts presented, the jury correctly concluded that any other explanation was unreasonable.

For the reasons stated herein, the judgment of the court of appeal is reversed and defendant's conviction and sentence are reinstated.

Dissenting, Knoll, J.

Neither the defendant's mere presence in an area where drugs are located nor the defendant's mere association with one possessing drugs necessarily constitutes constructive possession. . . . [T]he State must present evidence of constructive possession other than mere presence or mere association in order to support a defendant's conviction.

In *Jackson*, the defendant's conviction for constructive possession was correctly reversed by the court of appeal because the State failed to present any evidence of constructive possession except mere presence or mere association. . . . The court of appeal's reversal was based on the lack of evidence to show that the residue-containing pipe was warm, that the defendant's fingerprints were on any of the items, that the defendant tested positive for cocaine, or that the defendant was anything more than a guest at the residence.

Conversely, in *Harris*, the defendant's conviction for constructive possession was correctly affirmed by the court of appeal because the State presented sufficient evidence of constructive possession, not just evidence of mere presence or mere association. In that case, police executing a search warrant of the defendant's brother's house discovered the defendant seated at the kitchen table with another individual, while his brother was free-basing cocaine at the kitchen sink. On the kitchen table in front of the defendant were a plastic bag containing cocaine, 54 marijuana cigarettes, drug paraphernalia, cash, and two plates, one of which tested positive for cocaine. The court correctly found that evidence was sufficient to support defendant's conviction for constructive possession.

In the instant case, police officers executing a search warrant discovered the defendant seated beside the resident of the address on a sofa three feet in front of a coffee table bearing drug paraphernalia with traces of cocaine and two rocks of crack cocaine. She was not sitting at a table—round, square, or otherwise—with drugs directly in front of her. She was charged with constructive possession of the two rocks of crack cocaine on the coffee table.

The majority distinguishes this case from *Jackson* by noting that actual drugs were present in plain sight within defendant's reach in this case, while only drug paraphernalia was present in the *Jackson* case. However, the drug paraphernalia in *Jackson* contained cocaine residue, which this court has found sufficient to support drug possession convictions. Moreover, the fact that the drugs were located within defendant's reach is insufficient, by itself, to support a defendant's conviction for constructive possession.

Similar to *Jackson*, the State in the instant case presented no evidence to show that the crack pipes were warm, that defendant's fingerprints were found on any of the drug paraphernalia, that defendant had ingested any cocaine, that defendant intended to ingest cocaine, or that defendant was anything more than a guest in the residence. At the same time, in contrast to the *Harris* case, the State presented no evidence in the instant case that anyone was ingesting drugs in the residence when the police arrived, or that anyone had ingested drugs in the residence while defendant was present. In fact, the State presented no evidence of constructive possession except mere presence or mere association.

Accordingly, I respectfully dissent from the majority decision reversing the judgment of the court of appeal and reinstating the defendant's conviction and sentence.

Questions for Discussion

1. What are the facts in *Toups*?
2. Why does the Louisiana Supreme Court find that the jury could reasonably have concluded that Toups was in constructive possession of the cocaine?
3. How does the Supreme Court majority distinguish the facts in *Toups* from the facts in *State v. Bell*, *State v. Jackson*, and *State v. Harris*?
4. Why does Justice Knoll in his dissenting opinion differ from the majority in his discussion comparing the facts in *Toups* to the facts in *Jackson*?
5. Do you agree with the majority or with the dissenting opinion?

CASES AND COMMENTS

1. A leading case on constructive possession is *State v. Cashen*. Ross Cashen was convicted of marijuana possession. He was a passenger in the back seat of an automobile that was stopped for a traffic violation. There were six people in the car, four of whom were in the back seat. Cashen was sitting next to a window with his girlfriend sitting on his lap. A lighter and cigarette rolling papers were found on Cashen, and cigarette rolling papers and a small baggie of marijuana seeds were discovered in the pants pocket of his girlfriend. The officers also found a baggie of marijuana wedged in the rear seat on the side where Cashen and his girlfriend had been seated. The baggie was stuck in the crack between the back and bottom of the rear seat. At the jail, Cashen denied knowledge of the marijuana and later told the police that the drugs belonged to his girlfriend. She subsequently confessed to owning the drugs. Cashen was prosecuted and convicted of marijuana possession.

The Iowa Supreme Court noted that the issue was whether Cashen exercised constructive possession over the marijuana. His presence alone was ruled to be insufficient to establish possession, because he was not in exclusive possession of the automobile and did not have exclusive access to the back seat. The rolling papers, at most, demonstrated that Cashen possessed marijuana “in the past and intended to do so again in the future. However, we cannot infer from this fact that Cashen had authority or the ability to exercise unfettered influence of these drugs.” Cashen’s question to the police whether anyone had “fessed up to ownership may indicate that he had knowledge of the presence of the drugs, but does not constitute dominion and control over the marijuana.”

The Iowa Supreme Court in reversing Cashen’s conviction further stressed that Cashen was not the owner of the automobile, the drugs were not in plain view, and the marijuana was not found among Cashen’s personal effects. Cashen was completely cooperative, and the police also did not offer evidence that Cashen’s fingerprints were on the baggie. The other three passengers were as close to the narcotics as Cashen, and the prosecution in order to convict Cashen was required to “prove facts other than mere proximity to show [Cashen’s] dominion and control of the drugs.”⁷⁰

Compare *Cashen* with the U.S. Supreme Court case of *Maryland v. Pringle*. The Supreme Court affirmed Pringle’s conviction for possession with intent to distribute

cocaine and possession of cocaine, and he was sentenced to 10 years in prison. Pringle was one of three passengers in an automobile that was stopped for speeding in the early morning hours in Baltimore. He was sitting in the front seat directly in front of the glove compartment, which contained \$763. Five plastic glassine baggies of cocaine were behind him in the back seat armrest and were accessible to all three passengers. The Supreme Court concluded that it is entirely reasonable to conclude "that any or all . . . of the occupants [of this confined space] had knowledge of, and exercised dominion and control over the cocaine. . . . There was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly." The Court stressed that the quantity of drugs and cash indicated the "likelihood of drug dealing" and that a "dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him." See *Maryland v. Pringle*, 540 U.S. 366 (2003).

2. Possession and Computer Files. Christopher Worden was convicted of four counts of possession of child pornography, and of one count each of indecent exposure and of unlawful exploitation of a minor. Worden admitted to inappropriate contact with two young juveniles. The police seized and searched two computers from Worden's home and found images of child pornography in the computer cache files.

Virgil Gattenby, a police technician who examined the computer, testified that Worden had visited certain websites containing child pornography "more than once" and that "it would have taken Worden's computer several minutes to load the images and the images recovered had loaded completely." Gattenby testified that although the images of child pornography were found among the cache files on the hard drive of Worden's computer, there was no indication that Worden "had any intent to store the images—his intent was simply to view the images on his computer screen during the time that he visited a website." Gattenby explained that when a person uses a computer to access a site, the "computer automatically stores the images from the web page in the browser cache." According to Gattenby, this "enables the computer to load the web page more quickly when you revisit it, because data is accessed directly from the computer's hard drive rather than loading that data over the internet." There was no evidence that Worden possessed the type of "specialized knowledge" required to know that images were "being stored in his computer cache or that he intended to save them on his computer." Did Worden's viewing of sexual images constitute "knowing possession" of "material that visually or aurally depicts conduct [constituting] child pornography"? The Alaska Supreme Court held that the state statute prohibiting the possession of child pornography does not prohibit viewing material on a computer screen and observed that "[i]f Worden had gone to a movie depicting child pornography, it could not be said that he possessed the child pornography depicted in the movie, even though it might be clear that he had intentionally set out to view those images." See *Worden v. State*, 213 P.3d 144 (Alaska Ct. App. 2009).

The Alabama Court of Criminal Appeals in *Ward v. State* adopted a different approach. Ward was arrested for possession of child pornography on a computer at Troy State University. The police located 288 images in the cache folder of the hard drive of the computer. Similar images later were found on his home computer. Ward admitted viewing the files although there was no evidence that he downloaded, copied, or printed the photographs. The question according to the Supreme Court was "[d]id the defendant specifically seek out the prohibited images and did he have the ability to exercise dominion and control over those images?"

The Alabama court held that Ward, whether or not aware that the images were automatically saved in his cache, had intentionally sought out and exercised control

over the files present in his Web browser cache files. He had the ability to “view” an image and “had the potential” to “attach it to an email, post it to a newsgroup, place it on a Web site, or print a hard copy.” The evidence was sufficient “to show that Ward exercised dominion and control over child pornography and was in possession of child pornography.”

The court explained that imposing liability on individuals who intentionally viewed child pornography was the best approach to deter individuals from downloading these images and to protect children from being exploited. Judge Pamela Baschab in dissent noted that although Ward’s actions were “reprehensible,” they did not constitute possession. As a judge, would you favor the approach in *Worden* or in *Ward*? See *Ward v. State*, 994 So. 293 (Ala. Crim. App. 2007). See also *Tecklenburg v. Appellate Division*, 169 Cal. App. 4th 1402 (2009).

YOU DECIDE 4.5

Six Spirit Lake, Iowa, police officers executed a search warrant at an apartment shared by Patricia Lynn Bash, her husband Kevin, and their three sons. The warrant authorized the police to seize controlled substances and a safety deposit box. The officers arrested Kevin and removed him from the home. The defendant stated that she could “show [the police] where the stuff is.” One of the officers followed Bash into the master bedroom where she told the officer that “it’s on his nightstand in a cardboard box, that it’s Kevin’s stuff, that his bong . . . was sitting on the floor next to the bed.”

Bash’s version was somewhat different. She testified that when questioned, she stated that “[i]f there is anything here, it would be on Kevin’s side of the bed.” She pointed toward his nightstand, which was on the left side of the bed.

On Kevin’s nightstand, the officers found a cardboard box bearing the word “Friscos.” Inside the box, they found 1.37 grams of marijuana. Bash claimed that she “did not know what was in the box until after the officers opened it. However, she admitted that she knew there had been marijuana in the house, in the box, in the past.”

Bash was charged with possession of a controlled substance. She was convicted and sentenced to a 30-day suspended sentence with credit for time served and a \$250 fine.

Was Bash guilty of possession of a controlled substance? See *State v. Bash*, 670 N.W.2d 135 (Iowa 2003).

CRIME IN THE NEWS

In February 2019, Mexican drug kingpin Joaquin Guzmán Loera, popularly known as El Chapo (“shorty” or “burly”), was convicted on 10 counts following an 11-week trial in federal district court in Brooklyn, New York. The verdict was handed down by an “anonymous jury” in which the identity of jurors was concealed for their own protection. The more than 56 witnesses at the trial documented that El Chapo had directed the Sinaloa international drug cartel for decades. The cartel was alleged to have shipped tons of illegal narcotics into the United

States; was responsible for violence against rival cartels and law enforcement; had bribed Mexican police, military, and political officials; and allegedly had paid millions of dollars to a former Mexican president and to top law enforcement officials. El Chapo's larger-than-life profile was enhanced following his 2001 escape from a Mexican prison and subsequent capture more than a decade later by Mexican authorities and extradition to stand trial in the United States. El Chapo was sentenced in federal district court to life in prison.

The prosecution of El Chapo, who is considered the most important and powerful drug lord ever prosecuted in the United States, was based on evidence gathered from virtually every federal law enforcement agency that had taken over a decade to compile. The trial for the first time in a legal proceeding detailed the organization, financing, and primary figures of a major drug cartel.

Trial testimony described El Chapo's rise from a poor peasant in the village of La Tuna in the Sierra Madre mountains. He launched his career transporting cocaine into the United States for a Colombian drug cartel and built a multinational drug organization that is acknowledged to be perhaps the most powerful narcotics organization in the world.

According to trial testimony, narcotics were shipped into Mexico on fast boats from Colombia and other countries and then transported to various locations in Mexico by human operatives. The drugs were then shipped into the United States by a multitude of methods: speedboats, fishing boats, carbon-fiber airplanes, trucks, trains, tractor-trailers, semi-submersible submarines, and tunnels.

El Chapo on four occasions was included on an annual list of global billionaires. According to prosecutors, between the early 1990s and El Chapo's arrest in 2016, he distributed cocaine, heroin, and marijuana, which together with other illicit activities resulted in revenues of over \$12.5 billion.

El Chapo at trial was alleged to have killed and to have ordered the immolation of the bodies of the two victims and was accused of ordering another victim to be burned alive.

El Chapo was able to afford a lifestyle in which he owned yachts, a fleet of Learjets, a private zoo, and a \$10 million beachfront home. He was accompanied at all times by an entourage of armed operatives as he moved between his various houses in Mexico. El Chapo reportedly armed himself with a gold-plated AK-47, a camouflage patterned M-16, and three diamond-encrusted pistols.

El Chapo did not take the stand in his own defense. His conviction was based on the testimony of a significant number of prosecution witnesses, many of whom apparently had been offered immunity. This included El Chapo's chief lieutenant in Mexico City; a paid assassin; his Colombian cocaine supplier; American narcotics dealers; his personal secretary, mistress, and online security specialist; and law enforcement officers and prosecutors from various Latin American countries.

El Chapo's arrest and conviction reportedly has had little impact on the Sinaloa drug cartel, which under the leadership of his two sons has increased the cartel's drug trafficking into the United States. The cartel continues to work with "suppliers" in Colombia, Ecuador, and Panama and despite challenges from other cartels remains a strong presence in the Mexican states of Chihuahua, Durango, and Sinaloa. The difficulty in deterring individuals from participating in the drug trade is illustrated by the fact a \$9 million investment in narcotics when sold in the United States would be worth roughly \$48 million if sold in Chicago and over \$70 million if sold in Los Angeles.

COVID-19 and the restrictions on border crossing have resulted in the Mexican cartels diversifying their methods of smuggling drugs and relying on fewer and larger drug shipments into the United States, and have made it more difficult to obtain the chemical precursors, which are used in the manufacture of various narcotics, from China.

In April 2020, the United States indicted Venezuelan president Nicolás Maduro along with leading members of his government and intelligence and military officials for a conspiracy to import hundreds of tons of cocaine into the United States. The indictment was part of the effort of the Trump administration to remove Maduro from office. Maduro's Venezuelan cartel allegedly has been assisted by the Colombian terrorist group, the Revolutionary Armed Forces, known as the FARC. In 2020, the United States indicted and later dropped charges against Salvador Cienfuegos, 72, the former Mexican secretary of defense, on charges he helped the H-2 Cartel traffic heroin, cocaine, methamphetamine, and marijuana into the United States. The first major conviction of a Latin American leader for drug crimes in an American court occurred in 1992 when Panamanian leader General Manuel Antonio Noriega was convicted of eight counts of drug trafficking and sentenced to 30 years in prison.

Do you believe that the United States should focus to a greater extent on the criminal prosecution of high-level figures in the narcotics trade rather than on low-level dealers and individual users?

CHAPTER SUMMARY

A crime involves a *concurrence* between an *actus reus* (act) and *mens rea* (intent). The act generally must have *caused* the social harm punishable under the relevant statute.

A crime is limited to acts and omissions; an individual may not be punished for “mere thoughts.” This would involve an unacceptable degree of governmental intrusion into individual privacy and would result in the disproportionate punishment of individuals for ideas that ultimately may not be translated into criminal conduct. An act must be voluntary. It is fundamentally unfair to punish individuals for involuntary acts that are the product of a disease or lack of consciousness and are not the product of a conscious and deliberate choice. The punishment of an individual based on status is also considered “particularly obnoxious” and “cruel and unusual,” because it involves punishment for a personal condition or characteristic that may not be translated into socially harmful acts.

Criminal law, with some limited exceptions, typically does not punish individuals for a failure to act. There are limited circumstances in which individuals are required to assist those in peril. These involve a status, statute, contract, assumption of duty, creation of peril, and control and ownership of property.

The possession of contraband is also subject to punishment based on a knowing and voluntary acquisition or failure to dispose of the material. Possession requires “dominion and control.” This may be actual or constructive as well as either individual or joint.

CHAPTER REVIEW QUESTIONS

1. Why are individuals not punished for their thoughts?

2. What is the reason for requiring a voluntary act? Provide some examples of acts that are considered involuntary. May a defendant be criminally condemned for reckless driving despite the fact that an accident results from a stroke?
3. Why do status offenses constitute cruel and unusual punishment?
4. Is there a difference between the American and European rules on omissions? What are the reasons behind the American rule? When does a duty arise to intervene to assist an individual in peril?
5. Discuss the difference between actual and constructive possession and between sole and joint possession. What facts are important in establishing possession?

LEGAL TERMINOLOGY

actual possession	joint possession
<i>actus reus</i>	knowing possession
American bystander rule	mere possession
attendant circumstances	omission
constructive possession	possession
duty to intervene	preparatory offense
European bystander rule	result crime
fleeting possession	status offense
Good Samaritan statute	voluntary act
involuntary act	

TEST YOUR KNOWLEDGE ANSWERS

1. True.
2. True.
3. False
4. False.

5

MENS REA, CONCURRENCE, CAUSATION

TEST YOUR KNOWLEDGE: TRUE/FALSE

1. The same criminal act may be considered more serious or less serious based on the offender's intent.
2. The criminal intent of purposely is considered the most serious criminal intent because an individual deliberately violates a law and is not deterred by the threat of criminal prosecution, conviction, and punishment.
3. An important difference between the criminal intent of recklessness and the criminal intent of negligence is whether the offender is aware of the substantial risk caused by an act.
4. Strict liability offenses do not require a criminal intent.
5. A criminal intent and a criminal act in most instances are not required to concur (to occur at the same time or coincide with one another).
6. Offenders are responsible for all the consequences that follow from their criminal acts.
7. An armed robber, in all likelihood, would be held guilty of murder if the victim, during the course of the robbery, was struck by lightning and died.

Check your answers at the end of the chapter on page 210.

Did the Defendant Know That His Pet Tigers Endangered His Daughter?

By June 6, 1999, the tigers were two years old. Lauren was ten. She stood 57 inches tall and weighed 80 pounds. At dusk that evening, Lauren joined [Bobby Lee] Hranicky in the tiger cage. Suddenly, the male tiger attacked her. It mauled the child's throat, breaking her neck and severing her spinal cord. She died

instantly. . . . Hranicky testified . . . [that] he did not view the risk to be substantial because he thought the tigers were domesticated and had bonded with the family. . . . Thus, he argues, he had no knowledge of any risk. (*Hranicky v. State*, No. 13-00-431-CR [Tex. App. 2004])

INTRODUCTION

In the last chapter, we noted that a criminal act or *actus reus* is required to exist in unison with a criminal intent or *mens rea*; and as you soon will see, these two components must combine to cause a prohibited injury or harm. This chapter completes our introduction to the basic elements of a crime by introducing you to criminal intent, concurrence, and causation.

One of the common law's great contributions to contemporary justice is to limit criminal punishment to "morally blameworthy" individuals who consciously choose to cause or to create a risk of harm or injury. Individuals are punished based on the harm caused by their decision to commit a criminal act rather than because they are "bad" or "evil" people. Former Supreme Court justice Robert Jackson observed that a system of punishment based on intent is a celebration of the "freedom of the human will" and the "ability and duty of the normal individual to choose between good and evil." Jackson noted that this emphasis on individual choice and free will assumes that criminal law and punishment can deter people from choosing to commit crimes, and those who do engage in crime can be encouraged to develop a greater sense of moral responsibility and avoid crime in the future.¹

MENS REA

You read in the newspaper that your favorite rock star shot and killed one of her friends. There is no more serious crime than murder; yet before condemning the killer, you want to know, "What was on her mind?" The rock star may have intentionally aimed and fired the rifle. On the other hand, she may have aimed and fired the gun believing that it was unloaded. We have the same act, but a different reaction based on whether the rock star intended to kill her friend or acted in a reckless manner. As Oliver Wendell Holmes Jr. famously remarked, "Even a dog distinguishes between being stumbled over and being kicked."²

As we have seen, it is the bedrock principle of criminal law that a crime requires an act or omission and a criminal intent. The appropriate punishment of an act depends to a large extent on whether the act was intentional or accidental. Law texts traditionally have repeated that *actus non facit reum nisi mens sit rea*: "There can be no crime, large or small, without an evil mind." The "mental part" of crimes is commonly termed *mens rea* ("guilty mind") or *scienter* ("guilty knowledge") or criminal intent. The U.S. Supreme Court noted that the requirement of a "relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory (not responsible) plea, 'But I didn't mean to.'"³

The common law originally punished criminal acts and paid no attention to the mental element of an individual's conduct. The killing of an individual was murder, whether committed intentionally or **recklessly**. Canon, or religious law, with its stress on sinfulness and moral guilt, helped to introduce the idea that punishment should depend on an individual's "moral blameworthiness." This came to be fully accepted in the American colonies; and, as observed by the U.S. Supreme Court, *mens rea* is now the "rule of, rather than the exception to, the principles . . . of American criminal jurisprudence." There are some good reasons for requiring moral blameworthiness.

- *Responsibility.* It is just and fair to hold a person accountable who intentionally chooses to commit a crime.
- *Deterrence.* Individuals who act with a criminal intent pose a threat to society and should be punished in order to discourage them from violating the law in the future and in order to deter others from choosing to violate the law.
- *Punishment.* The punishment should fit the crime. The severity of criminal punishment should depend on whether an individual's act was intentional, reckless, or accidental.

The concept of *mens rea* has traditionally been a source of confusion, and the first reaction of students and teachers has been to flee from the topic. This is understandable when it is realized that in 1972, U.S. statutes employed 76 different terms to describe the required mental element of federal crimes. This laundry list included terms such as *intentionally*, *knowingly*, *fraudulently*, *designedly*, *recklessly*, *wanton*, *unlawfully*, *feloniously*, *willfully*, *purposely*, **negligently**, *wickedly*, and *wrongfully*. These are what Justice Jackson termed "the variety, disparity and confusion" of the judicial definition of the "elusive mental element" of crime.⁴

The Evidentiary Burden

The prosecution must establish the required *mens rea* beyond a reasonable doubt. Professor Jerome Hall noted that we cannot observe or record what goes on inside an individual's mind. The most reliable indication of intent is a defendant's confession or statement to other individuals. Witnesses may also testify that they saw an individual take careful aim when shooting or that a killing did not appear to be accidental.⁵

In most cases, we must look at the surrounding circumstances and apply our understanding of human behavior. In *People v. Conley*, a high school student at a party hit another student with a wine bottle, breaking the victim's upper and lower jaws, nose, and cheek and permanently numbing his mouth. The victim and his friend were alleged to have made insulting remarks at the party and were leaving when one of them was assaulted with a wine bottle. The attacker was convicted of committing an aggravated battery that "intentionally" or "**knowingly**" caused "great bodily harm or permanent disability or disfigurement." The defendant denied possessing this intent. An Illinois appellate court held that the "words, the weapon used, and the force of the blow, . . . the use of a bottle, the absence of warning and the force of the blow are facts from

which the jury could reasonably infer the intent to cause permanent disability.” In other words, the Illinois court held that the defendant’s actions spoke louder than his words in revealing his thoughts. Evidence that helps us indirectly establish a criminal intent or criminal act is termed **circumstantial evidence**.⁶

The Model Penal Code Standard

The common law provided for two confusing categories of *mens rea*, a general intent and a specific intent. These continue to appear in various state statutes and decisions.

A **general intent** is simply an intent to commit the *actus reus* or criminal act. There is no requirement that prosecutors demonstrate that an offender possessed an intent to violate the law, an awareness that the act is a crime, or an awareness that the act will result in a particular type of harm. Proof of the defendant’s general intent is typically inferred from the nature of the act and the surrounding circumstances. The crime of battery or a nonconsensual, harmful touching provides a good illustration of a general intent crime. The prosecutor is required to demonstrate only that the accused intended to commit an act that was likely to substantially harm another. In the case of a battery, this may be inferred from factors such as the dangerous nature of the weapon, the number of blows, and the statements uttered by the accused. A statute that provides for a general intent typically employs terms such as *intentionally* or *wilfully* to indicate that the crime requires a general intent.

A **specific intent** is a mental determination to accomplish a specific result. The prosecutor is required to demonstrate that the offender possessed the intent to commit the *actus reus* and then is required to present additional evidence that the defendant possessed the specific intent to accomplish a particular result. For example, a battery with an intent to kill requires proof of a battery along with additional evidence of a specific intent to murder the victim. The classic example is common law burglary. This requires the *actus reus* of breaking and entering and evidence of a specific intent to commit a felony inside the dwelling. Some commentators refer to these offenses as **crimes of cause and result** because the offender possesses the intent to “cause a particular result.”

Courts often struggle with whether statutes require a general or specific intent. The consequences can be seen from the Texas case of *Alvarado v. State*. The defendant was convicted of “intentionally and knowingly” causing serious bodily injury to her child by placing him in a tub of hot water. The trial judge instructed the jury that they were merely required to find that the accused deliberately placed the child in the water. The appellate court overturned the conviction and ruled that the statute required the jury to find that the defendant possessed the intent to place the child in hot water, as well as the specific intent to inflict serious bodily harm.⁷

You may encounter two additional types of common law intent. A **transferred intent** applies when an individual intends to attack one person but inadvertently injures another. In *People v. Conley*, Conley intended to hit Carroll but instead struck and inflicted severe injuries on O’Connell. Nevertheless, he was convicted of aggravated battery. The classic formulation of the common law doctrine of transferred intent states that the defendant’s guilt is “exactly what it would have been had the blow fallen upon the intended victim instead of the bystander.” Transferred intent also applies to property crimes in cases where, for example, an individual

intends to burn down one home, and the wind blows the fire onto another structure, burning the latter dwelling to the ground.

Constructive intent is a fourth type of common law intent. This was applied in the early 20th century to protect the public against reckless drivers and provides that individuals who are grossly and wantonly reckless are considered to intend the natural consequences of their actions. A reckless driver who caused an accident that resulted in death is, under the doctrine of constructive intent, guilty of a willful and intentional battery or homicide.

In 1980, the U.S. Supreme Court complained that the common law distinction between general and specific intent had caused a “good deal of confusion.”⁸ The Model Penal Code attempted to clearly define the mental intent required for crimes by providing four easily understood levels of responsibility. All crimes requiring a mental element (some do not, as we shall see) must include one of the four mental states provided in the Model Penal Code. These four types of intent, in descending order of culpability, are

- purposely,
- knowingly,
- recklessly, and
- negligently.

MODEL PENAL CODE

Section 2.02. General Requirements of Culpability

1. Minimum Requirements of Culpability. . . . [A] person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently . . . with respect to each material element of the offense.
2. Kinds of Culpability Defined.
 - a. Purposely.
A person acts purposely with respect to material elements of an offense when:
 - i. . . . it is his conscious object to engage in conduct of that nature or to cause such a result. . . .
 - b. Knowingly.
A person acts knowingly . . . when:
 - i. If the element involves the nature of his conduct, . . . he is aware of the existence of such circumstances or he believes or hopes that they exist; and
 - ii. If the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.
 - c. Recklessly.
A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances

known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

d. Negligently.

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

Analysis

- **Purposely.** "You borrowed my car and wrecked it on purpose."
- **Knowingly.** "You may not have purposely wrecked my car, but you knew that you were almost certain to get in an accident because you had never driven such a powerful and fast automobile."
- **Recklessly.** "You may not have purposely wrecked my car, but you were driving over the speed limit on a rain-soaked and slick road in heavy traffic and certainly realized that you were extremely likely to get into an accident."
- **Negligently.** "You may not have purposely wrecked my car and apparently did not understand the power of the auto's engine, but I cannot overlook your lack of awareness of the risk of an accident. After all, any reasonable person would have been aware that such an expensive sports car would pack a punch and would be difficult for a new driver to control."

At the end of the chapter we take a look at strict liability, which is a category of crime that does not require a criminal intent.

We now turn our attention to a discussion of each type of criminal intent.

PURPOSELY

The Model Penal Code established **purposely** as the most serious category of criminal intent. This merely means that a defendant acted "on purpose" or "deliberately." In legal terms, the defendant must possess a specific intent or "conscious object" to commit a crime or cause a result. A murderer pulls the trigger with the purpose of killing the victim, a burglar breaks and enters with the purpose of committing a felony inside the dwelling, and a thief possesses the purpose of permanently depriving individuals of the possession of their property.

In *State v. Sanborn*, Sanborn attacked his wife, from whom he was separated, when she threatened to call his mother if he did not leave her apartment. Sanborn held his wife's head in an arm lock, hit her in the face four times, and beat her multiple times with a stainless steel coffee maker and carafe, and a microwave oven. Sanborn, while beating his wife, threatened to make her head explode and to kill her. The question was whether Sanborn acted with the "purpose" to cause serious bodily injury. The judge concluded that when Sanborn "slugs a five-foot-two-inch, 135-pound woman in the eye and side of the head and back of the head several times, and then attempts to smash down a microwave on her head, and then hits her with a toaster

oven in the head, that is clearly . . . a purposeful attempt . . . to cause serious bodily injury.”⁹⁹ In *Commonwealth v. Rink*, a Pennsylvania court was asked to decide whether the defendant’s attack on Mr. and Mrs. Snow was motivated by the fact that they are African American or because of some other reason.

WAS THE DEFENDANT GUILTY OF A HATE CRIME?

COMMONWEALTH V. RINK, 574 A.2d 1078 (PA. SUPER. 1990)

Opinion by Cerone, J.

Issue

Did the evidence support the conviction of Ronald Rink for “ethnic intimidation” and other related offenses?

Facts

Ethnic intimidation is defined in 18 Pa. C.S.A. § 2710 as:

Offense defined. A person commits the offense of ethnic intimidation if, with malicious intention toward the race, color, religion or national origin of another individual or group of individuals, he commits an offense . . . with respect to one or more members of such group or to their property. . . . *Definition.* As used in this section “malicious intention” means the intention to commit any act . . . motivated by hatred toward the race, color, religion or national origin of the individual or group of individuals.

William and Mary Snow and their four children had been living at 4328 Waln Street in the lower Frankford section of the city for two (2) years. They were the only [B]lack family in the neighborhood. On November 6, 1987, at about 10:00 P.M., Mr. Snow was driven home by his friend Al Bendzynski, a co-worker, with whom he intended to share the six pack of beer he had brought home with him. There was a crowd of teenagers across the street in front of the Snow residence playing a radio loudly. Mr. Snow asked them to hold the noise down. Moments after entering his home, Mr. Snow heard a knock at the front door. The group of teenagers was now at his front steps. Believing his wife and children to be asleep upstairs, he shut the door behind him to confront the knocker. A two-by-four hit him at the thigh, knocking him off the step. Armed with sticks, the crowd of about sixteen or seventeen white youths then started to pummel him on the arms, head, and body. They threw objects at his home, breaking windows. Appellant [Rink] was urging the group to “kill the n__; get him.”

When Mrs. Snow came to the door, her husband was on the ground surrounded by a group of young white males, wielding two-by-fours, some holding on to her husband, others tossing beer bottles at them and the house, cussing, yelling that they hated n__s, and “kill a couple of n__s.” Prominent in the group, holding a board and urging the group to “kill the n__s” was the appellant. The appellant punched Mrs. Snow and called her a “b__” and “n__.” The crowd of youths disbursed as the police arrived on the scene. At the end of it all, Mr. Snow was bleeding, suffering from contusions of arms, legs, and body. The house front was in shambles with both first and second floor windows shattered. . . .

Appellant alleges that the underlying incident was not motivated by hatred of the Snows' race, but was the result of Mr. Bendzynski tapping one of the teenagers on the cheek. Allegedly, when the co-workers arrived at Mr. Snow's home, Mr. Bendzynski engaged in a friendly discussion about football with the group of teenagers. At the conclusion of the discussion and after a handshake, Mr. Bendzynski purportedly gave one of the teenagers a friendly pat on the cheek. Appellant contends that the teenager was offended by this action and went to Mr. Snow's house to seek an apology from Mr. Bendzynski.

While there is testimony to support appellant's theory, viewing the testimony in the light most favorable to the Commonwealth, we find overwhelming testimony that Mr. Snow, and not Mr. Bendzynski, suffered the consequences of the teenagers' actions. Not only were both Mr. and Mrs. Snow assaulted, but also their house was vandalized. Neither Mr. Bendzynski nor his car, which was sitting right outside the victims' home, was touched. Mr. Bendzynski even admitted at trial that the teenagers did not seem to want him, but were after Mr. Snow. Further, no ethnic slurs were hurled at Mr. Bendzynski, but rather the teenagers directed all of their aspersions at the Snows. We are not persuaded by appellant's rationalization that the ethnic epithets were not racially motivated but were the result of emotionally charged behavior. . . .

Not only was appellant present with the group of teenagers, but he was actively involved in striking both Mr. and Mrs. Snow, in encouraging the continuation of the confrontation, and in shouting the racial epithets. Further, the testimony found credible by the jury was that several of the teenagers, including appellant, were at the door already armed. Finding no merit to appellant's arguments, we affirm the decision of the trial court on this issue.

Holding

[Rink claims that] the trial court erred by sentencing him on two charges of ethnic intimidation. . . . Appellant, in the instant case, argues that even though there were two individuals that were the subject of the racial slurs, there was a single act. . . . Appellant's first act involved urging the crowd of teenagers to "kill the n—; get him" when Mr. Snow initially came out of his house. We find that on these facts . . . [Rink] engaged in ethnic intimidation as to Mr. Snow. There was no need for him to engage in any further activity to complete the offense of ethnic intimidation. However, rather than leaving the premises, appellant engaged in a second act of ethnic intimidation. This occurred when Mrs. Snow came out of the house. Upon her appearance, appellant . . . called Mrs. Snow a "n__," was urging the crowd to "kill a couple of . . . n__s," and was party to the crowd that was assaulting Mr. Snow. Thus, appellant engaged in two separate acts of ethnic intimidation.

Questions for Discussion

1. What is the intent and act requirement of the Pennsylvania ethnic intimidation statute?
2. Describe the evidence that the court relies on to support Rink's conviction for ethnic intimidation.
3. What would you argue, if you represented Rink, in support of his argument that he did not have the purpose to attack Mr. and Mrs. Snow because of their race? Would you hold Rink guilty of a hate crime if ethnic hatred was a substantial cause but not the only (primary) cause of the attack on Mr. and Mrs. Snow?
4. As a prosecutor, would you charge Rink with ethnic intimidation in addition to aggravated assault?
5. In *Commonwealth v. Ferino*, Emmitt Harris and Matthew Chapman were disposing of trash from a restaurant after closing at 3 a.m. Theresa Ferino "walked toward Harris

and Chapman, and at a distance of about 50 yards, she extended her arms and said: 'I'm going to kill you, you f__king n___,' and fired two shots. Ferino indicated that she may have been motivated by a disagreement with the restaurant owner and with Chapman. The court, in reaching its decision, relied on the decision in *Rink*. Was Ferino guilty of a hate crime? See *Commonwealth v. Ferino*, 640 A.2d 934 (Pa. Super. 1994).

6. Would you hold a defendant guilty of a hate crime if the individual against whom the crime is directed, in fact, is not a member of the targeted group? The New Hampshire Supreme Court heard a case involving a hate crime against two individuals who a self-identified Nazi incorrectly believed were Jewish. The New Hampshire Supreme Court held that society is "harmed by a bias-motivated crime regardless of whether the victim is, in fact, a member of the protected class that the defendant has targeted." Do you agree with this holding? See *State v. Costella*, 103 A.3d 1155 (N.H. 2014).
7. Louisiana, in 2016, adopted a "Blue Lives Matter" law that makes attacks on the police, firefighters, and first responders a felony hate crime. Do you agree with this expansion of state hate crimes legislation?

Transferred Intent

The doctrine of transferred intent first developed in England in 1575 in the case of *Regina v. Saunders & Archer*. Saunders gave his wife a poison apple. She took a bite out of the apple and gave the apple to her daughter, who died after finishing the apple. Saunders's intent to kill his wife was transferred to his daughter, and the judge convicted him of killing his daughter although his intent was to poison his wife.¹⁰

The doctrine of transferred intent subsequently was adopted by courts in the United States. Transferred intent primarily is applied to cases of homicide and battery although it applies to other cases as well. Most courts limit the doctrine to crimes requiring an intent of purposely or knowingly.

The California case of *People v. Scott* is one of the most important American cases on transferred intent. Calvin Hughes and Elaine Scott went through a bitter breakup of their relationship. Scott's two sons, Damien Scott and Derrick Brown, retaliated by attempting to shoot and kill Hughes. They hit Hughes in the heel of his shoe and inadvertently killed an innocent teenager, Jack Gibson, who was sitting in a nearby car.¹¹

The California Supreme Court relied on the transferred intent theory of liability to hold Scott and Brown liable for the death of Gibson. The court explained that a "defendant who shoots with an intent to kill but misses and hits a bystander instead should be punished for a crime of the same seriousness as the one he tried to commit against his intended victim." A shorthand way to understand transferred intent is to remember that the defendant's intent follows the bullet. Why does the law recognize transferred intent in these "wrong aim" cases?

Individual accountability. Defendants should be held responsible for the result (murder) that they intended to achieve (murder) and did achieve (murder).

Justice. There is a social interest in punishing defendants whose acts create the social harm that they intended to commit despite the fact that the wrong individual was victimized.

YOU DECIDE 5.1

Five Black juveniles between the ages of 11 and 14 were walking in the street when they heard a vehicle approaching and moved onto the sidewalk. Mark Hennings, a white man, drove past the young men and shouted at them to "get the f__ off the road." One of the young men, K.W., yelled back at Hennings, "[W]e don't have to get the f__ off the street."

Hennings exited the truck and threatened the young men with a pocketknife with a serrated blade between 3 and 4 inches long. Four of the juveniles fled, although K.W. stood his ground. K.W. challenged Hennings that "if you drop the knife," "we'll beat [your] ass." The other four boys started back toward K.W., and Hennings walked back to his truck. Hennings called the boys "f__ n__s" as he got back into his truck.

Hennings sped off and circled back around the block. As the boys were crossing a street, they saw Hennings heading toward them in his truck. He aimed the truck at A.M., and the truck's tires drove over him. Hennings left the scene.

A.M. was able to recover from potentially severe injuries, although he suffered permanent scarring and discoloration across his body, including on his face.

Hennings, when questioned by the police, referred to the young men as "monkeys" and stated if they "don't have enough sense to stay out the f__ road, . . . they deserve to get hit." Hennings's mother, who was present during the police interrogation, asked, "Why didn't you wait for 'em to move?" Hennings responded, "When they're standing in f__ road like stupid monkeys." Hennings's parents suggested the complaint was brought against Hennings because the family was not well liked because of their opinions on race relations. Was Hennings guilty of ethnic intimidation? See *State v. Hennings*, 791 N.W.2d 828 (Iowa 2010).

KNOWINGLY

Individuals satisfy the knowledge standard when they are "aware" that circumstances exist or that a result is practically certain to follow from their conduct. Examples of knowledge of circumstances are to knowingly "possess narcotics" or to knowingly "receive stolen property." It is sufficient that a person is aware that there is a high probability that property is stolen; one need not be certain. An illustration of a result that is practically certain to occur is a terrorist who bombs a public building knowing the people inside are likely to be maimed or injured or to die.

The commentary to the Model Penal Code uses the example of treason to illustrate the difference between purpose and knowledge. In *Haupt v. United States*, Chicago resident Hans Haupt was accused of treason during World War II based on the assistance he provided to his son, who he knew was a German spy. The U.S. Supreme Court ruled that treason requires a specific intent (purpose) to wage war on the United States. Haupt claimed that as a loving father, he knowingly assisted his son, who unfortunately happened to be sympathetic to the German cause, and he did not possess the purpose to injure the U.S. government. The Supreme Court, however, pointed to Haupt's statements that "he hoped that Germany would win the war" and that "he would never permit his son to fight for the United States" as indicating that Haupt's "son had the misfortune of being a chip off the old block."¹²

An example of a result that is practically certain to occur is *State v. Fuelling*. Michelle Fuelling left her 23-month-old son, Raven, at home with her son's father, Carlos Mendoza.

Mendoza beat Raven and inflicted severe brain injury and bruises, resulting in Raven's death. An autopsy indicated that Raven's death resulted from severe head trauma. Mendoza was convicted of child abuse and murder.

The evidence indicated that Fuelling knew that Mendoza had abused Raven in the past and that her family had warned her about leaving Raven with Mendoza. Fuelling was convicted of having "knowingly acted in a manner that created a substantial risk to the life, body and health of Raven . . . by leaving [him] in the care of Carlos Mendoza, knowing that . . . Mendoza [had] abused the child." The evidence clearly established that Fuelling knew that leaving her child with Mendoza was "practically certain to endanger the child." Keep in mind that Fuelling likely did not have the purposeful intent to injure Raven although she was aware that he would be in severe danger.¹³

In the next case in the chapter, *State v. Nations*, the defendant remained "willfully blind" or deliberately unaware of the criminal circumstances and claims that she did not knowingly violate the law. This type of situation typically arises in narcotics prosecutions in which drug couriers claim to have been unaware that they were transporting drugs.¹⁴

DID THE DEFENDANT KNOW THE DANCER'S AGE?

STATE V. NATIONS, 676 S.W.2D 282 (MO. CT. APP. 1984)

Opinion by Satz, J.

Issue

Defendant, Sandra Nations, owns and operates the Main Street Disco, in which police officers found a scantily clad sixteen year old girl dancing for tips. Consequently, defendant was charged with endangering the welfare of a child "less than seventeen years old." Defendant was convicted and fined \$1,000.00. Defendant appeals. We reverse. . . .

Specifically, defendant argues the state failed to show she knew the child was under seventeen and, therefore, failed to show she had the requisite intent to endanger the welfare of a child "less than seventeen years old." We agree.

Reasoning

The pertinent part of § 568.050 provides as follows:

1 A person commits the crime of endangering the welfare of a child if: . . . (2) He knowingly encourages, aids or causes a child less than seventeen years old to engage in any conduct which causes or tends to cause the child to come within the provisions of subdivision (1)(c) . . . of section 211.031, RSMo. . . .

. . . Thus, § 568.050 requires the state to prove the defendant "knowingly" encouraged a child "less than seventeen years old" to engage in conduct tending to injure the child's welfare, and "knowing" the child to be less than seventeen is a material element of the crime.

"Knowingly" is a term of art, whose meaning is limited to the definition given to it by our present Criminal Code. Literally read, the Code defines "knowingly" as actual knowledge.

"A person 'acts knowingly,' or with knowledge, (1) with respect . . . to attendant circumstances when he is aware . . . that those circumstances exist. . . ." So read, this definition of "knowingly" or "knowledge" excludes those cases in which "the fact [in issue] would have been known had not the person willfully 'shut his eyes' in order to avoid knowing." The Model Penal Code, the source of our Criminal Code, does not exclude these cases from its definition of "knowingly." Instead, the Model Penal Code proposes that "[when] knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence." . . .

The additional or expanded definition of "knowingly" proposed in § 2.02(7) of the Model Penal Code "deals with the situation British commentators have denominated **willful blindness** or connivance," the case of the actor who is aware of the probable existence of a material fact but does not satisfy himself that it does not in fact exist. . . . The inference of "knowledge" of an existing fact is usually drawn from proof of notice of substantial probability of its existence, unless the defendant establishes an honest, contrary belief. . . .

Our legislature, however, did not enact this proposed definition of "knowingly." . . . The sensible, if not compelling, inference is that our legislature rejected the expansion of the definition of "knowingly" to include willful blindness of a fact, and chose to limit the definition of "knowingly" to actual knowledge of the fact. Thus, in the instant case, the state's burden was to show defendant actually was aware the child was under seventeen, a heavier burden than showing there was a "high probability" that the defendant was aware that the child was under seventeen. . . .

Facts

The record shows that, at the time of the incident, the child was sixteen years old. When the police arrived, the child was "dancing" on stage for "tips" with another female. The police watched her dance for some five to seven minutes before approaching defendant in the service area of the bar. Believing that one of the girls appeared to be "young," the police questioned defendant about the child's age. Defendant told them that both girls were of legal age and that she had checked the girls' identification when she hired them. When the police questioned the child, she initially stated that she was eighteen but later admitted that she was only sixteen. She had no identification. . . .

The state also called the child as a witness. Her testimony was no help to the state. She testified the defendant asked her for identification just prior to the police arriving, and she was merely crossing the stage to get her identification when the police took her into custody. Nor can the state secure help from the defendant's testimony. She simply corroborated the child's testimony; i.e., she asked the child for her identification; the child replied she would "show it to [her] in a minute"; the police then took the child into custody.

Holding

These facts simply show defendant was untruthful. Defendant could not have checked the child's identification, because the child had no identification with her that day, the first day defendant hired the child. This does not prove that defendant knew the child was less than seventeen years old. At best, it proves defendant did not know or refused to learn the child's age. . . . Having failed to prove defendant knew the child's age was less than seventeen, the state failed to make a . . . case.

Admittedly, a person in defendant's shoes can easily avoid conviction of a crime under § 568.050 by simply refusing to check the age of "dancers." This result is to be rectified, however, by the legislature, not by judicial redefinition of already precisely defined statutory language or by improper inferences from operative facts.

The Model Penal Code's expanded definition of "knowingly" attracts us by its logic. Apparently, it was not as attractive to our legislature for use throughout our Criminal Code.

Questions for Discussion

1. Why does the court conclude that the defendant is not guilty under the statute of endangering the welfare of the young dancer?
2. In your view, was the defendant aware that there was a "high probability" that the dancer was under 17 and for that reason intentionally avoided checking her age?
3. How does the Missouri statute differ from the Model Penal Code in regard to willful blindness? What is the impact of the court decision for offenses involving the possession of narcotics? How would you amend the Missouri statute to eliminate the willful blindness defense?
4. If you were a judge, how would you rule in *Nations*?

YOU DECIDE 5.2

Charles Demore Jewell testified that he sold his car for \$100 to get the money "to have a good time." Along with a friend, Jewell rented a car and drove from Los Angeles to Mexico. Jewell and his friend testified that a stranger named "Ray" offered to sell them marijuana and, when they refused, asked if they would drive his car back to Los Angeles for \$100 and deliver the automobile to the address on the car registration and to leave the keys in the ashtray. Jewell's companion "wanted no part" of the scheme. Jewell, although accepting the offer, reportedly believed that "it didn't sound right to me." He later stated to law enforcement authorities that "he thought there was probably something wrong and something illegal in the vehicle." As a result, before driving the car, Jewell looked in the glove compartment and under the front seat and in the trunk. He "didn't find anything," and assumed that the "people at the border wouldn't find anything either." When Jewell arrived at the border, an American Customs agent opened the trunk and saw a special compartment situated between the trunk and the rear seat. The agent opened the compartment and seized 110 pounds of marijuana valued at \$6,250. Jewell was asked at trial whether he had seen the special compartment when he opened the trunk and responded, "Well, you know, I saw a void there, but I didn't know what it was." He stated that he did not investigate further. The Customs agent testified that when he opened the trunk and saw the compartment, he asked appellant "when he had that put in." Jewell reportedly told the agent "that it was in the car when he got it." Jewell was convicted and received concurrent sentences on two counts: (1) knowingly or intentionally importing a controlled substance, and (2) knowingly or intentionally possessing, with intent to distribute, a controlled substance. Jewell challenged his conviction on the grounds that he did not know that the marijuana was in the compartment. How would you decide this case? Would your answer be different if Jewell had not been aware of the special compartment

when he first looked in the trunk of the car? Would Jewell be convicted if he was prosecuted under the Missouri law relied on by the court in *Nations*? See *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976).

RECKLESSLY

We all know people who enjoy taking risks and skirting danger and who are confident that they will beat the odds. These reckless individuals engage in obviously risky behavior that they know creates a risk of substantial and unjustifiable harm and yet do not expect that injury or harm will result.

Why does the law consider individuals who are reckless less blameworthy than individuals who act purposely or knowingly?

- Individuals who act purposely deliberately create a harm, and individuals who act knowingly are aware that injury is certain to follow.
- Individuals acting recklessly, in contrast, disregard a strong probability that harm will result.

Recklessness is big, bold, and outrageous. Recklessness involves a conscious disregard of a substantial and unjustifiable risk. This must constitute a gross deviation from the standard of conduct that a law-abiding person would observe in a similar situation. The reckless individual speeds down a street where children usually play, builds and sells to an uninformed buyer a house that is situated on a dangerous chemical waste dump, manufactures an automobile with a gas tank that likely will explode in the event of an accident, or locks the exit doors of a rock club during a performance in which a band ignites fireworks.

The Model Penal Code provides a twofold test for reckless conduct:

- *A Conscious Disregard of a Substantial and Unjustifiable Risk.* The defendant must be personally aware of a severe and serious risk. *Unjustifiable* means that the harm was not created in an effort to serve a greater good, such as speeding down the street in an effort to reach the hospital before a passenger who was in an auto accident bleeds to death.
- *A Gross Deviation From the Standard That a Law-Abiding Person Would Observe in the Same Situation.* The defendant must have acted in a fashion that demonstrates a clear lack of judgment and concern for the consequences. This must clearly depart from the behavior that would be expected of other law-abiding individuals. Note this is an objective test based on the general standard of conduct.

In *Durkovitz v. State*, Gary Durkovitz was convicted of the offense of recklessly causing serious bodily injury to a child. Durkovitz, an experienced animal trainer, took his 350-pound grown lion to a flea market in Houston on eight occasions and charged patrons to be

photographed with the lion. The court found that the defendant was aware that there were a number of children at the market and that the lion posed a danger to children because of the animal's predatory instincts. Although the lion had injured two children in the past, Durkovitz took the lion to the flea market and secured the animal with only a short, heavy chain. Dukovitz lost control of the lion, which grabbed and attempted to crush a child's head in its mouth.¹⁵

In *Williams v. State*, the Texas Court of Criminal Appeals noted cases in which the court found the defendant possessed a reckless intent.¹⁶

These include holding a child's feet under extremely hot water, ramming a parked car that had an 18-month-old child in it, twisting and pulling a baby's leg . . . and speeding and running through stop signs with a child passenger. . . . In other reckless injury cases, the defendant failed to perform an act that directly resulted in injury. In one case the defendant was held to have recklessly caused bodily injury to her children by failing to report to the authorities that her boyfriend had violently kidnaped them. In still other cases the actors have left a disabled victim lying in bleach for at least an hour; . . . failed to immediately seek medical help for a lethargic child; and left four-year-old twins unsupervised and wandering around an apartment complex.

In *Hranicky v. State*, the next case in the chapter, the court is confronted with the challenge of determining whether the defendant recklessly caused serious bodily injury to his stepdaughter.

WAS THE DEFENDANT AWARE OF THE RISK POSED BY THE TIGERS TO HIS DAUGHTER?

HRANICKY V. STATE, NO. 13-00-431-CR (TEX. APP. 2004)

Opinion by Castillo, J.

Bobby Lee Hranicky appeals his conviction for the second-degree felony offense of recklessly causing serious bodily injury to a child. A jury found him guilty, sentenced him to eight years confinement in the Institutional Division of the Texas Department of Criminal Justice, and assessed a \$5,000 fine. On the jury's recommendation, the trial court suspended the sentence and placed Hranicky on community supervision for ten years.

Facts

A newspaper advertisement offering tiger cubs for sale caught the eye of eight-year-old Lauren Villafana. She decided she wanted one. She expressed her wish to her mother, Kelly Dean Hranicky, and to Hranicky, her stepfather. Over the next year, the Hranickys investigated the idea by researching written materials on the subject and consulting with owners of exotic animals. They visited tiger owner and handler Mickey Sapp several times. They decided to buy two rare tiger cubs from him, a male and a female whose breed is endangered in the wild. . . .

Sapp trained Hranicky in how to care for and handle the animals. In particular, he demonstrated the risk adult tigers pose for children. Sapp escorted Hranicky, Kelly Hranicky, and Lauren past Sapp's tiger cages. He told the family to watch the tigers' focus of attention. The tigers' eyes followed Lauren as she walked up and down beside the cages.

The Hranickys raised the cubs inside their home until they were six or eight months old. Then they moved the cubs out of the house, at first to an enclosed porch in the back and ultimately to a cage Hranicky built in the yard. The tigers matured into adolescence. The male reached 250 pounds, the female slightly less. Lauren actively helped Hranicky care for the animals.

By June 6, 1999, the tigers were two years old. Lauren was ten. She stood 57 inches tall and weighed 80 pounds. At dusk that evening, Lauren joined Hranicky in the tiger cage. Suddenly, the male tiger attacked her. It mauled the child's throat, breaking her neck and severing her spinal cord. She died instantly.

The record reflects four different versions of the events that led to Lauren's death. Hranicky told the grand jury he and Lauren were sitting side-by-side in the cage about 8:00 p.m., petting the female tiger. A neighbor's billy goat cried out. The noise attracted the male tiger's attention. He turned toward the sound.

The cry also caught Lauren's attention. She stood and looked at the male tiger. When Lauren turned her head toward the male tiger, "that was too much," Hranicky told the grand jury. The tiger attacked. Hranicky yelled. The tiger grabbed Lauren by the throat and dragged her across the cage into a water trough. Hranicky ran after them. He struck the tiger on the head and held him under the water. The tiger released the child.

Kelly Dean Hranicky testified she was asleep when the incident occurred. She called for emergency assistance. Through testimony developed at trial, she told the dispatcher her daughter had fallen from a fence. She testified she did not remember giving that information to the dispatcher. However, police officer Daniel Torres, who responded to the call, testified he was told that a little girl had cut her neck on a fence.

Hranicky gave Torres a verbal statement that evening. Torres testified Hranicky told him that he had been grooming the female tiger. He asked Lauren to come and get the brush from him. Lauren came into the cage and grabbed the brush. Hranicky thought she had left the cage because he heard the cage door close. Then, however, Hranicky saw Lauren's hand "come over and start grooming the female, start petting the female cat, and that's when the male cat jumped over." The tiger grabbed the child by the neck and started running through the cage. It dragged her into the water trough. Hranicky began punching the tiger in the head, trying to get the tiger to release Lauren.

Justice of the Peace James Dawson performed an inquest at the scene of the incident. Judge Dawson testified Hranicky gave him an oral statement also. Hranicky told him Lauren went to the cage on a regular basis and groomed only the female tiger. He then corrected himself to say she actually petted the animal. Hranicky was "very clear about the difference between grooming and petting." Hranicky maintained that Lauren never petted or groomed the male tiger. Hranicky told Dawson that Lauren asked permission to enter the cage that evening, saying "Daddy, can I come in?"

Sapp, the exotic animal owner who sold the Hranickys the tigers, testified Hranicky told him yet another version of the events that night. When Sapp asked Hranicky how it happened, Hranicky replied, "Well, Mickey, she just snuck in behind me." Hranicky admitted to Sapp he had allowed Lauren to enter the cage. Hranicky told Sapp he had lied because he did not want Sapp to be angry with him.

Hranicky told the grand jury that Sapp and other knowledgeable sources had said "there was no problem in taking a child in the cage." He did learn children were especially vulnerable because the tigers would view them as prey. However, Hranicky told the grand jury, he thought the tigers would view Lauren differently than they would an unfamiliar child. He believed the tigers would not attack her, he testified. They would see her as "one of the family." Hranicky also told the grand jury the tigers' veterinarian allowed his young son into the Hranickys' tiger cage.

Several witnesses at trial contradicted Hranicky's assessment of the level of risk the tigers presented, particularly to children. Sapp said he told the Hranickys it was safe for children to play with tiger cubs. However, once the animals reached forty to fifty pounds, they should be confined in a cage and segregated from any children. "[T]hat's enough with Lauren, any child, because they play rough, they just play rough."

Sapp further testified he told the Hranickys to keep Lauren away from the tigers at that point because the animals would view the child as prey. He also said he told Lauren directly not to get in the cage with the tigers. Sapp did not distinguish between children who were strangers to the tigers and those who had helped raise the animals. He described any such distinction as "ludicrous." In fact, Sapp testified, his own two children had been around large cats all of their lives. Nonetheless, he did not allow them within six feet of the cages. The risk is too great, he told the jury. The Hranickys did not tell him that purchasing the tigers was Lauren's idea. Had he known, he testified, "that would have been the end of the conversation. This was not for children." He denied telling Hranicky that it was safe for Lauren to be in the cage with the tigers.

Charles Currer, an animal care inspector for the United States Department of Agriculture, met Hranicky when Hranicky applied for a USDA license to exhibit the tigers. Currer also denied telling Hranicky it was permissible to let a child enter a tiger's cage. He recalled giving his standard speech about the danger big cats pose to children, telling him that they "see children as prey, as things to play with."

On his USDA application form, Hranicky listed several books he had read on animal handling. One book warned that working with exotic cats is very dangerous. It emphasized that adolescent males are particularly volatile as they mature and begin asserting their dominance. Big cat handlers should expect to get jumped, bit, and challenged at every juncture. Another of the listed books pointed out that tigers give little or no warning when they attack. The book cautioned against keeping large cats such as tigers as pets.

Veterinarian Dr. Hampton McAda testified he worked with the Hranickys' tigers from the time they were six weeks old until about a month before the incident. McAda denied ever allowing his son into the tigers' cage. All large animals present some risk, he testified. He recalled telling Hranicky that "wild animals and female menstrual periods . . . could cause a problem down the road" once both the animals and Lauren matured. Hranicky seemed more aware of the male tiger, the veterinarian observed, and was more careful with him than with the female. . . .

James Boller, the Chief Cruelty Investigator for the Houston SPCA [Society for the Prevention of Cruelty to Animals], testified that tigers, even those raised in captivity, are wild animals that act from instinct. Anyone who enters a cage with a conscious adult tiger should bring a prop to use as a deterrent. Never take one's eyes off the tiger, [Robert] Evans [the Curator of Mammals at the San Antonio Zoo] told the jury. Never make oneself appear weak and vulnerable by diminishing one's size by crouching or sitting. Never bring a child into a tiger cage. The danger increases when the tigers are in adolescence, which begins as early as two years of age for captive tigers. Entering a cage with more than one tiger

increases the risk. Entering with more than one person increases the risk further. Entering with a child increases the risk even more. Tigers' activity level depends on the time of day. . . . Boller identified eight o'clock on a summer evening as a high activity time. A child should never enter a tiger cage in the first place, Boller testified. Taking a child into a tiger cage "during a high activity time for the animal is going to increase your risk dramatically."

Dr. Richard Villafana, Lauren's biological father, told the jury he first learned of the tigers when his daughter told him over the phone she had a surprise to show him at their next visit. When he came to pick her up the following weekend, he testified, she took him into the house and showed him the female cub. Villafana described his reaction as "horror and generalized upset and dismay, any negative term you care to choose." He immediately decided to speak to Kelly Hranicky about the situation. He did not do so in front of Lauren, however, in an effort to avoid a "big argument." Villafana testified he later discussed the tigers with Kelly Hranicky, who assured him Lauren was safe. . . . As the tigers matured, no one told Villafana the Hranickys allowed Lauren in the cage with them. Had he known, he "would have talked to Kelly again" and "would have told her that [he] was greatly opposed to it and would have begged and pleaded with her not to allow her in there." He spoke to his daughter about his concerns about the tigers "almost every time" he saw her.

Kelly Hranicky told the jury Lauren was a very obedient child. Villafana agreed. Lauren would not have gone into the tiger cage that evening without Hranicky's permission.

Issue

Did Hranicky act in a reckless fashion?

Reasoning

The record reflects that each of the witnesses who came into contact with Hranicky in connection with the tigers testified they told him that: (1) large cats, even those raised in captivity, are dangerous, unpredictable wild animals; and (2) children were particularly at risk from adolescent and adult tigers, especially males. Expert animal handlers whom Hranicky consulted and written materials he claimed to have read warned Hranicky that the risks increased with adolescent male tigers, with more than one person in the cage, with more than one tiger in the cage, at dusk during the animals' heightened activity period, and when diminishing one's size by sitting or crouching on the ground. They each cautioned that tigers attack swiftly, without warning, and are powerful predators.

Further, Hranicky's initial story to Sapp that Lauren had sneaked into the cage evidences Hranicky's awareness of the risk. The jury also could have inferred his awareness of the risk when he concealed from Sapp that the family was purchasing the tigers for Lauren. The jury also could have inferred Hranicky's consciousness of guilt when he gave several different versions of what happened.

On the other hand, the record shows that before buying the tigers, Hranicky researched the subject and conferred with professionals. He received training in handling the animals. Further, Kelly Hranicky testified she also understood the warnings about not allowing children in the tiger cage to apply to strangers, not to Lauren. Hranicky told the grand jury he did not think the warnings applied to children, like Lauren, who had helped raise the animal. He said he had seen other handlers, including Sapp and McAda, permit Lauren and other children to go into tiger cages. He testified Currer told him it was safe to permit children in tiger cages. Further, while the State's witness described zoo policies for handling tigers,

those policies were not known to the general public. Finally, none of the significant figures in Lauren's life fully appreciated the danger the tigers posed for Lauren. Hranicky was not alone in not perceiving the risk.

Holding

Hranicky testified to the grand jury he did not view the risk to be substantial because he thought the tigers were domesticated and had bonded with the family. He claimed not to have any awareness of any risk. The tigers were acting normally. Lauren had entered the cage numerous times to pet the tigers with no incident. Further, he asserted, other than a minor scratch by the male as a cub, the tigers had never harmed anyone. Thus, he argues, he had no knowledge of any risk.

Viewing all the evidence neutrally, favoring neither Hranicky nor the State, we find that proof of Hranicky's guilt of reckless injury to a child is not so obviously weak as to undermine confidence in the jury's determination.

Questions for Discussion

1. Did Hranicky's disregard constitute a substantial and unjustifiable risk? Did his actions constitute a gross deviation from the standard of conduct that a law-abiding person would observe in a similar situation?
2. Why does the court consider it to be a close call as to whether Hranicky was aware of the risk posed by the tigers to Lauren?
3. Would the result be the same in the event that the tigers attacked Lauren when they were tiger cubs and were first living in the home?
4. What if Bobby Lee Hranicky had been mauled and killed by the tiger? Would a court convict Kelly Hranicky of recklessly causing Bobby Lee's death?

YOU DECIDE 5.3

The defendant [Chad Belleville] was driving southbound in a Ford Explorer, a sport utility vehicle (SUV). Corey Pickering was driving in the opposite direction, in the northbound lane, followed by a Subaru occupied by Tressa Flanders (Flanders) who was in the front passenger seat, Flanders' husband, who was driving, and their son (the victim) and two daughters, who were in the back seat. Behind the Flanderses' vehicle was a Honda driven by Evan Welch. It was dark and the weather was dry, clear, and cold.

. . . Pickering observed the defendant's SUV, traveling in the opposite direction, drifting into the median lane. The SUV came within inches of Pickering's driver's side mirror and Pickering had to swerve his vehicle to avoid being hit. Pickering then saw in his rearview mirror that the SUV hit the Flanderses' Subaru.

Prior to the collision, Flanders saw headlights from an oncoming vehicle and yelled to her husband to "watch out." Her husband tried to swerve to avoid being hit, but the oncoming vehicle hit the driver's side of their car. Welch saw the Subaru "fishtail really suddenly" and saw its back end "explode into a lot of pieces." He then saw "headlights coming straight at [him]" and within a couple of seconds, the SUV hit his vehicle. Welch skidded into the

passenger side of the Subaru and both vehicles came to a stop on the side of the road. The SUV “traveled across a small field” and came to rest alongside the road.

Immediately after the collision, Flanders “saw a gaping hole” in the back of the Subaru on the driver’s side and noticed that her son was no longer in the vehicle. She climbed out of the vehicle, made sure that her daughters and her husband were not seriously injured, and then looked for her son. She located him lying “in a cradled position.” As a result of the accident, her son sustained a traumatic brain injury, loss of “his left eye socket,” and dislocation and fracture of his jawbone.

The defendant [Belleville] admitted that, at the time of the accident, he was checking a text message. He stated that he did not see the Subaru and that, “I just looked down and the next thing you know I crashed.” . . .

The defendant [Belleville] admitted that he looked down to check a text message on his cellular telephone while driving and stated, “the next thing you know I crashed.” During the time he spent looking down at a text message, rather than paying attention to the road, the defendant drove across the median, which was approximately the width of two lanes and divided from the travel lanes by two sets of solid double yellow lines, and entered into the opposite lane of traffic.

Did Belleville act recklessly? See *State v. Belleville*, 88 A.3d 918 (N.H. 2014).

NEGLIGENTLY

Recklessness entails creating and disregarding a risk. The reckless individual consciously lives on the edge, walking on a ledge above the street. Negligence, in contrast, involves engaging in harmful and dangerous conduct while being unaware of a risk that a reasonable person would appreciate. The reckless individual would “play around” and push someone off a cliff into a pool of water that the reckless individual knows contains a string of dangerous boulders and rocks. The negligent individual simply does not bother to check whether the water conceals a rock quarry before pushing another person off the cliff. Recklessness involves an awareness of harm that is lacking in negligence, and for that reason is considered to be of greater “moral blameworthiness.”

In considering negligence, keep the following in mind:

- *Mental State.* The reckless individual is aware of and disregards the substantial and unjustifiable risk; the negligent individual is not aware of the risk.
- *Objective Standard.* Recklessness and negligence ask juries to decide whether the individual’s conduct varies from that expected of the general public. The reckless individual grossly deviates from the standard of care that a law-abiding person would demonstrate in the situation; the negligent individual grossly deviates from the standard of care that a reasonable person would exhibit under a similar set of circumstances.

It is not always easy to determine whether a defendant was unaware of a risk and is guilty of negligence rather than recklessness. In *Tello v. State*, the defendant was convicted of criminally

negligent homicide after a trailer that he was pulling came unhitched, jumped a curb, and killed a pedestrian. Tello argued that he had not previously experienced difficulties with the trailer and claimed to have been unaware that safety chains were required or that the hitch was clearly broken and in need of repair. The court convicted Tello of negligent homicide based on the fact that a reasonable person would have been aware that the failure to safely secure the trailer hitch constituted a gross deviation from the standard of care that an ordinary person would have exhibited and posed a substantial risk of death. Is it credible to believe that Tello regularly used the trailer and yet lacked awareness that the trailer was secured so poorly that a bump in the road was able to separate the trailer from the truck?¹⁷

As you might have concluded, it often is challenging to determine whether a defendant possesses a reckless or a negligent intent. In *People v. Stanfield*, Stanfield was convicted of reckless homicide. An appellate court held that the jury should have been provided with the opportunity to determine whether he was negligent rather than reckless. Stanfield pointed a pistol at his wife, whom he accused of being involved with another during his absence. She told him to stop “fooling and slapped his hand.” The gun discharged, fatally killing his wife. Stanfield claimed that he neither pulled the trigger nor intended that his wife should be fatally shot. A New York court held that Stanfield’s “perception of the risk” was the central issue. If Stanfield was aware of the risk of pointing a firearm at his wife, he was reckless; if Stanfield was unaware of the risk of pointing the firearm at his wife, he was negligent. What is your view?¹⁸

People v. Baker illustrates the difficulty of distinguishing negligence from recklessness.

WAS THE BABYSITTER GUILTY OF NEGLIGENCE OR RECKLESS HOMICIDE?

PEOPLE V. BAKER, 771 N.Y.S.2D 607 (N.Y. APP. DIV. 2004)

Opinion by Rose, J.

Facts

After a three-year-old child died while defendant was babysitting in the child’s home, she was charged with both intentional and depraved indifference murder. At trial, the evidence established that, on a warm summer night, the victim died of hyperthermia as a result of her prolonged exposure to excessive heat in a bedroom of her foster parents’ apartment. The excessive heat was caused by the furnace having run constantly for many hours as the result of a short circuit in its wiring. The victim was unable to leave her bedroom because defendant engaged the hook and eye latch on its door after putting her to bed for the night. Defendant then remained in the apartment watching television while the furnace ran uncontrollably.

The victim’s foster parents and another tenant testified that when they returned in the early morning hours and found the victim lifeless in her bed, the living room of the apartment where defendant sat waiting for them felt extremely hot, like an oven or a sauna, and the victim’s bedroom was even hotter. Temperature readings taken later that morning during a

police investigation while the furnace was still running indicated that the apartment's living room was 102 degrees Fahrenheit, the victim's bedroom was 110 degrees Fahrenheit and the air coming from the vent in the bedroom was more than 130 degrees Fahrenheit.

In characterizing defendant's role in these events, the prosecutor argued that the key issue for the jury was whether or not defendant had intended to kill the victim. The prosecution's proof on this issue consisted primarily of the second of two written statements given by defendant to police during a four-hour interview conducted a few hours after the victim was found. In the first statement, defendant related that she had been aware of the oppressive heat in the victim's bedroom, kept the victim latched in because the foster parents had instructed her to do so, had not looked at or adjusted the thermostat even though the furnace was running on a hot day, heard the victim kicking and screaming to be let out and felt the adverse effects of the heat on herself. The second statement, which defendant disavowed at trial, described her intent to cause the victim's death by turning up the thermostat to its maximum setting, closing all heating vents except the one in the victim's bedroom and placing additional clothing on the victim which she then removed after the victim died. Because these actions differed from those described in the first statement and each reflects an intent to kill the victim, the jurors' initial task, as proposed by the prosecutor during summation, was to decide which statement they would accept.

After trial, the jury acquitted defendant of intentional murder, thereby rejecting the second statement, and instead convicted her of depraved indifference murder of a child. County Court sentenced her to a prison term of 15 years to life, and she now appeals.

Issue

Could the jury reasonably infer from the evidence a culpable mental state greater than criminal negligence due to the unique combination of events that led to the victim's death, as well as the lack of proof that defendant actually perceived and ignored an obvious and severe risk of serious injury or death?

Reasoning

The jury's finding that defendant was not guilty of intentional murder clearly indicates that it rejected defendant's second statement. That statement contains an explicit admission of an intent to kill. . . . Although the excessive heat in the victim's bedroom ultimately proved fatal and defendant failed to provide relief from the heat by removing the victim from her bedroom or attempting to reduce the heat, the evidence does not establish that her acts and omissions were "committed under circumstances which evidenced a wanton indifference to human life or a depravity of the mind."

Is the defendant guilty of reckless or negligent homicide?

. . . [T]here is no evidence that defendant knew the actual temperature in any portion of the apartment or subjectively perceived a degree of heat that would have made her aware that serious injury or death from hyperthermia would almost certainly result. Put another way, the risk of serious physical injury or death was not so obvious under the circumstances that it demonstrated defendant's actual awareness. There was only circumstantial evidence on this point consisting of the subjective perceptions of other persons who later came into the apartment from cooler outside temperatures. Defendant, who had been in the apartment as the heat gradually intensified over many hours, and who was described by others as appearing flushed and acting dazed, could not reasonably be presumed to have had the

same perception of oppressive and dangerous heat. Rather, defendant testified that she knew only that the heat made her feel dizzy and uncomfortable, and denied any awareness of a risk of death. Most significantly, there is no dispute that defendant remained in a room that was nearly as hot as the victim's bedroom for approximately nine hours and checked on the victim several times before the foster parents returned. This evidence of defendant's failure to perceive the risk of serious injury stands unrefuted by the prosecution.

Defendant's ability to appreciate such a risk was further brought into doubt by the prosecution's own expert witness, who described her as having borderline intellectual function, learning disabilities and a full scale IQ of only 73. We also note that here, unlike where an unclothed child is shut outside in freezing temperatures, the circumstances are not of a type from which it can be inferred without a doubt that a person of even ordinary intelligence and experience would have perceived a severe risk of serious injury or death. . . .

A person is guilty of manslaughter in the second degree when he or she recklessly causes the death of another person and of criminally negligent homicide when, with criminal negligence, he or she causes the death of another person. Reckless criminal conduct occurs when the actor is aware of and consciously disregards a substantial and unjustifiable risk, and criminal negligence is the failure to perceive such a risk.

As we have noted, there is no support for a finding that defendant perceived and consciously disregarded the risk of death which was created by the combination of the "run-away" furnace and her failure to release the victim from her bedroom. None of defendant's proven conduct reflects such an awareness and the fact that she subjected herself to the excessive heat is plainly inconsistent with a finding that she perceived a risk of death.

Holding

However, the evidence was sufficient to establish defendant's guilt beyond a reasonable doubt of criminally negligent homicide. A jury could reasonably conclude from the evidence that defendant should have perceived a substantial and unjustifiable risk that the excessive heat, in combination with her inaction, would be likely to lead to the victim's death. Since defendant was the victim's caretaker, this risk was of such a nature that her failure to perceive it constituted a gross deviation from the standard of care that a reasonable person in the same circumstances would observe in such a situation. Thus, defendant's conduct was shown to constitute criminal negligence and such a finding would not be against the weight of the evidence.

Accordingly, we reduce the conviction from depraved indifference murder to criminally negligent homicide and remit the matter to County Court for sentencing on the reduced charge.

Questions for Discussion

1. Explain the court's factual basis for determining that the defendant should be held liable for negligent rather than reckless homicide.
2. Should the appellate court overturn the verdict of the jurors who actually observed the trial?
3. As a judge, what would be your ruling in this case?
4. Compare *Baker* to *State v. Patterson*. The victim, a 2-year-old boy, was placed in the care of Sharon Patterson by his mother on February 18, 2008. On that date, the victim was in good health. Patterson did not allow the victim to consume liquids after 8 p.m. in order to prevent him from wetting the bed. The defendant also prevented the victim from

consuming liquids at other times so as to encourage him to consume solid food. As a result of these measures, the victim received little or nothing to drink from the morning of February 22, 2009, to the morning of February 26, 2009. Patterson also attempted to discourage the child from drinking out of cups belonging to other people by placing a small amount of hot sauce in the cups.

In the days immediately preceding the child's death, he began to exhibit symptoms of dehydration. He had dry, cracked lips; a sunken face; and a diminished appetite and also had lost a significant amount of weight. On the morning of February 26, 2008, Patterson discovered that the child was not breathing. Shortly thereafter, she contacted emergency personnel by telephone. During this call, Patterson stated that the victim was "dehydrated." The child died after being hospitalized.

Patterson possesses an IQ of 61. This score places her within the bottom half-percent of the population. The trial court judge found that as a result of this cognitive disability Patterson did not know that withholding liquids could cause the victim's death. Patterson did, however, generally understand that depriving someone of fluids can cause dehydration.

The trial court convicted Patterson, in part, of criminally negligent homicide. The court imposed a total effective sentence of 10 years' incarceration, suspended after five years, with five years' probation. Patterson claimed that she was unfairly held to a reasonable person standard given her mental challenge. What is your view? See *State v. Patterson*, 27 A.3d 374 (Conn. App. 2011).

CASES AND COMMENTS

Wakesha Ives was convicted of criminally negligent homicide by leaving her 5-month-old child Janay unattended in a motor vehicle. The trial court sentenced appellant to 180 days, but suspended the sentence for two years and imposed only minimal conditions. The following text is taken directly from the decision of the Texas court.

In 2013, Appellant's daily routine involved loading Janay, the four-year-old [a daughter who also lived with her], and Kendall [her 16-year-old stepdaughter] into her SUV. . . . Janay's car seat occupies the center seat and faces to the rear. The four-year-old's car seat was on the passenger side. Kendall sat on the driver's side rear seat. Appellant [ives] always placed Janay's diaper bag in the front seat floorboard. Appellant would first drop the four-year-old off at one daycare, and then take Janay to another daycare that was about two to three miles away. She would always bring Janay into the daycare with the car seat, and some days leave the car seat there, but some days she placed it back in the vehicle. She would always leave the diaper bag at Janay's daycare. Appellant and Kendall would then proceed to Riverside High School where she taught business and finance courses and Kendall attended as a student. . . .

Appellant developed health issues with the birth of Janay. Her husband believed that following the pregnancy, she at times became forgetful, irritable, emotional, tired, and stressed. Appellant recognized her own lightheadedness and forgetfulness. These issues also led to high blood pressure for which she took several medications. . . .

On May 9, the day prior to the tragedy [Janay's death], Appellant developed a bad headache. She came home tired and exhausted. At her husband's suggestion, she prepared

Janay's diaper bag in advance. . . . In an effort to make the morning commute easier, Appellant's husband loaded the car, and in doing so, placed the diaper bag in the rear-seat floorboard. Appellant was behind schedule as she left the house and got further behind as she needed to stop for gas. Appellant also had nothing to eat at home, and knew she needed to eat when taking her medications.

Janay was sleeping in the car seat and was covered with a blanket. Per her routine, Appellant dropped the four-year-old off at daycare. But rather than take Janay to her daycare, she went to the drive-through at [a fast-food restaurant] to get something to eat. From [the fast-food restaurant] she went straight to Riverside High School, arriving around 8:00 a.m. She and Kendall exited the vehicle, leaving Janay still sleeping in the back seat. She returned to the vehicle between 4:00 and 4:30 p.m. and found Janay still in her car seat. CPR efforts failed as the child was already dead.

The trial began with the State playing the recorded 911 call that reported the tragedy. On the recording, Appellant is heard screaming hysterically in the background, and reacting as one might expect a parent would who just realized she had made a terrible mistake. . . .

Dr. David Diamond, who researches the mechanisms and the effects of stress on memory . . . theorized that after Appellant went to [the fast-food restaurant], she lapsed back to her routine of then driving directly to the school, having created a "false memory" of already dropping Janay off at daycare. . . . He placed emphasis on the absence of the diaper bag in the front seat floorboard that would have been a cue that the baby was still in the car.

Would you hold Ives responsible for negligent homicide? Keep in mind that in 2018 53 children died after being left in a hot car, and an average of 38 children die each year under these circumstances. See *State v. Ives*, No. 08-16-00026-CR (Tex. App. 2017).

YOU DECIDE 5.4

Robert Strong, age 57, left his "native Arabia" at the age of 19 and emigrated to the United States. He testified that he has been a member of the Sudan Muslim religion since birth and has been a leader in the sect for 40 years and has attracted 70 followers. Strong stated that the three central beliefs of this religion are cosmetic consciousness, mind over matter, and physiomatic psychomatic consciousness. "Mind over matter" empowers a "master" or leader to lie on a bed of nails without bleeding, to walk through fire or on hot coals, to perform surgical operations without anesthesia, to raise people up off the ground, and to suspend a person's heartbeat, pulse, and breathing while that person remained conscious.

Strong claimed by exercising "mind over matter," he could stop an individual's heartbeat and breathing and plunge knives into the individual's chest without injury and could perform other supernatural acts. There was testimony from one of the defendant's followers that the defendant had successfully performed this ceremony on several occasions. Defendant himself claimed to have carried out this ceremony countless times over the previous 40 years without causing an injury. Kenneth Goins was a new member of the cult who consented to Strong's carrying out this knife ceremony. Unfortunately, Goins suffered wounds from a hatchet and from the three knives with which he was stabbed that proved fatal. The defendant was charged with acting in a reckless fashion although he argues that, at most, he had a negligent intent. What is your view? See *People v. Strong*, 45 A.D.2d 18 (N.Y. App. Div. 1974).

STRICT LIABILITY

We all have had the experience of telling another person that “I don’t care why you acted in that way; you hurt me, and that was wrong.” This is similar to a strict liability offense. A **strict liability** offense is a crime that does not require a *mens rea*, and an individual may be convicted based solely on the commission of a criminal act. An example is a federal statute that makes it a strict liability offense to attempt to board a commercial aircraft while carrying a “deadly or dangerous weapon which was concealed on or about the defendant’s person.”¹⁹ Strict liability offenses have their origin in the industrial development of the United States in the middle of the 19th century. The U.S. Congress and various state legislatures enacted a number of **public welfare offenses** that were intended to protect society against impure food, defective drugs, pollution, and unsafe working conditions, trucks, and railroads. These *mala prohibita* offenses (an act is wrong because it is prohibited) are distinguished from those crimes that are *mala in se* (inherently wrongful, such as rape, robbery, and murder).

The common law was based on the belief that criminal offenses required a criminal intent; this ensured that offenders were morally blameworthy. The U.S. Supreme Court has pronounced that the requirement of a criminal intent, although not required under the Constitution, is “universal and persistent in mature systems of law.”²⁰ Courts, however, have disregarded the strong policy in favor of requiring a criminal intent in upholding the constitutionality of *mala prohibita* laws. Congress and state legislatures typically indicate that these are strict liability laws by omitting language such as “knowingly” or “purposely” from the text of the law. Courts look to several factors in addition to the textual language in determining whether a statute should be interpreted as providing for strict liability:

- The offense is not a common law crime.
- A single violation poses a danger to a large number of people.
- The risk of the conviction of an “innocent” individual is outweighed by the public interest in preventing harm to society.
- The penalty is relatively minor.
- A conviction does not harm a defendant’s reputation.
- The law does not significantly impede the rights of individuals or impose a heavy burden. Examples are the prohibition of acts such as “selling alcohol to minors” or “driving without a license.”
- These are acts that most people avoid, and individuals who engage in such acts generally possess a criminal intent.

The argument for strict liability offenses is that these laws deter unqualified people from participating in potentially dangerous activities, such as the production and selling of pharmaceutical drugs, and that those who engage in this type of activity will take extraordinary steps to ensure that they proceed in a cautious and safe fashion. There is also concern that requiring

prosecutors to establish a criminal intent in these relatively minor cases will consume time and energy and divert resources from other cases.

There is a trend toward expanding strict liability into the non-public welfare crimes that carry relatively severe punishment. Many of these statutes are criticized for imposing prison terms without providing for the fundamental requirement of a criminal intent. For instance, in *State v. York*, the defendant was sentenced to one year in prison in Ohio after he was convicted of having touched the buttocks of an 11-year-old girl.

The appellate court affirmed his conviction for “gross sexual imposition” and ruled that this was a strict liability offense and that the prosecutor was required to demonstrate only a prohibited contact with an individual under 13 that could be perceived by the jury as sexually arousing or gratifying to the defendant.²¹

The U.S. Supreme Court indicated in *Staples v. United States* that it may not be willing to continue to accept the growing number of strict liability public welfare offenses. The National Firearms Act was intended to restrict the possession of dangerous weapons and declared it a crime punishable by up to 10 years in prison to possess a “machine gun” without legal registration. The defendant was convicted for possession of an AR-15 rifle, which is a semiautomatic weapon that can be modified to fire more than one shot with a single pull of the trigger. The Supreme Court interpreted the statute to require a *mens rea*, explaining that the imposition of a lengthy prison sentence has traditionally required that a defendant possess a criminal intent. The Court noted that gun ownership is widespread in the United States and that a strict liability requirement would result in the imprisonment of individuals who lacked the sophistication to determine whether they purchased or possessed a lawful or unlawful weapon.²²

A Michigan appellate court held that John Wesley Janes should not be held criminally liable for possession of a dangerous animal based on his pit bull’s attack on an infant absent Janes’s knowledge that the dog was dangerous. The court reasoned that dog ownership is widespread in the United States and that the incidence of aggressive behavior by dogs is not so widespread that individuals should be expected to be on notice, absent a history of violent behavior, that their dog is a “dangerous animal.” It was “unthinkable that the Legislature intended to subject law-abiding, well-intentioned citizens to a possible four-year prison term if, despite genuinely and reasonably believing their animal to be safe, . . . the animal nevertheless harms someone.”²³

On the other hand, a Washington State appellate court held in *State v. Pinkham* that the misdemeanor offense of carrying a loaded weapon in a moving vehicle was a strict liability offense. The court reasoned that the law promoted the safe handling of firearms and an individual should know that carrying a loaded weapon in a moving vehicle posed a threat to public safety, did not constitute “innocent behavior,” and may result in criminal liability. There also was the benefit that a prosecutor under a strict liability law was relieved of the difficult challenge of establishing the defendant’s intent.²⁴

The Model Penal Code, in section 1.04(5), accepts the need for strict liability crimes while limiting these crimes to what the code terms “violations.” Violations are not subject to imprisonment and are punishable only by a fine, forfeiture, or other civil penalty, and they may not result in the type of legal disability (e.g., result in loss of the right to vote) that flows from a criminal conviction.

In the next case in the chapter, *Steelman v. State*, Steelman was convicted of knowingly or intentionally delivering marijuana within 1,000 feet of a school. An Indiana appellate court was asked to decide whether the trial court was correct in ruling that the prosecution was not required to establish that Steelman knew that there was a school nearby, because this is a strict liability offense. The answer was important to Steelman because delivering the marijuana within 1,000 feet of a school enhanced his sentence from a misdemeanor to a felony, punishable in his case by four years in prison. Pay attention to the majority and to the dissenting opinion, and ask yourself whether this should be a strict liability offense.

IS DEALING IN MARIJUANA WITHIN 1,000 FEET OF SCHOOL PROPERTY A STRICT LIABILITY OFFENSE?

STEELMAN V. STATE, 602 N.E.2d 152 (IND. CT. APP. 1992)

Opinion by Baker, J.

Issue

Defendant-appellant Monte Steelman was convicted of dealing in marijuana within 1,000 feet of school property, a Class C felony, and was adjudicated an habitual offender. The court sentenced him to the presumptive term of four years' imprisonment for the dealing in marijuana conviction, and enhanced the sentence by the minimum term of 20 years' imprisonment for the habitual offender adjudication. Steelman now appeals his conviction and sentence. He raises [two] issues for our review, which we restate as:

- I. Whether the state had to prove Steelman both delivered and knew he delivered marijuana within 1,000 feet of school property. . . .
- II. Whether the sentence was manifestly unreasonable and disproportionate to the crime.

Facts

On November 26, 1990, Steelman offered to sell six marijuana joints for \$4 a piece to a confidential informant, Joseph Moore. Officer Branum of the Richmond Police Department gave Moore \$24 to make the buy and agreed to pay him \$25. The officers fitted Moore with a listening device, a tape recorder, and a microphone. They followed Moore in a separate car as Moore drove to Steelman's residence, a second story apartment on 11th Street in Richmond, Indiana, to make the buy.

Upon arriving at Steelman's apartment, Moore followed Steelman and Steelman's wife into the kitchen. Moore paid Steelman \$24 and Steelman's wife handed Moore a plastic sandwich bag with six marijuana joints inside. Moore and Steelman discussed the possibility of purchasing an ounce of marijuana for \$200, but Steelman said he would have to go somewhere to get the ounce. After staying 20 to 30 minutes, Moore left. He took the plastic bag with six joints to the police department, and a chemical analysis revealed the joints contained marijuana and weighed 2.4 grams. The Wayne County Surveyor measured the distance from the front of Steelman's residence to the nearby Vaile Elementary School

property. The surveyor concluded the distance was 959 feet, accurate to within three one-hundredths of a foot.

Following a jury trial, Steelman was convicted of dealing in marijuana within 1,000 feet of school property, a Class C felony, and he was adjudicated an habitual offender.

Reasoning

Steelman first challenges the State's failure to prove he knew he was within 1,000 feet of school property when he sold marijuana to Moore. The statute under which he was convicted, IND. CODE 35-48-4-10, provides, in relevant part:

- a. A person who:
 1. knowingly or intentionally:
 - A. manufactures;
 - B. finances the manufacture of;
 - C. delivers; or
 - D. finances the delivery of;
marijuana, hash oil, or hashish, pure or adulterated; or
 2. possesses, with intent to:
 - A. manufacture;
 - B. finance the manufacture of;
 - C. deliver; or
 - D. finance the delivery of;
marijuana, hash oil, or hashish, pure or adulterated;
commits dealing in marijuana, hash oil, or hashish, a Class A misdemeanor,
except as provided in subsection (b).
- b. The offense is:
...
 1. a Class C felony if:
...
 - A. the person;
 - i. delivered; or
 - ii. financed the delivery of;
marijuana, hash oil or hashish in or on school property or within one thousand (1,000) feet of school property or on a school bus.

Steelman acknowledges this court has ruled that the State does not have to prove as an element of the crime that the defendant knew he was within 1,000 feet of school property. Nonetheless, he argues the facts in this case are distinguishable from our previous cases because here, the drug transaction did not take place with the school in plain view. See, e.g., *Reynolds-Herr v. State* [1991], 582 N.E.2d 833 [transaction took place across the street from elementary school]; *Berry v. State* [1990], 561 N.E.2d 832 [defendant was inside the school attempting to deal marijuana]; [and] *Crocker v. State* [1990], 563 N.E.2d 617 [defendant admitted his house, where the deal took place, was across the street from a school].

In this case, Steelman argues it is not obvious to a lay person that his apartment is within 1,000 feet of school property. The Vaile Elementary School is two streets away from his apartment, and the school property cannot be seen from the street on which his apartment building is located. He relies further on the fact that it took an expert surveyor to determine his apartment building is within 959 feet of the southern and westernmost corner of the school property.

Steelman further urges this court to reconsider our opinion in *Williford v. State* (1991), Ind. App., 571 N.E.2d 310. In that case, Williford sold a quarter ounce of marijuana to an undercover police officer in the Four Crowns Tavern in Auburn, Indiana. Following a jury trial, he was convicted of selling marijuana within 1,000 feet of school property.

Although there was no evidence Williford knew the McIntosh Elementary School was within 1,000 feet of the tavern, we affirmed his conviction. We held that the statute does not require the State to prove the defendant knew he was within the legislatively mandated "drug-free zone" which surrounds our schools. "A dealer's lack of knowledge of his proximity to the schools does not make the illegal drug any less harmful to the youth in whose hands it may eventually come to rest." As we said in *Williford*, we say again today: "[T]hose who choose to deal drugs in the vicinity of our schools do so at their own peril." The State did not have to prove Steelman knew he was within 1,000 feet of the Vaile Elementary School when he delivered marijuana to Moore.

Steelman also argues [that the Indiana Code] is impermissibly ambiguous because the statutory definition of school property is so broad that it could encompass any building rented by a school or the farthest reaches of the grounds adjacent to such a building.

. . . In this case, Steelman does not question that the Vaile Elementary School is school property under [the Indiana Code, but] he challenges the statute simply by questioning whether a building rented by a school would be considered school property. As applied to him the statute is not vague. Steelman's vagueness challenge is therefore without merit.

Steelman complains next that the statute is impermissibly silent on how the 1,000-foot distance is to be calculated, and he challenges the technique the State used to measure the distance from his apartment to the school property. He recognizes that surveyors measure distances based on "line of sight" calculations. Because one would not walk in a straight line from the elementary school to his apartment, however, Steelman argues the "line of sight" measurement is irrational. He tells us that neither defendants nor school children walk through obstacles such as buildings, homes, fences, concrete barriers, creeks, or the like. Steelman complains further that he was on the second floor of his apartment building, so, at the very least, the surveyor should have measured the distance to the second floor, not the ground level.

When the legislature created the 1,000-foot drug-free zone surrounding our schools, it made no allowance for barriers such as buildings or homes or fences or concrete barriers or creeks. Rather, the legislative intent is plain: to punish those who deal drugs within 1,000 feet of school property. The surveyor's line-of-sight technique to determine the 1,000-foot perimeter around the school property conforms to the legislative intent. There was no error.

Next, the State had to prove Steelman delivered marijuana within 1,000 feet of school property. In this case, the delivery took place inside of Steelman's second floor apartment. We agree with Steelman, therefore, that the State had to prove the delivery in Steelman's second floor apartment was within 1,000 feet of the elementary school. Contrary to Steelman's assertions, however, the State met its burden of proof.

The surveyor's "line of sight" measurement ran between a point on the far side of Steelman's apartment building to a point on the southwest corner of the school lot. That distance was 959 feet. The surveyor did not need to do a line-of-sight measurement from the school property to where Steelman delivered the marijuana in his second floor apartment because, mathematically, no matter where in his apartment the delivery took place, Steelman had to be within the 1,000-foot zone. Because the surveyor's measurement was sufficient to prove the delivery in Steelman's second floor apartment took place within 1,000 feet of school property, there was no error.

Steelman also argues the statutory provision increasing the penalty for delivering marijuana within 1,000 feet of school property violates the Equal Protection Clause because it discriminates against minority defendants. He reasons that “[g]iven the demographics of the typical modern urban setting, and the movement toward community schools, inner city [B]lack defendants are far more likely to reside in close proximity to a school than is true of their white suburban counterparts.” . . . In this case, Steelman completely fails to set forth proof of a racially discriminatory intent or purpose, let alone proof that the statute does, in fact, affect a greater proportion of minority defendants than their “white suburban counterparts.” Without proving a racially discriminatory impact, coupled with an intent or purpose to discriminate, Steelman’s argument must fail. . . .

Finally, Steelman argues his sentence is manifestly unreasonable and disproportionate to the nature of his offenses. The court sentenced him to the presumptive term of four years’ imprisonment for his conviction for dealing in marijuana within 1,000 feet of school property, a Class C felony. The court then enhanced the sentence by the minimum term of 20 years’ imprisonment for the habitual offender adjudication. . . . Steelman complains first that his dealing in marijuana offense was relatively minor. In support of his argument, he cites the fact that he delivered the marijuana to his adult cousin, and that he sold only six marijuana cigarettes weighing a total of 2.4 grams, a quantity within the misdemeanor range. Steelman fails to realize, however, that the seriousness of the offense escalated when he delivered the marijuana within 1,000 feet of school property. The offense Steelman committed was a Class C felony, [so] it was not a misdemeanor. He is very much mistaken, therefore, when he calls the offense relatively minor. The four year sentence for dealing marijuana within 1,000 feet of school property was more than reasonable. Likewise, the seriousness of the felony supports enhancing his sentence by 20-years for being an habitual offender.

We must also consider Steelman’s two prior felonies upon which his habitual offender adjudication is based. Both offenses were Class D felony thefts, committed in 1983 and 1985. Our supreme court has long recognized that the purpose of habitual offender statutes is to punish more severely those defendants who have not been deterred by prior sanctions. When short term incarcerations have failed to deter, our legislature has mandated longer sentences for third felony convictions. We find Steelman’s enhanced sentence is neither unreasonable nor disproportionate to his offenses.

Holding

The judgment is in all things affirmed.

Questions for Discussion

1. Why does Indiana make selling marijuana within 1,000 feet of school property a strict liability offense?
2. What does the prosecutor have to prove to convict Steelman under Indiana Code 35-48-4-10?
3. How does Steelman distinguish his case from other cases prosecuted under the same statute?
4. Do you believe Steelman’s sentence was unreasonable and disproportionate to his crime?

YOU DECIDE 5.5

In July 1995, Ronnie Polk was the passenger in an automobile that was stopped for a moving violation in close proximity to Highland Christian School in Lafayette, Indiana. A police officer's search led to the seizure of crack cocaine and several tablets of diazepam. In Indiana, possession of more than 3 grams of cocaine within 1,000 feet of a school is enhanced from a Class D felony to a Class A felony punishable by 30 years in prison, and possession of a Schedule IV drug without a doctor's prescription within 1,000 feet of a school is enhanced from a Class D to a Class C felony, punishable by 4 years in prison.

Polk was convicted and sentenced for both offenses, and his two sentences were to run concurrently. Polk also was convicted of being a habitual offender, and his combined sentence for the three convictions totaled 50 years. Polk maintains that the legislature did not intend for the possession of cocaine within 1,000 feet of a school to be a strict liability offense that applied to passengers possessing narcotics in automobiles because this did not advance Indiana's interest in protecting schoolchildren. Applying the statute to individuals in automobiles would allow the police to wait to stop automobiles suspected of containing narcotics as they approached within 1,000 feet of a school.

How would you decide *Polk v. State* in light of the precedent established in *Steelman v. State*? See *Polk v. State*, 683 N.E.2d 567 (Ind. 1997).

CONCURRENCE

We now have covered both *actus reus* and *mens rea*. The next step is to understand that there must be a **concurrence** between a criminal act and a criminal intent. *Chronological concurrence* means that a criminal intent must exist at the same time as a criminal act. An example of chronological concurrence is the requirement that a burglary involves breaking and entering with an intent to commit a felony therein. The classic example is an individual who enters a cabin to escape the cold and after entering decides to steal food and clothing. In this instance, the intent did not coincide with the criminal act, and the defendant will not be held liable for burglary.

The principle of concurrence is reflected in section 20 of the California Penal Code, which provides that in "every crime . . . there must exist a union or joint operation of act and intent or criminal negligence." The next case is *State v. Rose*. Can you explain why the defendant's guilt for manslaughter depends on the prosecution's ability to establish a concurrence between the defendant's act and intent?

FIGURE 5.1 ■ The Legal Equation: Concurrence



WAS THERE A CONCURRENCE BETWEEN THE DEFENDANT'S CRIMINAL ACT AND CRIMINAL INTENT?

STATE V. ROSE, 311 A.2D 281 (R.I. 1973)

Opinion by Roberts, J.

These are two indictments, one charging the defendant, Henry Rose, with leaving the scene of an accident, death resulting, . . . and the other charging the defendant with manslaughter. The defendant was tried on both indictments to a jury in the Superior Court, and a verdict of guilty was returned in each case. Thereafter the defendant's motions for a new trial were denied. . . .

Facts

These indictments followed the death of David J. McEnery, who was struck by defendant's motor vehicle at the intersection of Broad and Summer Streets in Providence at about 6:30 p.m. on April 1, 1970. According to the testimony of a bus driver, he had been operating his vehicle north on Broad Street and had stopped at a traffic light at the intersection of Summer Street. While the bus was standing there, he observed a pedestrian starting to cross Broad Street, and as the pedestrian reached the middle of the southbound lane he was struck by a "dirty, white station wagon" that was proceeding southerly on Broad Street. The pedestrian's body was thrown up on the hood of the car. The bus driver further testified that the station wagon stopped momentarily, the body of the pedestrian rolled off the hood, and the car immediately drove off along Broad Street in a southerly direction. The bus operator testified that he had alighted from his bus, intending to attempt to assist the victim, but was unable to locate the body.

Subsequently, it appears from the testimony of a police officer, about 6:40 p.m. the police located a white station wagon on Haskins Street, a distance of some 610 feet from the scene of the accident. The police further testified that a body later identified as that of David J. McEnery was wedged beneath the vehicle when it was found and that the vehicle had been registered to defendant. . . .

Issue

The defendant is contending that if the evidence is susceptible of a finding that McEnery was killed upon impact, he was not alive at the time he was being dragged under defendant's vehicle and defendant could not be found guilty of manslaughter. An examination of the testimony of the only medical witness makes it clear that, in his opinion, death could have resulted immediately upon impact by reason of a massive fracture of the skull. The medical witness also testified that death could have resulted a few minutes after the impact but conceded that he was not sure when it did occur.

Reasoning

We are inclined to agree with defendant's contention in this respect. Obviously, the evidence is such that death could have occurred after defendant had driven away with McEnery's body lodged under his car and, therefore, be consistent with guilt. On the other hand, the medical

testimony is equally consistent with a finding that McEnery could have died instantly upon impact and, therefore, be consistent with a reasonable conclusion other than the guilt of defendant.

Holding

It is clear, then, that, the testimony of the medical examiner lacking any reasonable medical certainty as to the time of the death of McEnery, we are unable to conclude that on such evidence defendant was guilty of manslaughter beyond a reasonable doubt. Therefore, we conclude . . . that it was error to deny defendant's motion for a directed verdict of acquittal.

We are unable, however, to reach the same conclusion concerning the denial of the motion for a directed verdict of acquittal . . . in which defendant was charged with leaving the scene of an accident.

Questions for Discussion

1. Why is it important to determine whether the victim died on impact with Rose's automobile or whether the victim was alive at the time he was dragged under the defendant's automobile? What is the ruling of the Rhode Island Supreme Court?
2. How does this case illustrate the principle of concurrence?
3. In the leading English case on concurrence, Fagan accidentally reversed his car and rolled it onto the foot of a police officer. The officer directed Fagan to move the car off his foot at which point Fagan swore at the officer, refused to move the vehicle, and turned off the engine. Fagan appealed his conviction for a battery on the grounds that the act of driving onto the officer's foot did not coincide with his intent to commit a battery against the officer by refusing to drive off the officer's foot. In other words, the *mens rea* and *actus reus* did not concur with one another. The court, however, held that Fagan's refusal to move the tire off the officer's foot was a continuation of Fagan's driving onto the officer's foot and that Fagan's refusal to move the automobile coincided with the intent to harm the officer and constituted a battery. Do you agree? See *Fagan v. Commissioner of the Police for the Metropolis* [1969] 1 Q.B. 439.

YOU DECIDE 5.6

Scott Jackson administered what he believed was a fatal dose of cocaine to Pearl Bryan in Cincinnati, Ohio. Bryan was pregnant, apparently as a result of her intercourse with Jackson. Jackson and a companion then transported Bryan to Kentucky and cut off her head to prevent identification of the body. Bryan, in fact, was still alive when brought to Kentucky and died as a result of the severing of her head. A state possesses jurisdiction over offenses committed within its territorial boundaries. Can Jackson be prosecuted for the intentional killing of Bryan in Ohio? In Kentucky? See *Jackson v. Commonwealth*, 38 S.W. 422 (Ky. 1896).

CAUSATION

You now know that a crime entails a *mens rea* that concurs with an *actus reus*. Certain crimes (termed *crimes of criminal conduct causing a criminal harm*) also require that the criminal act cause a particular harm or result: for example, the death or maiming of a victim, the burning of a house, or damage to property.

Causation is central to criminal law and must be proven beyond a reasonable doubt. The requirement of causality is based on two considerations²⁵:

- *Individual Responsibility.* The criminal law is based on individual responsibility. Causality connects a person's acts to the resulting social harm and permits the imposition of the appropriate punishment.
- *Fairness.* Causality limits liability to individuals whose conduct produces a prohibited social harm. A law that declares that all individuals in close proximity to a crime are liable regardless of their involvement would be unfair and penalize people for being in the wrong place at the wrong time. If such a law were enacted, individuals might hesitate to gather in crowds or bars or to attend concerts and sporting events.

Establishing that a defendant's criminal act caused harm to the victim can be more complicated than you might imagine. Should an individual who commits a rape be held responsible for the victim's subsequent suicide? What if the victim attempted suicide a week before the rape and then successfully committed suicide following the rape? Would your answer be the same if the stress induced by the rape appears to have contributed to the victim's contracting cancer and dying a year later? What if doctors determine that a murder victim who was hospitalized would have died an hour later of natural causes in any event? We can begin to answer these hypothetical situations by reviewing the two types of causes that a prosecutor must establish beyond a reasonable doubt at trial in order to convict a defendant: **cause in fact** and legal or **proximate cause**.

As noted, causality arises in prosecutions for crimes that require a particular result, such as murder, maiming, arson, and damage to property. The prosecution must prove beyond a reasonable doubt that the harm to the victim resulted from the defendant's unlawful act. You will find that most causality cases involve defendants charged with murder who claim that they should not be held responsible for the victim's death.

Cause in Fact

The cause in fact or factual cause simply requires you to ask whether "but for" the defendant's act, would the victim have died? An individual aims a gun at the victim, pulls the trigger, and kills the victim. "But for" the shooter's act, the victim would be alive. In most cases, the defendant's act is the only factual cause of the victim's injury or death and is clearly the direct cause of the harm. This is a simple cause-and-effect question. The legal or proximate cause of the victim's injury or death may not be so easily determined.

A defendant's act must be the cause in fact or factual cause of a harm in order for the defendant to be criminally convicted. This connects the defendant to the result. The cause in fact or

factual cause is typically a straightforward question. Note that the defendant's act must also be the legal or proximate cause of the resulting harm.

Legal or Proximate Cause

Just when things seem simple, we encounter the challenge of determining the legal or proximate cause of the victim's death. Proximate cause analysis requires the jury to determine whether it is fair or just to hold a defendant legally responsible for an injury or death. This is not a scientific question. We must consider questions of fairness and justice. There are few rules to assist us in this analysis.

In most cases, a defendant is clearly both the cause in fact and the legal cause of the victim's injury or death. However, consider the following scenarios: You pull the trigger, and the victim dies. You point out that it was not your fault since the victim died from the wound you inflicted in combination with a minor gunshot wound that she suffered earlier in the day. Should you be held liable? In another scenario, you shoot but an ambulance driver rescues the victim, the ambulance's brakes fail, and the vehicle crashes into a wall, killing the driver and victim. Are you or the driver responsible for the victim's death? You later learn that the victim died after the staff of the hospital emergency room waited five hours to treat her and that she would have lived had she received timely assistance. Who is responsible for the death? Would your answer be different in the event that the doctors protested that they could not operate on the victim because of a power outage caused by a hurricane? What if the victim was wounded from the gunshot and, although barely conscious, stumbled into the street and was hit by an automobile or by lightning? In each case, "but for" your act, the victim would not have been placed in the situation that led to the victim's death. On the other hand, you might argue that in each of these examples, you were not legally liable, because the death resulted from an **intervening cause** or outside factor rather than from the shooting. As you can see from the previous examples, an intervening cause may arise from

- the act of the victim wandering into the street;
- an act of nature, such as a hurricane;
- the doctors who did not immediately operate; or
- a wound inflicted by an assailant in combination with a previous injury.

Another area that complicates the determination of proximate causes is a victim's preexisting medical condition. This arises when you shoot an individual, and the shock from the wound results in the failure of the victim's already seriously weakened heart.

Intervening Cause

Professor Joshua Dressler helps us answer these causation problems by providing two useful categories of intervening acts: **coincidental intervening acts** and **responsive intervening acts**.

Coincidental Intervening Acts

A defendant is not considered legally responsible for a victim's injury or death that results from a coincidental intervening act (some texts refer to this as an *independent intervening cause*). The classic case is an individual who runs from a mugger and dies from injuries sustained when a tree that has been struck by lightning falls on him. It is true that "but for" the robbery, the victim would not have fled.

The defendant nevertheless did not order or compel the victim to run and certainly had nothing to do with the lightning strike that felled the tree. As a result, the perpetrator generally is not held legally liable for a death that results from this unpredictable combination of an attempted robbery, bad weather, and a tree.

Coincidental intervening acts arise when a defendant's act places a victim in a particular place where the victim is harmed by an unforeseeable event.

The Ninth Circuit Court of Appeals offered an example of an unforeseeable event as a hypothetical in the case of *United States v. Main*. The defendant in this example drives in a reckless fashion and crashes his car, pinning the passenger in the automobile. The defendant leaves the scene of the accident to seek assistance, and the semiconscious passenger is eaten by a bear. The Ninth Circuit Court of Appeals observed that reckless driving does not create a foreseeable risk of being eaten by a bear and that this intervening cause is so out of the ordinary that it would be unfair to hold the driver responsible for the victim's death.²⁶ Another example of an unforeseeable coincidental intervening event involves a victim who is wounded, taken to the hospital for medical treatment, and then killed in the hospital by a knife-wielding mass murderer. Professor Dressler notes that in this case the unfortunate victim has been found in the "wrong place at the wrong time."²⁷ Defendants will be held responsible for the harm resulting from coincidental causes in those *rare* instances in which the event is "normal and foreseeable" or could have been reasonably predicted. In *Kibbe v. Henderson*, two defendants were held liable for the death of George Stafford, whom they robbed and abandoned on the shoulder of a dark, rural two-lane highway on a cold, windy, and snowy evening. Stafford's trousers were down around his ankles, his shirt was rolled up toward his chest, and the two robbers placed his shoes and jacket on the shoulder of the highway and did not return Stafford's glasses. The nearsighted and drunk Stafford was sitting in the middle of a lane on a dimly lit highway with his hands raised when he was hit and killed by a pickup truck traveling 10 miles per hour over the speed limit that coincidentally happened to be passing by at the precise moment that Stafford wandered into the highway.²⁸ The defendant generally is legally liable for foreseeable coincidental intervening acts.

Responsive Intervening Acts

The response of a victim to a defendant's criminal act is termed a *responsive intervening act* (some texts refer to this as a *dependent intervening act*). In most instances, the defendant is considered responsible because the defendant's behavior caused the victim to respond. A defendant is relieved of responsibility only in those instances in which the victim's reaction to the crime is both abnormal and unforeseeable. Consider the case of a victim who jumps into the water to evade an assailant and drowns. The assailant will be charged with the victim's death despite the

fact that the victim could not swim and did not realize that the water was dangerously deep. The issue is the *foreseeability* of the victim's response rather than the *reasonableness* of the victim's response. Again, courts generally are not sympathetic to defendants who set a chain of events in motion and generally will hold such defendants criminally liable.

In *People v. Armitage*, David Armitage was convicted of "drunk boating causing [the] death" of Peter Maskovich. Armitage was operating his small aluminum speedboat at a high rate of speed while zigzagging across the river when it flipped over. There were no floatation devices on board, and the intoxicated Armitage and Maskovich clung to the capsized vessel. Maskovich disregarded Armitage's warning and decided to try to swim to shore and drowned. A California appellate court ruled that Maskovich's decision did not break the chain of causation. The "fact that the panic stricken victim recklessly abandoned the boat and tried to swim ashore was not a wholly abnormal reaction to the peril of drowning," and Armitage could not exonerate himself by claiming that the "victim should have reacted differently or more prudently."²⁹

Defendants have also been held liable for the response of individuals other than the victim. For instance, in the California case of *People v. Schmies*, defendant Schmies fled on his motorcycle from a traffic stop at speeds of up to 90 miles an hour and disregarded all traffic regulations. During the chase, one of the pursuing patrol cars struck another vehicle, killing the driver and injuring the officer. Schmies was convicted of grossly negligent vehicular manslaughter and of reckless driving. A California court affirmed the defendant's conviction based on the fact that the officer's response and the resulting injury were reasonably foreseeable. The officer's reaction, in other words, was not so extraordinary that it was unforeseeable, unpredictable, and statistically extremely improbable.³⁰

Medical negligence has also consistently been viewed as foreseeable and does not break the chain of causation. In *People v. Saavedra-Rodriguez*, the defendant claimed that the negligence of the doctors at the hospital rather than the knife wound he inflicted was the proximate cause of the death and that he should not be held liable for homicide. The Colorado Supreme Court ruled that medical negligence is "too frequent to be considered abnormal" and that the defendant's stabbing of the victim started a chain of events, the natural and probable result of which was the defendant's death. The court added that only the most gross and irresponsible medical negligence is so removed from normal expectations as to be considered unforeseeable.³¹

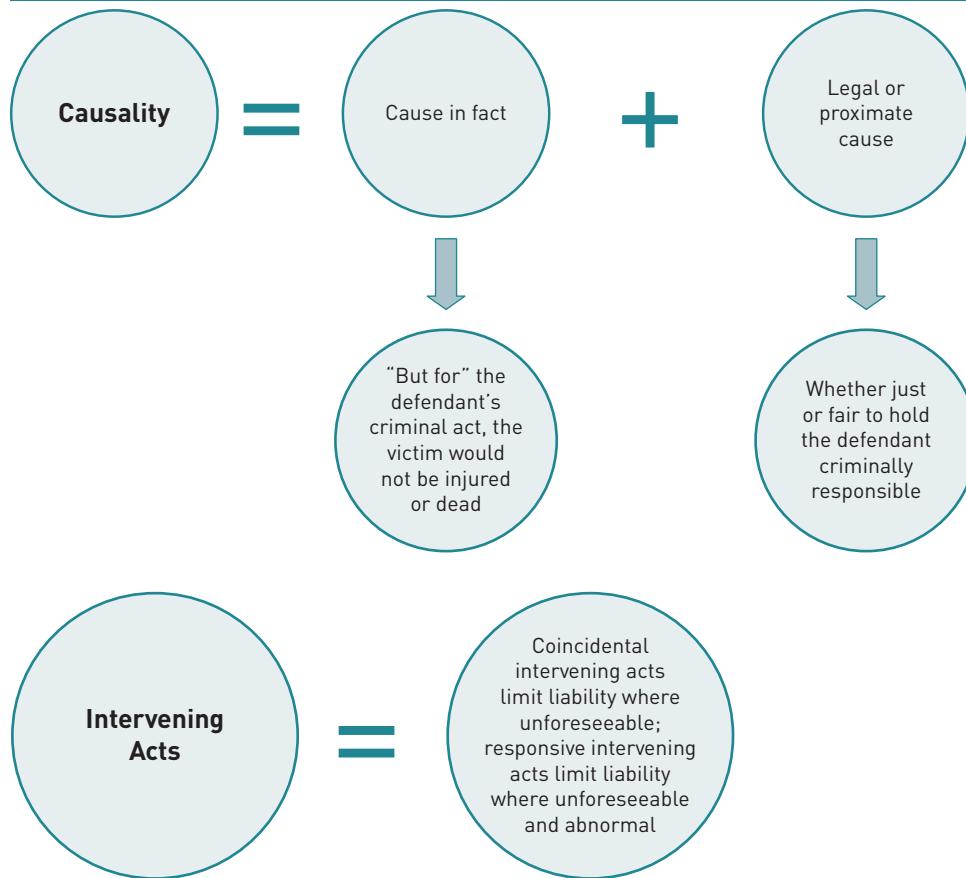
In *United States v. Hamilton*, the defendant knocked the victim down and jumped on and kicked his face. The victim was rushed to the hospital, where nasal tubes were inserted to enable him to breathe, and his arms were restrained. During the night the nurses changed his bedclothes and negligently failed to reattach the restraints on the victim's arms. Early in the morning the victim went into convulsions, pulled out the nasal tubes, and suffocated to death. The court held that regardless of whether the victim accidentally or intentionally pulled out the tubes, the victim's death was the ordinary and foreseeable consequence of the attack and affirmed the defendant's conviction for manslaughter.³²

In *State v. Pelham*, the New Jersey Supreme Court upheld the defendant's conviction for vehicular manslaughter. Five months after the accident, the victim's family in accordance with his wishes removed him from a ventilator, and he died four hours later. The New Jersey Supreme Court held that the removal of life-sustaining equipment was an individual's right and that it is

foreseeable that a victim may exercise the right not to be placed on, or to be removed from, life support systems.³³

In sum, defendants who commit a crime are responsible for the natural and probable consequences of their actions. Defendants are responsible for foreseeable responsive intervening acts.

FIGURE 5.2 ■ The Legal Equation: Causality



THE MODEL PENAL CODE

The Model Penal Code eliminates legal or proximate causation and requires only “but-for causation.” The code merely asks whether the result was consistent with the defendant’s intent or knowledge or was within the scope of risk created by the defendant’s reckless or negligent act. In other words, under the Model Penal Code, you merely look at the defendant’s intent and act and ask whether the result could have been anticipated. In cases of a resulting harm or injury that is “remote” or “accidental” [e.g., a lightning bolt or a doctor

who is a serial killer), the Model Penal Code requires that we look to see whether it would be unjust to hold the defendant responsible.³⁴

The next case, *People v. Cervantes*, asks whether it is just and fair to hold a defendant liable as the legal or proximate cause of the victim's death.

SHOULD CERVANTES BE HELD CRIMINALLY LIABLE FOR CAUSING THE KILLING OF A RIVAL GANG MEMBER?

PEOPLE V. CERVANTES, 29 P.3d 225 (CAL. 2001)

Opinion by Baxter, J.

Issue

This case presents a question concerning proof of proximate causation in a provocative act murder case. We granted review to decide whether defendant, a member of a street gang, who perpetrated a nonfatal shooting that quickly precipitated a revenge killing by members of an opposing street gang, is guilty of murder on the facts before us.

Facts

Shortly after midnight on October 30, 1994, defendant and fellow Highland Street gang members went to a birthday party in Santa Ana thrown by the Alley Boys gang for one of their members. Joseph Perez, the prosecution's gang expert, testified the Highland Street and Alley Boys gangs were not enemies at the time. Over 100 people were in attendance at the party, many of them gang members.

Outside of the house, defendant approached a woman he knew named Grace. She was heavily intoxicated and declined defendant's invitation to go to another party with him, which prompted him to call her a "ho," leading, in turn, to an exchange of crude insults. Juan Cisneros, a member of the Alley Boys, approached and told defendant not to "disrespect" his "homegirl." Richard Linares, also an Alley Boy, tried to defuse the situation, but Cisneros drew a gun and threatened to "cap [defendant's] ass." Defendant responded by brandishing a handgun of his own, which prompted Linares to intervene once again, pushing or touching defendant on the shoulder in an effort to separate him from Cisneros. In response, defendant stated "nobody touches me" and shot Linares through the arm and chest.

A crowd of some 50 people was watching these events unfold. Someone yelled, "Why did you shoot my home boy?" or "your home boy shot your own homeboy," to which someone responded "Highland [Street] is the one that shot." A melee erupted, and gang challenges were exchanged.

A short time later a group of Alley Boys spotted Hector Cabrera entering his car and driving away. Recognizing him as a member of the Highland Street gang, they fired a volley of shots, killing him. A variety of shell casings recovered from the street evidenced that at least five different shooters had participated in the murder of Cabrera.

Perez testified that although the Highland Street and Alley Boys gangs were not enemies at the time of the shootings, both gangs would be expected to be armed. He opined that the Alley Boys would consider defendant's conduct in shooting Linares to be an act of "major disrespect" to their gang. To avenge the shooting, they would be expected to respond quickly with equal or greater force against defendant or another member of his gang. Therefore, Perez opined, Cabrera's death was a reasonably foreseeable consequence of defendant's actions.

Defendant testified he did not intend to shoot Linares, but was simply trying to protect himself from Cisneros, who drew his weapon first. He was surprised when his gun went off, because he did not feel it fire or see any flash. He testified, "I don't know if I shot [Linares] or somebody else shot [him], but what I do know is that if I [had] attempted to murder anybody, I would have shot [him] while he was on the floor." In the confusion following the shooting of Linares, defendant heard someone say, "[Y]our home boy shot your own home boy," and then he heard someone say "Highland's the one that shot." Realizing he was in danger, defendant ran from the party and sped off with several others. He heard shots being fired as they drove away. He was stopped by police and arrested a short distance away.

Defendant was charged with murdering Cabrera. . . . The jury was . . . instructed that liability for homicide requires a causal connection between an unlawful act and death, namely, that the act's direct, natural and probable consequences must be death. . . . [T]he jury was instructed that a direct, natural and probable consequence must be reasonably foreseeable, measured objectively under a reasonable person test. . . . The jury convicted defendant of the murder of Cabrera, fixed at second degree.

Reasoning

The question before us is therefore whether sufficient evidence supports defendant's conviction of murder based on the provocative act murder theory. . . . In particular, the essential element with which we are here concerned is proximate causation in the context of a provocative act murder prosecution.

In homicide cases, a "cause of the death of [the decedent] is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the death of [the decedent] and without which the death would not occur." In general, "[p]roximate cause is clearly established where the act is directly connected with the resulting injury, with no intervening force operating." In this case there was an intervening force in operation—at least five persons in attendance at the party, presumably all members of the Alley Boys, shot and killed Highland Street gang member Hector Cabrera in a hail of bullets shortly after the melee erupted. . . .

The provocative act murder doctrine has traditionally been invoked in cases in which the perpetrator of the underlying crime instigates a gun battle, either by firing first or by otherwise engaging in severe, life-threatening, and usually gun-wielding conduct, and the police, or a victim of the underlying crime, responds with privileged lethal force by shooting back and killing the perpetrator's accomplice or an innocent bystander. . . .

[In *People v. Gilbert*, 408 P.2d 365 (Cal. 1965), we stated:]

When the defendant or his accomplice, with a conscious disregard for life, intentionally commits an act that is likely to cause death, and his victim or a police officer kills in reasonable response to such act, the defendant is guilty of murder. In such a case, the killing is attributable, not merely to the commission of a felony, but to the

intentional act of the defendant or his accomplice committed with conscious disregard for life.

We then discussed causation:

[T]he victim's self-defensive killing or the police officer's killing in the performance of his duty cannot be considered an independent intervening cause for which the defendant is not liable, for it is a reasonable response to the dilemma thrust upon the victim or the policeman by the intentional act of the defendant or his accomplice.

In short, *Gilbert* described provocative act murder liability in traditional terms of proximate causation and . . . reaffirmed the general rule that no criminal liability attaches . . . for an unlawful killing that results from an independent intervening cause (i.e., a superseding cause). In contrast, when the death results from a dependent intervening cause, the chain of causation ordinarily remains unbroken and the initial actor is liable for the unlawful homicide. . . .

In an early Illinois case, *Belk v. The People* (1888) 125 Ill. 584, the defendants were alleged to have negligently allowed their team of horses to break loose on a narrow country lane. The team collided with a wagon in plain sight just ahead, causing that wagon's team of horses to panic and run away and thereby throwing the victim, a passenger, to her death. The Illinois court reversed the resulting manslaughter convictions on other grounds, but reasoned that "[b]etween the acts of omission or commission of the defendants, by which it is alleged the collision occurred, and the injury of the deceased, there was not an interposition of a human will acting independently . . . or any extraordinary natural phenomena, to break the causal connection." We also cited *Madison v. State* (1955) 234 Ind. 517, in which "the court . . . affirmed a conviction of second degree murder when the defendant threw a hand grenade at one Couch who, presumably impulsively [i.e., instinctively and not as an act of will], kicked it to another who was killed. The fact that Couch kicked the grenade did not break the line of causation. . . ." And we recalled *Wright v. State* (Fla. Dist. Ct. App. 1978) 363 So.2d 617, wherein the defendant was convicted of manslaughter for firing from his car into his intended victim's car. The intended victim had "rapidly accelerated his car while 'ducking bullets'" and fatally ran over a pedestrian. We found the significance of the facts and holding in *Wright* to be as follows: "Shots that cause a driver to accelerate impulsively and run over a nearby pedestrian suffice to confer liability; but if the driver, still upset, had proceeded for several miles before killing a pedestrian, at some point the required causal nexus would have become too [remote] for the [shooter] to be liable [for homicide]."

The principles derived from these and related authorities have been summarized as follows.

In general, an "independent" intervening cause will absolve a defendant of criminal liability. However, in order to be "independent" the intervening cause must be "unforeseeable . . . an extraordinary and abnormal occurrence, which rises to the level of an exonerating, superseding cause." On the other hand, a "dependent" intervening cause will not relieve the defendant of criminal liability. . . . If an intervening cause is a normal and reasonably foreseeable result of defendant's original act the intervening act is "dependent" and not a superseding cause, and will not relieve defendant of liability. . . . The precise consequence need not have been foreseen; it is enough that the defendant should have foreseen the possibility of some harm of the kind which might result from his act.

Turning to the facts at hand, we agree with defendant that the evidence introduced below is insufficient as a matter of law to support his conviction of provocative act

murder, for it fails to establish the essential element of proximate causation. The facts of this case are distinguishable from the classic provocative act murder case in a number of respects. Defendant was not the initial aggressor in the incident that gave rise to the provocative act. There was no direct evidence that Cabrera's unidentified murderers were even present at the scene of the provocative act, i.e., in a position to actually witness defendant shoot Linares. Defendant himself was not present at the scene where Cabrera was fatally gunned down; the only evidence introduced on the point suggests he was already running away from the party or speeding off in his car when the victim was murdered.

But the critical fact that distinguishes this case from other provocative act murder cases is that here the actual murderers were not responding to defendant's provocative act by shooting back at him or an accomplice, in the course of which someone was killed. They were not in the shoes of police officers . . . who shot back and killed an accomplice as an objectively "reasonable response to the dilemma thrust upon [them]" by the defendant's malicious and life-endangering provocative acts . . . [and were not like] the intermediary in *Madison v. State* who instinctively kicked away a live hand grenade thrown at him by defendant Madison, resulting in the death of another.

To the contrary . . . nobody forced the Alley Boys' murderous response in this case, if indeed it was a direct response to defendant's act of shooting Linares. The willful and malicious murder of Cabrera at the hands of others was an independent intervening act on which defendant's liability for the murder could not be based.

The circumstance that the murder occurred a very short time after defendant shot Linares, and the opinion of prosecution gang expert Perez that Cabrera's murder was a foreseeable consequence of defendant's shooting of Linares in the context of a street gang's code of honor mentality, was essentially the only evidence on which the jury was asked to find that Cabrera's murder was "a direct, natural, and probable consequence" of defendant's act of shooting Linares. Given that the murder of Cabrera by other parties was itself felonious, intentional, perpetrated with malice aforethought, and directed at a victim who was not involved in the original altercation between defendant and Linares, the evidence is insufficient . . . to establish the requisite proximate causation to hold defendant liable for murder.

Holding

The judgment of the Court of Appeal is reversed to the extent it affirms defendant's conviction of murder.

Questions for Discussion

1. Summarize the facts in *Cervantes*.
2. Explain the court's distinction between dependent intervening acts and independent intervening acts.
3. Why did the court find that the killing of Cabrera was an independent intervening act and that Cervantes was not liable for murder?
4. Do you agree with the prosecution's gang expert that Cabrera's murder was a foreseeable consequence of the shooting of Linares?
5. As a juror, would you hold Cervantes liable for murder?

CASES AND COMMENTS

1. **Apparent Safety Doctrine.** At 2:00 a.m. Rideout was driving his sport utility vehicle (SUV) east on 17 Mile Road in northern Kent County. He attempted to turn north onto Edgerton Avenue and drove into the path of an oncoming car driven by Jason Reichelt. Reichelt's car hit the defendant's SUV and spun 180 degrees, coming to rest on the centerline. The SUV spun onto the side of the road. It was later determined that Rideout had a blood alcohol concentration of 0.16, which is twice the legal limit

Reichelt and his passenger, Jonathan Keiser, were not seriously injured, although Reichelt's car was severely damaged and the headlights stopped working. Both men left the car and walked to the SUV to determine if anyone was injured. After speaking briefly with Rideout, the two men walked back to Reichelt's car. Reichelt stated that he was aware that an oncoming car could hit his darkened car and that he wanted to determine if his flashers operated. As Reichelt and Keiser stood by the car, an oncoming car driven by Tonya Welch hit Keiser, killing him.

Did Rideout cause Reichelt's death? A Michigan court of appeals held that Keiser made the voluntary decision to "return to the vehicle on the roadway, despite the danger that it posed. He could have chosen to remain on the side of the road. He chose instead to reenter the roadway, with the danger of standing in the roadway next to an unlit vehicle in the middle of the night being readily apparent." The court stressed that after reaching a place of apparent safety that Keiser had decided to place himself in peril. Do you agree? See *People v. Rideout*, 727 N.W.2d 620 (Mich. App. 2006).

2. **Death of a Third-Party Intervenor.** Shortly before dawn, a Ford F-150 truck driven by Frahm rear-ended a Honda CR-V SUV driven by Steven Klase. The impact caused the SUV to spin out of control, strike a concrete barrier in the freeway median, and come to rest partially blocking the left and middle lanes of an Interstate highway. Klase sustained serious injuries and remained in his vehicle. Frahm fled the scene. An eyewitness, Richard Irvine, stopped his vehicle on the right shoulder. Irvine activated his vehicle's emergency flashers, exited his vehicle, and crossed the freeway on foot. After seeing Klase's injuries, Irvine called 911. While Irvine spoke with a 911 dispatcher, a Honda Odyssey minivan driven by Fredy Dela Cruz-Moreno approached in the left lane. Dela Cruz-Moreno's minivan struck Klase's vehicle and propelled it into Irvine. As a result, Irvine died. Would you hold Frahm liable for Irvine's death? See *State v. Frahm*, 418 P. 3d 215 (Wash. Ct. App. 2008).

3. **Drag Racing.** In *Velazquez v. State*, the defendant Velazquez and the deceased Alvarez agreed to drag race their automobiles over a quarter-mile course on a public highway. Upon completing the race, Alvarez suddenly turned his automobile lane. Velazquez also reversed direction. Alvarez was in the lead and attained an estimated speed of 123 miles per hour. He was not wearing a seat belt and had a blood alcohol content of between 0.11 and 0.12. Velazquez had not been drinking and was traveling at roughly 90 miles per hour. As both approached the end of the road, they applied their brakes, but Alvarez was unable to stop. He crashed through the guardrail and was propelled over a canal and landed on the far bank. Alvarez was thrown from his car, pinned under the vehicle when it landed, and died. The defendant crashed through the guardrail, landed in the canal, and managed to escape.

A Florida district court of appeal determined that the defendant's reckless operation of his vehicle in the drag race was technically the cause in fact of Alvarez's death under

the “but for” test. There was no doubt that “but for” the defendant’s participation, the deceased would not have recklessly raced his vehicle and would not have been killed. The court, however, ruled that the defendant’s participation was not the proximate cause of the deceased’s death because the “deceased, in effect, killed himself by his own volitional reckless driving,” and that it “would be unjust to hold the defendant criminally responsible for this death.” The race was completed when Alvarez turned his car around and engaged in a “near-suicide mission.”

From the standpoint of public policy, would it have been advisable to hold Velazquez liable? Was Alvarez’s death foreseeable? See *Velazquez v. State*, 561 So. 2d 347 (Fla. Dist. Ct. App. 1990).

4. **Children and Handguns.** Bauer left a .45-caliber registered handgun on the dresser in a downstairs bedroom where he slept with his girlfriend. His girlfriend’s 9-year-old son TC was spending the night and removed the handgun from the dresser. TC, who had never before held a loaded firearm and had not been instructed on how to use a gun, took the firearm with him to school and accidentally shot a classmate, AK-B. TC told the police that he and his siblings often slept in the bedroom and had complete access to the downstairs portion of the house. The children told the police that there were several guns in the house, including a shotgun in the downstairs bedroom, a handgun on the downstairs dresser, a handgun on a computer desk, a handgun under the couch, and a handgun in the glove compartment of the car. TC had been warned by Bauer and by his mother never to touch the guns because they were loaded. Bauer told the police that he did not know that TC took the gun although he was aware that TC had taken money from the glove compartment of Bauer’s car. Washington law at the time did not impose any requirements for the storage of firearms. Bauer was charged with the assault of AK-B. Would you hold Bauer criminally liable for the assault committed by TC? See *State v. Bauer*, 295 P.3d 1227 (Wash. Ct. App. 2013), and two opinions by the Washington Supreme Court, 304 P.3d 115 (Wash. 2013) and 329 P.3d 67 (Wash. 2014).

5. **Preexisting Medical Condition.** Defendant, Michael Desmar Losey, was convicted of aggravated burglary and involuntary manslaughter. Losey contended that he was not the proximate cause of the death of the 69-year-old female victim.

Losey testified that he approached a house shortly after 11:00 p.m., knocked at the front door, and, upon receiving no response, forced open the door and proceeded to attempt to remove a bicycle. His friend, who had been waiting outside, yelled that a car was slowly approaching. Losey then placed the bicycle beside the front door and fled, leaving the front door open behind him. James Harper, the owner of the home, testified that he heard a noise at approximately 1:00 a.m. Shortly thereafter, his mother appeared at his bedroom door asking about the noise. They went to the living room, where they discovered the open front door and the bicycle near the door. Harper stated that he then told his mother to go back to her bedroom while he went to check the rest of the house. After looking throughout the house, Harper returned to the living room and was calling the police when his mother appeared in the hallway looking very upset and then collapsed. Harper phoned for emergency assistance. The emergency technicians after attempting to revive Mrs. Harper for almost an hour pronounced her dead. Prior to the burglary, Mrs. Harper had returned from bingo at approximately 10:00 p.m. that evening and had gone to bed. The deputy coroner testified that, due to her existing condition, Mrs. Harper was a “prime candidate” for a heart attack and that “[i]t would be more probable that an insult would have lethal consequence because of the already damaged heart.” Would you hold Losey liable for Mrs. Harper’s death? See *State v. Losey*, 23 Ohio App.3d 93 (Ohio Ct. App. 1985).

6. The Year-and-a-Day Rule. Defendant Wilbert Rogers stabbed James Bowdery in the heart with a butcher knife on May 6, 1994. During an operation to repair Bowdery's heart, he suffered a cardiac arrest. This led to severe brain damage as a result of a loss of oxygen. Bowdery remained in a coma and died on August 7, 1995, from kidney complications resulting from remaining in a vegetative condition for such a lengthy period of time. Rogers was convicted of second-degree murder and appealed on the grounds that the prosecution was barred by the **year-and-a-day rule**, which prohibits a murder conviction when more than a year has transpired between the defendant's criminal act and the victim's death. The Tennessee Supreme Court observed that the rule was based on the fact that 13th-century medical science was incapable of establishing causation beyond a reasonable doubt when a significant amount of time elapsed between the injury to the victim and the victim's death. The rule has also been explained as an effort to moderate the common law's automatic imposition of the death penalty for felonies.

The Tennessee Supreme Court, in abolishing the year-and-a-day rule, noted that almost half of the states had now eliminated the rule. The court explained that medical science now possessed the ability to determine the cause of death with greater accuracy and that it no longer made sense to terminate a defendant's liability after a year. In addition, medicine was able to sustain the life of a victim of a criminal act for a lengthy period of time, and the year-and-a-day rule would result in the perpetrators of slow-acting poisons or viruses escaping criminal prosecution and punishment. The court declined to adopt a revised period in which prosecutions for murder must be undertaken and, instead, stressed that prosecutors possessed the burden of establishing causation. The U.S. Supreme Court later ruled that the Tennessee court's abolition of the year-and-a-day rule was not in violation of the *Ex Post Facto Clause* of the U.S. Constitution. See *State v. Rogers*, 992 S.W.2d 393 (Tenn. 1999), aff'd 532 U.S. 451 (2001).

Should there be a time limit on prosecutions for homicide? See *Commonwealth v. Casanova*, 708 N.E.2d 86 (Mass. 1999).

CRIME IN THE NEWS

On June 17, 2015, Dylann Storm Roof, age 21, a slight young Caucasian man with a bowl haircut, entered Emanuel African Methodist Episcopal Church in Charleston, South Carolina, during bible study and asked for and took a seat next to Pastor Clementa C. Pinckney. An hour after arriving, Roof suddenly stood and pulled out a pistol and, in response to an effort to calm him down, announced that "[y]ou [African Americans] are raping our women and taking over the country. And you have to go." When Tywanza Sanders, 26, told Roof to shoot him rather than Susie Jackson, his 87-year-old aunt, Roof replied, "It doesn't matter. I'm going to shoot all of you." Roof told one woman that he would allow her to live "so she can tell the story of what happened." All of the African American victims were shot multiple times by Roof, whose image was captured by a number of security cameras.

Nine people—three men and six women aged 29 to 87—were killed by Roof, including pastor, state senator, and civil rights leader Clementa C. Pinckney, age 41. Pinckney was a highly respected voice for justice and a conciliatory figure in South Carolina. The other

deceased individuals included a library manager, a former county administrator, a speech therapist who also worked for the church, and two ministers.

Emanuel African Methodist Episcopal Church, known as "Mother Emanuel," is the oldest African American congregation south of Baltimore. The members of the congregation convened in secret in the years prior to the Civil War when African American churches were prohibited, and the church contains a shrine to one of its founders, Denmark Vesey, who helped to organize a slave revolt in 1822. Vesey, along with 35 other Black enslaved persons, was executed when the plans for a slave revolt were uncovered, and 313 suspected conspirators were arrested. The church was burned down by a white mob in retribution and subsequently was rebuilt in 1891. In the 1960s, Mother Emanuel was a center of civil rights activity, and the Reverend Dr. Martin Luther King spoke at the church in 1962. Observers were struck by the fact that at Roof's arraignment, family members of the victims, while wanting to see Roof punished, expressed forgiveness and prayed for Roof's soul.

Roof, who had not finished high school, purchased a .45-caliber handgun with money given to him by his parents. According to friends, in the days leading to the killings, he seemed obsessed with defending the white race against what he viewed as the rising power of Black Americans and advocated segregation between Blacks and whites. Roof's friends reportedly did not take him seriously when he talked about starting a race war by undertaking the mass killing of Black Americans. He had been arrested five months earlier for unlawful possession of a prescription drug and was arrested two weeks later for misdemeanor trespass at a shopping mall, from which he earlier had been banned. At the time of Roof's arrest, the police seized assault rifle parts and six 40-round magazines from the trunk of his car.

A federal grand jury indicted Roof on 33 charges, including 12 hate crimes charges; 18 of the charges carried the death penalty. South Carolina is one of three states that do not enhance penalties for bias-motivated offenses. U.S. Department of Justice officials pointed out that Roof had knowingly entered a renowned African American church and had selected African American victims. Nationally, roughly 60% of hate crimes are based on race and ethnicity, 20% are motivated by religion, 17% are directed against individuals because of their sexual orientation, and the remainder are motivated based on an individual's disability or gender identity. Some commentators called for Roof to be charged with terrorism. They pointed out that similar acts when carried out by Muslims are labeled as terrorism but are not considered terrorism when committed by non-Muslims. In December 2016, Roof was convicted in federal court, and he was sentenced to death a month later.

There was little question of Roof's guilt after the prosecution introduced Roof's FBI interview, in which he confessed to the killings and complained that he had been "worn out" after firing more than 70 rounds at the victims. Roof told interrogators that he "had to" kill Black Americans to protect white people. He had selected Mother Emanuel after researching possible targets because it was the South's oldest Black American church, and he knew that a number of Blacks would be gathered in the area.

In the sentencing phase of the trial, the jury heard excerpts from Roof's jailhouse journal. There he expressed no regret and wrote that he had not "shed a tear for the innocent people I killed." The jury determined that Roof should receive the death penalty. There are 53 federal prisoners, including Boston Marathon bomber Dzhokhar Tsarnaev, who have been sentenced to death. Fourteen federal prisoners have been executed since the federal death penalty was reinstated in 1988 after a 16-year moratorium. Eleven of these executions were carried in the last five months of the Trump administration. Roof is the first federal defendant convicted of a hate crime to be sentenced to death.

South Carolina subsequently indicted and prosecuted Roof for nine counts of murder, one count of possession of a firearm during commission of a felony, and three counts of attempted murder. He pled guilty to nine murder charges to avoid the death sentence, and in April 2017, he was sentenced to nine terms of life imprisonment.

In the aftermath of the attack, publication of photos pictured Roof posing with the Confederate battle flag. South Carolina's then governor Nikki Haley called on the state legislature to remove the flag from the grounds of the state capitol. The flag originally was flown over the state house in 1962 as a symbol of resistance to the civil rights movement. Supporters of the flag objected to the legislature's removal of the flag and insisted that it is a symbolic acknowledgment of the heritage of their ancestors who fought in the Civil War. Would you prosecute Roof for a hate crime? Can crimes like those committed by Roof be deterred?

CHAPTER SUMMARY

It is a fundamental principle of criminal law that a criminal offense requires a criminal intent that occurs concurrently with a criminal act. The requirement of a *mens rea*, or the mental element of a criminal act, is based on the concept of "moral blameworthiness." The notion of blameworthiness, in turn, reflects the notion that individuals should be subject to criminal punishment and held accountable only when they consciously choose to commit a crime or to create a high risk of harm or injury.

We cannot penetrate into the human brain and determine whether an individual harbored a criminal intent. In some cases, defendants may confess to the police or testify as to their intent in court. In most instances, prosecutors rely on circumstantial evidence and infer an intent from a defendant's motives and patterns of activity.

The Model Penal Code proposed four levels of *mens rea* or criminal intent. The four in order of severity or culpability are as follows:

- *Purposely.* You aimed and shot the arrow at William Tell with the purpose of killing him rather than with the intent of hitting the apple on his head. (Tell is the national hero of Switzerland who was required to shoot an apple off his son's head.)
- *Knowingly.* You know that you are a poor shot, and when shooting at the apple on William Tell's head, you knew that you were practically certain to kill him.
- *Recklessly.* You clearly appreciated and knew the risk of shooting the arrow at William Tell with your eyes closed. Nevertheless, you proceeded to shoot the arrow despite the fact that this was a gross deviation from the standard of care that a law-abiding person would exhibit.
- *Negligently.* You claim that you honestly believed that you were such an experienced hunter that there was no danger in shooting the apple from William Tell's head. This was a gross deviation from the standard of care that a reasonable person would practice under the circumstances.

Strict liability crimes require only an *actus reus* and do not require proof of a *mens rea*. These offenses typically are public welfare crimes whose creation is meant to protect the safety and security of society by regulating food, drugs, and transportation. These offenses are *mala prohibita* rather than *mala in se* and usually are punishable by a small fine. Strict liability offenses are criticized as inconsistent with the traditional concern with “moral blameworthiness.”

A criminal act requires the unison or concurrence of a criminal intent and a criminal act. This means that the intent must dictate the act.

Crimes such as murder, aggravated assault, and arson require the achievement of a particular result. Particularly in the case of homicide, defendants may claim that their act did not cause the victim’s death. The prosecution must establish beyond a reasonable doubt that an individual’s act was the cause in fact, or “but for” cause, that set the chain of causation in motion. The defendant’s act must also be the legal or proximate cause of the death. Normally this is not difficult. Cases involving complex patterns of causation, however, may require judges to make difficult decisions concerning whether it is fair and just to hold an individual responsible for the consequences of intervening acts.

We saw that two types of intervening acts are important in examining the chain of causation:

- A *coincidental intervening act* is unforeseeable and breaks the chain of causation.
- A *responsive intervening act* breaks the chain of causation only when the reaction is both abnormal and unforeseeable.

CHAPTER REVIEW QUESTIONS

1. What is the reason that the law requires a *mens rea*? Provides for different types of *mens rea*?
2. Why is it difficult to prove *mens rea* beyond a reasonable doubt? Discuss some different ways of proving *mens rea*.
3. Explain the difference between purpose and knowledge. Which is punished more severely? Why?
4. Distinguish recklessness from negligence. Which is punished more severely? Why?
5. What is the difference between a crime requiring a criminal intent and a crime requiring strict liability?
6. Explain the “willful blindness” rule.
7. What is the importance of the principle of concurrence? Provide an example of a lack of concurrence.
8. Explain the statement that an individual’s criminal act must be shown to be both the cause in fact and the legal or proximate cause.

9. What is meant by the statement that legal or proximate cause is based on a judgment of what is just or fair under the circumstances? How does this differ from the determination of a cause in fact or a “but for” analysis?
10. Explain the difference between a coincidental intervening act and a responsive intervening act. Provide examples.
11. Discuss the test for determining whether coincidental intervening acts and responsive intervening acts break the chain of causation.
12. Provide concrete examples illustrating a coincidental intervening act and a responsive intervening act that do not break the chain of causation. Now provide examples of coincidental and intervening acts that do break the chain of causation.
13. What is the year-and-a-day rule? Why are states now abandoning this principle?
14. What are the arguments for and against strict liability offenses?
15. Are we too concerned with criminal intent? Why not impose the same punishment on criminal acts regardless of an individual’s intent? Is the father or mother of a child hit by a car concerned whether the driver was acting intentionally, knowingly, recklessly, or negligently?

LEGAL TERMINOLOGY

causation	proximate cause
cause in fact	public welfare offenses
circumstantial evidence	purposely
coincidental intervening acts	recklessly
concurrence	responsive intervening acts
constructive intent	<i>scienter</i>
crimes of cause and result	specific intent
general intent	strict liability
intervening cause	transferred intent
knowingly	willful blindness
<i>mens rea</i>	year-and-a-day rule
negligently	

TEST YOUR KNOWLEDGE ANSWERS

1. True.
2. True.
3. True.

4. True.
5. False.
6. False
7. False.

6

PARTIES TO CRIME AND VICARIOUS LIABILITY

TEST YOUR KNOWLEDGE: TRUE/FALSE

1. A gang member who drives the car in a drive-by killing may be held criminally liable for the murder despite neither possessing the intent to kill nor firing the fatal shot.
2. A store owner who lawfully sells a firearm to a known gang member is criminally liable for a murder committed by the gang member using the firearm, despite the fact that the store owner did not know about the planned homicide or intend for the gang member to commit the murder.
3. An individual who knowingly and intentionally assists a murderer to flee the police is criminally liable for murder.
4. An individual under the doctrine of vicarious liability can be held criminally liable for crimes that the individual did not know occurred and did not intend to occur.

Check your answers at the end of the chapter on page 257.

Did Randy Gometz Aid and Abet the Killing of a Prison Guard?

In the morning, [Thomas] Silverstein, while being escorted from the shower to his cell, stopped next to Randy Gometz's cell, and while two of the escorting officers were for some reason at a distance from him, reached his handcuffed hands into the cell. The third officer, who was closer to him, heard the click of the handcuffs being released and saw Gometz raise his shirt to reveal a home-made knife ("shank")—which had been fashioned from the iron leg of a bed—protruding from his waistband. Silverstein drew the knife and attacked one of the guards, Clutts, stabbing him 29 times and killing him. (*United States v. Fountain*, 768 F.2d 790 [7th Cir. 1985])

INTRODUCTION

Thus far, we have established a number of building blocks of criminal conduct. First, there are *constitutional limits* on the government's ability to declare acts criminal. Second, *actus reus* requires that an individual commit a voluntary act or omission. People are punished for what they do, not for what they think or for who they are. Third, the existence of a criminal intent or *mens rea* means that punishment is limited to morally blameworthy individuals. Last, there must be a *concurrence* between a criminal act and a criminal intent. The criminal act must be established as both the *factual cause* and the *legal or proximate cause* of a prohibited harm or injury. We now add another building block to this foundation by observing that more than one individual may be liable for a crime. In this chapter, we will discuss two situations in which multiple parties are held liable for a crime.

- *Parties to a Crime or Complicity.* Individuals who assist the perpetrator of a crime before, during, or following the crime are held criminally responsible. In other words, individuals who assist in the commission of a crime are held liable for the criminal conduct of the perpetrator of the offense.
- *Vicarious Liability.* Individuals may be held liable based on their *relationship* with the perpetrator of a crime. The most common instance involves extending guilt to an employer for the acts of an employee or imposing liability on a corporation for the acts of a manager or employee. Two other instances of vicarious liability are reviewed in this chapter. The first involves holding the owner of an automobile liable for traffic tickets issued to the car despite the fact that the auto may have been driven by another individual. The second entails imposing responsibility on parents for the acts of their children.

In reading cases concerning complicity, you should ask yourself whether the appellant intended to assist and assisted a crime. As a matter of social policy, consider why we punish people who assist another to commit a crime. Should the parties to a crime be subject to the same punishment as the perpetrator? As for vicarious liability, consider whether criminal responsibility should be extended to individuals who were neither present nor involved nor perhaps even aware of the crime.

PARTIES TO A CRIME

Common law judges appreciated that criminal conduct often involves a range of activities: planning the crime, carrying out the offense, evading arrest, and disposing of the fruits of the crime. The common law divided the participants in a crime into *principals* and *accessories*. Principals were actually present and carried out the crime, while *accessories* assisted the principals. Holding individuals accountable for intentionally assisting the criminal acts of another is termed *accomplice* or *accessory liability*.

The four categories of **parties to a crime** under the common law are as follows:

- **Principals in the First Degree.** The perpetrators of the crime. For example, the person or persons actually robbing the bank.
- **Principals in the Second Degree.** Individuals assisting the perpetrator(s). In our robbery example, this includes lookouts, getaway drivers, and those disabling burglar alarms. Principals in the second degree are required to be either physically present at the bank or constructively present, meaning that they directly assist the robbery at a distance by engaging in such activities as serving as a lookout.
- **Accessories Before the Fact.** Individuals who help prepare for the crime. In the case of a bank robbery, accessories before the fact may purchase firearms or masks, plan the crime, or encourage the robbers. Accessories, in contrast to principals, are neither physically nor constructively present.
- **Accessories After the Fact.** Individuals who assist the perpetrators, knowing that a crime has been committed. This includes those who help the bank robbers escape or hide the stolen money.

Both principals and accessories were punishable as felons under the common law. All felonies were subject to the death penalty. Common law judges desired to limit the offenses for which capital punishment might be imposed, and they developed various rules to frustrate the application of the death penalty. Judges, for instance, held that principals and accessories could be prosecuted only following the conviction of the principal in the first degree. This posed a barrier to prosecution in those instances in which the principal in the first degree was acquitted, fled, or died, or in which the principal's conviction was reversed. There were additional requirements that complicated prosecutions, such as the fact that an accessory who assisted a crime while living in another state could be prosecuted only in the state in which the acts of accessoryship occurred. These jurisdictions typically had little interest in prosecuting an accessory for crimes committed outside the state.¹

Today we are no longer required to overcome these complications. Virtually every jurisdiction has abandoned the common law categories. States typically provide for two parties to a crime:

- **Accomplices.** Individuals involved before and during a crime in assisting the offender.
- **Accessories.** Individuals involved in assisting an offender following the crime.

Returning to our bank robbery example, the perpetrator of the bank robbery and the individuals planning and organizing the robbery as well as the lookout, the driver of the getaway car, and the individuals disabling the bank guard will all be charged with bank robbery. In the event that the accomplices are convicted, they will receive the same sentence as the perpetrator of the crime.

Individuals who assist the perpetrators following the crime will be charged as accessories after the fact. Accessoryship is no longer viewed as being connected to the central crime. It is considered a separate, minor offense involving the frustration of the criminal justice process, and it is punishable as a misdemeanor. Despite these changes to the law of parties, you will find that common law categories are frequently referred to in judicial decisions and in various state statutes.

Holding an individual liable for the conduct of another seems contrary to the American value of personal responsibility. Why should we punish an individual who drives a getaway car in a bank robbery to the same extent as the actual perpetrator of the crime? The law presumes that the individuals who assisted the robber implicitly consented to be bound by the conduct of the principal in the first degree and, in the words of Joshua Dressler, “forfeited their personal identity.” Professor Dressler refers to this as **derivative liability**, in which the accessory’s guilt flows from the acts of the primary perpetrator of the crime.²

In a later chapter we will discuss *conspiracy*, which is an agreement to commit a crime, such as bank robbery. A defendant may be liable both for an agreement to rob a bank and for the bank robbery itself. This is the so-called **Pinkerton rule**, which provides that a conspiracy to commit a crime and the crime itself are separate and distinct crimes. An individual may be charged with one or both of these offenses.³

ACTUS REUS OF ACCOMPLICE LIABILITY

Statutes and judicial decisions describe the *actus reus* of **accomplice liability** using a range of seemingly confusing terms such as *aid*, *abet*, *encourage*, and *command*. Whatever the terminology, keep in mind that the *actus reus* of accomplice liability is satisfied by even a relatively insignificant degree of material or psychological assistance. In a well-known English case, a journalist bought a ticket to attend and review a concert by American jazz musician Coleman Hawkins and was convicted of encouraging and supporting Hawkins, who had not received permission to perform from British immigration authorities.⁴ Consider the range of conduct in the following examples that courts have considered to constitute aiding and abetting a crime and as accomplice liability.⁵

- Two men attacked and broke Clifton Robertson’s leg. The men initially approached Robertson’s brother-in-law, Carl Brown, who pointed to Robertson. Following the attack, one of the assailants remarked to Brown, “You can pay me now.” Brown was found guilty of aggravated assault for inciting, encouraging, or assisting the perpetrators of the assault.⁶
- Guadalupe Steven Mendez was an incarcerated felon who directed Patricia Morgan over the phone to molest and to take nude photos of her 14-year-old granddaughter. Mendez was found to have aided and abetted aggravated rape.⁷
- Delfino Alejandres was convicted of aggravated robbery for having encouraged an offense by either word or deed. Alejandres parked his car so as to prevent Peter Pham, a

15-year-old fellow high school student, from pulling out of a driveway. Chris Valoretta exited Alejandres's auto and shot Pham when Pham refused to give Valoretta the keys to Pham's automobile. Alejandres and Valoretta then drove away. The evidence indicated that Alejandres and Valoretta were friends and that Alejandres had earlier commented to a fellow student that he was considering "wasting" Pham.⁸

- Donald Jones directed his son Michael to rob Guy Justice, who owed money to Donald. Michael agreed to rob Justice later in the day. The three subsequently met at Andra Wright's house, and Donald asked Michael whether he still planned to rob Justice. Michael demanded that Justice empty his pockets, and during the struggle Donald shouted at Michael to "shoot . . . it's either you or him, you better shoot." Michael responded by shooting Justice in the chest. Donald was convicted of having aided and abetted Michael through his "conduct, presence and companionship."⁹
- Prentiss Phillips was a high-ranking member of the Gangster Disciples street gang and was convicted of the murder and aggravated kidnapping of Vernon Green, whom he suspected of standing outside of a meeting of the street gang in order to identify members of the Gangster Disciples for the rival Vice Lords. Phillips allegedly ordered gang members to seize Green and watched as Green was dragged upstairs, where he was beaten. Phillips later ordered three gang members to take Green outside and kill him. Phillips was convicted of aiding and abetting the murder and aggravated kidnapping of Green.¹⁰
- Anderson handed Palfrey a handgun before fighting Carter. At some point during the fight, Anderson retrieved the firearm and shot and killed Carter. The Louisiana Supreme Court held that "[a]cting in concert, each man . . . became responsible . . . not only for his own acts but for the acts of the other."¹¹

It is important to note that although an accomplice must assist in the commission of a crime, there is no requirement that the prosecution demonstrate that the accomplice's contribution was essential to the commission of the crime. This seems to be intended to deter individuals from assisting in the commission of a crime. Such a rule, of course, may prove unfair, because the punishment of an accomplice who makes a small contribution may be much more severe than the accomplice actually deserves. The Maine Supreme Judicial Court ruled that a defendant who offered to make an automobile available was guilty of being an accomplice to murder despite the fact that the perpetrator carried out the crime without the car.¹² How should a court rule in those instances in which the perpetrator is unaware of the accomplice's effort to assist in the crime? The consensus is that as long as individuals act with the required intent, they will be held liable as an accessory.

In the cases discussed previously, the defendants' acts clearly assisted, encouraged, or incited criminal conduct. The **mere presence rule** provides that being present and watching the commission of a crime is not sufficient to satisfy the *actus reus* requirement of accomplice liability. Why is that? A mere presence is ambiguous. On one hand, it is sometimes the case that an individual's presence encourages and facilitates a defendant's criminal conduct. On the other hand, silence may indicate disapproval.

Courts have struggled with what action is required for an individual who is present to be considered an accomplice. Judges have ruled that a gang member was not guilty of aiding and abetting when he, along with 15 or 20 others, chanted the name of the gang while two gang members smashed and beat an automobile containing a member of a rival gang.¹³ On the other hand, an Illinois court convicted a gang member who joined a group in chasing a truck, watched as the driver was pulled out of the truck, and then silently stood over the driver as a codefendant kicked the victim while another man hit the victim with a bat. The defendant then left the crime scene with the assailants.¹⁴ Is there a clear and meaningful difference in the contribution of these two gang members?

The leading case on the mere presence rule is *Bailey v. United States*. Bailey spent most of the day conversing with his partner and then left to shoot craps while his partner stood across the street near the entrance to the Center Market. Bailey later joined his partner. The two watched as an employee followed his regular routine and exited the market carrying money receipts in a bag. As the employee approached, Bailey retreated to the curb 10 feet from his partner, who then seized the deposits at gunpoint. Bailey and his partner then fled, and only Bailey was subsequently apprehended. The District of Columbia Court of Appeals determined that Bailey was innocently talking to his partner when his partner suddenly pulled out a gun and seized the bag of money. The fact that Bailey fled did not mean that he was involved with his partner either in planning or in assisting the crime as a lookout. The court stressed that individuals who are entirely innocent sometimes flee based on a fear of being considered guilty or in order to avoid appearing as a witness.¹⁵

An exception to the mere presence doctrine arises where defendants possess a duty to intervene. In *State v. Walden*, a mother was convicted of aiding and abetting an assault with a deadly weapon when she failed to intervene to prevent an acquaintance from brutally beating her young son. The North Carolina Supreme Court reasoned that a parent's failure to protect a child communicates an approval of the criminal conduct.¹⁶ The mere presence rule is explored in the next case, *State v. Ulvinen*. This decision also raises the liability of individuals who utter words of approval and the difficulty of determining whether these individuals intend to assist the perpetrator.

WAS THE DEFENDANT AN ACCOMPLICE TO THE MURDER OF HER DAUGHTER-IN-LAW?

STATE V. ULVINEN, 313 N.W.2D 425 (MINN. 1981)

Opinion by Otis, J.

Issue

[Was the appellant properly] convicted of first degree murder pursuant to Minn. Stat. § 609.05, subd. 1 (1980), imposing criminal liability on one who "intentionally aids, advises, hires, counsels, or conspires with or otherwise procures" another to commit a crime[?]

Facts

Carol Hoffman, . . . daughter-in-law [of appellant Helen Ulvinen], was murdered late on the evening of August 10th or the very early morning of August 11th [1980] by her husband, David Hoffman. She and David had spent an amicable evening together playing with their children, and when they went to bed David wanted to make love to his wife. However, when she refused him he lost his temper and began choking her. While he was choking her he began to believe he was "doing the right thing" and that to get "the evil out of her" he had to dismember her body.

After his wife was dead, David called down to the basement to wake his mother, asking her to come upstairs to sit on the living room couch. From there she would be able to see the kitchen, bathroom, and bedroom doors and could stop the older child if she awoke and tried to use the bathroom. Appellant didn't respond at first but after being called once, possibly twice, more she came upstairs to lie on the couch. In the meantime David had moved the body to the bathtub. Appellant was aware that while she was in the living room her son was dismembering the body but she turned her head away so that she could not see.

After dismembering the body and putting it in bags, Hoffman cleaned the bathroom, took the body to Weaver Lake and disposed of it. On returning home he told his mother to wash the cloth covers from the bathroom toilet and tank, which she did. David fabricated a story about Carol leaving the house the previous night after an argument, and Helen agreed to corroborate it. David phoned the police with a missing person report and during the ensuing searches and interviews with the police, he and his mother continued to tell the fabricated story.

On August 19, 1980, David confessed to the police that he had murdered his wife. In his statement he indicated that not only had his mother helped him cover up the crime but she had known of his intent to kill his wife that night. After hearing Hoffman's statement the police arrested appellant and questioned her with respect to her part in the cover up. Police typed up a two-page statement which she read and signed. The following day a detective questioned her further regarding events surrounding the crime, including her knowledge that it was planned.

Appellant's relationship with her daughter-in-law had been a strained one. She [had] moved in with the Hoffmans on July 26, [1980,] two weeks earlier to act as a live-in babysitter for their two children. Carol was unhappy about having her move in and told friends that she hated Helen, but she told both David and his mother that they could try the arrangement to see how it worked.

On the morning of the murder Helen told her son that she was going to move out of the Hoffman residence because "Carol had been so nasty to me." In his statement to the police David reported the conversation that morning as follows:

A: Sunday morning I went downstairs and my mom was in the bedroom reading the newspaper and she had tears in her eyes, and she said in a very frustrated voice, "I've got to find another house." She said, "Carol don't want me here," and she said, "I probably shouldn't have moved in here." And I said then, "Don't let what Carol said hurt you. It's going to take a little more period of readjustment for her." Then I told mom that I've got to do it tonight so that there can be peace in this house.

Q: What did you tell your mom that you were going to have to do that night?

A: I told my mom I was going to have to put her to sleep.

Q: Dave, will you tell us exactly what you told your mother that morning, to the best of your recollection?

A: I said I'm going to have to choke her tonight and I'll have to dispose of her body so that it will never be found. That's the best of my knowledge.

Q: What did your mother say when you told her that?

A: She just—she looked at me with very sad eyes and just started to weep. I think she said something like "it will be for the best."

David spent the day fishing with a friend of his. When he got home that afternoon, he had another conversation with his mother. She told him at that time about a phone conversation Carol had had in which she discussed taking the children and leaving home. David told the police that during the conversation with his mother that afternoon, he told her, "Mom, tonight's got to be the night."

Q: When you told your mother, "Tonight's got to be the night," did your mother understand that you were going to kill Carol later that evening?

A: She thought I was just kidding her about doing it. She didn't think I could.

Q: Why didn't your mother think that you could do it?

A: Because for some time I had been telling her I was going to take Carol scuba diving and make it look like an accident.

Q: And she said?

A: And she always said, "Oh, you're just kidding me."

Q: But your mother knew you were going to do it that night?

A: I think my mother sensed that I was really going to do it that night.

Q: Why do you think your mother sensed you were really going to do it that night?

A: Because when I came home and she told me what had happened at the house, and I told her, "Tonight's got to be the night," I think she said, again I'm not certain, "that it would be the best for the kids."

Reasoning

It is well-settled in this state that presence, companionship, and conduct before and after the offense are circumstances from which a person's participation in the criminal intent may be inferred. The evidence is undisputed that appellant was asleep when her son choked his wife. She took no active part in the dismembering of the body but came upstairs to intercept the children, should they awake, and prevent them from going into the bathroom. She cooperated with her son by cleaning some items from the bathroom and corroborating David's story to prevent anyone from finding out about the murder. She is insulated by statute from guilt as an accomplice after-the-fact for such conduct because of her relation as a parent of the offender.

The jury might well have considered appellant's conduct in sitting by while her son dismembered his wife so shocking that it deserved punishment. Nonetheless, these subsequent actions do not succeed in transforming her behavior prior to the crime to active instigation and encouragement. Minn. Stat. § 609.05, subd. 1 (1980) implies a high level of activity on the part of an aider and abettor in the form of conduct that encourages another

to act. Use of terms such as "aids," "advises," and "conspires" requires something more of a person than mere inaction to impose liability as a principal.

Holding

The evidence presented to the jury at best supports a finding that appellant passively acquiesced in her son's plan to kill his wife. The jury might have believed that David told his mother of his intent to kill his wife that night and that she neither actively discouraged him nor told anyone in time to prevent the murder. Her response that "it would be the best for the kids" or "it will be the best" was not, however, active encouragement or instigation. There is no evidence that her remark had any influence on her son's decision to kill his wife. [The Minnesota statute] imposes liability for actions which affect the principal, encouraging him to take a course of action which he might not otherwise have taken. The state has not proved beyond a reasonable doubt that appellant was guilty of anything but passive approval. However morally reprehensible it may be to fail to warn someone of their impending death, our statutes do not make such an omission a criminal offense.

David told many people besides appellant of his intent to kill his wife but no one took him seriously. He told a co-worker, approximately three times a week[,] that he was going to murder his wife, and confided two different plans for doing so. Another co-worker heard him tell his plan to cut Carol's air hose while she was scuba diving, making her death look accidental, but did not believe him. Two or three weeks before the murder, David told a friend of his that he and Carol were having problems and he expected Carol "to have an accident sometime." None of these people has a duty imposed by law, to warn the victim of impending danger, whatever their moral obligation may be. The state has not proved beyond a reasonable doubt that appellant was guilty of any of the activities enumerated in the statute. Appellant's comment is not sufficient additional activity on her part to constitute planning or conspiring with her son. She did not offer advice on how to kill his wife, nor [did she] offer to help him. She did not plan when to accomplish the act or tell her son what to do to avoid being caught. She was told by her son that he intended to kill his wife that night and responded in a way which, while not discouraging him, did not aid, advise, or counsel him to act as he did.

Where, as here, the evidence is insufficient to show beyond a reasonable doubt that appellant was guilty of active conduct sufficient to convict her of first degree murder . . . , her conviction must be reversed.

Questions for Discussion

1. What facts did the prosecutor likely rely on to establish Ms. Ulvinen's guilt? What facts would the defense attorney rely on in urging her acquittal? Why did the Minnesota Supreme Court reverse Ms. Ulvinen's conviction?
2. Does Ms. Ulvinen's behavior following Carol Hoffman's murder indicate that she approved of Carol's killing? Does Ms. Ulvinen's involvement in covering up the crime establish that she shared her son's intent to kill Carol Hoffman?
3. Is it significant that Ms. Ulvinen took the initiative in informing David that she was not getting along with Carol and that Carol planned to leave with the children? What of Ms. Ulvinen's response that killing Carol would be beneficial for the children? How do Ms. Ulvinen's comments to David on the day of the killing differ from her earlier responses to David's statements that he intended to kill Carol? Is it significant that David killed

Carol only following his conversation with his mother? Was the court correct in characterizing Ms. Ulvinen as passive? What is the significance the fact that David told “many people” of his intent to kill Carol although “no one took him seriously”?

4. Did Ms. Ulvinen have a duty to protect her daughter-in-law, the mother of her grandchildren?
5. Why does the statute exempt a parent from liability for accessory after the fact?
6. Draft your own one-page opinion in this case.

CASES AND COMMENTS

The Mere Presence Rule. The 4- or 5-year-old victim lived with her mother, Holly Swanson-Birabent, for a year while in kindergarten. On one occasion, the victim wandered into her mother’s bedroom and observed her mother sexually engaged with her boyfriend, Don Umble. The victim got into the bed with her mother and Umble and fell asleep. At some point, Umble woke up the victim and molested her. The defendant stood to the side of the bed watching silently. Swanson-Birabent then entered the bed, and her daughter returned to her own bedroom. The same series of events was repeated on another occasion. The California appellate court determined that the defendant was aware of what was occurring, because there was light from the street shining through the window, and the sheet was sufficiently thin to reveal what was transpiring.

The appellate court concluded that the defendant engaged in an “act” sufficient to constitute aiding and abetting in that the “defendant was not merely present. Her presence served an important purpose: it encouraged the victim to comply with Umble rather than resist . . . [and] also encouraged Umble to continue molesting the victim.” In addition, the court concluded that Swanson-Birabent failed to fulfill her duty as a parent to protect her daughter from molestation. This failure to act both encouraged the “victim to comply with Umble rather than resist. Defendant’s presence also encouraged Umble to continue molesting the victim.” The appellate court affirmed Swanson-Birabent’s conviction of two counts of committing a lewd or lascivious act on a child under the age of 14. See *People v. Swanson-Birabent*, 7 Cal. Rptr. 3d 744 (Cal. Ct. App. 2003).

YOU DECIDE 6.1

A woman entered a bar in New Bedford, Massachusetts, in March 1983, in order to purchase cigarettes. As she started to leave, she was knocked to the ground by two men who tore off her clothing, and for the next 75 minutes she was forced to commit various sexual acts, which she resisted. The victim cried for help, but the 16 men in the bar yelled, laughed, and cheered. No one came to her assistance. Were all 15 male customers and the male bartender accomplices to the sexual attack? Various procedural issues are discussed in *Commonwealth v. Cordeiro*, 519 N.E.2d 1328 (Mass. 1988), and *Commonwealth v. Vieira*, 519 N.E.2d 1320 (Mass. 1988).

MENS REA OF ACCOMPLICE LIABILITY

A conviction for accomplice liability requires that a defendant both assist and intend to assist the commission of a crime. In *People v. Perez*, the defendant, Victor Perez, encountered a group of individuals on the street. Victor was not a member of a gang and was unaware that several of the individuals were affiliated with the Maniac Latin Disciples and that they were confronting Victor's former acquaintance, Pedro Gonzalez. Victor was unaware that the Maniac Latin Disciples alleged that Pedro had taunted them by displaying hand signs of the rival Latin Kings. In an effort to defend himself when they asked Victor whether Pedro was a member of the Latin Kings, Victor responded that he knew that Pedro had been a member of the Kings, but was uncertain whether he still was a member. Pedro was immediately shot and killed. An Illinois appellate court concluded that the defendant lacked the requisite criminal intent to be held liable for first-degree murder. What intent was required? Would it have been sufficient for Victor to know that Pedro might be killed if Victor identified him? Or was it necessary that Victor intended to assist in Pedro's death?¹⁷

There is a lack of agreement over the required *mens rea* for accomplice liability. In most cases, an accomplice is required to intend or possess the purpose that an individual commit a specific crime. This is described as *dual intents*:

- the intent to assist the primary party, and
- the intent that the primary party commit the offense charged.¹⁸

The requirement of purposeful conduct was articulated in the decision of Judge Learned Hand in *United States v. Peoni*. Peoni sold counterfeit money to Regno in the Bronx. The money later was sold to Dorsey, who was arrested attempting to pass the money in Brooklyn. Peoni was charged with aiding and abetting Dorsey's possession of counterfeit money.

Judge Hand recognized that Peoni was aware that Regno would sell the money to another individual and that the money then would be circulated in the economy. Hand, however, ruled that Peoni's "mere knowledge" was not sufficient to hold him liable for aiding and abetting. Peoni was required to "associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed." Hand stressed that Peoni had to possess a "purposive attitude" that Regno sell the money on the street. Peoni, however, once having sold the money to Regno, had no real interest in whether the money was circulated.¹⁹

In *State v. Case*, Kelly Moffett attempted to dissuade Case from killing Anastasia by telling him, "That's ridiculous. Why can't you just break up with her?" Kelly thereafter made a phone call to set up a meeting between Case and Anastasia. At the meeting, Case shot and killed Anastasia. The court held that Kelly's actions were neither assistance nor encouragement and "unless she hoped or desired that by making the phone call she was helping [defendant] achieve his diabolical goal—which was not the case—Kelly was not an accomplice." The Missouri

court noted that “[m]ere knowledge that one’s actions might be the commission of a crime is not enough.”²⁰

In other words, an individual will not be held liable as an accomplice for knowingly rather than purposely

- selling a gun to an individual who plans to rob a bank,
- renting a room to someone who plans to use the room for prostitution, or
- repairing the car of a stranded motorist who intends to use the auto to rob a bank.

Some judges have ruled that the *mens rea* requirement for accomplice liability in the case of serious crimes is satisfied by knowledge of a defendant’s criminal plans. In *Backun v. United States*, Backun sold stolen silver to Zucker in New York and was aware that Zucker intended to sell the silver in various southern states. Backun’s conviction as an accomplice to Zucker’s transporting stolen merchandise in interstate commerce was affirmed by a federal court on the grounds that the

seller may not ignore the purpose for which the purchase is made if he is advised of that purpose, or wash his hands of the aid that he has given the perpetrator . . . by the plea that he has merely made a sale of merchandise.²¹

Regardless of whether a “purpose” or “knowledge” standard is employed, an accomplice is subject to the **natural and probable consequences doctrine**. This provides that individuals encouraging or facilitating the commission of a crime will be held liable as accomplices for the crime they aided and abetted as well as for crimes that are the natural and probable outcome of the criminal conduct. Two issues arise: What crimes are the natural and probable consequence of a criminal act? Should accomplices be held liable for crimes they did not intend to assist or knowingly assist?

The next case in the chapter, *United States v. Fountain*, explores the best approach to determining the *mens rea* for complicity. Ask yourself whether Judge Richard Posner relied on a “purpose” or “knowledge” standard for aiding and abetting. What approach do you favor?

MODEL PENAL CODE

Section 2.06. Liability for Conduct of Another; Complicity

1. A person is an accomplice of another person in the commission of an offense if:
 - a. with the purpose of promoting or facilitating the commission of the offense, he
 - i. aids or agrees or attempts to aid such other person in planning or committing it, or
 - ii. having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or
 - b. his conduct is expressly declared by law to establish his complicity. . . .

2. An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted.

FIGURE 6.1 ■ The Legal Equation: Complicity



DID GOMETZ AID AND ABET THE KILLING OF A PRISON GUARD?

UNITED STATES V. FOUNTAIN, 768 F.2D 790 (7TH CIR. 1985)

Opinion by Posner, J.

We have consolidated the appeals in two closely related cases of murder of prison guards in the Control Unit of the federal penitentiary at Marion, Illinois—the maximum-security cell block in the nation's maximum-security federal prison—by past masters of prison murder, Clayton Fountain and Thomas Silverstein.

Facts

Shortly before these crimes [were committed], Fountain and Silverstein, both of whom were already serving life sentences for murder, had together murdered an inmate in the Control Unit of Marion, and had again been sentenced to life imprisonment. After that, Silverstein killed another inmate, pleaded guilty to that murder, and received his third life sentence. At this point Fountain and Silverstein had each killed three people. (For one of these killings, however, Fountain had been convicted only of voluntary manslaughter. And Silverstein's first murder conviction was reversed for trial error, and a new trial ordered, after the trial in this case.) The prison authorities—belatedly, and as it turned out ineffectually—decided to take additional security measures. Three guards would escort Fountain and Silverstein (separately), handcuffed, every time they left their cells to go to or from the recreation room, the law library, or the shower. (Prisoners in Marion's Control Unit are confined, one to a cell, for all but an hour or an hour and a half a day, and are fed in their cells.) But the guards would not be armed; nowadays guards do not carry weapons in the presence of prisoners, who might seize the weapons.

The two murders involved in these appeals took place on the same October day in 1983. In the morning, Silverstein, while being escorted from the shower to his cell, stopped next

to Randy Gometz's cell; and while two of the escorting officers were for some reason at a distance from him, reached his handcuffed hands into the cell. The third officer, who was closer to him, heard the click of the handcuffs being released and saw Gometz raise his shirt to reveal a home-made knife ("shank")—which had been fashioned from the iron leg of a bed—protruding from his waistband. Silverstein drew the knife and attacked one of the guards, Clutts, stabbing him 29 times and killing him. While pacing the corridor after the killing, Silverstein explained that "this is no cop thing. This is a personal thing between me and Clutts. The man disrespected me and I had to get him for it." Having gotten this off his chest he returned to his cell.

Fountain was less discriminating. While being escorted that evening back to his cell from the recreation room, he stopped alongside the cell of another inmate [who, however, apparently was not prosecuted for his part in the events that followed] and reached his handcuffed hands into the cell, and when he brought them out he was out of the handcuffs and holding a shank. He attacked all three guards, killing one (Hoffman) with multiple stab wounds (some inflicted after the guard had already fallen), injuring another gravely (Ditterline, who survived but is permanently disabled), and inflicting lesser though still serious injuries on the third (Powles). After the wounded guards had been dragged to safety by other guards, Fountain threw up his arms in the boxer's gesture of victory, and laughing walked back to his cell.

A jury convicted Fountain of first-degree murder and of lesser offenses unnecessary to go into here. The judge sentenced him to not less than 50 nor more than 150 years in prison, and also ordered him, pursuant to the Victim and Witness Protection Act of 1982 . . . , to make restitution of \$92,000 to Hoffman's estate, \$98,000 to Ditterline, and nearly \$300,000 to the Department of Labor. . . .

Silverstein and Gometz were tried together (also before a jury, and before the same judge who presided at Fountain's trial) for the murder of Clutts, and both received the same 50 to 150 year sentences as Fountain and were ordered to pay restitution to Clutts's estate and to the Department of Labor of \$68,000 and \$2,000 respectively. Fountain and Silverstein are now confined in different federal prisons, in what were described at argument as "personalized" cells. . . .

Issue

Gometz argues that the evidence was insufficient to convict him of aiding and abetting Silverstein in murdering Clutts. This argument requires us to consider the mental element in "aiding and abetting." . . . Under the older cases . . . it was enough that the aider and abettor knew the principal's purpose.

Although this is still the test in some states, after the Supreme Court adopted Judge Learned Hand's test—that the aider and abettor "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed"—it came to be generally accepted that the aider and abettor must share the principal's purpose in order to be guilty of violating . . . the federal aider and abettor statute. But . . . there is support for relaxing this requirement when the crime is particularly grave. . . .

Reasoning

In *People v. Lauria*, 59 Cal. Rptr. 628, 634 (1967)—not a federal case, but illustrative of the general point—the court, en route to holding that knowledge of the principal's purpose would not suffice for aiding and abetting of just any crime, said it would suffice for "the seller of

gasoline who knew the buyer was using his product to make Molotov cocktails for terroristic use." Compare the following hypothetical cases. In the first, a shopkeeper sells dresses to a woman whom he knows to be a prostitute. The shopkeeper would not be guilty of aiding and abetting prostitution unless the prosecution could establish the elements of Judge Hand's test. Little would be gained by imposing criminal liability in such a case. Prostitution, anyway a minor crime, would be but trivially deterred, since the prostitute could easily get her clothes from a shopkeeper ignorant of her occupation. In the second case, a man buys a gun from a gun dealer after telling the dealer that he wants it in order to kill his mother-in-law, and he does kill her. The dealer would be guilty of aiding and abetting the murder. This liability would help to deter—and perhaps not trivially given public regulation of the sale of guns—a most serious crime. We hold that aiding and abetting murder is established by proof beyond a reasonable doubt that the supplier of the murder weapon knew the purpose for which it would be used. . . .

Holding

Gometz argues that there is insufficient evidence that he knew why Silverstein wanted a knife. We disagree. The circumstances make clear that the drawing of the knife from Gometz's waistband was prearranged. There must have been discussions between Silverstein and Gometz. Gometz must have known through those discussions or others that Silverstein had already killed three people in prison—two in Marion—and while this fact could not be used to convict Silverstein of a fourth murder, it could ground an inference that Gometz knew that Silverstein wanted the knife in order to kill someone. If Silverstein had wanted to conceal it on his person in order to take it back to his cell and keep it there for purposes of intimidation, escape, or self-defense (or carry it around concealed for any or all of these purposes), he would not have asked Gometz to release him from his handcuffs (as the jury could have found he had done), for that ensured that the guards would search him. Since the cuffs were off before Silverstein drew the shank from Gometz's waistband, a reasonable jury could find beyond a reasonable doubt that Gometz knew that Silverstein, given his history of prison murders, could have only one motive in drawing the shank and that was to make a deadly assault.

Questions for Discussion

1. Judge Richard Posner states that it is sufficient that the aider and abettor "knew the principal's purpose" and contrasts this with an intent to "bring about" a crime. Explain the difference between these two approaches to intent using the facts in *Fountain* to illustrate your answer.
2. What was Gometz's intent in providing the shank to Fountain? Would Gometz have been convicted under either a purpose or knowledge standard?
3. Do you agree with Judge Posner that a knowledge standard should be employed for more serious offenses in order to deter criminal activity? Would such a test cause difficulties for businesses selling goods to the public? The Supreme Court in *Rosemond v. United States* held that to establish the intent to aid and abet the violation of a federal criminal statute, which prohibits using or carrying a firearm during and in relation to any crime of violence or drug trafficking, the prosecution is required to demonstrate that an accomplice actively participated in the violent crime or in the drug trafficking with "advance knowledge" that a confederate would use or carry a gun during the crime. See *Rosemond v. United States*, 572 U.S. 65, 134 S. Ct. 1240 (2014).

4. Judge Ming Chin offered the following hypothetical to illustrate that an accessory may be guilty of a more serious crime than the actual perpetrator. Can you understand this complicated scenario?

[A]ssume someone, let us call him Iago, falsely tells another person, whom we will call Othello, that Othello's wife, Desdemona, was having an affair, hoping that Othello would kill Desdemona in a fit of jealousy. Othello does so without Iago's further involvement. In that case, depending on the exact circumstances of the killing, Othello might be guilty of manslaughter, rather than murder, on a heat of passion theory. . . . But Iago's criminal liability, as Othello's, would be based on his own personal *mens rea*. . . . We thus conclude that when a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person's guilt is determined by . . . that person's own *mens rea*. If that person's *mens rea* is more culpable than another's, that person's guilt may be greater even if the other might be deemed the actual perpetrator.

Do you agree with Judge Chin's analysis? Does this make sense? See *People v. McCoy*, 25 Cal. 4th 1111 [Cal. 2001].

YOU DECIDE 6.2

Mark Manes, 22, met Eric Harris, a 17-year-old student at Columbine High School in Littleton, Colorado, at a gun show. Manes purchased a semiautomatic handgun for Harris and accompanied Harris to a target range. After hitting a target, Harris excitedly proclaimed that this could have been someone's brain. Several months later, Manes sold Harris 100 rounds of ammunition for \$25. The next day, Harris and Dylan Klebold entered Columbine High School and killed 12 students and a teacher and then took their own lives. Harris and Klebold left a tape recording thanking Manes for his help and urged that he not be arrested, because they would have eventually found someone willing to sell them guns and ammunition.

As a prosecutor, would you charge Manes as an accomplice to the murders? To the suicides? What if Harris and Klebold arrived at the school armed with weapons and ammunition provided by Manes but used other weapons to kill? What if they left the weapons and ammunition provided by Manes at home? See Joshua Dressler, *Cases and Materials on Criminal Law*, 3rd ed. (St. Paul, MN: West Publishing, 2003), p. 886.

NATURAL AND PROBABLE CONSEQUENCES DOCTRINE

The leading case on the natural and probable consequences doctrine is the Maine case of *State v. Linscott*. Joel Fuller enlisted William Linscott in a robbery scheme. The plan was for Linscott and Fuller to enter through the back door to prevent Norman Grenier from grabbing a shotgun that he kept in the bedroom. Linscott carried a hunting knife and a switchblade, and Fuller was armed with his shotgun. As they approached the house, they saw that the snow blocked the back door. They revised their plan. Linscott was to break the living room picture window whereupon Fuller would freeze Grenier with the shotgun while Linscott seized the cash.

Linscott broke the window with his body, and Fuller immediately fired a shot through the broken window, killing Grenier. Fuller entered the house through the broken window and took \$1,300 from Grenier's pocket. Fuller gave Linscott \$500.

Linscott later was arrested. He claimed that it was not unusual for Fuller to carry a shotgun, that he was unaware that Fuller had a reputation for violence, and that although he may have been negligent, he had no intention of killing Grenier during the course of the robbery. Linscott was convicted of intentionally or knowingly killing Grenier. He was found to possess the intent to commit the crime of robbery and that the murder was a reasonably foreseeable consequence of Linscott's participation in the robbery. The court recognized that Linscott did not intend to kill Grenier and that he probably would not have participated in the robbery had he believed that Grenier would be killed during the course of the robbery.²²

A number of state courts have rejected the natural and probable consequences doctrine because "it permits conviction without proof that the accused possessed the state of mind required by the . . . definition of the crime."²³ Other states have restricted the doctrine. The California Supreme Court has held that an aider and abettor may not be convicted of first-degree premeditated murder under the natural and foreseeable consequences doctrine.²⁴

In reading *State v. Robinson*, ask yourself whether the natural and probable consequences doctrine unfairly punishes defendants.

SHOULD ROBINSON BE HELD LIABLE FOR MURDER?

PEOPLE V. ROBINSON, 715 N.W.2d 44 (MICH. 2006)

Opinion by Young, J.

Issue

Defendant and a codefendant, Samuel Pannell, committed an aggravated assault, and Pannell shot and killed the victim, Bernard Thomas. After a bench trial, the trial court convicted defendant of second-degree murder under an aiding and abetting theory. The Court of Appeals reversed the trial court's judgment, because it concluded that there was insufficient evidence that defendant shared or was aware of Pannell's intent to kill. [The government appealed the judgment of the appellate court.]

Facts

According to the evidence adduced at trial, defendant and Pannell went to the house of the victim, Bernard Thomas, with the stated intent to "f— him up." Under Pannell's direction, defendant drove himself and Pannell to the victim's house. Pannell knocked on the victim's door. When the victim opened the door, defendant struck him. As the victim fell to the ground, defendant struck the victim again. Pannell began to kick the victim. Defendant told Pannell that "that was enough," and walked back to the car. When defendant reached his car, he heard a single gunshot.

Following a bench trial, the trial court found defendant guilty of second-degree murder. . . . Specifically, the court found that defendant drove Pannell to the victim's house with the intent to physically attack the victim. The court also found that once at the victim's home, defendant initiated the attack on the victim, and that defendant's attack enabled Pannell to "get the upper-hand" on the victim. The court sentenced defendant to a term of 71 months to 15 years.

The Court of Appeals reversed defendant's murder conviction, holding that there was insufficient evidence to support defendant's second-degree murder conviction. The Court held that the trial court improperly convicted defendant of second-degree murder because there was no evidence establishing that defendant was aware of or shared Pannell's intent to kill the victim.

This Court granted the prosecution's application for leave to appeal. . . .

Reasoning

This case involves liability under our aiding and abetting statute, MCL 767.39, which provides:

Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

[Aiding and abetting] " . . . is simply a theory of prosecution" that permits the imposition of vicarious liability for accomplices. This Court recently described the three elements necessary for a conviction under an aiding and abetting theory:

(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement.

The primary dispute in this case involves the third element. Under the Court of Appeals analysis, the third element would require the prosecutor to prove beyond a reasonable doubt that a defendant intended to commit the identical offense, here homicide, as the accomplice or, alternatively, that a defendant knew that the accomplice intended to commit the homicide. We reaffirm that evidence of defendant's specific intent to commit a crime or knowledge of the accomplice's intent constitutes sufficient *mens rea* to convict under our aiding and abetting statute. However, as will be discussed later in this opinion, we disagree that evidence of a shared specific intent to commit the crime of an accomplice is the exclusive way to establish liability under our aiding and abetting statute. . . .

We hold that when the Legislature abolished the distinction between principals and accessories, it intended for all offenders to be convicted of the intended offense, in this case aggravated assault, as well as the natural and probable consequences of that offense, in this case death. The case law that has developed since the Legislature codified these common-law principles provides examples of accomplice liability under both theories.

Under the natural and probable consequences theory, "[t]here can be no criminal responsibility for any thing not fairly within the common enterprise, and which might be expected to happen if the occasion should arise for any one to do it." . . .

The propriety of the trial court's verdict is clear. The victim's death is clearly within the common enterprise the defendant aided because a homicide "might be expected to happen if the occasion should arise" within the common enterprise of committing an aggravated assault. The evidence establishes that the victim threatened Pannell's children in Pannell's

presence, enraging Pannell. When defendant woke up at 10:00 that evening, Pannell was still “ranting and raving” in the house. Despite knowing that Pannell was in an agitated state, defendant agreed to drive to the victim’s house with the understanding that he and Pannell would “f— him up.” When the pair arrived at the victim’s home, defendant initiated the assault by hitting the victim once in the face and once in the neck with the back of his hand. After the victim fell to the ground, Pannell punched him twice and began kicking him. In our judgment, a natural and probable consequence of a plan to assault someone is that one of the actors may well escalate the assault into a murder. . . . Pannell’s anger toward the victim escalated during the assault into a murderous rage.

Defendant argues that he should not be held liable for the murder because he left the scene of the assault after telling Pannell, “That’s enough.” We disagree. Defendant was aware that Pannell was angry with the victim even before the assault. Defendant escalated the situation by driving Pannell to the victim’s house, agreeing to join Pannell in assaulting the victim, and initiating the attack. He did nothing to protect Thomas and he did nothing to defuse the situation in which Thomas was ultimately killed by Pannell. A “natural and probable consequence” of leaving the enraged Pannell alone with the victim is that Pannell would ultimately murder the victim. That defendant . . . left the scene of the crime moments before Thomas’s murder does not under these circumstances exonerate him from responsibility for the crime.

The fact that Pannell shot the victim, rather than beat him to death, does not alter this conclusion. It cannot be that a defendant can initiate an assault, leave an already infuriated principal alone with the victim, and then escape liability for the murder of that victim simply because the principal shot the victim to death, instead of kicking the victim to death. The defendant is criminally liable as long as the crime is within the natural and probable consequences of the intended assaultive crime. . . .

We hold that a defendant must possess the criminal intent to aid, abet, procure, or counsel the commission of an offense. A defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those crimes that are the natural and probable consequences of the offense he intends to aid or abet. Therefore, the prosecutor must prove beyond a reasonable doubt that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense . . . or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense.

Holding

We hold that under Michigan law, a defendant who intends to aid, abet, counsel, or procure the commission of a crime, is liable for that crime as well as the natural and probable consequences of that crime. In this case, defendant committed and aided the commission of an aggravated assault. One of the natural and probable consequences of such a crime is death. Therefore, the trial court properly convicted defendant of second-degree murder. We reverse the judgment of the Court of Appeals and reinstate defendant’s conviction of second-degree murder.

Dissenting, Cavanagh, J.

[I]t cannot fairly be said that this death was the natural and probable consequence of this beating where the trial court found that the victim did not die from injuries inflicted during the beating, defendant did not intend to kill, and defendant did not know Pannell would shoot and kill the victim. Thus, I disagree with the majority’s rationale that because under some circumstances a death *may* result from a beating, defendant’s conviction of second-degree murder was proper.

Dissenting, Kelly, J.

[The defendant's] conviction of second-degree murder, as an aider and abettor, [should] be reversed. . . .

Robinson went along "only to beat up" the victim. In Robinson's words, "it was understood between us that we were going to f— him up." As a practical matter, f—ing up someone necessarily entails leaving them alive. In the context of this case, it most likely means to "put [the victim] in an extremely difficult or impossible situation." Offensive as the word is, it is not used to mean "to kill." We have many other slang words that mean "to kill," such as "bump off," "ice," "knock off," "waste," "rub out," and "whack." Applying the trial judge's factual findings, it is clear that Robinson agreed to harm the victim, not to kill him. . . .

The victim's death here was not within Robinson and Pannell's common enterprise; a homicide by gun is not a natural and probable consequence of an intended assault and battery. The majority is mistaken in concluding otherwise. It errs by determining that the unintended result of an intentional act was a "natural and probable consequence" for which a defendant may be held criminally liable. . . .

I would reduce the charge of which Robinson was convicted to assault with intent to do great bodily harm . . . and remand for resentencing on that reduced charge.

Questions for Discussion

1. Describe the facts leading up to Pannell's killing of Thomas.
2. What is the basis for prosecuting and convicting Robinson for second-degree murder?
3. Summarize the arguments of the dissenting judges in *Robinson*.
4. As a judge, would you hold Robinson liable for second-degree murder or assault with an intent to do great bodily harm?

CASES AND COMMENTS

Juan Alexander Montes was convicted of attempted murder, assault with a semiautomatic firearm, assault with a deadly weapon, exhibiting a firearm, and attendant use of a firearm with gang enhancements. "Montes and several other members of the Orange Krazy Mexicans gang (OKM) were hanging out in the parking lot of a fast-food restaurant when Jorge Garcia pulled in with Eduardo Flores and two female companions." Garcia anticipated a problem because he used to belong to the Varrio Pelones Locos (VPL), a rival gang of OKM. Two months earlier, Montes and another OKM member had confronted Garcia and Flores at the same restaurant. An argument developed, and Montes had hit Flores in the head with a stick. As Garcia exited his car, Montes sprayed him with soda and yelled, "F— VPL." Montes and his fellow gang members surrounded Garcia, who pulled out a switchblade. Montes responded by hitting Garcia on the right shoulder with doubled-over chain, which is described as "kind of thick" and bigger than a wallet chain. Flores to save Garcia yelled out "something about a gun," which caused the OKM'ers to run to their car. Garcia then retrieved a pipe from his car and threw it toward the OKM'ers. Flores and Garcia got in their car to drive away when Arturo Cuevas grabbed a gun from a nearby vehicle and ran

up to Garcia and shot him several times. Would you convict Montes of attempted murder as a natural and probable consequence of assault with the chain or as a natural and probable consequence of a breach of the peace for fighting in public? See *People v. Montes*, 74 Cal. App. 4th 1050 (1999).

YOU DECIDE 6.3

Leon McCoy conspired with Keith Lamar Bellamy to rob a McDonald's restaurant where McCoy worked. Andre Randall, McCoy's coworker, was aware of the plan.

C.B. was working the evening shift as the assistant manager of a McDonald's in Wilmington, Delaware. She was assisted by defendant Leon McCoy and Andre Randall. C.B. locked the doors at 10:00 p.m. Randall took out the trash and, contrary to restaurant policy, failed to notify C.B., who ordinarily opened and locked the door.

Randall simply opened the door and, rather than closing the door, turned the deadbolt so as to prop the door open. Bellamy, who was armed, entered at around 11:30 p.m. as McCoy was mopping the hallway and C.B. was preparing the night deposit. Bellamy put the gun to the side of C.B.'s head and seized the deposit money, and also took C.B.'s personal cash. He demanded a bag for the cash. McCoy went to the front of the store and got a bag. Although there were several silent alarms in this area, McCoy did not activate any of the alarms.

Once he bagged the money, Bellamy told C.B. to undress. As she was unbuttoning her shirt, he said she was taking too long and he told her to just drop her pants and underwear. He then demanded that she spread her labia apart. He stooped down to inspect her genitals, and used the barrel of his gun to pull her labia further apart. He noticed that she had a tampon inserted, and told her that she was "lucky." Following the robbery, Bellamy fled and McCoy went to the front of the store and hit a silent alarm. There were security cameras in the store recording the robbery. Is McCoy guilty of sexual assault? See *State v. Bellamy*, 617 S.E. 2d 81 (N.C. Ct. App. 2005).

ACCESSORY AFTER THE FACT

The Common Law

Conviction as an accessory after the fact at common law required that a defendant conceal or assist an individual who the defendant knew had committed a felony in order to hinder the perpetrator's arrest, prosecution, or conviction. For example, an individual would be held liable for assisting a friend—who the individual knew had killed a member of an opposing gang—to flee to a foreign country.

Accessories after the fact at common law were treated as accomplices and were subject to the same punishment as the principal who committed the offense. A wife, however, could not be held liable as an accessory after the fact because it was expected that she had assisted her husband.

The Elements of Accessory After the Fact

The elements of accessory after the fact are as follows:

- *Commission of a Felony.* There must be a completed felony. The crime need not have been detected or formal charges filed.
- *Knowledge.* Defendants must possess knowledge that the individual they are assisting has committed a felony. A reasonable but mistaken belief does not create liability.
In *Wilson v. State*, the defendant was speaking with Mendez and Valentine outside a convenience store. Valentine later followed Mendez back to Mendez's trailer and took two gold chains from Mendez's neck. Mendez and three others chased, apprehended, and struggled with Valentine. Wilson was driving by the altercation and intervened to defend Valentine. The Florida District Court of Appeal ruled that there was no evidence that Wilson was aware of the robbery and that he had not intended to assist Valentine after the fact.²⁵ In *Clark v. United States*, Clark said that on the evening of the robbery, McLaughlin called out to him when he was driving with two of his friends. McLaughlin told them there was a party going on, but he did not know the precise address and asked to be dropped off in the vicinity of 1400 W Street, N.W., to get some more information about the party. Clark agreed and, after letting McLaughlin out, drove around the block waiting for McLaughlin to return. He said that he did not see McLaughlin again until McLaughlin jumped into the car. Clark drove roughly a block, and when he saw the police car behind him, he immediately stopped. The District of Columbia court concluded that there was insufficient direct proof that Clark knew that McLaughlin committed an armed robbery after exiting the car and, as a result, he could not be held liable as an accessory after the fact.²⁶
- *Affirmative Act.* The accessory must take affirmative steps to hinder the felon's arrest; a refusal or failure to report the crime or to provide information to the authorities is not sufficient. Examples of conduct amounting to accessoryship after the fact are hiding or helping a felon escape, destroying evidence, or providing false information to the police in order to mislead law enforcement officials. In *Melahn v. State*, the defendant was acquitted by a jury that accepted his testimony that he let his roommate drive his automobile, he fell asleep, and as a result, he was unaware that his roommate had burglarized a pet store. The Florida court further ruled that Melahn's refusal to cooperate with the police was not sufficient to establish accessoryship after the fact, which requires a false statement to the police.²⁷
- *Criminal Intent.* The defendant must provide assistance with the intent or purpose of hindering the detection, apprehension, prosecution, conviction, or punishment of the individual receiving assistance. In *State v. Jordan*, Kenneth Jordan shot Pendley after seeing Pendley talking to Teresa Jordan, Kenneth Jordan's wife. Teresa was convicted of being an accessory after the fact based on her falsely reporting to friends, nurses,

and the police and testifying at trial that Pendley had been shot while attempting to rape her. Kenneth Jordan pled guilty to the voluntary manslaughter of Pendley prior to Teresa's conviction.²⁸

The modern view is that because accessories after the fact are involved following the completion of a crime, they should not be treated as harshly as the perpetrator of the crime or accomplices. Accessories after the fact are now held liable for a separate, less serious felony or for a misdemeanor. Some states have abandoned the crime of accessory after the fact and have created the new offense of "hindering prosecution," which punishes individuals frustrating the arrest, prosecution, or conviction of individuals who have committed felonies as well as misdemeanors.

Most states have abandoned the common law requirements that frustrated the conviction of individuals for accessoryship after the fact. A spouse is no longer immune in most states from prosecution for being an accessory after the fact. The common law rule that an individual may be prosecuted only for being an accessory after the fact following the conviction of the principal has also been modified. Most states require only proof of a completed felony.

Modern statutes increasingly follow the Model Penal Code and list the specific types of assistance that are prohibited. Other statutes retain the common law language and look to courts to define the acts constituting the offense of being an accessory after the fact.

On April 15, 2013, two homemade bombs were ignited at the finish line of the Boston Marathon by Dzhokhar Tsarnaev and his older brother Tamerlan Tsarnaev, who later was killed in a shootout with the police. The bomb killed three people and wounded more than 260 others, a number of whom were severely injured. Three college friends of Dzhokhar were found guilty in 2014 of obstruction of justice who, following the bombing, removed a backpack containing incriminating evidence from Dzhokhar's dorm room and disposed of the backpack in a Dumpster. In 2017, Joey Meek was convicted and sentenced to 27 months in prison for pressuring a friend who wanted to report to the police that Dylann Roof was the shooter who killed nine individuals in 2015 at a historically significant African American church in Charleston, South Carolina (discussed in Chapter 5).

The next case, *State v. Sherron*, asks you to decide whether the defendant intended to assist her daughter in obtaining an abortion in order to terminate an unwanted pregnancy or intended to assist her husband in avoiding a charge of the rape of her daughter.

MODEL PENAL CODE

Section 242.3. Hindering Apprehension or Prosecution

A person commits an offense if, with purpose to hinder the apprehension, prosecution, conviction or punishment of another for crime, he:

1. harbors or conceals the other; or
2. provides or aids in providing a weapon, transportation, disguise or other means of avoiding apprehension or effecting escape; or

3. conceals or destroys evidence of the crime, or tampers with a witness, informant, document or other source of information, regardless of its admissibility in evidence; or
4. warns the others of impending discovery or apprehension . . . ; or
5. volunteers false information to a law enforcement officer.

Analysis

The Model Penal Code views accessory after the fact as obstruction of justice and does not require that the person providing assistance be aware that the alleged offender actually committed a crime. The essence of the crime is interference with the functioning of the legal process. An individual charged with accessory after the fact is thus not treated as a principal. Liability extends to assisting an individual to avoid apprehension for a misdemeanor as well as a felony. The Model Penal Code specifies the type of assistance that is prohibited to prevent courts from too narrowly or too broadly interpreting the behavior that is prohibited.

Accessory after the fact is punished as a felony carrying five years' imprisonment if the person aided is charged or is liable to be charged with a felony of the first or second degree. Assisting a felony of the third degree (one to two years in prison) or a misdemeanor is punished as a misdemeanor. The fact that the person who provides assistance is related to the individual confronting a criminal charge is to be considered as a mitigating factor at sentencing rather than being considered as a complete defense.

FIGURE 6.2 ■ The Legal Equation: Accessory After the Fact



DID THE DEFENDANT INTEND TO CONCEAL THE RAPE OF HER DAUGHTER?

SHERRON V. STATE, 959 SO.2D 30 (MISS. CT. APP. 2006)

Opinion by Southwick, J.

Issue

Charlotte Sherron was convicted of being an accessory after the fact to her husband's [felony] crime of statutory rape by assisting the victim, who was her minor daughter, obtain an abortion. This assistance helped hide the husband's crime by removing its most obvious evidence. [Sherron challenges whether the evidence supports her criminal guilt.]

Facts

In January 1988, the defendant Charlotte Sherron, then known as Charlotte Howard, gave birth to a daughter whom we will . . . call "Jane." . . . Jane's mother and father were not married. Charlotte Sherron had a daughter with another man in about 1992, then had a third daughter in about 1996 with Xavier Sherron. When Xavier and Charlotte Sherron married is unclear, but it was before the 2001–2002 events that we next describe.

Xavier Sherron began having sexual intercourse with his stepdaughter Jane in December 2001 or January 2002. At the time that the intercourse began, Jane was still thirteen years old. After learning she was pregnant, Jane with the permission and assistance of her mother obtained an abortion in Tuscaloosa, Alabama. Only later did police learn that Xavier Sherron had intercourse with Jane. He was arrested, indicted, and convicted of statutory rape. He received a sentence of twenty-seven years without the possibility of parole. In August 2002, the defendant here, Charlotte Sherron, was indicted as an accessory after the fact to Xavier Sherron's crime of rape. The only event alleged in the indictment which constituted her crime was assisting her daughter obtain an abortion. Trial before a Lowndes County Circuit Court jury was not held until August 2004.

The first witness was the then-sixteen year old victim, Jane. She said that after her mother went to sleep, Xavier Sherron would leave her mother's bedroom and go into Jane's room, where he would touch her sexually and then later began to have intercourse with her. Jane was frightened of him. She testified that Xavier Sherron told her not to tell her mother, the defendant. He told Jane that her mother would be upset with her if she discovered the sexual intercourse.

Jane testified that Xavier Sherron would come into her room as frequently as every other night. She did not testify as to the exact dates of the sexual abuse. However, the defendant, Charlotte Sherron, gave a statement to police on May 22, 2002. . . . She said that approximately one year before the statement, Jane told her that Xavier Sherron had touched her inappropriately. Charlotte Sherron asked her husband whether he was molesting Jane. Though he initially denied it, he finally admitted that he touched Jane but did not admit to intercourse. According to Charlotte Sherron's statement, Xavier Sherron promised that he would not do this again. She stated, "I gave him another chance, but I did not trust him." The sexual intercourse that made Jane pregnant occurred a few months later.

Jane testified that in February 2002, after she had turned fourteen, Xavier Sherron took her from school and asked whether she had experienced her monthly period. She had not. He then purchased a pregnancy test at a pharmacy. After arriving home, she complied with his demand that she take the test. It indicated that she was pregnant.

Xavier Sherron called his brother George Sherron, and also called Rosa and Greg Mostella, his wife's maternal aunt and uncle. He notified them that he had impregnated Jane. He then confessed his actions to Charlotte Sherron. Greg Mostella suggested that the situation be kept secret from Alice Howard, Charlotte Sherron's mother. Mostella stated that Ms. Howard would "kill" Xavier if she found out. According to Charlotte Sherron's statement, the Mostellas and George Sherron suggested that law enforcement authorities also not be told, because she would lose custody of her children and her husband would go to jail. Charlotte Sherron said that she let Xavier Sherron continue to live with her because she did not know how she was going to pay the bills if he went to prison.

Jane and her mother talked in a room by themselves about whether Jane wanted an abortion. Jane testified that she had no doubts about wanting to have an abortion. She did not want to give birth to and raise a child fathered by Xavier Sherron. Jane testified that this

same night, after everyone went to sleep, her mother put her and the two younger daughters in the car, with the goal of driving to her grandmother Alice Howard's house. Xavier Sherron followed and tried "to run [them] off the road." Xavier Sherron pulled alongside his wife's vehicle, moved his van towards her car, but never hit her. Jane testified that "if we had kept on going, he would have actually ran us off the road." Both vehicles stopped. Xavier Sherron told his wife to return to their house, and she did. He said that no one would learn about the pregnancy. Charlotte Sherron stated that she had Jane lock her door at night for protection.

The defendant telephoned the Women's Clinic in Tuscaloosa, Alabama. The Clinic indicated that among the items needed to be scheduled for an abortion, Jane should have a picture identification card. Xavier Sherron took Jane to get the identification. On March 14, 2002, Xavier and Charlotte Sherron drove Jane to Tuscaloosa, Alabama, where the abortion was performed.

In May 2002, Jane visited with her uncle's fiancee and discussed what had happened in a "what-if-this-happened-to-you" manner. The fiancee concluded that Jane was discussing herself. Jane's uncle was told, and he told Charlotte Sherron's mother, Alice Howard.

Howard took Jane to the Columbus Police Department. Jane spoke with investigator Wayne McClemore. Lieutenant McClemore testified that he took Jane's statement, filed a report, and contacted the local Department of Human Services (DHS). DHS placed Jane in the care of her grandmother, Alice Howard, the person who upon learning of the crime had finally reported it.

The DHS investigation led to Xavier Sherron's admission to the statutory rape. McClemore and another investigator picked Sherron up, drove him to the police department, and obtained a statement from him. A statement was also taken from Charlotte Sherron which included this:

I did call the Women's Clinic in Tuscaloosa, Alabama, and ask them about how far along in the pregnancy a person has to be to have an abortion. They said four to six weeks. They also said they needed a birth certificate, a Social Security card, and a picture ID. Xavier took [Jane] to the driver's license office in Columbus Tuesday, two days before [Jane] went to the doctor, to get her ID. Xavier and I took [Jane] to the Women's Clinic, and [Jane] got the abortion. I filled out the paperwork for [Jane] at the clinic. Xavier, Uncle Greg and I took [Jane] to her checkup in Tuscaloosa. I did not tell anyone about this because I have nobody to confide in. I was scared to tell the police because [I] did not know what would happen to me or my family. Uncle Greg, Rosa Mostella and George Sherron told me not to tell the police or my mom because I would lose my kids, and George did not want his brother going to jail. I let Xavier stay because I did not know how I was going to pay the bills. They thought my mom would kill Xavier if she found out about this. . . .

Charlotte Sherron did not testify at her trial. She was convicted and sentenced to three years' imprisonment, which would be followed by two years of post-release supervision.

Reasoning

Our recitation of the facts has indicated many things that Charlotte Sherron did not do—she did not contact law enforcement authorities; she did not throw her husband out of the house; she did not send her daughter elsewhere to escape this man; and she did not in any other way initiate an accounting for his crimes. Yet as the State must have recognized when preparing the indictment, most of the elements of Charlotte Sherron's damning inaction are

not crimes in Mississippi. The exception is failure to report child abuse. The offense can be committed by physicians, school employees, and others who in the normal course of their occupations may encounter child abuse, but the crime also can be committed by “any other person” who becomes aware of the abuse. . . . [At the time that Charlotte was informed of Xavier’s abuse, she was an employee of a school district and could have been prosecuted for failing to report the abuse. The offense is a misdemeanor, a crime with a maximum sentence of a year in county jail.]

So in drawing up an indictment that Charlotte Sherron tried to conceal the rape committed by Xavier Sherron, the prosecution did not charge the inactions. The only action for which she was indicted was taking her daughter “to obtain an abortion. . . .” The indictment alleged that Charlotte Sherron’s assistance with the abortion was given with the intent to hide her husband’s crime. Though it was overwhelmingly proven that the mother failed to take any meaningful steps to protect the daughter from further abuse or to cause the husband’s crimes to be detected, this conviction as an accessory to that crime depends on Sherron’s consent to her daughter’s abortion. . . .

In order to establish that Charlotte Sherron was an accessory after the fact to the statutory rape of Jane, the prosecution had to prove: (1) Xavier Sherron committed a completed felony; (2) Charlotte Sherron concealed, received, relieved, aided or assisted him when she knew he had committed a felony; and (3) Charlotte Sherron rendered such assistance or aid with the intent to enable Xavier Sherron to escape or avoid arrest, trial, conviction or punishment after he committed that felony. Xavier Sherron’s felony conviction and twenty-seven year sentence are not disputed. The issues here are the second and third elements of accessory after the fact. . . .

We now examine the elements of the offense. As noted above, the first element is conceded, which is that there must have been a completed felony committed by someone else. To prove the second element of accessory after the fact, the prosecution had to prove that Charlotte Sherron “concealed, received, relieved, aided or assisted” her husband and that she knew he had committed a felony. There are no statutory definitions for the words “conceal,” “receive,” “aid,” or “assist.” . . . These commonly understood words support that a defendant is guilty when she acts to prevent discovery and prosecution of a felony.

The evidence supported that Sherron “concealed, received, relieved, aided or assisted” her husband when she took Jane to Tuscaloosa for an abortion. The prosecution alleged that Charlotte Sherron committed these acts with the intent to conceal the fact that Xavier Sherron committed statutory rape. Sherron alleges that those acts were not personal assistance to the husband but to the child. She only “wanted to respect her daughter’s wishes and wanted to free her daughter of the burden of raising her stepfather’s child.” . . . We now turn to intent.

The State had to prove that Sherron intended to enable her husband “to escape or avoid arrest, trial, conviction or punishment” after he committed statutory rape. Whether an accused had a specific intent is a question of fact for the jury. The jury makes its determination based on the facts shown in each case. “Unless one expresses [her] intent, the only method by which intent may be proven is by showing the acts of the person involved at the time in question, and by showing the circumstances surrounding the incident.”

Sherron argues there is not sufficient evidence that she intended to shield her husband from punishment for statutory rape and her intent was solely to help her daughter. According to the State, a reasonable juror could conclude that regardless of what else she had in mind, Sherron also intended to hide her husband’s awful offense. Among the circumstances relevant that the jury had to consider as to intent were these: (a) Sherron did

not report her husband's crime; (b) Sherron helped her daughter end a pregnancy caused by statutory rape; and (c) Sherron continued to allow her husband to live with her and her children because they relied on his income.

In support of her mother, Jane indicated that Charlotte Sherron was afraid of Xavier Sherron. Jane testified that he was violent with her mother and that she once saw him choke her. Jane also testified that Xavier Sherron once threw a pot of grease against the wall during an argument with her mother. Xavier Sherron also pushed the defendant onto a couch and bit her breasts. Jane testified that, on occasion, he slammed flower pots on the floor and threw figurines at her mother. Jane's grandmother, Ms. Howard, supported in her testimony that the defendant was afraid of her husband.

In the defense view, the intent for the assistance on the abortion was one to aid the minor child. It is further argued that failure to report the statutory rape was solely a function of Xavier Sherron's intimidating nature. However, the defendant admitted to other considerations. Sherron stated, "Uncle Greg, Rosa Mostella and George Sherron told [her] not to tell the police or [Ms. Howard] because [she] would lose [her] kids, and George did not want his brother going to jail." Sherron also explained that she allowed her husband to continue to live with her because she needed his monthly disability check. She also said that she did not report the crime because she did not know how she would pay her bills.

This evidence constitutes circumstantial proof that one of Sherron's intents was to keep the crime of rape from being exposed. In addition, she likely had an intent to keep her young daughter from giving birth to a child who was fathered by rape. Quite simply and logically, the defendant could have operated with mixed purposes when she assisted in her daughter's abortion.

[In Mississippi, a] minor who has become pregnant due to sexual intercourse with a step-father has the right to an abortion if her mother alone consents. Absent the parental consent, a court would have had to consider whether to permit the abortion. The rape victim in this case testified that she never had any doubt that she wanted an abortion. The defendant also testified that she did not wish for her daughter to bear a child fathered by rape. There is no argument that there was anything illegal under Mississippi law in Jane's having this abortion.

This mother's assistance on the abortion could well be found to have had two intents behind it, one to support her daughter and the other to support her husband in preventing his crime from being exposed. When an act is done with multiple intents, it may be criminalized if one of the intents is an element of the relevant offense. . . .

Summarizing some of this case law, one treatise-writer labeled the issue as one of "multiple intents," and concluded that "so long as the defendant has the intention required by the definition of the crime, it is immaterial that he may also have had some other intention." We conclude that the existence of a legal intent sufficient to cause the defendant to commit the act being prosecuted is not a defense if the criminal intent was also present in more than a *de minimis* [minor] way. The existence of the improper intent will be a jury issue, determined largely by circumstantial evidence and guided by proper jury instructions. Since the jury certainly could find on this evidence that the defendant intended to hide her husband's crime no matter what else she intended to do, there was sufficient evidence of a criminal intent.

We find no error in the jury's evaluation of the conflicting evidence of intent and decision that Sherron acted to conceal Xavier Sherron's crime when she took Jane to get an abortion.

Holding

We affirm Charlotte Sherron's conviction [of accessory after the fact to statutory rape] and sentence [of three years in prison and two years' probation].

Questions for Discussion

1. What are the elements of accessory after the fact utilized by the court in *Sherron*?
2. Why does the court conclude that the facts support Sherron's guilt as an accessory after the fact?
3. What facts indicate that Sherron's primary concern after learning of Xavier's molestation of her daughter was to "keep the crime of rape from being exposed"? What facts indicate that her intent was to "keep her young daughter from giving birth to a child who was fathered by rape"?
4. Do other individuals discussed in the court's opinion have criminal liability as accessories after the fact?
5. How would you decide this case?

CASES AND COMMENTS

1. In a leading case on accessory after the fact, Tony Duke, along with defendant Brian Chism, drove to pick up beer at the home of Chism's grandmother. Duke was unaware that Chism "was impersonating a female." They were joined by Chism's "one-legged uncle," Ira Lloyd. Duke expressed a desire to make love to Chism. Lloyd also indicated that he would like to engage in sexual relations, and they drove him to a church where Lloyd confronted his former wife Gloria. Lloyd and Gloria immediately entered into an argument, and Lloyd stabbed Gloria with a knife in the stomach several times and once in the neck. Gloria's shouts attracted two neighbors, who unsuccessfully tried to prevent Lloyd from pushing Gloria into the front seat of the car alongside Chism and Duke. Lloyd also squeezed into the front seat. Gloria was bleeding profusely, and although Lloyd was armed with a knife, there is no indication that he threatened either Chism or Duke. Lloyd ordered Duke to drive to an isolated area. One witness testified that as they left the church, Duke was driving and Chism's foot was on the accelerator. After arriving at their destination, Lloyd directed Chism and Duke to remove Gloria's body from the car and place her on some high grass at the side of the road. Lloyd's artificial leg had come off and he was unable to assist Chism and Duke. Lloyd then directed Chism and Duke to leave him alone with Gloria. Duke dropped Chism off and Chism changed to male clothing, placed his blood-stained female clothing in a trash bin, and after discussing the events with his mother, provided the police with a complete statement of the facts and directed them to Gloria's body. The Louisiana Supreme Court convicted Chism of being an accessory after the fact for assault, kidnapping, and attempted murder. The court pointed out that Chism did not protest, make an effort to leave the automobile, attempt to persuade Duke to flee, or refuse to cooperate with Lloyd. Chism, instead, fully cooperated with Lloyd and did not immediately call the police or seek medical assistance for Gloria. Chism only approached the police after

discarding his blood-stained clothing and discussing what happened with his mother. Did Chism possess the intent to assist his uncle avoid or escape arrest, trial, conviction, or punishment? Did he willingly assist his uncle or act out of fear of his uncle? Why did the court mention that Chism apparently was transgender? Is it important in determining Chism's legal responsibility that Chism was not driving and did not own the automobile? What about the fact that Chism eventually reported the killing to the police? See *State v. Chism*, 436 So. 2d 464 (La. 1983).

2. Chezmin Brittany Suter witnessed an emotional disagreement between Roberts and Martin, saw Roberts produce and fire the gun at Martin, and immediately thereafter drove Roberts from the scene of the shooting. Suter argued that although she knew Roberts had committed a crime at the time she provided assistance to Roberts by driving him away, a homicide had not yet occurred because Martin did not die until two days later. Suter argued that she was not an accessory after the fact to the murder of Martin because the completed felony of murder had not yet occurred when Suter rendered aid to Roberts. Would you hold Suter criminally liable as an accessory after the fact to murder? See *Suter v. Commonwealth*, 796 S.E.2d 416 (Va. App. 2017).

YOU DECIDE 6.4

Mark Anderson, 17 years old, was arrested while driving a stolen 1997 Cadillac. To minimize his sentence, Anderson told the police he would cooperate in breaking up an automobile theft ring. He stated he had been driving with Shannon Smith and Randell Fields, who had shot Hume in an attempted robbery. Based on Anderson's tip, the detectives obtained arrest warrants for Fields and Smith. "Fields and Smith turned themselves in to the Omaha Police Department, where they were booked on murder charges. On the same day, after the arrest of Fields and Smith, one of the detectives received a call from an anonymous female who told them that the wrong individuals had been arrested for Hume's murder. This female later came down to police headquarters and told the detectives that a man named 'Arlyn Ildefonso' had told her that he murdered Hume. She also provided the names of two eyewitnesses who would corroborate her statement. . . . Ildefonso was arrested, and Fields and Smith were released. Ildefonso was later convicted of murdering Hume. . . . Anderson admitted that he had lied to detectives and made up the story about the involvement of Fields and Smith in Hume's murder . . . because he was scared of Fields and Smith and wanted to 'pay them back' [for threatening him]. Anderson also stated that he received all the information concerning the Hume murder from television and newspaper accounts of the murder." Anderson argued he could not be convicted as an accessory after the fact because he did not know the identity of Hume's killer and did not intend to assist Ildefonso in escaping apprehension. Would you convict Anderson as an accessory after the fact despite the fact that he did not know that Ildefonso was the killer and had no intent to assist Ildefonso? See *State v. Anderson*, 10 Neb. App. 163 (2001).

Test your knowledge on parties to a crime by analyzing the case of *People v. Williams*. The defendant, Jacqueline Annette Williams, and Fedell Caffey had been dating for two years. Williams and Caffey had unsuccessfully attempted to conceive a child. Caffey is described as wanting "a baby boy with light skin so that the baby would resemble him."

Williams's cousin, Laverne Ward, was angry with Debra Evans with whom he had a 2-year-old child, Jordan. Williams, Caffey, and Ward met and visited Debra, who was pregnant by Ward with her fourth child, who was to be named Elijah. Williams was aware that Ward and Caffey wanted to talk to Evans about the unborn baby and to "teach her a lesson."

Williams was in the bathroom when she heard a loud noise. She emerged to see Caffey standing over Evans with a small automatic gun while Ward appeared to be stabbing her in the neck. Williams stood next to Caffey as he used poultry shears to cut across Evans's abdomen and to remove a male child from Evans's womb and cut the umbilical cord. Caffey stated that he did not want the baby because he believed that the infant boy was dead. Williams blew into Elijah's nose and mouth, and he began breathing.

Caffey and Ward went into a bedroom where they killed 10-year-old Samantha. Seven-year-old Joshua began crying, and Williams put him in a car with Caffey and Ward, and they dropped him at a friend's house. They learned that Joshua had talked about the murders, and the next day Williams and Caffey drove Joshua to a suburban location where Caffey stabbed him to death. Williams left the body in an alley and discarded the sheet in which Joshua was wrapped. The killing occurred on November 19, and Evans was scheduled to be admitted to the hospital to give birth on November 20. Williams, for several months prior to the murders, represented that she was pregnant and later claimed that Elijah was her son.

The defendant argued that she did not inflict injuries on Evans or Samantha or Joshua and that she should not be held liable as an accomplice. Williams was convicted and sentenced to death. Do you agree that Williams possessed the required criminal intent to be held liable for Evans's and Samantha's murders? For Joshua's murder? See *People v. Williams*, 739 N.E.2d 455 (Ill. App. Ct. 2000).

VICARIOUS LIABILITY

We have seen that strict liability results in holding a defendant criminally responsible for the commission of a criminal act without a requirement of a criminal intent. An act, in other words, is all that is required. **Vicarious liability** imposes liability on an individual for a criminal act committed by another. The other person acts, and you are responsible. **Accomplice liability**, in contrast, holds individuals responsible who affirmatively aid and abet a criminal act with a purposeful intent.

Vicarious liability is employed to hold employers and business executives and corporations (which are considered "legal persons") liable for the criminal acts of employees. Vicarious liability has also been used to hold the owner of an automobile liable for parking violations committed by an individual driving the owner's car. Another example of vicarious liability is imposing liability on parents for crimes committed by their children.

Vicarious liability is contrary to the core principle that individuals should be held responsible and liable for their own conduct. The primary reason for this departure from individual responsibility in the case of corporations is to encourage employers to control and to monitor employees so as to ensure that the public is protected from potential dangers, such as poisoned food.²⁹ We have distinguished strict and vicarious liability. Keep in mind that statutes that are intended to protect the public health, safety, and welfare typically combine both doctrines. In

the California case of *People v. Travers*, Mitchell, a service station employee, misrepresented the quality of motor oil he sold to the public.

The defendant Leo Wayne Travers was the owner of the station and was prosecuted along with employee Greg Mitchell under a statute that punished the sale of a misbranded product. Travers objected that he was completely unaware of Mitchell's actions. The court reasoned that the importance of smoothly running motor vehicles and the right of the public to receive what they paid for justified the imposition of vicarious liability on Travers without the necessity of demonstrating that he possessed a criminal intent. The court explained that it was reasonable to expect a service station owner to supervise the sale of motor oil, and requiring the prosecution to establish criminal intent would permit owners to escape punishment by pleading that they were unaware of the quality or contents of the motor oil sold in their service stations.³⁰ Is it fair to impose strict liability on Travers for the acts of Mitchell? Would a significant number of guilty people be acquitted in the event that the court required the prosecution to establish a criminal intent? Professor Wayne R. LaFave poses a choice between punishing 100 people for selling tainted food under a strict liability statute or using an intent standard that would result in the conviction of 5 of the 100. The first alternative would result in some innocent people being convicted; the second alternative would result in some guilty people avoiding a criminal conviction. What is the better approach?³¹ In the next section we consider the use of vicarious liability to hold corporations criminally liable.

FIGURE 6.3 ■ The Legal Equation: Vicarious Liability



Corporate Liability

The early common law adopted the logical position that corporations are not living and breathing human beings and therefore cannot be held criminally liable. There was no doctrine of **corporate liability**, prosecution, and punishment. Prosecution and punishment were limited to corporate officers and employees. Over time, corporations were subject to fines for failing to maintain the repair of public works such as roads and bridges.³² The increasing power and prominence of large-scale business enterprises resulted in the gradual growth of the idea of corporate criminal liability and the punishment of corporations through the imposition of financial penalties. The U.S. Supreme Court noted in 1909 that acts of an employee "may be controlled in the interests of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting."³³

The U.S. Supreme Court, in *United States v. Dotterweich*, affirmed in 1943 that corporations, along with corporate executives and employees, could be held criminally liable under the

Federal Food, Drug, and Cosmetic (FD&C) Act. The Court stressed that holding the president of the corporation and the corporation vicariously liable for the strict liability crimes of employees was intended to ensure that company executives and managers closely monitor the distribution of potentially dangerous drugs to the public.³⁴ In *United States v. Park*, the Supreme Court upheld the conviction of a large national food store chain, along with the president of the company, for shipping adulterated food in interstate commerce.³⁵

Keep in mind that a corporate crime may result in the criminal conviction of the employee committing the offense as well as the extension of vicarious liability to the owner and the corporation. There is nothing mysterious about a corporation. It is a method of organizing a business that provides certain financial benefits in return for complying with various state regulations. Note that most small corporations typically are run by an owner or by several partners, although moderately sized and larger corporations may be organized with boards of directors and outside investors or shareholders. The corporation possesses a life of its own separate and apart from all the executives, managers, and employees and is considered a “person” under the law.

The first step in determining whether a corporation may be criminally liable is to examine whether the legislature intends the criminal statute to apply to corporations. In *United States v. Dotterweich*, the U.S. Supreme Court affirmed the conviction of the defendant and corporation under the FD&C Act for introducing an “adulterated or misbranded” drug into interstate commerce. The Court stressed that “a person” under the act was defined to include corporations. Courts have ruled in other instances that the term *person* was limited to “natural persons” and did not include “corporate persons.”³⁶

Once it is determined that a statute encompasses corporations, there are two primary tests for determining whether a corporation should be criminally liable under the statute.

- *Respondeat Superior or the Responsibility of a Superior.* A corporation may be held liable for the conduct of employees who commit a crime within the scope of their employment who possess the intent to benefit the corporation.
- *Model Penal Code Section 2.07.* Criminal liability is imposed in those instances that the criminal conduct is authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a high managerial official acting on behalf of the corporation within the scope of his or her office or employment.

Respondeat superior extends vicarious criminal liability to a corporation for the acts of employees, even when such acts are contrary to corporate policy. It may seem unfair to impose liability on a corporation for the independent criminal acts of an employee, such as Mitchell’s selling of motor oil in the *Travers* case. On the other hand, Mitchell’s sale of misbranded motor oil increased the company’s profits. The Model Penal Code test limits vicarious liability to acts approved or tolerated by high-level corporate officials. Managers, corporate boards, and corporate entities under this approach are liable only for acts that they direct or tolerate. Under this test, decision makers may not possess an incentive to closely monitor employees to ensure that they are not engaging in acts that have not been approved by management. A corporation, for

instance, would not be convicted for Mitchell's independent decision to misrepresent the quality of motor oil sold to consumers. Which test do you favor?

Public Policy

There is an increasing trend toward holding corporations criminally liable. The aim is to encourage corporate executives to vigorously prevent and punish illegal activity. Executives know that a criminal conviction may lead to a decline in consumer sales and investment in the firm as well as to criminal fines, and they have a powerful incentive to ensure that the corporation acts in a legal fashion. The prevention of corporate misconduct is important because we depend on large firms to provide safe and secure health care, transportation, food, and products in the home. Holding a corporation strictly and vicariously liable also makes good sense because business decisions often involve a large number of individuals, and it often is difficult to single out a specific individual or individuals as responsible for designing, manufacturing, marketing, and delivering a defective drug or automobile.³⁷

On the other hand, it seems unfair to hold a corporation strictly and vicariously liable and to impose a heavy fine for crimes that may have been committed by low-level employees or managers or secretly approved by a high-level corporate executive. A criminal fine against a corporation is merely paid out of the corporate treasury, and the threat of a financial penalty may not encourage corporate officials to monitor the activities of employees. A fine may also be passed on to consumers, who will be charged a higher price. In the final analysis, the profits to be gained from misrepresenting the effectiveness of a drug may far outweigh any fine that may be imposed. Critics of corporate liability argue that it makes more sense to limit criminal liability to the individuals who committed the offense.³⁸

Are there penalties other than fines that might be used against corporations? One federal district court imposed a three-year prison sentence on a corporation that was later suspended. The court observed that this could be carried out by ordering the U.S. marshal to seize corporate assets such as computers, machinery, and trucks. This type of punishment has the advantage of completely shutting down a business. On the other hand, it would likely result in innocent individuals losing their jobs.³⁹

Should vicarious liability be extended to corporations for crimes requiring a criminal intent or recklessness? Why should a corporation be immune from a conviction for serious crimes that may result in injury or death? But how can a corporation possess a criminal intent?

In *Commonwealth v. Penn Valley Resorts, Inc.*, the resort and owner were convicted of involuntary manslaughter. The resort was fined \$10,000. A Pennsylvania statute, section 307(a)(2), provides that a corporation may be convicted of an offense "authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of employment." The court held that the resort owner qualified as a "high managerial agent" under the statute and that the law did not limit the vicarious responsibility of corporations to strict liability health, safety, and welfare offenses.

In *Penn Valley*, Edwin Clancy, the president of the resort, permitted a group of underage students to engage in a drinking binge at the resort. William Frazer, a 20-year-old, drank excessively for five or six hours. Clancy personally served alcohol to Frazer and seized and later

handed Frazer back the keys to Frazer's automobile and encouraged the drunk and hostile student to leave the resort. Frazer was subsequently killed when his car drove off the road and hit a bridge. He was found to possess a blood alcohol content of 0.23. The Supreme Court of Pennsylvania concluded that the resort, "through its managerial agent, committed involuntary manslaughter and reckless endangerment." How can a corporation act with gross disregard for the safety of customers? On the other hand, Clancy was president, and his acts legally obligated and financially benefited the corporation.⁴⁰

In 2011, the accounting firm KPMG International paid a \$456 million fine for helping wealthy individuals to avoid taxes. In another case, British oil company BP, in 2012, agreed to plead guilty and to pay \$1.256 billion, the largest criminal fine in history, stemming from a rig explosion that killed 11 people and caused an oil spill in the Gulf of Mexico. BP also agreed to pay \$2.4 billion to the National Fish and Wildlife Foundation.⁴¹

In the next case, *Commonwealth v. Koczwara*, the Supreme Court of Pennsylvania examined whether the legislature intended to impose vicarious liability on the owner of a bar for the sale of liquor by his employees. Pay particular attention to the court's reasoning in reviewing the constitutionality of the owner's criminal conviction. Give careful consideration to the views of the dissenting judge.

CAN A BAR OWNER BE HELD VICARIOUSLY LIABLE AND SENTENCED TO JAIL FOR THE SALE OF LIQUOR TO A MINOR?

COMMONWEALTH V. KOCZWARA, 155 A.2d 825 (PA. 1959)

Opinion by Cohen, J.

This is an appeal from the judgment of the Court of Quarter Sessions of Lackawanna County sentencing the defendant to three months in the Lackawanna County Jail, a fine of five hundred dollars and the costs of prosecution, in a case involving violations of the Pennsylvania Liquor Code.

Facts

John Koczwara, the defendant, is the licensee and operator of an establishment on Jackson Street in the City of Scranton known as J.K.'s Tavern. At that place he had a restaurant liquor license issued by the Pennsylvania Liquor Control Board. . . .

At the conclusion of the Commonwealth's evidence, count three of the indictment, charging the sale by the defendant personally to the minors, was removed from the jury's consideration by the trial judge on the ground that there was no evidence that the defendant had personally participated in the sale or was present in the tavern when sales to the minors took place. . . . [T]he case went to the jury and the jury returned a verdict of guilty as to each of the remaining three counts: two counts of permitting minors to frequent the licensed premises without parental or other supervision, and the count of permitting sales to minors.

. . . [Judge Hoban] sentenced the defendant to pay the costs of prosecution, a fine of five hundred dollars and to undergo imprisonment in the Lackawanna County Jail for three months.

The defendant took an appeal to the Superior Court, which . . . affirmed the judgment and sentence of the lower court. . . . Judge Hoban found as fact that

in every instance the purchase [by minors] was made from a bartender, not identified by name, and service to the boys was made by the bartender. There was *no* evidence that the defendant was present on any one of the occasions testified to by these witnesses, nor [was there any evidence] that he had any personal knowledge of the sales to them or to other persons on the premises.

Issue

We, therefore, must determine the criminal responsibility of a licensee of the Liquor Control Board for acts committed by his employees upon his premises, without his personal knowledge, participation, or presence, which acts violate a valid regulatory statute passed under the Commonwealth's police power.

Reasoning

While an employer in almost all cases is not criminally responsible for the unlawful acts of his employees, unless he consents to, approves, or participates in such acts, courts all over the nation have struggled for years in applying this rule within the framework of "controlling the sale of intoxicating liquor." At common law, any attempt to invoke the doctrine of *respondeat superior* in a criminal case would have run afoul of our deeply ingrained notions of criminal jurisprudence that guilt must be personal and individual. In recent decades, however, many states have enacted detailed regulatory provisions in fields that are essentially non-criminal, e.g., pure food and drug acts, speeding ordinances, building regulations, and child labor, minimum wage and maximum hour legislation. Such statutes are generally enforceable by light penalties, and although violations are labelled crimes, the considerations applicable to them are totally different from those applicable to true crimes, which involve moral delinquency and which are punishable by imprisonment or another serious penalty. Such so-called statutory crimes are in reality an attempt to utilize the machinery of criminal administration as an enforcing arm for social regulations of a purely civil nature, with the punishment totally unrelated to questions of moral wrongdoing or guilt. It is here that the social interest in the general well-being and security of the populace has been held to outweigh the individual interest of the particular defendant. The penalty is imposed despite the defendant's lack of a criminal intent or *mens rea*.

Not the least of the legitimate police power areas of the legislature is the control of intoxicating liquor. . . . It is abundantly clear that the conduct of the liquor business is lawful only to the extent and manner permitted by statute. Individuals who embark on such an enterprise do so with knowledge of considerable peril, since their actions are rigidly circumscribed by the Liquor Code.

Because of the peculiar nature of this business, one who applies for and receives permission from the Commonwealth to carry on the liquor trade assumes the highest degree of responsibility to his fellow citizens. As the licensee of the Board, he is under a duty not only to regulate his own personal conduct in a manner consistent with the permit he has

received, but also to control the acts and conduct of any employee to whom he entrusts the sale of liquor. Such fealty is the [price that] the commonwealth demands in return for the privilege of entering the highly restricted and, what is more important, the highly *dangerous* business of selling intoxicating liquor. . . .

The question here raised is whether the legislature *intended* to impose vicarious criminal liability on the licensee-principal for acts committed on his premises without his presence, participation, or knowledge. . . .

In the Liquor Code, Section 493, the legislature has set forth twenty-five specific acts which are condemned as unlawful, and for which penalties are provided in Section 494. Subsections (1) and (14) of Section 493 contain the two offenses charged here. In neither of these subsections is there any language which would require the prohibited acts to have been done knowingly, willfully or intentionally, there being a significant absence of such words as "knowingly, willfully, etc." . . . It indicates a legislative intent to eliminate both knowledge and criminal intent as necessary ingredients of such offenses. . . .

As the defendant has pointed out, there is a distinction between the requirement of a *mens rea* and the imposition of vicarious absolute liability for the acts of another. It may be that the courts below, in relying on prior authority, have failed to make such a distinction. In any case, we fully recognize it. Moreover, we find that the intent of the legislature in enacting this Code was not only to eliminate the common law requirement of a *mens rea*, but also to place a very high degree of responsibility upon the holder of a liquor license to make certain that neither he nor anyone in his employ commit any of the prohibited acts upon the licensed premises. Such a burden of care is imposed upon the licensee in order to protect the public from the potentially noxious effects of an inherently dangerous business. We, of course, express no opinion as to the *wisdom* of the legislature's imposing vicarious responsibility under certain sections of the Liquor Code. There may or may not be an economic-sociological justification for such liability on a theory of deterrence. Such determination is for the legislature to make, so long as the constitutional requirements are met. . . .

Holding

Defendant, by accepting a liquor license, must bear this financial risk. Because of a prior conviction for violations of the Code, however, the trial judge felt compelled under the mandatory language of the statute, Section 494(a), to impose not only an increased fine of five hundred dollars, but also a three month sentence of imprisonment. Such sentence of imprisonment in a case where liability is imposed vicariously cannot be sanctioned by this Court consistently with the law of the land clause of Section 9, Article I of the Constitution of the Commonwealth of Pennsylvania . . . [which prohibits an individual from being] "deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land."

. . . We have found *no* case in any jurisdiction which has permitted a *prison term* for a vicarious offense. . . . Our own courts have stepped in time and again to protect a defendant from being held criminally responsible for acts about which he had no knowledge and over which he had little control. We would be utterly remiss were we not to so act under these facts.

In holding that the punishment of imprisonment deprives the defendant of due process of law under these facts, we are not declaring that Koczwara must be treated as a first offender under the Code. He has clearly violated the law for a second time and must be punished accordingly. Therefore, we are only holding that so much of the judgment as calls for imprisonment is invalid, and we are leaving intact the five hundred dollar fine imposed by Judge Hoban under the subsequent offense section.

Dissenting, *Musmanno, J.*

The Majority of this Court is doing something which can find no justification in all the law books which ornament the libraries and enlighten the judges and lawyers in this Commonwealth. It sustains the conviction of a person for acts admittedly not committed by him, not performed in his presence, not accomplished at his direction, and not even done within his knowledge. It is stigmatizing him with a conviction for an act which, in point of personal responsibility, is as far removed from him as if it took place across the seas. The Majority's decision is so novel, so unique, and so bizarre that one must put on his spectacles, remove them to wipe the lenses, and then put them on again in order to assure himself that what he reads is a judicial decision proclaimed in Philadelphia, the home of the Liberty Bell, the locale of Independence Hall, and the place where the fathers of our country met to draft the Constitution of the United States, the Magna Carta of the liberties of Americans and the beacon of hope of mankind seeking justice everywhere.

The decision handed down in this case throws a shadow over that Constitution, applies an eraser to the Bill of Rights, and muffles the Liberty Bell which many decades ago sang its song of liberation from monarchical domination over man's inalienable right to life, liberty, and the pursuit of happiness. . . .

The Majority introduces into its discussion a proposition which is shocking to contemplate. It speaks of "vicarious criminal liability." Such a concept is . . . alien to American soil. . . . [T]here was a time in China when a convicted felon sentenced to death could offer his brother or other close relative in his stead for decapitation. The Chinese law allowed such "vicarious criminal liability." I never thought that Pennsylvania would look with favor on anything approaching so revolting a barbarity. . . .

The Majority says that it cannot permit the sentencing of a man to jail "for acts about which he had no knowledge and over which he had little control."

It says: "Such sentence of imprisonment in a case where liability is imposed vicariously cannot be sanctioned by this Court consistently with the law of the land" . . . But if the Majority cannot sanction the incarceration of a person for acts of which he had no knowledge, how can it sanction the imposition of a fine? How can it sanction a conviction at all?

Questions for Discussion

1. What is the justification for the vicarious liability of John Koczwara? Is there any evidence that Koczwara was aware of the sale of liquor to juveniles? Could he have prevented his employees from selling the liquor? Why does the Supreme Court of Pennsylvania not affirm Koczwara's prison sentence?
2. What are the reasons that Judge Musmanno dissents from Koczwara's conviction? Would following Judge Musmanno's view weaken the law against serving alcohol to minors?
3. This was Koczwara's second offense. Will fining Koczwara encourage him to prevent the sale of alcohol to minors in the future? Under what factual conditions do you believe that the Supreme Court of Pennsylvania would have affirmed Koczwara's prison sentence?

YOU DECIDE 6.5

A 17-year-old rented sexually oriented videotapes on two occasions from VIP Video in Millville, Ohio. The first time, the 17-year-old used his father's driver's license for identification, and the second time, he paid in cash and the clerk did not ask him for identification or proof of age. The owner of the store, Peter Tomaino, did not post a sign in the store indicating that sexually oriented rentals would not be made to juveniles. Tomaino was absent from the store at the time of the rentals. He was convicted under a statute that provides that "no person, with knowledge of its character or content, shall recklessly . . . sell . . . material . . . that is obscene or harmful to juveniles."

Should Tomaino's conviction be overturned? Could he constitutionally be sentenced to prison? Consider whether this statute differs from the legislative enactment in *Koczwara*. See *State v. Tomaino*, 733 N.E.2d 1191 (Ohio Ct. App. 1999).

AUTOMOBILES, PARENTS, AND VICARIOUS LIABILITY

Vicarious liability, as we have seen, is typically applied to extend criminal liability to corporate executives or businesses. Vicarious liability is also used to hold the owners of automobiles liable for traffic tickets issued to their automobiles. In addition, there is a recent trend toward holding parents vicariously liable for the crimes of their children. Ask yourself the reason for applying vicarious liability in these two instances.

Traffic Tickets

You lend your automobile to a friend, who later informs you that she was ticketed for illegal parking. She forgets to pay the ticket as promised, and later you receive a letter reminding you that you owe money to the county. You protest and are told that as the owner of the automobile, you are vicariously liable for tickets issued to the car. Will you be successful in fighting this ticket in court?

Most parking statutes consider the owner of the vehicle *prima facie* responsible for paying the ticket. This means that unless you present evidence that you were not responsible, you are presumed liable for the ticket. In other words, the prosecutor is not required to present any evidence to establish your responsibility; you are presumed responsible unless you appear in court and establish that someone else was driving your car. This approach seems to be based on the desirability of a smooth and efficient method of collecting money that avoids court hearings on the identity of drivers. Why is this unfair? After all, you always can be reimbursed by your friend.

Parents

Susan and Anthony Provenzano of St. Clair Shores, Michigan, were aware that their son Alex was experiencing difficulties. He was arrested in May 1995, and the Provenzanos obtained Alex's release from juvenile custody in the fall of 1995, fearing that he would be mistreated by

violent juveniles housed in the facility. Over the course of the next year, Alex was involved in a burglary, excessive drinking, and using and selling marijuana. Alex verbally abused his parents at home and on one occasion attacked his father with a golf club. In May 1996, the Provenzinos were convicted of violating a two-year-old local ordinance that placed an affirmative responsibility on parents to “exercise reasonable control over their children.” The jury required only 15 minutes to find them guilty; each was fined \$100 and ordered to pay \$1,000 in court fees.⁴²

Roughly 17 states and cities today have similar **parental responsibility laws**. States have a long history of passing laws against parents who abuse, neglect, or abandon their children or fail to ensure that their children attend school. In 1903, Colorado was the first state to punish “contributing to the delinquency of a minor.” Similar provisions were subsequently adopted by roughly 42 states and the District of Columbia. These statutes are not limited to parents and require some affirmative act on the part of an adult that aids, encourages, or causes the child’s delinquent behavior.⁴³

The first wave of parental responsibility statutes were passed in the late 1980s and early 1990s, when various states and municipalities adopted laws holding parents strictly and vicariously liable for the criminal conduct of their children. It was presumed that parents possess a duty to supervise their offspring and that this type of statute would encourage parents to monitor and to control their kids. These strict and vicarious liability statutes were ruled unconstitutional in Connecticut, Louisiana, Ohio, Oregon, and Wyoming. The New Hampshire Supreme Court struck down a law that held parents vicariously liable when their minor children unlawfully drove off-highway vehicles on public highways. The court noted that “there is no other basis for criminal responsibility other than . . . that a person is the parent of one who violates the law. . . . Even if the parent has been as careful as anyone could be, even if the parent has forbidden the conduct, and even if the parent is justifiably unaware of the activities of the child, criminal liability is still imposed.”⁴⁴

Parental responsibility statutes generally hold parents responsible for the failure to take reasonable steps to prevent their children from engaging in serious or persistent criminal behavior. A New York law, for instance, punishes a parent who “fails or refuses to exercise reasonable diligence in the control of . . . a child to prevent him from becoming . . . a ‘juvenile delinquent’ or a ‘person in need of supervision.’” These statutes, as illustrated by the New York law, generally lack clear and definite standards.⁴⁵

There are a variety of laws that hold adults liable for teenage drinking. **Social host liability laws** hold adults liable for providing liquor in their home to minors in the event that an accident or injury occurs. Variants are so-called **teen party ordinances**, which declare that it is criminal for an adult to host a party for minors at which alcohol is served.

In *Allen v. Bordentown*, a New Jersey Superior Court held that a curfew on juveniles under 18 was unconstitutional. The parents of a juvenile convicted under the law, once notified that their son or daughter has violated the curfew, are subject to a fine not exceeding \$300, or imprisonment not exceeding 30 days, or both for a second violation. The court in its decision noted that the provision of the law that imposed vicarious liability on parents whose child violated the curfew was a reasonable presumption. “It is to be expected, however, that parents will have some knowledge of the whereabouts of their minor children when they are absent during curfew

hours. Consequently, it is ‘more likely than not’ that parents, once notified of a curfew violation, will be sensitive to the fact that their minor child is again outside the home in violation of the curfew.”⁴⁶

In 1993 in *Williams v. Garcetti*, the Supreme Court of California upheld the constitutionality of a California parental responsibility statute. The law stated that a “parent or legal guardian to any person under the age of 18 years shall have the duty to exercise reasonable care, supervision, protection, and control over their minor child.” A parent or guardian whose “act or omission causes or encourages a child to violate a curfew, be habitually truant, or commit a crime” is held liable under the statute. In other words, a parent is held liable who knows (intentionally) or should know (negligently) “that their child is at risk of delinquency and . . . they are able to control the child.” A violation of the statute is punished as a misdemeanor although the charges may be dismissed prior to trial against a parent or guardian who completes an education, treatment, or rehabilitation program. The legislature passed the law as part of an effort to combat “violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of . . . neighborhoods.” The California Supreme Court stressed that the provision for parental diversion from criminal prosecution in “less serious cases” means that parents will face criminal penalties for a “failure to supervise only in those cases in which the parent’s culpability is great and the causal connection correspondingly clear.”⁴⁷ On the one hand, it seems unfair to hold parents vicariously liable for the criminal acts of their children. On the other hand, parents would certainly seem to have an obligation and responsibility to society to supervise their children. Holding parents liable may lead them to closely monitor their children’s activities and may serve to protect society. What is your view?

The New Hampshire Supreme Court held a parental responsibility law unconstitutional. The New Hampshire statute provided that “[t]he parents or guardians or persons assuming responsibility will be responsible for any damage incurred or for any violations of this chapter by any person under the age of eighteen operating Off Highway Recreational Vehicles (OHRV).” The court held the law unconstitutional because “[e]ven if the parent has been as careful as anyone could be, even if the parent has forbidden the conduct, and even if the parent is justifiably unaware of the activities of the child, criminal liability is still imposed under the wording of the present statute. There is no other basis for criminal responsibility other than the fact that a person is the parent of one who violates the law.”⁴⁸

YOU DECIDE 6.6

The City of Trenton, New Jersey, adopted a “parent responsibility ordinance.” The ordinance presumed that a parent is responsible for the misbehavior of a child who twice within one year is adjudged guilty of acts defined as violations of the public peace. The acts so defined include adjudications for delinquency and of the status of being a juvenile in need of supervision. A parent convicted under the ordinance may be fined up to \$500. Should parents be held responsible for the “misbehavior of a child”? See *Doe v. Trenton*, 362 A.2d 1200 (N.J. Super. Ct. App. Div. 1976).

CRIME IN THE NEWS

Under the Texas “law of parties” statute, an individual who solicits, encourages, directs, aids, or attempts to aid another individual to commit a crime is liable for any additional crime that could have been “reasonably anticipated though having no intent to commit it.”

Jeffery Lee Wood, age 22, and Daniel Earl Reneau on January 2, 1996, agreed to rob a Texaco service station in Kerrville, Texas. Wood waited in the car while Reneau, armed with a .22-caliber handgun, entered the convenience store and confronted Kris Keeran. Keeran initially had discussed cooperating in the robbery although later decided that he did not want to go through with the crime. Reneau killed Keeran with one shot between the eyes, seized the cash box, and retrieved the safe from the back room. Wood, hearing the shot, entered the store and spotted Keeran’s body behind the counter. Reneau allegedly ordered Wood at gunpoint to get the surveillance video and forced Wood at gunpoint to drive the getaway car. They fled from the scene with an estimated \$11,350 in cash and checks. Wood later destroyed the video after showing it to his brother.

Reneau and Wood were immediately arrested, and Wood was convicted and sentenced to death. Wood, based on his history of severe mental illness and emotional and learning disabilities and an IQ of 80, at first was determined to be mentally incompetent to stand trial. He was hospitalized, and after 22 days was found competent to stand trial. Following Wood’s conviction, his lawyer failed to call witnesses at sentencing to challenge the imposition of the death penalty. In August 2008, the Texas Board of Pardons and Paroles voted 7–0 against granting clemency to Wood. A federal judge subsequently issued a stay of execution five and one half hours before Wood’s scheduled execution to determine whether Wood was mentally competent. Another stay of execution was granted in August 2016 by the Texas Court of Criminal Appeals, which, under pressure from vocal protests, returned Wood’s case to the trial court for review. The trial court judge “reprieved” Wood’s death sentence although the Texas Court of Criminal Appeals subsequently reinstated the death penalty in 2018. The appellate court reasoned that although controversial psychiatrist James P. Grigson had provided “false and misleading testimony” regarding Wood’s future dangerousness there nevertheless was sufficient evidence that Woods posed a future danger.

In 2017, Lucy Wilke, the prosecutor in Wood’s original trial, had written the Texas Board of Pardons and Paroles asking the board to recommend to Governor Greg Abbott that Wood’s sentence be reduced to life imprisonment. She explained that she was a young prosecutor at the time of the trial and in retrospect would not have asked Grigson to testify had she known about his expulsion from two psychiatric associations.

Charles Keeran, the victim’s father, on the day of Daniel Reneau’s execution in 2008, spoke out against executing his son’s killer. “The death penalty, to me, is the easy way out,” he said. “If you had to be down there and get up every morning, as hot and humid as it is knowing that you are going to spend the rest of your life locked up under those conditions, that’s punishment. That’s what I think my son would want for him.”

At Renau’s trial he described Wood as more of a companion than a co-conspirator. Jared Tyler, Wood’s lawyer, argues that Reneau was far more enthusiastic than Wood about the robbery and that Wood did not know that Reneau was armed with a weapon. Wood, according to individuals working on his behalf, had been led to believe that the planned robbery had been called off and that Reneau was entering the store to get “road drinks and munchies.”

Tyler argues that “Wood’s case is the embodiment of the arbitrariness of capital punishment in Texas. . . . It is impossible to hazard a guess how many thousands of individuals in Texas have committed more disturbing crimes than Wood; who played a far greater, more

culpable role in those crimes than Wood; who had a far worse criminal record than Wood; and who received a term of years or life as a sentence. Yet Wood, an impaired individual who neither killed anybody, intended that anybody be killed, or even meaningfully anticipated that anybody would be killed, has found himself convicted of capital murder and sitting on Texas's death row." Since the reintroduction of the death penalty in 1976, there have been at least 10 executions in six states under the law of parties in which the defendants did not directly kill the victim. Five of these executions took place in Texas. Ever since 2003, bipartisan laws have been introduced in the Texas legislature to repeal the law of parties, although by the time this legislation is adopted, it may be too late to assist Wood. State prosecutors oppose the legislation on the grounds that the law would handcuff their prosecution of offenders and limit their ability to persuade defendants to testify against their codefendants who actually pulled the trigger. Imposing capital punishment under the law of parties according to prosecutors also encourages defendants to take active steps to ensure that their codefendants do not kill victims during the course of a felony. Prosecutors further argue that law of parties is essential to holding felons accountable and point to two instances in which one of several inmates involved in a prison escape killed guards or innocent citizens.

The prevailing law under the Eighth Amendment on the constitutionality of executing individuals who do not actually kill is not entirely clear. In *Enmund v. Florida*, 458 U.S. 782 (1987), the U.S. Supreme Court held that it was unconstitutional to execute the driver of a getaway car who lacked a criminal intent and who did not participate in a robbery and murder. On the other hand, in *Tison v. Arizona*, 481 U.S. 137 (1987), the Court noted that "substantial participation in a violent felony under circumstances likely to result in the loss of innocent life may justify the death penalty even absent an intent to kill." In 2019, the U.S. Supreme Court halted the execution of an escaped prison inmate sentenced to death under the law of parties on the ground that Texas had violated the inmate's religious liberty by denying a Buddhist cleric access to the execution chamber. Should Jeff Wood and other individuals on death row be executed by the State of Texas under the law of parties?

CHAPTER SUMMARY

We have seen that under the common law there were four parties to a crime. The procedural requirements surrounding the prosecution of parties developed by judges were intended to impede the application of the death penalty. Today there are two parties to a crime:

- *Accomplices*. Individuals involved before and during a crime
- *Accessories*. Individuals involved following a crime

The *actus reus* of accomplice liability is described as "aiding," "abetting," "encouraging," and "commanding" the commission of a crime. This is satisfied by even a small degree of material or psychological assistance. Mere presence is not sufficient. The *mens rea* of accomplice liability is typically described as the intent to assist the primary party to commit the offense with which the individual is charged. Some judges have argued for a knowledge standard, but other courts have recognized liability based on recklessness. The criminality of an accessory after the fact is distinguished from that of accomplices by the fact that the legal guilt of an accessory after the fact is not derived from the primary crime. Instead, accessory after the fact is now considered a

separate and minor offense involving an intent and an act undertaken with the purpose of hindering the detection, apprehension, prosecution, conviction, or punishment of the individual receiving assistance.

Strict liability holds an individual liable based on the commission of a criminal act while dispensing with the requirement of a criminal intent. Vicarious liability imposes liability on an individual for the criminal act of another. A corporate officer or corporation may be held vicariously liable under a statute where there is a legislative intent to impose vicarious liability for the act of an employee or corporate agent. This typically arises in the case of strict liability offenses that are punishable by a fine and are intended to protect the societal health, safety, and welfare. Vicarious liability is extended to the owners of automobiles for traffic tickets based on their legal title to the car and the interest in efficiently processing tickets. Parents, under some state statutes, are held vicariously liable for the criminal conduct of their children based on their status relationship.

CHAPTER REVIEW QUESTIONS

1. What were the four categories of common law parties? How does this differ from the modern categorization of parties?
2. Illustrate the definition of common law accomplices and accessories using the example of a bank robbery. Should accomplices be held criminally responsible for the same crime and punished to the same extent as the primary perpetrator of the crime?
3. What *actus reus* is required for an accomplice? Provide some illustrations of acts satisfying the *actus reus* requirement. What is the mere presence rule? Is there an exception to the mere presence rule?
4. Discuss the *mens rea* of accomplice liability. Distinguish this from the minority position that “knowledge” is sufficient. How would these two approaches result in a different outcome in a case? Which approach do you favor?
5. What are the requirements for an individual to be considered an accessory after the fact? Is this considered as serious a criminal violation as that of being an accomplice?
6. Distinguish accomplice liability, strict liability, and vicarious liability.
7. How does the language of a statute determine whether a corporation may be held vicariously liable? What are the two primary tests for determining corporate liability? Discuss some of the arguments for and against the vicarious liability of corporations.
8. What constitutional considerations are involved in holding the owner of an automobile vicariously liable for the traffic tickets issued to the car?
9. Is it constitutional to hold parents strictly and vicariously liable for the criminal acts of their children? In your view, are there any situations in which parents should or should not be held vicariously liable?
10. Write a brief essay summarizing the law of parties.

LEGAL TERMINOLOGY

accessories	parental responsibility laws
accessories after the fact	parties to a crime
accessories before the fact	<i>Pinkerton</i> rule
accomplice liability	principals in the first degree
corporate liability	principals in the second degree
derivative liability	social host liability laws
mere presence rule	teen party ordinances
natural and probable consequences doctrine	vicarious liability

TEST YOUR KNOWLEDGE ANSWERS

1. True.
2. False.
3. False.
4. True.

7

ATTEMPT, CONSPIRACY, AND SOLICITATION

TEST YOUR KNOWLEDGE: TRUE/FALSE

1. A criminal attempt under the common law may involve an intentional, negligent, or reckless intent.
2. The *actus reus* of a criminal attempt in general is exactly the same as the *actus reus* of the completed crime.
3. Both factual impossibility and legal impossibility constitute a defense to an attempted crime.
4. The law in most states recognizes the defense that a defendant abandoned an attempt to commit a crime.
5. A defendant may be guilty of conspiracy despite not knowing the name of the other individuals in the conspiracy.
6. An individual who solicits another person to commit a crime is not guilty of a crime if the other person does not commit the crime.

Check your answers at the end of the chapter on page 313.

Was the Defendant Guilty of a Criminal Attempt?

Defendant . . . told police that he planned to conclude any shooting in the school's library, in mimicry of the Columbine shooting, and discussed the kinds of guns and other items that he would want to have for a school shooting. Defendant told police that he had converted money from his bank account to Bitcoin, installed a browser that would allow him to access the dark web, and intended to purchase a handgun with Bitcoin on the dark web. He had been unable to purchase this handgun, which is included in the lists of needed equipment in defendant's journal . . . because the value of defendant's Bitcoin had diminished. Defendant

told the officers that he wanted to exceed the body count from the Virginia Tech shooting and that he had chosen his ammunition accordingly. Finally, defendant told police that he wanted to commit a mass shooting on the anniversary of the date of the Columbine school shooting but that [the high school] would not be in session at that time, and he instead would commit any shooting on March 14th. (*State v. Sawyer*, 187 A.3d 377 [Vt. 2018])

INTRODUCTION

We live in fear of a terrorist bombing or hijacking and certainly do not want to wait for an attack to occur before arresting terrorists. On the other hand, at what point can we be confident that individuals are intent on terrorism?

Inchoate or “beginning” crimes provide that individuals can be convicted and punished for an intent to commit a crime when this intent is accompanied by a significant step toward the commission of the offense.

At this point, society is confident that the individual presents a threat and that society is justified in acting to protect itself. There are three **inchoate crimes**:

- *Attempt* punishes an unsuccessful effort to commit a crime.
- *Conspiracy* punishes an agreement to commit a crime and an overt act in furtherance of this agreement.
- *Solicitation* punishes an effort to persuade another individual to commit a crime.

The conviction of an individual for an inchoate crime requires

- a specific intent or purpose to accomplish a criminal offense, and
- an act to carry out the purpose.

Individuals who commit inchoate offenses may be punished less severely than or as severely as they would have been punished if they had completed the crime that was the object of the attempt, conspiracy, or solicitation.

ATTEMPT

Professor Joshua Dressler notes that attempts are failures. A sniper misses an intended victim, two robbers are apprehended as they enter a store, and a pickpocket finds that the victim’s pocket is empty. In this section, we will ask at what point an **attempt** is subject to criminal punishment. Must we wait until a bullet misses its mark and whistles past the head of an intended victim to arrest the shooter? What defenses are available? May a pickpocket plead that the intended victim’s pocket was empty?

There are two types of attempts: **complete attempt** (but “imperfect”) and **incomplete attempt**. A complete, but imperfect, attempt occurs when an individual takes every act required to commit a crime and yet fails to succeed. An example is an individual firing a weapon and missing the intended victim. In the case of an incomplete attempt, an individual abandons or is prevented from completing a shooting due to the arrival of the police or as a result of some other event outside the individual’s control. A third category that we should mention is the **impossible attempt**. This arises where the perpetrator makes a mistake, such as aiming and firing the gun only to realize that it is not loaded. You should keep these categories in mind as you read the cases on attempt.¹

Judges and lawyers, as we mentioned, disagree over how far an individual must progress toward the completion of a crime to be held legally liable for an attempt. It is only when an assailant pulls the trigger that we can be confident that the assailant possesses an intent to kill or to seriously wound a potential victim.

Yet, the longer we wait to arrest an individual, the greater the risk that the individual may carry out the crime and wound or kill a victim. At what point do you believe the police are entitled to arrest a potential assailant?

In *People v. Miller*, Miller, while slightly inebriated, threatened to kill Albert Jeans. Miller appeared that afternoon on a farm owned by Sheriff Ginochio where Jeans worked. Miller was carrying a .22-caliber rifle and walked toward Ginochio, who was 250 or 300 yards in the distance. Jeans stood roughly 30 yards behind Ginochio. The defendant walked about 100 yards, stopped, appeared to load his rifle, and then continued to walk toward Ginochio, who seized the weapon from Miller without resistance. Jeans, as soon as he saw Miller, fled on a right angle to Miller’s line of approach, but it is not clear whether this occurred before or after Miller crouched and appeared to place a bullet in the rifle. The firearm was loaded with a high-speed cartridge. At no time did Miller raise and aim his rifle. Was this sufficient for an attempt?

What was Miller’s intent? To frighten Jeans or to kill him? Should we consider Jeans’s reaction in determining Miller’s guilt? Consider the presence of Ginochio in formulating your view. Would you hold Miller liable for an attempt to kill Jeans? Should an attempt be punished to the same extent as the actual offense? Do you believe that the resources of the legal system should be devoted to prosecuting Miller under the circumstances?²

History of Attempt

Scholars and philosophers dating back to the ancient Greeks have wrestled with the appropriate punishment for an attempted crime. After all, an attempt arguably does not result in any harm. In 360 B.C.E., the famous Greek philosopher Plato argued that an individual who possesses “the purpose and intention to slay another . . . should be regarded as a murderer and tried for murder.” Plato, however, also recognized that an attempt does not result in the death of the victim and that banishment rather than the death penalty would be an appropriate penalty.³

The early common law did not punish attempts. Henry of Bracton explained this by asking, “What harm did the attempt cause, since the injury took no effect?”⁴ English law, rather than relying on the prosecution of attempts to prevent and punish the first steps toward crime, adopted laws against unlawful assemblies, walking at night, and unemployed persons wandering in the countryside, as well as other prohibitions on activities that may result in crime, such

as keeping guns or crossbows in the house, lying in wait, or drawing a sword to harm a judge. Gaps in the law were filled by the Court of Star Chamber, which was authorized by the king to maintain order by modifying common law rules where necessary. These were volatile and violent times, and the Star Chamber began to introduce the concept of attempts into the law by punishing threats and verbal confrontations that were likely to escalate into armed confrontations, challenges, and attempts to enter into duels. In 1614, Sir Francis Bacon prosecuted a case before the Star Chamber for dueling in which he argued that acts of preparation for a sword fight should be punished in order to discourage armed confrontations.

The law of attempt was finally recognized by the common law in the important decision of *Rex v. Scofield* in 1784. The defendant was charged with placing a lighted candle and combustible material in a house with the intent of burning down the structure. Lord Mansfield, in convicting the defendant, stressed the importance of intent, writing that “the intent may make an act, innocent in itself, criminal. . . . Nor is the completion of an act, criminal in itself, necessary to constitute criminality.”⁵ In 1801, the law of attempt was fully accepted in the case of *Rex v. Higgins*, which involved the indictment of an individual for urging a servant to steal his master’s goods. The court proclaimed that “all offenses of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable.”⁶ This common law rule was subsequently accepted by courts in the United States, which ruled that it was a misdemeanor to attempt to commit any felony or misdemeanor.

Public Policy and Attempt

Why punish an act that does not result in the successful commission of a crime? There are at least three good reasons:

- *Retribution.* An individual who shoots and misses or makes efforts to commit a murder is as morally blameworthy as a successful assailant. Success or failure may depend on unpredictable factors, such as whether the victim moved to the left or to the right or whether the police happened to drive by the crime scene.
- *Utility.* The lesser punishment for attempt provides an incentive for individuals to halt before completing a criminal act in order to avoid being subjected to a harsher punishment.
- *Incapacitation.* The individual clearly poses a threat to society.

The Elements of Criminal Attempt

Criminal attempt comprises three elements:

- an intent or purpose to commit a crime,
- an act or acts toward the commission of the crime, and
- a failure to complete the crime.

A general attempt statute punishes an attempt to commit any criminal offense. Other statutes may be directed at specific offenses, such as an attempt to commit murder, robbery, or rape.

YOU DECIDE 7.1

Consider an Indiana case. J.F. told David Calvert of his intent and desire to rob a liquor store. Calvert and J.F. drove to the liquor store with BB guns, a sawed-off shotgun, ski masks, and sunglasses. They parked near the liquor store and were approached by a police officer who observed the firearms in the car and arrested Calvert for attempted robbery with a deadly weapon. Would you convict Calvert of attempted armed robbery? See *Calvert v. State*, 930 N.E.2d 633 (Ind. Ct. App. 2010).

FIGURE 7.1 ■ The Legal Equation: Attempt



MENS REA OF ATTEMPT

A Criminal Attempt Involves a Dual Intent

- An individual must intentionally perform acts that are proximate to the completion of a crime.
- An individual must possess the specific intent or purpose to achieve a criminal objective.

In the case of an individual accused of attempted murder, the prosecution must demonstrate that (1) the defendant intentionally aimed and engaged in an act toward the shooting of the arrow, and (2) this was undertaken with the intent to kill a hunter walking on the trail. A defendant who did not notice the hunter and lacked the intent to kill would not be held liable for attempted premeditated murder.⁷ As noted by an Illinois appellate court, “a finding of specific intent to kill is a necessary element of intent to kill.”⁸

The commentary to the Model Penal Code offers the example of an individual who detonates a bomb with the purpose of demolishing a building knowing that people are inside. In the event that the bomb proves defective, the commentary notes that the defendant likely would not be held responsible for attempted murder, because the purpose was to destroy the building rather than to kill the individuals inside the structure. The Model Penal Code section 5.01(1)(b) adopts a broad approach to intent and argues that when a defendant knows that death is likely

to result from the destruction of the building, it is appropriate to hold the defendant liable for attempted murder.⁹

In *Smallwood v. State*, the Maryland Court of Appeals was confronted with the issue of whether a rapist with HIV was guilty of an attempt to murder his victims. In this case, consider whether it makes sense to limit the intent for attempt to purpose. Is purpose too difficult a standard to satisfy? Should knowledge also result in criminal liability?

DID SMALLWOOD POSSESS THE INTENT TO KILL THROUGH THE TRANSMISSION OF HIV?

SMALLWOOD V. STATE, 680 A.2d 512 (MD. 1996)

Opinion by Murphy, J.

Facts

On August 29, 1991, Dwight Ralph Smallwood was diagnosed as being infected with the Human Immunodeficiency Virus (HIV). According to medical records from the Prince George's County Detention Center, he had been informed of his HIV-positive status by September 25, 1991. In February 1992, a social worker made Smallwood aware of the necessity of practicing "safe sex" in order to avoid transmitting the virus to his sexual partners, and in July 1993, Smallwood told health care providers at Children's Hospital that he had only one sexual partner and that they always used condoms. Smallwood again tested positive for HIV in February and March of 1994.

On September 26, 1993, Smallwood and an accomplice robbed a woman at gunpoint, and forced her into a grove of trees where each man alternately placed a gun to her head while the other one raped her. On September 28, 1993, Smallwood and an accomplice robbed a second woman at gunpoint and took her to a secluded location, where Smallwood inserted his penis into her with "slight penetration." On September 30, 1993, Smallwood and an accomplice robbed yet a third woman, also at gunpoint, and took her to a local school where she was forced to perform oral sex on Smallwood and was raped by him. In each of these episodes, Smallwood threatened to kill his victims if they did not cooperate or to return and shoot them if they reported his crimes. Smallwood did not wear a condom during any of these criminal episodes.

Based upon his attack on September 28, 1993, Smallwood was charged with, among other crimes, attempted first-degree rape, robbery with a deadly weapon, assault with intent to murder, and reckless endangerment. In separate indictments, Smallwood was also charged with the attempted second-degree murder of each of his three victims. On October 11, 1994, Smallwood pled guilty in the Circuit Court for Prince George's County to attempted first-degree rape and robbery with a deadly weapon. The circuit court also convicted Smallwood of assault with intent to murder and reckless endangerment based upon his September 28, 1993 attack, and convicted Smallwood of all three counts of attempted second-degree murder.

Following his conviction, Smallwood was sentenced to concurrent sentences of life imprisonment for attempted rape, twenty years imprisonment for robbery with a deadly

weapon, thirty years imprisonment for assault with intent to murder, and five years imprisonment for reckless endangerment. The circuit court also imposed a concurrent thirty-year sentence for each of the three counts of attempted second-degree murder. The circuit court's judgments were affirmed in part and reversed in part by the Court of Special Appeals, which found that the evidence was sufficient for the trial court to conclude that Smallwood intended to kill his victims and upheld all of his convictions. . . .

Issue

Smallwood asserts that the trial court lacked sufficient evidence to support its conclusion that he intended to kill his three victims. Smallwood argues that the fact that he engaged in unprotected sexual intercourse, even though he knew that he carried HIV, is insufficient to infer an intent to kill. The most that can reasonably be inferred, Smallwood contends, is that he is guilty of recklessly endangering his victims by exposing them to the risk that they would become infected themselves. The State disagrees, arguing that the facts of this case are sufficient to infer an intent to kill. The State likens Smallwood's HIV-positive status to a deadly weapon and argues that engaging in unprotected sex when one is knowingly infected with HIV is equivalent to firing a loaded firearm at that person.

Reasoning

. . . [HIV is] a retrovirus that attacks the human immune system, weakening it, and ultimately destroying the body's capacity to ward off disease. We also noted that

[t]he virus may reside latently in the body for periods as long as ten years or more, during which time the infected person will manifest no symptoms of illness and function normally. HIV typically spreads via genital fluids or blood transmitted from one person to another through sexual contact, the sharing of needles in intravenous drug use, blood transfusions, infiltration into wounds, or from mother to child during pregnancy or birth. . . .

AIDS . . . is the condition that eventually results from an immune system gravely impaired by HIV. Medical studies have indicated that most people who carry the virus will progress to AIDS. AIDS patients by definition are profoundly immunocompromised; that is, they are prone to any number of diseases and opportunistic infections that a person with a healthy immune system might otherwise resist. AIDS is thus the acute clinical phase of immune dysfunction. . . . AIDS is invariably fatal.

In this case, we must determine what legal inferences may be drawn when an individual infected with the HIV virus knowingly exposes another to the risk of HIV-infection, and the resulting risk of death by AIDS.

As we have previously stated, "[t]he required intent in the crimes of assault with intent to murder and attempted murder is the specific intent to murder, i.e., the specific intent to kill under circumstances that would not legally justify or excuse the killing or mitigate it to manslaughter." . . . Smallwood . . . was properly found guilty of attempted murder and assault with intent to murder only if there was sufficient evidence from which the trier of fact could reasonably have concluded that Smallwood possessed a specific intent to kill at the time he assaulted each of the three women. . . .

The State argues that Smallwood similarly knew that HIV infection ultimately leads to death, and that he knew that he would be exposing his victims to the risk of HIV

transmission by engaging in unprotected sex with them. Therefore, the State argues, a permissible inference can be drawn that Smallwood intended to kill each of his three victims. . . .

Death by AIDS is clearly one *natural* possible consequence of exposing someone to a risk of HIV infection, even on a single occasion. It is less clear that death by AIDS from that single exposure is a sufficiently *probable* result to provide the sole support for an inference that the person causing the exposure intended to kill the person who was exposed. While the risk to which Smallwood exposed his victims when he forced them to engage in unprotected sexual activity must not be minimized, the State has presented no evidence from which it can reasonably be concluded that death by AIDS is a probable result of Smallwood's actions to the same extent that death is the probable result of firing a deadly weapon at a vital part of someone's body. Without such evidence, it cannot fairly be concluded that death by AIDS was sufficiently probable to support an inference that Smallwood intended to kill his victims in the absence of other evidence indicative of an intent to kill.

In this case, we find no additional evidence from which to infer an intent to kill. Smallwood's actions are wholly explained by an intent to commit rape and armed robbery, the crimes for which he has already pled guilty. For this reason, his actions fail to provide evidence that he also had an intent to kill. . . . Smallwood's knowledge of his HIV-infected status provides the only evidence in this case supporting a conclusion that he intended anything beyond the rapes and robberies for which he has been convicted. . . .

The evidence in *State v. Haines*, 545 N.E.2d 834 (Ind. App. 1989), contained both statements by the defendant demonstrating intent and actions solely explainable as attempts to spread HIV. There, the defendant's convictions for attempted murder were upheld where the defendant slashed his wrists and sprayed blood from them on a police officer and two paramedics, splashing blood in their faces and eyes. Haines attempted to scratch and bite them and attempted to force blood-soaked objects into their faces. During this altercation, the defendant told the officer that he should be left to die because he had AIDS, that he wanted to "give it to him," and that he would "use his wounds" to spray the officer with blood. Haines also "repeatedly yelled that he had AIDS, that he could not deal with it and that he was going to make [the officer] deal with it." . . .

Holding

We have no trouble concluding that Smallwood intentionally exposed his victims to the risk of HIV-infection. The problem before us, however, is whether knowingly exposing someone to a risk of HIV-infection is by itself sufficient to infer that Smallwood possessed an intent to kill.

Questions for Discussion

1. Why does the court conclude that Smallwood lacked a specific intent to kill? As a prosecutor, what arguments would you present in support of the contention that Smallwood, in fact, possessed a specific intent to kill? What additional evidence might you present to persuade the court to affirm Smallwood's conviction?
2. As a juror, would you vote to convict or to acquit Smallwood?

YOU DECIDE 7.2

Lee W. Johnson called the police to assist him to retrieve a gun that he lawfully possessed that was inside a house he had previously occupied with his former girlfriend Glenda Pankey. Pankey let Officer Born inside the house and refused to return the gun. Johnson, who was on the front porch with Officer Osenga, loudly threatened that "if I don't get this gun back, I will burn this 'm___ing' house down." Born subsequently explained to Johnson that Pankey denied having the gun and offered to bring the gun to the police station if she later reported to the police that she found the gun. Johnson became even more agitated and again threatened to burn down the house. The officers ordered Johnson to leave the premises. Officer Osenga positioned himself in a squad car along with another officer to keep Pankey's house under surveillance. Johnson returned to his house and retrieved a gasoline can, which he filled with gasoline at a service station, and returned to Pankey's house. Johnson began to pour gasoline about a foot away from the house which had a concrete foundation about one and a half to two feet deep. The grass was covered with snow, and it was a cold and damp day. When Johnson noticed Osenga, he stopped pouring the gasoline on the ground and began to walk away from the house. Osenga approached Johnson and told Johnson that he was under arrest. Johnson resisted, and Osenga forcibly subdued him. Another officer then went to question Pankey who turned the gun over to the officer. Johnson later explained that Pankey had requested him to come over the previous night because someone had attempted to enter the house. He arrived with his gun, secured the house, and slept on the couch and in the morning began arguing with Pankey. Johnson called the police because two other people had come over and were drinking and he was worried about a gun in the house with the children. Johnson claimed that he had only poured a cup of gasoline on the ground, and a search revealed that he had no matches, no lighter, and nothing else to ignite the fire. He subsequently was convicted of attempted aggravated arson and of one count of resisting a peace officer and was sentenced to 11 years in prison. Did Johnson possess the required criminal intent to be held criminally liable for attempted aggravated arson? See *People v. Johnson*, 429 N.E.2d 905 (Ill. App. Ct. 1981).

ACTUS REUS OF ATTEMPT

There are two steps in considering the *actus reus* of attempt. First, determine the legal test to be applied. Second, apply the legal test to the facts.

The often-confusing legal tests reflect two different approaches to attempt. The **objective approach to criminal attempt** requires an act that comes extremely close to the commission of the crime. An arsonist, for instance, must spread kerosene on the ground surrounding a house and then strike a match to ignite the fire. At this point, although the match may be blown out by the wind, we can be confident that the defendant possesses the intent to commit arson and is determined to act on this desire. The fact that the arsonist went so far as to light the match also confirms that the defendant poses a threat to society. This objective approach distinguishes **preparation**, or the planning and purchasing of the materials to commit arson, from acts taken to perpetrate the crime, such as spreading the kerosene and lighting the match.

The **subjective approach to criminal attempt** focuses on an individual's intent rather than on an individual's acts. This approach is based on the belief that society should intervene as

soon as an individual who possesses the required intent takes an act toward the commission of a crime. The intent may be revealed by an individual's statements or actions. The subjective approach dictates that the police arrest an arsonist as soon as the individual approaches the crime scene with the kerosene and matches. At this point, we can be fairly certain that the individual poses a threat to society. Critics point out that this early intervention fails to provide individuals with the opportunity to change their mind and risks punishing individuals for bad thoughts who may never, in fact, engage in bad acts.

The objective approach stresses the danger posed by a defendant's acts; the subjective approach focuses on the danger to society presented by a defendant who possesses a criminal intent.

In considering these two perspectives, review *People v. Miller* in the introductory section on the law of attempt. Now consider which approach you would adopt in analyzing whether the two 12-year-old girls in *State v. Reeves* are guilty of attempted murder. Molly and Tracie agreed to poison their teacher, Janice Geiger, and then steal her car. They shared their scheme with an older high school student the night before the planned murder and were unable to persuade him to drive them to the mountains in Geiger's automobile.

Later, Molly revealed the plan to another student while on the bus to school and went so far as to show her a packet of rat poison. This student informed Janice Geiger of the plan, and during homeroom Geiger observed Molly and Tracie lean over her desk, giggle, and run back to their seats. Geiger also noticed a purse lying next to her coffee cup on the desk and arranged for Molly to be called to the principal's office, where rat poison was found in the purse.

Were Molly and Tracie liable for an attempt to kill Janice Geiger? At what point did they cross the line from preparing to poison Ms. Geiger to attempting to poison Ms. Geiger? When they entered the school? When they approached the desk? Should we wait until the poison is actually placed in the coffee cup? Is the best approach to emphasize the defendants' acts (objective approach) or intent (subjective approach)?¹⁰

Three Legal Tests

There are three major legal tests for the *actus reus* of attempt. All three ask whether an individual's actions so clearly indicate an intent to commit a crime that we can confidently charge the individual with an attempt.

- *Physical Proximity to the Commission of a Crime.* The defendant's acts come close to completing the crime. The focus is on the remaining steps required to complete the crime.
- *Uequivocality or Clarity of Purpose to Commit a Crime.* Without any other information, an ordinary person looking at the defendant's acts would conclude without a doubt that the defendant intends to commit the crime.
- *Model Penal Code or Substantial Step Toward the Commission of a Crime.* The defendant's acts are sufficient to clearly indicate possession of an intent to commit the crime.

At common law, the first steps toward the commission of a crime were considered mere preparation and did not constitute an attempt. The common law followed the **last step approach** and provided that an attempt occurred only after the completion of the final step required for the commission of a crime. In other words, an attempted arson required that individuals actually ignite a fire before they could be arrested for attempt. In an attempted murder, the assailant must pull the trigger only to miss the target or to find that the gun is unloaded.

The modern **physical proximity test** is employed by some state courts and is slightly less demanding than the last step approach. The physical proximity test follows an objective approach and provides that an attempt occurs when an act is “very near” or “dangerously close” to the completion of a crime. An individual must possess the immediate ability to complete the crime or, in the words of the courts, the act must “amount to the commencement of the consummation.” Under this test, the arsonist would be required to spread the kerosene on the building and to strike a match. The killer must aim a rifle at the victim and have the victim within the sights of the rifle. There is good reason to believe at that point the arsonist or killer intends to take the final steps required to commit the crime.

The **unequivocality test** or clarity test, or *res ipsa loquitur* (“the thing speaks for itself”), asks whether an ordinary individual observing the defendant’s acts would conclude that the defendant clearly and indisputably intends to commit a crime. The focus is on what an individual has “already done.” The defendant’s statements to the police or to other persons are not considered in this analysis. The moment the arsonist arrives at the crime scene with the necessary materials, most people would conclude that the defendant possesses a clear intent and is guilty of an attempted arson. This test is criticized for lacking clear guidelines and providing jurors with considerable discretion.

The Model Penal Code **substantial step test** simplifies matters by providing an understandable and easily applied test for attempt. The Model Penal Code states that to constitute an attempt, an act must be a *clear step* toward the commission of a crime. This step is not required to come close to the completion of the crime itself. The Model Penal Code does state that the act must be “strongly corroborative of the actor’s criminal purpose.” The focus is on the acts already taken by the defendant toward the commission of the crime. The code offers a number of factual examples:

- lying in wait, searching for, or following the contemplated victim of a crime;
- enticing the victim of the crime to go to the place contemplated for its commission;
- surveillance of the site of the contemplated crime;
- unlawful entry of a building or vehicle that is the site of the contemplated crime;
- possession of materials specifically designed for the commission of a crime; and
- soliciting an individual to engage in conduct constituting a crime.

The Model Penal Code substantial step analysis concentrates on asking whether an individual has taken affirmative acts toward the completion of a crime that, in combination with

other evidence, indicate a defendant possesses a criminal intent. These steps are not required to be physically proximate or close to the offense, and there is no firm distinction between preparation and perpetration of a crime. The concern is with detaining dangerous persons rather than with delaying an arrest until an individual comes close to committing a dangerous act.

The Physical Proximity and Substantial Step Tests

You are likely understandably confused by the broad and uncertain nature of the law of attempt. Keep in mind that the fundamental question is whether the law of attempt should be concerned with a defendant's intent or with the proximity of the defendant's acts to the completion of a crime.

The substantial step test significantly broadens the authority of the police to arrest individuals for an attempt to commit a crime. For instance, the Model Penal Code provides that "lying in wait" and "searching for or following the contemplated victim" satisfies the *actus reus* requirement.

The commentary to the Model Penal Code recognizes that these acts would not satisfy the demanding standard for *actus reus* under the physical proximity test. For example, in *People v. Rizzo*, the New York Court of Appeals rejected that searching for a "contemplated victim" constituted an attempt. In *Rizzo*, four men planned to rob Charles Rao of the payroll that he was scheduled to carry from the bank to his company's offices. The four conspirators, two of whom were armed, drove to the bank and to the firm's various worksites, but failed to find Rao. The four were arrested and subsequently acquitted by the New York Court of Appeals. The court ruled that in searching for Rao, the four men had not progressed beyond preparation and that their acts were not "immediately near" or "dangerously close" to the commission of the crime of robbery, because they had yet to encounter and confront Rao. They clearly could still change their minds. On the other hand, the commentary to the Model Penal Code notes that the defendants' "following, searching," and "lying in wait" with a criminal purpose were sufficiently dangerous to constitute an attempted robbery.¹¹

Another illustration of the difference between the substantial step and dangerous proximity tests is *Commonwealth v. Gilliam*. Gilliam was a prisoner at the Dallas State Correctional Institution, and correctional officers discovered that the bars on the window in his cell had been cut and were being held in place by sticks and paper. A search of the cell revealed vise grips concealed inside Gilliam's mattress, and two knotted extension cords attached to a hook were found in a box of clothing. The vise grips were sufficiently strong to cut through the barbed wire along the top of the fence surrounding the prison compound, and the extension cords presumably were to be used to scale the surrounding penitentiary wall.

The Pennsylvania Superior Court ruled that Gilliam's sawing through the bars and gathering of tools indicated a clear intent to escape from prison and constituted a substantial step under the Model Penal Code. The court, however, noted that these same acts would not constitute an attempt under a physical proximity test, because a number of additional steps were required to escape from the prison.¹²

A number of states avoid the complexities of attempt by providing that preparation for specific offenses constitutes a crime. For instance, California Penal Code section 466 provides that

[e]very person having upon him or her in his or her possession a picklock, crowbar, keybit . . . or other instrument or tool with intent feloniously to break or enter into any building . . . is guilty of misdemeanor.

The challenge is to determine at what point an individual should be held liable for attempt. Early intervention removes a potentially dangerous individual from the street. This, of course, risks arresting and punishing individuals for crimes that they might never have committed. On the other hand, delaying an arrest until an act is proximate to a crime presents the threat that a crime will have been committed before the police are able to intervene. In the Texas case of *Bolton v. State*, Bolton appealed his conviction for attempted burglary with the intent to commit a sexual assault. An eyewitness testified that at approximately 10 p.m., Bolton was peeking through a bathroom window. When arrested, Bolton was wearing unbuttoned and unzipped camouflage pants and had a jar of petroleum jelly in his pocket. At some point in the evening, a young woman testified that she had taken a bath, although she did not see Bolton at the window and there was no evidence that Bolton had attempted to pull the screen from the window or tamper with the window. Would you affirm Bolton's burglary conviction or convict him of some lesser offense?¹³ The next case asks whether the defendant attempted various gun crimes associated with a mass shooting at his former high school.

WOULD YOU CONVICT THE DEFENDANT OF AN ATTEMPT TO COMMIT MURDER?

STATE V. SAWYER, 187 A. 3d 377 (VT. 2018)

Issue

Defendant is charged with four separate counts, each predicated on his alleged attempt to commit a crime, and three of which are punishable by life imprisonment. The sole question before this Court is whether the evidence of guilt is great that defendant attempted to commit any of the four charged crimes given the definition of "attempt" under Vermont law. . . .

Facts

Each of the four counts that defendant is charged with arises from his alleged attempt to commit a mass shooting at Fair Haven Union High School (FHUHS). The first count alleges that defendant attempted to cause bodily injury to another with a deadly weapon. . . . The second count alleges that defendant attempted to commit first-degree murder. . . . The third and fourth counts allege that defendant attempted to commit aggravated murder. . . . The attempted aggravated murder counts are punishable by life imprisonment with no possibility of parole and the attempted first-degree murder count carries the potential for life without parole. . . .

Defendant was held without bail. . . . which implements the Vermont Constitution's presumption that a person shall be released on bail, unless the person is charged with "an

offense punishable by death or life imprisonment . . . when the evidence of guilt is great." Vt. Const. ch. II, § 40. Section 7553 states that "[a] person charged with an offense punishable by life imprisonment when the evidence of guilt is great may be held without bail." . . .

On February 14, 2018, the Fair Haven police department received a call from the Vermont State Police about a possible threat to FHUHS. Based on this reported threat, the Fair Haven police located defendant at the home of one of his friends. Police explained to defendant that they were there because a threat to FHUHS had been reported. Defendant responded that he had problems with the school when he attended, and that he was still kind of upset with the school but had moved past it. Defendant explained to police that he had been engaged in target practice, showed police the empty milk jugs he used for target practice, and said that he had recently purchased a shotgun at a local business after returning to Vermont from a [school] program in Maine. Defendant also showed police the buckshot he was using at the time. The police did not detain defendant because, as the Fair Haven chief testified at the trial court hearing, they did not have probable cause to take any further action at that time.

The next day, the Dutchess County, New York, sheriff's office contacted Fair Haven police regarding Facebook messages received by a Dutchess County student from defendant that suggested defendant was making threats against FHUHS. . . . In the messages, defendant writes "[j]ust a few days ago I was still plotting on shooting up my old high school so it's not like I really wanted a future anyways." His messages also spoke approvingly of a recent school shooting in another state. The Fair Haven police chief reviewed the messages and concluded that police should question defendant again.

The police detained and interviewed defendant. During this interview, defendant stated that when he attended FHUHS, which he left permanently in 2016, he had planned to commit a mass shooting at the school. He also stated that until about a week or two prior to the interview, he was still thinking about committing a school shooting at FHUHS, though later in the interview he also admitted to discussing school shootings a day or two earlier in the Facebook messages described above. He discussed the need to go to FHUHS before the shooting to observe the School Resource Officer's habits and pattern of behavior in preparation for any shooting because, as defendant noted, the Officer would likely be the only person in the school that could stop defendant once a shooting began. Defendant had not yet gone to the school to observe the Officer. Defendant also told police that he planned to conclude any shooting in the school's library, in mimicry of the Columbine shooting, and discussed the kinds of guns and other items that he would want to have for a school shooting. Defendant told police that he had converted money from his bank account to Bitcoin, installed a browser that would allow him to access the dark web, and intended to purchase a handgun with Bitcoin on the dark web. He had been unable to purchase this handgun, which is included in the lists of needed equipment in defendant's journal . . . because the value of defendant's Bitcoin had diminished. Defendant told the officers that he wanted to exceed the body count from the Virginia Tech shooting and that he had chosen his ammunition accordingly. Finally, defendant told police that he wanted to commit a mass shooting on the anniversary of the date of the Columbine school shooting but that FHUHS would not be in session at that time, and he instead would commit any shooting on March 14th.

Police searched defendant's car after he was detained and found a shotgun and seventeen rounds of ammunition. Police also found four books related to school shootings, including the Columbine massacre, as well as defendant's journal. The journal was admitted into evidence at the trial court's hearing. Defendant had placed a label on the front of the journal, which read "The Journal of an Active Shooter." In the journal, defendant expresses suicidal ideation and his desire to commit "suicide by homicide." In an entry dated October

25, 2017, he writes that he wants to commit suicide “in a bigger and better way than just the stereotypical suicide.” Regarding his alleged plan to commit a mass shooting at FHUHS, in an entry dated November 29, 2017, he writes:

I've had a change in plans. The day will be coming much more sooner than previously thought. I've realized the huge importance of being able to kill the kids that I actually know vs. waiting a year or so until they're all gone. I'm aiming to kill as many as I can and whoever I can, but it'd also be more fun and satisfying to kill a lot of the dumb f___ks that I actually went to school with, I know what they're like and how idiotic they are. With the sudden shift in plans, that also means that I need to prepare and gather supplies quicker. It shouldn't take too extremely long to buy the guns, but it'll be difficult to make the bombs since I don't really have a good place to practice detonating them, but I'll probably figure it out.

By entry dated December 4, 2017, he writes: “It would save me a lot more energy and hopelessness to take myself out now. But I also can't abandon my plan. . . . From the time I had the first initial thoughts of shooting up FHUHS, it was too late to turn back on it.” Defendant's journal includes lists of materials, including several different kinds of guns, that defendant wanted to have for a school shooting, as well as possible dates for a school shooting according to the FHUHS calendar. The last entry in defendant's journal before he was arrested, which is dated February 3, 2018, describes his unsuccessful attempt to buy a shotgun in Maine. He indicates that he will take a “low key trip to VT soon to get the shotgun and hopefully rifle.”

After searching defendant's car, police went to defendant's father's house. Defendant's father gave police a second copy of the book about the Columbine school shooting found in defendant's car and a shotgun belonging to defendant. The shotgun had a modified stock and barrel, such that the total size of the gun was shorter than a typical shotgun.

On February 16, 2018, defendant was arraigned on the four offenses described above and held without bail pending a weight-of-the-evidence hearing. The trial court held a hearing over two days in late February and early March 2018. The trial court issued an order holding defendant without bail under § 7553 on March 19, 2018. This appeal followed. . . .

Reasoning

An “attempt” under Vermont law requires an intent to commit a crime, coupled with an act that, but for an interruption, would result in the completion of a crime. A person who attempts to commit an offense and does an act toward the commission thereof, but by reason of being interrupted or prevented fails in the execution of the same, shall be punished as herein provided unless other express provision is made by law for the punishment of the attempt.”

Those decisions begin with *State v. Hurley*, 64 A.78 (1906), decided over one hundred years ago. In *Hurley*, this Court was asked to decide whether obtaining the tools necessary to complete an intended crime constituted an attempt to commit that crime. The defendant was convicted of attempting to break out of jail after he was found in possession of a bundle of twelve hacksaws which an accomplice tossed to him through the bars covering an open window in the jail. Despite evidence of the defendant's intent to break out, this Court reversed his conviction and drew a distinction between generally preparatory acts and preparatory acts constituting an attempt to commit a crime. . . .

People v. Murray, 14 Cal. 159 (1859), which the *Hurley* Court relied on, provides a succinct illustration of the distinction between an act of preparation and an act of attempt.

The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made. To illustrate: a party may purchase and load a gun, with the declared intention to shoot his neighbor; but until some movement is made to use the weapon upon the person of his intended victim, there is only preparation and not an attempt. . . .

For example, in *State v. Boutin*, this Court was asked to consider whether a person holding a bottle over his head and advancing on a second, retreating person during an argument had attempted to commit an assault. 133 Vt. 531 (1975). This Court held that defendant's actions did not amount to an attempt: "To constitute an attempt to commit a crime, the act must be of such a character as to advance the conduct of the actor beyond the sphere of mere intent. It must reach far enough towards the accomplishment of the desired result to amount to the commencement of the consummation." Put simply, the act of holding the bottle was not so close to the act of striking the retreating person as to permit the conclusion that the first act would necessarily culminate in the second act. In reaching this conclusion, this Court noted that the defendant was never within ten feet of the other person and did not throw the bottle or move to strike the other person with the bottle.

In contrast, in *State v. Woodmansee*, this Court was asked to consider whether a person found kneeling in an empty apartment, with matches in his hand, and surrounded by a rolled cone of newspaper, a jar of paint thinner, and a strong smell of gasoline could be charged with an attempt to commit arson. 124 Vt. 387 (1964). Relying on *Hurley*, this Court held that this act crossed the line from preparation to attempt. That is, "the striking of a match would have, on the evidence, consummated the crime." . . .

The State's evidence, taken in the light most favorable to the State and excluding modifying evidence, showed the following facts. Defendant [Sawyer] purchased a shotgun and planned to purchase at least one more gun. He planned to conduct surveillance at FHUHS to determine when the School Resource Officer was not generally present. Defendant had not yet purchased another gun or conducted surveillance at FHUHS. He sent Facebook messages to the effect that he planned to commit a shooting at FHUHS, and he wrote at length in his journal that he currently planned to commit such an act at some future time. Defendant also kept lists of the items that he needed before actually committing a shooting at the school, many of which he did not have. He researched the FHUHS calendar to select an optimal date for the planned shooting.

Just as the defendant in *Hurley* did not commit an attempt to break out of jail based on the mere possession of the hacksaws to saw through the jail window bars, defendant in this case took no action so proximate to the commission of the school shooting as to constitute an attempt. Each of defendant's actions was a preparatory act, and not an act undertaken in the attempt to commit a crime. Therefore, as a matter of law, defendant's acts did not fall within the definition of an attempt. . . . "An overt act must advance beyond mere intent and reach far enough toward accomplishing the desired result to amount to the commencement of the consummation." . . . "[A]n attempt consists not only of an intent to commit a particular crime, but . . . some overt act designed to carry out such intent." . . . "[H]olding of a bottle in one hand ten feet from the intended victim does not make it likely to end in the consummation of the crime intended." In other words, defendant undertook no act that was the "commencement of the consummation" of the crimes he is charged with here.

Holding

Under Vermont's law . . . the State has not presented sufficient evidence to conclude that the "evidence of guilt is great" such that defendant may be presumed incarcerated rather than released prior to trial. . . . Beginning with *Hurley* over a century ago, this Court has consistently held that preparation alone does not satisfy the high bar required to prove an attempt. . . . This Court is bound to apply the law in agreement with statute and this Court's own earlier decisions. The Legislature can, if it chooses, deviate from this long-established standard by passing a law revising the definition of attempt.

Questions for Discussion

1. What are the facts in *Sawyer*?
2. Summarize the legal standard for an attempt in Vermont.
3. Discuss the precedents discussed in *Sawyer* and why based on these precedents the Vermont Supreme Court finds that the defendant was not guilty of an attempt.
4. What additional steps would Sawyer be required to take to be guilty of an attempt?
5. Do you agree with the decision of the Vermont Supreme Court in *Sawyer*?
6. Would Sawyer arguably have been guilty of an attempt under the proximity, unequivocality, or substantial step tests discussed in the textbook?
7. Should courts impose a less demanding standard for an attempt in the case of juveniles who plan school shootings?

YOU DECIDE 7.3

Mark Collier was separated from his wife Nancy after 17 years of marriage. Nancy obtained an order of protection prohibiting Mark from contacting her. A month later, Collier visited his neighbor Charles Cameron and stated that he feared losing his home because his wife had filed for divorce. Collier later returned to Cameron's house and proclaimed that "tonight's the night." Collier asked Cameron to take care of the cats and dogs and gave him keys to the house and to his pickup truck.

Collier then went into his bedroom and "started prayin', you know, telling—saying, 'God, forgive me for what I'm gonna do.'" Collier "started kinda cryin'. Then he . . . started kinda chuckling." He then came out of his room, hugged Cameron, and told him, "Tonight's the night. I'm gonna do it." Collier gathered an ice pick, a box cutter, and a pair of binoculars and said, "I'm gonna stab her in the effin' heart twice. I'm gonna cut her effin' throat." Collier also said that he would ram Nancy with his pickup. Collier drove off in his pickup.

Collier next stopped at the house of another of his neighbors, Billy Fansler. Fansler said that Collier told her that "he was going to end it and he had had enough." Collier also told Fansler "to tell [her] husband thank you and tell [her] children God bless them." When Collier was at Fansler's house, "he looked kind of wobbly," "he wasn't quite steady on his feet," "he kinda slurred [his speech] a little," and he was depressed and "maybe a little angry." Both the police and Nancy were alerted that Collier posed a threat.

At approximately 10:40 p.m., Officer Sandy Justice and Officer Robert Cunningham received a radio dispatch and arrived at the hospital and spotted Collier's pickup. The

pickup was backed into a parking space in the last row across the street from the emergency area of the hospital. Collier from this location would have been able to see the emergency room exit door. The door was the only exit available to individuals leaving the hospital after 10:00 p.m.

The lights of Collier's pickup were turned off, and Collier was asleep inside the vehicle. The officers ordered Collier to exit the truck. Once Collier was out of the vehicle, the officers noticed that he was intoxicated and took him into custody. They then searched the interior of the pickup and found an ice pick, a box cutter, a pair of binoculars, and an open container of beer that was partially full. Indiana has adopted the Model Penal Code provision on attempts. Is Collier guilty of attempted murder? See *Collier v. State*, 846 N.E.2d 340 (Ind. Ct. App. 2006).

IMPOSSIBILITY

Consider whether the following defendants should be held liable for an attempted offense.

- A pickpocket reaches into your pocket only to find that there is no wallet.
- An individual hands \$100 to a seller in an effort to purchase narcotics and is arrested by the police before the seller is able to hand over what is later revealed to be baking powder.
- A doctor begins to perform an illegal abortion on a woman who is, in fact, a government undercover agent who is not pregnant.
- In an attempt to kill a romantic rival, an individual enters the rival's bedroom and shoots into the bed, not realizing that it is empty.
- A male forces himself on a sleeping female with the belief that she did not consent and then discovers that the victim died of a heart attack an hour prior.

In each instance, the defendant possessed an intent to commit a crime that was factually impossible to complete. The perpetrators would have successfully completed the offenses had the facts been as the individuals "believed them to be" (i.e., there is a wallet in the pocket, the seller possessed drugs, the woman was pregnant, the romantic rival is in the bed, and the potential victim is alive).

A **factual impossibility** is not a defense to an attempt to commit a crime. This is based on the fact that an offender who possesses a criminal intent and who takes steps to commit an offense should not be free from legal guilt. The factual circumstance that prevents an individual from actually completing the offense is referred to in some state statutes as an **extraneous factor**, or an event outside of an individual's control.

Factual impossibility should be distinguished from **legal impossibility**, which is recognized as a defense. Legal impossibility arises when individuals mistakenly believe that they are acting illegally. An example is taking a tax deduction that an individual believes is illegal but that, in

fact, is perfectly permissible. A group of 18-year-old college freshmen will not be guilty of an attempt in the event that they go to a bar and order beers while mistakenly believing that the drinking age is 21. As Professor Jerome Hall notes, it is not a crime to throw a Kansas steak into the garbage, and an individual who makes an effort to toss the steak into the garbage is not guilty of an attempted offense. The individual attempting to discard the steak possesses a criminal intent to violate a nonexistent law. Our old friend *the principle of legality* prohibits punishing individuals for a crime that is the product of their imagination.¹⁴

The rule is that a mistake concerning the facts is not a defense; a mistake concerning the law is a defense. Ask yourself whether the individual charged with an attempt was mistaken concerning the facts or mistaken concerning the law.

We also should refer to the defense of **inherent impossibility**. This occurs in those rare situations in which a defendant could not possibly achieve the desired result. An English case provides an example, in which an individual who stuck pins in a voodoo doll was acquitted of attempted murder.¹⁵

The Model Penal Code does not recognize the defense of factual impossibility under any circumstances. The code provides a “safety valve” in section 5.05(2) by providing that an act should be treated as a minor offense in those instances in which neither the offender nor the offender’s conduct presents a serious threat to the public.

Consider the voodoo doll example. Is there a social benefit in punishing an individual who possesses a criminal intent and who has committed a factually impossible act? Should there be a defense of legal impossibility? A Colorado statute provides that neither factual nor legal impossibility is a defense “if the offense would have [been] committed had the attendant circumstances been as the actor believed them to be.”¹⁶

People v. Dlugash, decided by the New York Court of Appeals in 1977, is a well-known example of factual impossibility. A fight developed, and Bush shot Geller three times, killing Geller. Dlugash then approached the body and shot Geller five times in the head. The New York court determined that Dlugash believed at the time he fired his pistol that Geller was alive. As a prosecutor, would you charge Dlugash with attempted murder? Should we judge the dangerousness of Dlugash’s acts by his intent or by the actual facts? What if Dlugash arrived following Bush’s shooting of Geller and believed that Geller was lying wounded in bed and proceeded to shoot into the bed, only to discover that he shot a large toy bear? Would you charge Dlugash with attempted murder?¹⁷

In *State v. Curtis*, the defendant shot a deer decoy constructed by game wardens thinking it was a “real deer.” He was charged and convicted of taking a deer “outside of the season provided by law.” The Vermont Supreme Court affirmed Curtis’s conviction and held that there is “no defense of . . . impossibility in Vermont.”¹⁸

The next case, *Commonwealth v. Kerry Vann Bell*, involves a sting operation conducted by a Massachusetts police department in an effort to investigate and arrest sex offenders. This directly raises the question of whether an individual should be held liable for an attempt to commit a crime involving a “nonexistent” victim. Should, Kerry Vann Bell have been convicted of attempted rape of a “nonexistent” child and solicitation of sexual conduct for a fee?

SHOULD THE DEFENDANT BE CONVICTED OF ATTEMPTED RAPE AND SOLICITATION OF SEXUAL CONDUCT?

COMMONWEALTH V. KERRY VANN BELL, 67 MASS. APP. CT. 266 (2006)

Opinion by Katzmann, J.

Issue

A police undercover sting operation culminated in the indictment of defendant Kerry Vann Bell for attempted rape of a child and solicitation of sexual conduct for a fee. . . . [The issue is] “[w]hether one [can] commit the crimes of attempted rape of a child and solicitation of sexual conduct for a fee when there is no actual intended victim, because unbeknownst to the perpetrator, he is negotiating with an undercover [police] officer to arrange for sexual intercourse with a child.”

Facts

On March 25, 2004, Officer Patricia Cummings was assigned to pose as a prostitute willing to sell the sexual favors of a five year old child. Using a false name, Cummings called the defendant's cellular telephone number, which was provided to her by a confidential informant, and asked for a man named "Ron." "Ron," who turned out to be the defendant, answered the telephone and acknowledged that a mutual friend (the confidential informant) had told him that Cummings was "cool." After both parties verified that they were not recording the call, Cummings asked to meet the defendant in person at a convenience store in Worcester, and the defendant agreed. The defendant, however, would not describe his appearance or the car he would be driving. He asked Cummings for her description and said that he would find her. The defendant also asked her to bring the child with her; otherwise, he said, they did not need to meet. Cummings, unable to bring the nonexistent child, told the defendant that the child would be close to the meeting point, and the defendant agreed to meet.

There was some initial difficulty at the meeting point, as the defendant went to the wrong location, but eventually he arrived, approached Cummings's car, and said, "I found you." The defendant answered to the name "Ron." Cummings exited her car and walked with the defendant to the store. After questioning each other on whether either was a police officer or was wearing a wire, the defendant began to complain that Cummings had not brought the child. Eventually, Cummings told the defendant that the child was "over by" a nearby park.

Cummings and the defendant then walked to a black sport utility vehicle (SUV) (which the defendant had driven to the site), where they discussed the transaction in detail. First, the defendant entered the vehicle and moved some items around inside to show that he was not a police officer. Then he told Cummings to get in. Inside the vehicle, the defendant told Cummings that he "doesn't . . . [often] do this and that he had a lot at stake, that he was a professional," and that "[o]ther people that do this don't have much at stake." Cummings replied that she did not want this "to get back" to her and that she did not want the child hurt. The defendant asked if the child was "stretched," to which Cummings replied that the child had been. The defendant also asked the child's age. When Cummings answered that she was

almost five, the defendant said, “[t]hat is a good age because they’re not in school yet where no one has to report anything.” The defendant also said that he had “done boys before, but prefers girls,” and that he had “done ages from three to five, six.” Cummings responded to other questions from the defendant, explaining that the child was “withdrawn” and that she “doesn’t say much, kind of does what you say.” Cummings warned the defendant that she did not want the child hurt, and the defendant responded that he wanted intercourse and that he had done this before. The defendant asked Cummings about her “place that was nearby,” and whether she felt better about the arrangement now, after her initial hesitation. He again asked where the child was. Cummings replied that the child was at “Elm Street by Elm Park.” They then agreed that the defendant would follow Cummings to the location. When Cummings told the defendant she would not take anything less than \$200, he looked at her and nodded “yes.” Cummings then left the SUV, walked toward her car, and signaled other officers, who arrested the defendant. During booking, \$211 were found in the defendant’s possession.

Reasoning

The defendant argues that the statutory language of both of these crimes requires the presence of a victim as an element, and since the child in this case did not really exist, the evidence before the grand jury was insufficient. The defendant points to language in [the statute,] which states that “[w]hoever has sexual intercourse or unnatural sexual intercourse *with a person* and compels *such person* to submit by force and against *his* will, or compels *such person* to submit by threat of bodily injury” is guilty of rape. Similarly, he emphasizes the language in [another statute], which penalizes a “person who engages, agrees to engage, or offers to engage in sexual conduct *with another person* in return for a fee, or . . . who pays, agrees to pay or offers to pay *another person* to engage in sexual conduct, or to agree to engage in sexual conduct *with another natural person*” (emphasis added).

The fundamental flaw in the defendant’s argument is that it confuses legal and factual impossibility. “Legal impossibility as a defense to an attempt offense arises only when the defendant’s objective is to do something that is not a crime.” “Legal impossibility occurs when the actions which the defendant performs or sets in motion, even if fully carried out as he desires, would not constitute a crime.” “Factual impossibility occurs when the objective of the defendant is proscribed by the criminal law but a [physical] circumstance unknown to the [defendant] prevents him from [accomplishing] that [intended] objective.” As famously exemplified, factual impossibility arises when the crime cannot physically be effectuated, such as trying to pick a pocket that proves to be empty.

The defendant acknowledges that, in contrast to legal impossibility, factual impossibility is not a defense to a crime. That factual impossibility is not a defense reflects a judgment that a defendant should not be exonerated simply because of “facts unknown to him which made it impossible for him to succeed.” Thus, in an undercover sting operation culminating in a defendant’s conviction, “[w]hether the targeted victim . . . [actually exists], the defendant’s conduct, intent, culpability, and dangerousness are all exactly the same.” In such circumstance, the defendant is “deserving of conviction and is just as much in need of restraint and corrective treatment as the defendant who did not meet with the unanticipated events which barred successful completion of the crime.”

The defendant’s efforts to cast the alleged circumstances in terms of legal impossibility are unavailing. Here, the evidence before the grand jury showed that the defendant arranged a meeting with a person who he thought would provide him access to a child for the purpose of sexual favors. He negotiated the price and the terms of the rendezvous. He was in his car about to travel to the agreed location to commit the rape when he was arrested.

Had the police not arrested him, the defendant would have traveled to the nearby park only to discover that his expected, imminent victim was not present. That he was arrested as he was about to travel to the nearby park, rather than at the park itself, is of no material consequence. In sum, the evidence as alleged showed that notwithstanding his claims of legal impossibility, the defendant did take actions towards the commission of the crime of rape of a child and did commit the crime of offering to engage in sexual conduct for a fee; therefore, the evidence as alleged satisfied the legal elements of the charged crimes.

Holding

Because the defendant intended to commit illegal acts, took actions to carry out that intent, and was only precluded because the illegal acts could not physically be accomplished, there was factual impossibility. The nonexistence of the child in this case is no less an impediment to the application of the criminal sanction than was the absence of a wallet for a pickpocket, the absence of a fetus in an illegal abortion, or the failure of an attempted murderer to put enough poison in a victim's beverage. . . . The defendant's actions would have resulted in the successful completion of the crime, but for factual circumstances not known to him. That the child did not exist does not diminish the evidence, as alleged, that he attempted to victimize a child he believed existed. The nonexistence of the victim was a factual, not a legal, impossibility.

The Law of Attempt

[Another question] was whether the indictment alleging an attempt to commit rape of a child in this case is supported, as matter of law. . . . The overt act alleged "must approach the achievement of the substantive crime attempted near enough to warrant criminal liability in view of such circumstances as the gravity of the crime, the uncertainty of the result, and the seriousness of any threatened danger." While "preparation is not an attempt . . . [,] some preparations may amount to an attempt." . . . A court's focus should . . . be on "the distance or gap between the defendant's actions and the (unachieved) goal of the consummated crime." "If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a [crime] although there is still a *locus penitentiae* [opportunity to withdraw] in the need of a further exertion of the will to complete the crime. . . ." Here, we have just such a combination of factors. . . . [T]he defendant received a telephone call from a woman who he thought was offering a child to him in an exchange of sexual services for money. He agreed to meet that woman for the express purpose of effectuating that exchange. The defendant met the woman; expressed disappointment that she had not brought the child with her as he thought she had agreed to do; discussed with her the temperament and physical condition of the child, the location of the child, and the woman's experience in this type of activity; and agreed to the amount of the charge (not less than \$200). When the police arrested him, the defendant was about to follow the woman to the child for the purpose of having intercourse with the child in a nearby location. The defendant had just over \$200 in his possession when he was arrested. These alleged actions and the evidence, in context and taken together, show both a detailed plan and an agreement to commit the rape. All that was left to do was to drive to a nearby location and get the child. . . . In sum, considering the relatively small gap between the defendant's completed actions and consummation of the contemplated rape, the defendant's commitment to a detailed plan, and the gravity of the offense, we conclude that there was sufficient evidence of an overt act to survive a motion to dismiss the indictment. . . .

All in all, given the nature of the crime alleged, the thoroughness of the defendant's planning and his conduct as alleged, and the little that remained for him to do to complete the crime, we conclude that the gap here between what was done and what remained to be done was small enough to warrant probable cause for a charge of attempt.

Questions for Discussion

1. Summarize the facts in *Bell*.
2. Explain the difference between factual and legal impossibility and why the defendant claims that he should not be held liable based on legal impossibility.
3. Why does the Massachusetts court reject Bell's claim that he should not be held liable based on impossibility?
4. Explain the court's reasoning for holding that Bell committed a criminal attempt of rape of a child.
5. Did the defendant take sufficient affirmative acts toward the rape of a child to be convicted of attempt?
6. Consider whether factual and legal impossibility are easily distinguishable. For example, Kerry Vann Bell argues that because it was factually impossible to engage in sexual activity with a nonexistent child it also was legally impossible to commit the criminal acts with which he was charged.
7. As a police chief as a matter of public policy, would you have authorized officers to engage in the type of "sting" operation that led to the arrest of Kerry Vann Bell?
8. Can you explain why the court found that Bell satisfied the intent and act requirements for a criminal attempt?

CASES AND COMMENTS

Knowledge of the Facts. Ralph Damms was convicted of attempted murder and was sentenced to a term of imprisonment of not more than 10 years. The verdict was affirmed by the Wisconsin Supreme Court. Marjory Damms had initiated a divorce action against Ralph and was also estranged from her mother, Mrs. Laura Grant. Ralph stopped Marjory on her way to work, claimed that Mrs. Grant was dying, and drove Marjory to her mother's home. Marjory then discovered that her mother was perfectly fine. Damms took advantage of this opportunity to attempt a reconciliation with his former wife. After two hours of unproductive conversation, Ralph offered to drive Marjory to work. During the drive, Ralph commented that it was possible for a person to die "quickly" and that "judgment day" may occur without warning. He then removed a cardboard box from under the seat and opened it and took a gun out of a paper bag. He aimed at Marjory and said that this is "to show you that I'm not kidding . . . [or] fooling."

Ralph announced that he was taking Marjory "up north" for a few days. Ralph wanted to eat and drove the car into a restaurant parking lot. Marjory told Ralph that she had a "couple of dollars," and when she refused to let Ralph inspect her checkbook, an argument ensued. Marjory opened the car door and started to run around the restaurant building, screaming for help. Ralph pursued her with a pistol in his hand. Two officers eating lunch rushed out of the restaurant. Marjory slipped and fell, and Ralph crouched down, held the pistol against her head, and pulled the trigger. Ralph exclaimed, "It won't fire. It won't fire." The officers

arrested Ralph and discovered that the weapon was unloaded and that the clip containing the cartridges for the gun was in the cardboard box in the car. Damms later stated to two officers that he thought that the gun was loaded. However, Damms testified at trial that he knew that the pistol was not loaded.

The Wisconsin Supreme Court ruled that the jury could have reasonably concluded that Damms believed that the gun actually was loaded and that he therefore was legally liable for attempted murder. The court observed that an

unequivocal act accompanied by intent should be sufficient to constitute a criminal attempt . . . and he should not escape punishment . . . by reason of some fact unknown to him [that made it] impossible to effectuate the intended result.

The Supreme Court noted that Damms was excited when he grabbed the weapon and pursued his wife and may not have noticed the opening in the end of the butt caused by the absence of an ammunition clip, which would have clearly informed him that the gun was unloaded.

Judge Dietrich, in dissent, noted that Ralph had the gun in his hand several times and that "it would be impossible for him not to be aware or know that the pistol was unloaded. He could feel the hole in the bottom of the butt." Ralph, for example, certainly must have felt the hole in the bottom of the butt caused by the lack of an ammunition clip when he first removed the pistol from the box and then when he chased his wife with the pistol.

Why is the question whether Ralph knew the gun was unloaded significant? Do you agree with the Wisconsin Supreme Court? See *State v. Damms*, 100 N.W.2d 592 (Wis. 1960).

YOU DECIDE 7.4

Francisco Martin Duran was a 26-year-old upholsterer from Colorado. On September 13, 1994, Duran bought an assault rifle and roughly 100 rounds of ammunition. Two days later, he purchased a 30-round clip and equipped the rifle with a folding stock. Thirteen days later, Duran bought a shotgun and, the following day, additional ammunition. On September 30, 1994, Duran left work and, without contacting his family or employer, began a journey to Washington, D.C. He purchased another 30-round clip and a large coat in Virginia. On October 10, Duran arrived in Washington, D.C., and he stayed in various hotels over the next 19 days.

On October 29, 1994, Duran positioned himself outside the White House fence and observed a group of men in dark suits, one of whom was Dennis Basso, who strongly resembled then president Bill Clinton. Two eighth-grade students remarked that Basso looked like Bill Clinton. Duran almost immediately began firing 20 rounds at Basso, who managed to take cover. Duran was tackled by a pedestrian when attempting to reload a second clip. The Secret Service searched Duran's automobile and found incriminating evidence, including a map with the phrase "kill the Pres!" and an "X" drawn across a photo of President Clinton. A subsequent search of Duran's home led to the seizure of other incriminating evidence, including a business card on the back of which Duran called for the killing of all government officers and department heads.

Was Duran guilty of an attempt to kill the president of the United States despite the fact that this was impossible, given that President Clinton was not on the lawn of the White House? See *United States v. Duran*, 96 F.3d 1495 (D.C. Cir. 1996).

ABANDONMENT

An individual who abandons an attempt to commit a crime based on the intervention of outside or extraneous factors remains criminally liable. On the other hand, what about an individual who voluntarily abandons a criminal scheme after completing an attempt?

In *People v. Staples*, Staples intentionally rented an office above a bank. He learned that no one was in the building on Saturday and received permission from the owner to move items into his office over the weekend. Staples took advantage of the fact that no one was in the building and drilled several holes partway through the floor, which he then covered with a rug. He placed the drilling tools in the closet and left the key in the office. Later, the landlord discovered the holes and notified the police. Staples was arrested and confessed, explaining that he abandoned his criminal plan after realizing that he could not enjoy life while living off stolen money.

Is the defendant guilty of an attempt? Assuming that the defendant committed an attempted burglary (breaking and entering with an intent to steal), does the defendant's change of heart or abandonment constitute a defense? Would it make a difference if the defendant changed his mind only after hearing voices in the bank?¹⁹

The Model Penal Code, in section 5.01(4), recognizes the affirmative defense of **abandonment** in those instances in which an individual commits an attempt and "abandoned his effort . . . under circumstances manifesting a complete and voluntary renunciation of criminal purpose." The important point is that individuals can commit an attempt and then relieve themselves from liability by voluntarily abandoning the criminal enterprise. A renunciation is not voluntary when motivated by a desire to avoid apprehension, provoked by the realization that the crime is too difficult to accomplish, or where the offender decides to postpone the crime or to focus on another victim. For example, abandonment has not been recognized as a defense where the lock on a bank vault or the door on a cash register proved difficult to open, the police arrived during the commission of a crime, or a victim broke free and fled. Once having completed the commission of a crime, the fact that an offender is full of regret and rushes the victim to the hospital also does not free the assailant from criminal liability. Abandonment, in short, is a defense to attempt when an individual freely and voluntarily undergoes a change of heart and abandons the criminal activity.²⁰

In some cases, courts have continued to hold that once an attempt is complete, an individual cannot avoid criminal liability. Why should an attempt be treated differently than any other crime? The vast majority of decisions recognize that there are good reasons for recognizing the defense of abandonment, even in cases where the individual's acts are "dangerously close" to the completion of a crime.²¹

- *Lack of Purpose.* An individual who abandons a criminal enterprise lacks a firm commitment to complete the crime and should be permitted to avoid punishment.
- *Incentive to Renounce Crime.* The defense of abandonment provides an incentive for individuals to renounce their criminal conduct before completing the crime.

Several state and federal courts do not recognize the abandonment defense on the grounds that the crime of attempt is complete and cannot be renounced. In *Watkins v. Commonwealth*, Watkins was a convicted felon who was prohibited from possessing a firearm. He falsified his application for a firearm and paid for the weapon. Watkins subsequently was informed that the state police had rejected his application. He returned to the dealer and withdrew his application. A Virginia appellate court held that “[i]f a man resolves on a criminal enterprise, and proceeds so far in it that his act amounts to an indictable attempt, it does not cease to be such, although he voluntarily abandons the evil purpose.” At the time appellant canceled his attempted purchase of the gun, the attempt was complete, and, therefore, appellant’s “abandonment came too late.”²²

In reading the next case, *Ross v. State*, ask yourself whether the defendant was guilty of an attempted rape and whether he voluntarily or involuntarily abandoned his criminal activity. Does reading this case persuade you that the affirmative defense of abandonment is a good or a bad idea?

DID ROSS VOLUNTARILY ABANDON HIS ATTEMPT TO RAPE THE VICTIM?

ROSS V. STATE, 601 SO. 2D 872 (MISS. 1992)

Opinion by Prather, J.

This attempted-rape case arose on the appeal of Sammy Joe Ross from the ten-year sentence imposed on July 7, 1988 by the Circuit Court of Union County. . . .

Facts

Dorothy Henley [not her real name] and her seven-year-old daughter lived in a trailer on a gravel road. Henley was alone at home and answered a knock at the door to find Sammy Joe Ross asking directions. Henley had never seen Ross before. She stepped out of the house and pointed out the house of a neighbor who might be able [to] help him. When she turned back around, Ross pointed a handgun at her. He ordered her into the house, told her to undress, and shoved her onto the couch. Three or four times Ross ordered Henley to undress and once threatened to kill her. Henley described herself as frightened and crying. She attempted to escape from Ross and told him that her daughter would be home from school at any time. She testified:

I started crying and talking about my daughter, that I was all she had because her daddy was dead, and he said if I had a little girl he wouldn't do anything, for me just to go outside and turn my back.

As instructed by Ross, Henley walked outside behind her trailer. Ross followed and told her to keep her back to the road until he had departed. She complied.

Henley was able to observe Ross in her sunlit trailer with the door open for at least five minutes. She stated that she had an opportunity to look at him and remember his physical

appearance and clothing. Henley also described Ross's pickup truck, including its color, make, and the equipment[—that is], a tool-box.

On December 21, 1987, a Union County grand jury indicted Sammy Joe Ross for the attempted rape of Henley, charging that Ross "did unlawfully and feloniously attempt to rape and forcibly ravish" the complaining witness, an adult female. . . . On June 23, 1988, [t]he jury found Ross guilty. On July 7, the court sentenced Ross to a ten-year term. . . . Ross timely filed a notice of appeal.

Issue

[T]he primary issue here is whether sufficient evidence presents a question of fact as to whether Ross abandoned his attack as a result of outside intervention. Ross claims that the case should have gone to the jury only on a simple assault determination. Ross asserts that "it was not . . . Henley's resistance that prevented her rape nor any independent intervening cause or third person, but the voluntary and independent decision by her assailant to abandon his attack." The state, on the other hand, claims that Ross "panicked" and "drove away hastily."

Reasoning

. . . Henley told Ross that her daughter would soon be home from school. She also testified that Ross stated if Henley had a little girl, he wouldn't do anything to her and to go outside [the house] and turn her back [to him]. . . .

The trial court instructed the jury that if it found that Ross did "any overt act with the intent to have unlawful sexual relations with [the complainant] without her consent and against her will" then the jury should find Ross guilty of attempted rape. The court further instructed the jury that:

before you can return a verdict against the defendant for attempted rape, that you must be convinced from the evidence and beyond a reasonable doubt, that the defendant was prevented from completing the act of rape or failed to complete the act of rape by intervening, extraneous causes. If you find that the act of rape was not completed due to a voluntary stopping short of the act, then you must find the defendant not guilty.

. . . [T]his court [has] held that lewd [indecent] suggestions coupled with physical force constituted sufficient evidence to establish intent to rape. . . . [A]ttempt consists of "1) an intent to commit a particular crime, 2) a direct ineffectual act done toward its commission, and 3) failure to consummate its commission."

The Mississippi attempt statute requires that the third element, failure to consummate, result from extraneous causes. . . . [W]here the assailant released his throathold on the unresisting victim and told her she could go, after which a third party happened on the scene, the Court held that the jury could not have reasonably ruled out abandonment.

In comparison, this Court has held that where the appellant's rape attempt failed because of the victim's resistance and ability to sound the alarm, the appellant cannot establish an abandonment defense. In [another] case, the defendant did not voluntarily abandon his attempt, but instead fled after the victim, a hospital patient, pressed the nurse's buzzer; a nurse responded and the victim spoke the word "help." The Court concluded, "[T]he appellant ceased his actions only after the victim managed to press the buzzer

alerting the nurse." . . . In another case, the court properly sent the issue of attempt to the jury where the attacker failed because the victim resisted and freed herself.

Thus, abandonment occurs where, . . . with no physical resistance or external intervention, the perpetrator changes his mind. At the other end of the scale, a perpetrator cannot claim that he abandoned his attempt when, in fact, he ceased his efforts because the victim or a third party intervened or prevented him from furthering the attempt. Somewhere in the middle lies a case . . . where the victim successfully sounded an alarm, presenting no immediate physical obstacle to the perpetrator's continuing the attack, but sufficiently intervening to cause the perpetrator to cease his attack. . . .

The key inquiry is a subjective one: what made Ross leave? According to the undisputed evidence, he left because he responded sympathetically to the victim's statement that she had a little girl. He did not fail in his attack. No one prevented him from completing it. Henley did not sound an alarm. She successfully persuaded Ross, of his own free will, to abandon his attempt. No evidence shows that Ross panicked and hastily drove away, but rather, the record shows that he walked the complainant out to the back of her trailer before he left. Thus . . . this is not to say that Ross committed no criminal act, but "our only inquiry is whether there was sufficient evidence to support a jury finding that [Ross] did not abandon his attempt to rape."

Holding

Ross raises a legitimate issue of error in the sufficiency of the evidence supporting his conviction for attempted rape because he voluntarily abandoned the attempt. This court reverses.

Questions for Discussion

1. What is the subjective legal test for abandonment?
2. The Mississippi Supreme Court rules that Ross voluntarily abandoned the attempted rape. How do you explain this ruling in light of the fact that Ross likely would have raped Henley had she not informed him that her daughter would be returning home? Was this information an extraneous factor?
3. Can you distinguish this rule from the holding of the ruling of the Wisconsin Supreme Court in *Le Barron v. State*, 145 N.W.2d 79 (Wis. 1966)? In *Le Barron*, the Wisconsin court ruled that the defendant did not voluntarily abandon an attempted rape when he failed to complete the rape after determining that the victim was telling the truth in claiming that she was pregnant.
4. How would you rule in *Ross v. State*?

CASES AND COMMENTS

The victim, a 16-year-old girl, was walking to a bus stop to take a bus to her high school. McNeal grabbed her by the neck and stuck a butcher knife into her side. He forced her to walk several blocks and warned her that he had a gun in his pocket. Shortly before they arrived at McNeal's home, he wrapped a towel around her eyes and put a hood on her. Once

inside, the victim asked McNeal why he had grabbed her. He responded that she was an African American woman. At some point the victim began to cry, and McNeal told her to "shut up" because "he hadn't had [her] pants down yet." McNeal then pushed her onto a couch. For the next hour and a half, the victim and McNeal talked. McNeal discussed the African American women he had dated who he believed had treated him badly. The victim tried to keep defendant talking.

At some point following their conversation McNeal lay down on the couch next to the victim and began kissing her on the lips and neck. He rubbed her on the top part of her thighs and on the side of her stomach. The victim asked him several times to let her go. She told McNeal that she had two tests at school and that he should release her. McNeal said that he was unsure, but she promised that, if he did release her, she would not tell anyone. He took the towel and hood off her and took her to the bathroom so that she could fix her hair. McNeal then walked her to the bus stop, waited with her for the bus, and told her that he was sorry and that he would never do it again. A Michigan appellate court found that "because defendant never touched the victim's intimate parts, he could not have been convicted of the completed crime of second-degree criminal sexual conduct although his actions went beyond mere preparation and planning and constituted a direct movement toward the commission of the crime after preparations were made." The defendant, however, claimed that he had abandoned the attempted sexual offense and should be not held criminally responsible for attempted criminal sexual assault. What is your view? See *People v. McNeal*, 393 N.W.2d 907 (Mich. App. 1986).

YOU DECIDE 7.5

[George McCloskey] was serving a one- to three-years sentence for larceny in the Luzerne County Prison. At about 12:15 a.m., on December 26, 1972, James Larson, a Guard Supervisor at the prison, heard an alarm go off that indicated that someone was attempting an escape in the recreation area of the prison. The alarm was designed so that it could be heard in the prison office, but not in the courtyard. Larson immediately contacted Guards Szmulo and Banik. Initially, he guards checked the prison population, but found no one missing. The three men then conducted a search of the area where the alarm had been "tripped." Near the recreation yard between two wings of the prison, they found one piece of barbed wire that had been cut. In addition, Guard Szmulo found a laundry bag filled with civilian clothing. The bags are issued by the prison and are marked with a different number for each prisoner. A check revealed that the bag belonged to appellant.

At roughly 5:15 a.m., McCloskey voluntarily approached the supervising guard and explained that "I was gonna make a break last night, but I changed my mind because I thought of my family, and I got scared of the consequences." McCloskey testified at trial that he had become depressed prior to his decision to escape because he had been denied a Christmas furlough two days earlier. He testified that "in the yard, I realized that I had shamed my family enough, and I did not want to shame them any more. . . . So I went back to the boiler room and continued working." Was McCloskey guilty of an attempt? Would your answer be different if he realized that he likely would not succeed in escaping from prison? See *Commonwealth v. McCloskey*, 234 Pa. Super. 577 (1975).

CONSPIRACY

The crime of **conspiracy** comprises an agreement between two or more persons to commit a criminal act. There are several reasons for punishing an agreement:

- *Intervention.* Society is protected by arresting individuals before they commit a dangerous crime.
- *Group Activity.* Crimes committed by groups have a greater potential to cause social harm.
- *Deterrence.* Group pressure makes it unlikely that the conspirators will be deterred from carrying out the agreement.

The common law crime of conspiracy was complete with the agreement to commit a crime. Most modern statutes require an affirmative act, however slight, toward carrying out the conspiracy. The important point is that the law of conspiracy permits law enforcement to arrest individuals at an early stage of criminal planning.

Bear in mind that in common law, the conspiracy did not merge into the criminal act. Today, this continues to be the rule; conspiracy does not merge into the attempted or completed offense that is the object of conspiracy. As a result, an individual may be convicted both of the substantive offense that is the object of the conspiracy and of a conspiracy. A defendant may be held liable both for armed robbery and for a conspiracy to commit armed robbery. Remember that under the *Pinkerton* rule, an individual is guilty of all criminal acts committed by one of the conspirators in furtherance of the conspiracy, regardless of whether the individual aided or abetted or was even aware of the offense.

State statutes differ on the punishment of a conspiracy. Some provide that a conspiracy is a misdemeanor, others that the sentence for conspiracy is the same as the target offense, and a third group provides a different sentence for conspiracies to commit a misdemeanor and for conspiracies to commit a felony. In general, a conspiracy to commit a felony is a felony; a conspiracy to commit a misdemeanor is a misdemeanor.²³

The law of conspiracy is one of the most difficult areas of the criminal law to understand. As former Supreme Court justice Robert Jackson observed, “The modern crime of conspiracy is so vague that it almost defies definition.”²⁴

Actus Reus

The *actus reus* of conspiracy consists of

- entering into an agreement to commit a crime, and
- under some modern statutes, an overt act in furtherance of the agreement.

The core of a conspiracy charge is an agreement. Individuals do not normally enter into a formal contractual agreement to commit a crime. Prosecutors typically are forced to point

to circumstances that strongly indicate that the defendants agreed to commit a crime. In *Commonwealth v. Azim*, Charles Azim pulled his automobile over to the curb, and one of the passengers, Thomas Robinson, called to a nearby Temple University student. The student refused to respond, and Robinson and Mylice James exited the auto, beat and choked him, and took his wallet. The three then drove away from the area. The Pennsylvania Superior Court, in affirming Azim's conviction for conspiracy, pointed to Azim's association with the two assailants, his presence at the crime scene, and Azim's waiting in the automobile with the engine running and lights on as the student was beaten. The case for conspiracy would have been even stronger had this been part of a pattern of criminal activity or if there was evidence that the three divided the money.²⁵

United States v. Brown is often cited to illustrate the danger that courts will find a conspiracy based on even the slightest evidence suggesting that the defendants cooperated with one another. An undercover officer approached Valentine on the street seeking to purchase marijuana. Brown joined the conversation and advised Valentine three times that the officer "looks okay to me." Brown told Valentine that there was no reason to distrust the customer or to take precautions and persuaded Valentine to personally hand the drugs over to the undercover agent. The federal court of appeals concluded that the facts indicated that Brown had agreed with Valentine to direct or advise Valentine on drug sales. Judge Oakes observed in dissent that there was not a "shred of evidence" that Brown was involved with Valentine and that when "numerous other inferences could be drawn from the few words of conversation, . . . I cannot believe that there is proof of conspiracy . . . beyond a reasonable doubt." Judge Oakes asked, "What conspiracies might we approve tomorrow? The majority opinion will come back to haunt us, I fear."²⁶

Critics like to point to a series of trials of anti-Vietnam War activists conducted during the 1960s to demonstrate the potential abuse of conspiracy charges. In the "Chicago Eight" trial, eight activists, most of whom did not even know one another, were prosecuted for conspiring to cross state lines to incite a riot at the 1968 Chicago Democratic Convention; they were ultimately freed.²⁷

Overt Act

Under the common law, an agreement was sufficient to satisfy the elements of a conspiracy. Most states and the federal statute now require proof of an **overt act** in furtherance of the conspiracy. The overt act requirement is satisfied by even an insignificant act that is far removed from the commission of a crime. As observed by Justice Oliver Wendell Holmes, "The essence of the conspiracy is being combined for an unlawful purpose—and if an overt act is required, it does not matter how remote the act may be from accomplishing the purpose, if done to effect it."²⁸ Attending a meeting of the Communist Party was considered to constitute an overt act in furtherance of a Communist conspiracy to overthrow the U.S. government,²⁹ and purchasing large quantities of dynamite satisfied the overt act requirement for a conspiracy to blow up a school building.³⁰ In other cases, the overt act has been satisfied by observing the movements of an intended kidnapping victim or by purchasing stamps to send poison through the mail.³¹

An overt act by any party to a conspiracy is attributed to every member and provides a sufficient basis for prosecuting all the participants. The requirement of an overt act is intended to

limit conspiracy prosecutions to agreements that have progressed beyond the stage of discussion and that therefore present a social danger.³²

Mens Rea

The *mens rea* of conspiracy is the intent to achieve the object of the agreement. Some judges continue to express uncertainty over whether this requires a purpose to cause the result or whether it is sufficient that an individual knows that a result will occur. Under the knowledge standard, all that is required is that the seller be aware of a buyer's "intended illegal use." A purpose standard requires that the seller possess an intent to further, promote, and cooperate in the buyer's specific illegal objective.

A knowledge standard may deter individuals from providing assistance to individuals who they are aware or suspect are engaged in illegal activity. On the other hand, limiting liability to individuals with a criminal purpose targets individuals who intend to further criminal conduct.

The Model Penal Code reflects the predominant view that a specific intent to further the object of the conspiracy is required. In *United States v. Falcone*, the U.S. Supreme Court ruled that individuals who provided large quantities of sugar, yeast, and cans to individuals who they knew were engaged in illegally manufacturing alcohol were not liable for conspiracy. The court held that the government was required to demonstrate that the suppliers intended to promote the illegal enterprise.³³

In *People v. Lauria*, a California appellate court was confronted with the challenge of determining whether the operator of a telephone message service was merely providing a service to his clients knowing that they were prostitutes or whether he conspired to further acts of prostitution. The court rejected the prosecution's claim that Lauria's knowledge that three of the customers were prostitutes satisfied the mental element required to hold Lauria liable for conspiring to commit prostitution. The court ruled that the prosecution must demonstrate that Lauria possessed an intent to further a criminal enterprise and that there was insufficient evidence that "Lauria took any direct action to further, encourage or direct . . . call-girl activities."

The California court provided some direction to prosecutors in future cases by observing that Lauria's intent to further prostitution might be established by evidence that he promoted and encouraged the prostitutes' pursuit of customers or received substantial financial benefits from their activities. It was significant that only a small portion of Lauria's business was derived from the prostitutes and that he received the same fee regardless of the number of messages left for his prostitute customers.³⁴

Parties

A conviction for conspiracy requires that two or more persons intentionally enter into an agreement with the intent to achieve the crime that is the objective of the conspiracy. This is referred to as the **plurality requirement**. As noted by former Supreme Court justice Benjamin Cardozo, "It is impossible . . . for a man to conspire with himself."³⁵

This joint or **bilateral** conception of conspiracy means that a charge of conspiracy against one conspirator will fail in the event that the other party to the conspiracy lacked the required

mens rea. A conspirator in a two-person conspiracy, for example, would be automatically acquitted in the event that the other party was an undercover police officer or was legally insane and was legally incapable of entering into an agreement. In a joint trial of two conspirators at common law, the acquittal of one alleged conspirator resulted in the dismissal of the charges against the other conspirator. Keep in mind that under the bilateral approach, “There must be at least two guilty conspirators or none.”³⁶

The bilateral approach is criticized for undermining the enforcement of conspiracy laws. An individual who intends to enter into a conspiracy to commit a crime is a threat to society and should be subject to punishment regardless of whether the other party turns out to be an undercover police informant who lacks a criminal intent. On the other hand, the bilateral approach is consistent with the view that the law of conspiracy should be directed against group crime.³⁷

The Model Penal Code adopts a **unilateral** approach that examines whether a single individual agreed to enter into a conspiracy rather than focusing on whether two or more persons entered into an agreement. This scheme has been incorporated into a number of modern state statutes. Under the unilateral approach, the fact that one party is an undercover police officer or lacks the capacity to enter into a conspiracy does not result in the acquittal of the other conspirator. The commentary to the Model Penal Code notes that under the unilateral approach, it is “immaterial to the guilt of a conspirator . . . that the person or all of the persons with whom he conspired have not been or cannot be convicted.”³⁸

The unilateral approach has been criticized for permitting the prosecution of individuals for a conspiracy who, in fact, have not actually entered into a criminal agreement. The fear is expressed by civil libertarians that the unilateral approach enables undercover agents to manufacture crime by enticing individuals into unilateral conspiratorial agreements.³⁹

The Structure of Conspiracies

The structure of a conspiracy is important. Defendants may be found guilty only of the conspiracy charged at trial and may offer the defense that there were separate agreements to commit different crimes rather than a single conspiracy. A defendant might admit to being involved in a conspiracy to kidnap and hold a corporate executive for ransom and also argue that the other kidnappers entered into a separate conspiracy to kill the executive. Remember, in the event of a single conspiracy, our kidnapper would be held liable for all offenses committed in furtherance of the agreement to kidnap the executive, including the murder.⁴⁰

Most complex conspiracies can be categorized as either a **chain conspiracy** or a **wheel conspiracy**.

A chain conspiracy typically arises in the distribution of narcotics and other contraband. This involves communication and cooperation by individuals linked together in a vertical chain to achieve a criminal objective.

The classic case is *United States v. Bruno*, in which 88 defendants were indicted for a conspiracy to import, sell, and possess narcotics. This involved smugglers who brought narcotics into New York and sold them to middlemen who distributed the narcotics to retailers who, in turn, sold narcotics to operatives in Texas and Louisiana for distribution to addicts. The petitioners appealed on the grounds that there were three conspiracies rather than one large

conspiracy. The court ruled that this was a single chain conspiracy in which the smugglers knew that the middlemen must sell to retailers for distribution to addicts, and the retailers knew that the middlemen must purchase drugs from smugglers. In the words of the court, the “conspirators at one end of the chain knew that the unlawful business would not, and could not, stop with their buyers; and those at the other end knew that it had not begun with their sellers.” Each member of the conspiracy knew “that the success of that part with which he was immediately concerned, was dependent upon the success of the whole.” Remember that this means that every member of the conspiracy was liable for every illegal transaction carried out by their co-conspirators in Texas and in Louisiana.⁴¹

A circle or wheel conspiracy involves a single person or group that serves as a *hub*, or common core, connecting various independent individuals or spokes. The *spokes* typically interact with the hub rather than with one another. In the event that the spokes share a common purpose to succeed, there is a single conspiracy. On the other hand, in those instances that each spoke is unconcerned with the success of the other spokes, there are multiple conspiracies.

The most frequently cited case illustrating a wheel conspiracy is *Kotteakos v. United States*. Simon Brown, the hub, assisted 31 independent individuals to obtain separate fraudulent loans from the government. The Supreme Court held that although all the defendants were engaged in the same type of illegal activity, there was no common purpose or overall plan, and the defendants were not liable for involvement in a single conspiracy. Each loan “was an end in itself, separate from all others, although all were alike in having similar illegal objects. Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through.” As a result, the Supreme Court found that there were 32 separate conspiracies involving Brown rather than one common conspiracy.⁴²

State v. McLaughlin is an example of a wheel conspiracy in which the individuals involved share a common purpose. In *McLaughlin*, several gamblers independently agreed to subscribe to an illegal horse racing service that provided racing results and information. The customers realized that the success of this financially expensive venture depended on the willingness of each of the other gamblers to support the service, and the defendants were held liable for involvement in a single, common wheel conspiracy.⁴³

Criminal Objectives

The crime of conspiracy traditionally punished agreements to commit a broad range of objectives, many of which would not be criminal if committed by a single individual. The thinking was that these acts assume an added danger when engaged in by a group of individuals.

In 1832, English jurist Lord Denman pronounced that a conspiracy indictment must “charge a conspiracy either to do an unlawful act or [to do] a lawful act by unlawful means.”⁴⁴ English and American courts interpret “unlawful” to include acts that are not punishable under the criminal law. It was “enough if they are corrupt, dishonest, fraudulent, immoral, and in that sense illegal, and it is in the combination to make use of such practices that the dangers of this offense consist.”⁴⁵

The U.S. Supreme Court has recognized the danger that broadly defined conspiracy statutes may fail to inform citizens of the acts that are prohibited and may provide the police,

prosecutors, and judges with broad discretion in bringing charges.⁴⁶ The doctrine of conspiracy, for instance, was used in a New York court against workers who went on strike in protest against a fellow employee who agreed to work below union wages.⁴⁷ The English House of Lords upheld the conviction of an individual for “conspiracy to corrupt public morals” who agreed to publish a directory of prostitutes.⁴⁸ In ruling that a Utah conspiracy statute that punished conspiracies to commit acts injurious to the public morals was unconstitutional, the U.S. Supreme Court noted that the statute

would seem to be a warrant for conviction for an agreement to do almost any act which a judge and jury might find . . . contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order.⁴⁹

Modern statutes generally limit the criminal objectives of conspiracy to agreements to commit crimes. Several jurisdictions, however, continue to enforce broadly drafted statutes. California Penal Code section 182(5) punishes a conspiracy to commit “any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of justice.” Would a religious group’s vocal opposition to “safe sex” through the use of condoms potentially result in criminal liability under this statute? The U.S. government’s conspiracy statute broadly punishes persons conspiring either to “commit any offense against the United States, or to defraud the United States.” A conspiracy to commit a felony under this statute is punishable by up to five years in prison in addition to a fine, while a conspiracy to commit a misdemeanor is subject to the maximum penalty for the target offense.⁵⁰

Pinkerton v. United States established that all criminal acts undertaken in furtherance of a conspiracy or that are “reasonably foreseeable as the necessary or natural consequences of the conspiracy” are attributable to each member by virtue of their membership. In *Pinkerton*, Daniel Pinkerton was held liable for conspiring with his brother Walter to avoid federal taxes. Daniel was held criminally responsible for Walter’s failure to pay taxes, despite the fact that Daniel was in prison at the time that Walter submitted his fraudulent tax return.⁵¹ The Model Penal Code rejects the *Pinkerton* rule because individual conspirators may be held liable for “thousands of crimes” of which they were “completely unaware” and did not “influence at all.” Consider the often-cited example of a woman who refers individuals to a criminal abortionist who may find herself being held liable for unlawful abortions performed on women referred to the abortionist by a co-conspirator whom she has never met.

You also should be aware of **Wharton’s rule**. This provides that an agreement by two persons to commit a crime that requires the voluntary and cooperative action of two persons cannot constitute a conspiracy. The classic examples of consensual crimes that require the participation of two individuals and do not permit a charge of conspiracy under Wharton’s rule are adultery, bigamy, the sale of contraband, bribery, and dueling. These offenses already punish a cooperative agreement between two individuals to commit a crime, and there is no reason to further punish individuals for entering into a conspiratorial agreement. Wharton’s rule does not prevent a conspiracy involving more than the required number of individuals. Three individuals, for example, may conspire for two of them to engage in bribery. Two individuals may also conspire for other individuals to pay and receive bribes.⁵²

Another principle is the **Gebardi rule**. This provides that an individual who is in a class of persons who are excluded from criminal liability under a statute may not be charged with a conspiracy to violate the same law. In *Gebardi v. United States*, the U.S. Supreme Court reversed the conspiracy conviction of a man and woman for violation of the Mann Act. This statute prohibited and punished the transportation of a woman from one state to another for immoral purposes. The Court reasoned that the statute was intended to protect women from sexual exploitation and was defined so as to solely punish the individual transporting the women. The Court therefore reasoned that the two defendants could not enter into a criminal conspiracy and reversed their conviction.⁵³

Conspiracy Prosecutions

Judge Learned Hand called conspiracy the “darling of the modern prosecutor’s nursery.”⁵⁴ Judge Hand was referring to the fact that conspiracy constitutes a powerful and potential tool for prosecuting and punishing defendants.⁵⁵ Conspiracies are not typically based on explicit agreements and may be established by demonstrating a commitment to a common goal by individuals sharing a criminal objective.

- Defendants may be prosecuted for both conspiracy and the commission of the crime that was the object of the conspiracy.
- A prosecution may be brought in any jurisdiction in which the defendants entered into a conspiratorial agreement or committed an overt act.
- The defendants all may be joined in a single trial, creating the potential for “guilt by association.”
- All conspirators are held responsible for the criminal acts and statements of any co-conspirator in furtherance of the conspiracy. An individual may be held liable who is not present or even aware of a co-conspirator’s actions.
- Individuals may abandon the conspiracy and escape liability for future offenses only if this abandonment is communicated to the other conspirators. Some statutes require that individuals persuade the other conspirators to abandon the conspiracy.

The federal law of conspiracy was further expanded in 1970 when Congress passed the Racketeer Influenced and Corrupt Organizations Act (RICO). This law is intended to provide prosecutors with a powerful and potent weapon against organized crime. The RICO law essentially eliminates the need to prove that individuals are part of a single conspiracy and, instead, holds defendants responsible for all acts of racketeering undertaken as part of an “enterprise.” Racketeering includes a range of state and federal offenses typically committed by organized crime groups including murder, kidnapping, gambling, arson, robbery, bribery, extortion, and dealing in narcotics or obscene material. Critics have voiced concern over the government’s power to bring a counterfeiter to trial for murders committed by individuals involved in an unrelated component of a criminal enterprise.

The next case in the text, *United States v. Garcia*, asks you to determine whether Garcia entered into a conspiratorial agreement with members of his gang to commit an assault with a dangerous weapon.

MODEL PENAL CODE

Section 5.03. Criminal Conspiracy

1. . . A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
 - a. agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime; or
 - b. agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime. . . .
2. . . If a person guilty of conspiracy . . . knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such crime.
3. . . If a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.
4. . . [T]wo or more persons charged with criminal conspiracy may be prosecuted jointly.

Analysis

1. The Model Penal Code limits conspiracies to crimes and does not extend conspiracy to broad categories of immoral or corrupt behavior.
2. A defendant must possess the purpose of promoting or facilitating the commission of a crime. Knowledge does not satisfy the intent requirement of conspiracy (§5.04(1)).
3. The essence of a conspiracy is an agreement. This determination should be based on clear evidence (§5.04(1)(a)).
4. A unilateral approach to conspiratorial agreements is adopted (§5.04(1)(b)).
5. The Model Penal Code does not use the terminology of wheel or chain conspiracies. The code, instead, examines whether specific individuals have entered into a conspiratorial agreement and whether they are aware that the person with whom they have conspired has entered into agreements with other individuals. The end result would not differ from the wheel or chain analysis (§5.04(2)).
6. An overt act is required other than in the case of serious felonies.
7. The *Pinkerton* rule is rejected (§2.06); individuals are responsible only for crimes that they solicited, aided, agreed to aid, or attempted to aid.
8. Conspiracy is punished to the same extent as the most serious offense that is attempted or solicited or is an object of the conspiracy (§5.05(1)).

9. The code does not permit conviction of both a conspiracy and the substantive crime that is the object of the conspiracy (§1.07(1)(b)).
10. The *Gebardi* rule is incorporated into the Model Penal Code (§5.04(2)).

FIGURE 7.2 ■ The Legal Equation: Conspiracy



WAS THERE A SINGLE CONSPIRACY OR WERE THERE MULTIPLE CONSPIRACIES TO COMMIT ARSON? DID THE MEMBERS OF THE BLOODS STREET GANG ENTER INTO A CONSPIRATORIAL AGREEMENT TO ASSAULT MEMBERS OF THE CRIPS?

UNITED STATES V. GARCIA, 151 F.3D 1243 (9TH CIR. 1998)

Opinion by Reinhardt, J.

Issue

[Defendant Leon "Cody" Garcia was convicted in a U.S. district court of conspiracy to assault with a dangerous weapon. He appeals his conviction and sentence of 60 months in prison on the grounds that the evidence did not establish that he entered into a conspiracy.] In this case, we consider whether testimony regarding the existence of an implicit, general agreement among gang members to support one another in fights against rival gangs can constitute sufficient evidence to support a conviction of conspiracy to commit assault. . . .

Facts

One evening, a confrontation broke out between rival gangs at a party on the Pasqua Yaqui Indian reservation. The resultant gunfire injured four young people, including appellant Cody Garcia. Two young men involved in the shooting, Garcia and Noah Humo, were charged with conspiracy to assault three named individuals with dangerous weapons. A jury acquitted Humo but convicted Garcia. Because there is no direct evidence of an agreement to commit the criminal act which was the alleged object of the conspiracy, and because the

circumstances of the shooting do not support the existence of an agreement, implicit or explicit, the government relied heavily on the gang affiliation of the participants to show the existence of such an agreement. . . .

The party at which the shootings occurred was held in territory controlled by the Crips gang. The participants were apparently mainly young Native Americans. While many of the attendees were associated with the Crips, some members of the Bloods gang were also present. Appellant Cody Garcia arrived at the party in a truck driven by his uncle, waving a red bandanna [the Bloods claim the color red and the Crips the color blue] out the truck window and calling out his gang affiliation: "ESPB Blood!" Upon arrival, Garcia began "talking smack" to [insulting] several Crips members. Prosecution witnesses testified that Garcia's actions suggested that he was looking for trouble and issuing a challenge to fight to the Crips at the party.

Meanwhile, Garcia's fellow Bloods member Julio Baltazar was also "talking smack" to Crips members, and Blood Noah Humo bumped shoulders with one Crips member and called another by a derogatory Spanish term. Neither Baltazar nor Humo had arrived with Garcia, nor is there any indication that they had met before the party to discuss plans or that they were seen talking together during the party.

At some point, shooting broke out. Witnesses saw both Bloods and Crips, including Garcia and Humo, shooting at one another. Baltazar was seen waving a knife or trying to stab a Crip. The testimony at trial does not shed light on what took place immediately prior to the shooting, other than the fact that one witness heard Garcia ask, "Who has the gun?" There is some indication that members of the two gangs may have "squared off" before the shooting began. No testimony establishes whether the shooting followed a provocation or verbal or physical confrontation.

Four individuals were injured by the gunfire: the defendant, Stacy Romero, Gabriel Valenzuela, and Gilbert Baumea. Stacy Romero who at the time was twelve years old was the cousin both of Garcia's co-defendant Humo and his fellow Blood, Baltazar. No evidence presented at trial established that any of the injured persons was shot by Garcia, and he was charged only with conspiracy. The government charged both Garcia and Humo with conspiracy to assault Romero, Valenzuela, and Baumea with dangerous weapons under 18 U.S.C. §§ 371, 113(a)(3) and 1153; Humo alone was charged with two counts of assault resulting in serious bodily injury under 18 U.S.C. §§ 113(a)(6) and 1153.

After a jury trial, Humo was acquitted on all counts. Garcia was convicted of conspiracy to assault with a dangerous weapon and sentenced to 60 months in prison. He appeals on the ground that there was insufficient evidence to support his conviction.

Reasoning

In order to prove a conspiracy, the government must present sufficient evidence to demonstrate both an overt act and an agreement to engage in the specific criminal activity charged in the indictment. While an implicit agreement may be inferred from circumstantial evidence, proof that an individual engaged in illegal acts with others is not sufficient to demonstrate the existence of a conspiracy. Both the existence of and the individual's connection to the conspiracy must be proven beyond a reasonable doubt.

The government claims that it can establish the agreement to assault in two ways: first, that the concerted provocative and violent acts by Garcia, Humo and Baltazar are sufficient to show the existence of a prior agreement; and second, that by agreeing to become a

member of the gang, Garcia implicitly agreed to support his fellow gang members in violent confrontations.

However, no inference of the existence of any agreement could reasonably be drawn from the actions of Garcia and other Bloods members on the night of the shooting. An inference of an agreement is permissible only when the nature of the acts would logically require coordination and planning. [An example is two identical trucks traveling down the same highway, both of which contain drugs concealed in identical types of containers.]

The government presented no witnesses who could explain the series of events immediately preceding the shooting, so there is nothing to suggest that the violence began in accordance with some prearrangement. The facts establish only that perceived insults escalated tensions between members of rival gangs and that an ongoing gang related dispute erupted into shooting. Testimony presented at trial suggest[s] more chaos than concert. Such evidence does not establish that parties to a conspiracy “work[ed] together understandingly, with a single design for the accomplishment of a common purpose.”

Given that this circumstantial evidence fails to suggest the existence of an agreement, we are left only with gang membership as proof that Garcia conspired with fellow Bloods to shoot the three named individuals. The government points to expert testimony at the trial by a local gang unit detective, who stated that generally gang members have a “basic agreement” to back one another up in fights, an agreement which requires no advance planning or coordination. This testimony, which at most establishes one of the characteristics of gangs but not a specific objective of a particular gang—let alone a specific agreement on the part of its members to accomplish an illegal objective—is insufficient to provide proof of a conspiracy to commit assault or other illegal acts.

Recent authority in this circuit establishes that “[m]embership in a gang cannot serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to establish aiding and abetting.” *Mitchell v. Prunty*, 107 F.3d 1337 (9th Cir. 1997). In overturning the state conviction of a gang member that rested on the theory that the defendant aided and abetted a murder by “fanning the fires of gang warfare,” the *Mitchell* opinion expressed concern that allowing a conviction on this basis would “smack of guilt by association.” The same concern is implicated when a conspiracy conviction is based on evidence that an individual is affiliated with a gang which has a general rivalry with other gangs, and that this rivalry sometimes escalates into violent confrontations.

The *Mitchell* court reasoned that the conviction in that case necessarily rested on the faulty assumption that gang members typically act in a concerted fashion. Such an assumption would be particularly inappropriate here. Acts of provocation such as “talking smack” or bumping into rival gang members certainly does not prove a high level of planning or coordination. Rather, it may be fairly typical behavior in a situation in which individuals who belong to rival gangs attend the same events. At most, it indicates that members of a particular gang may be looking for trouble, or ready to fight. It does not demonstrate a coordinated effort with a specific illegal objective in mind (conspiracy requires proof of both “an intention and agreement to accomplish a specific illegal objective”). The fact that gang members attend a function armed with weapons may prove that they are prepared for violence, but without other evidence it does not establish that they have made plans to initiate it. And the fact that more than one member of the Bloods was shooting at rival gang members also does not prove a prearrangement—the Crips, too, were able to pull out their guns almost immediately, suggesting that readiness for a gunfight requires no prior agreement. Such readiness may be a sad commentary on the state of mind of many of the nation’s youth, but it is not indicative of a criminal conspiracy.

Finally, . . . allowing a general agreement among gang members to back each other up to serve as sufficient evidence of a conspiracy would mean that any time more than one gang member was involved in a fight it would constitute an act in furtherance of the conspiracy and all gang members could be held criminally responsible—whether they participated in or had knowledge of the particular criminal act, and whether or not they were present when the act occurred. Indeed, were we to accept “fighting the enemy” as an illegal objective, all gang members would probably be subject to felony prosecutions sooner rather than later, even though they had never personally committed an improper act. This is contrary to fundamental principles of our justice system. “There can be no conviction for guilt by association. . . .”

Because of these concerns, evidence of gang membership cannot itself prove that an individual has entered a criminal agreement to attack members of rival gangs. Moreover, here the conspiracy allegation was even more specific: the state charged Garcia with conspiracy to assault three specific individuals—Romero, Baumea and Valenzuela—with deadly weapons. Even if the testimony presented by the state had sufficed to establish a general conspiracy to assault Crips, it certainly did not even hint at a conspiracy to assault the three individuals listed in the indictment. Of course, a more general indictment would not have solved the state’s problems in this case. In some cases, when evidence establishes that a particular gang has a specific illegal objective such as selling drugs, evidence of gang membership may help to link gang members to that objective. However, a general practice of supporting one another in fights, which is one of the ordinary characteristics of gangs, does not constitute the type of illegal objective that can form the predicate for a conspiracy charge.

Holding

We hold that gang membership itself cannot establish guilt of a crime, and a general agreement, implicit or explicit, to support one another in gang fights does not provide substantial proof of the specific agreement required for a conviction of conspiracy to commit assault. The defendant’s conviction therefore rests on insufficient evidence, and we reverse.

Because the government introduced no evidence from which a jury could reasonably have found the existence of an agreement to engage in any unlawful conduct, the evidence of conspiracy was insufficient as a matter of law. A contrary result would allow courts to assume an ongoing conspiracy, universal among gangs and gang members, to commit any number of violent acts, rendering gang members automatically guilty of conspiracy for any improper conduct by any member. We therefore reverse Garcia’s conviction and remand to the district court to order his immediate release. As a result of this decision, Garcia is not subject to retrial. He has already served over a year in prison.

Questions for Discussion

1. What is the act and intent requirement to prove a conspiracy?
2. In *Garcia*, why does the government contend that the actions of Garcia, Humo, and Baltazar provide circumstantial evidence of a conspiracy?
3. Explain why the court of appeals decides that gang membership cannot serve as evidence that individuals have entered into a conspiracy.

4. Do you agree that "a general practice of supporting one another in fights . . . does not constitute the type of illegal objective that can form the predicate for a conspiracy charge"?
5. Are you persuaded that Garcia and Humo did not enter into a conspiracy to assault Romero, Valenzuela, and Baumea with a dangerous weapon?

CASES AND COMMENTS

Conspiracy and Agreement. Jason Escobedo went to Will Rogers State Beach with Billy Reyes, Zonia Petrazza, and Irene Melendez. Jason went into a restroom and became involved in an argument with the defendant. Billy ran into the restroom and intervened. Defendant, a member of the Southside 13 gang, issued a gang challenge and asked Jason "where he was from." Jason replied that he was not a gang member. Defendant told Billy that for \$2 the defendant "would forget the whole thing." Billy then hit the defendant in the face and a fight ensued. Zonia arrived on the scene to find defendant on top of Billy. Jason separated the two combatants and apologized to defendant for "intruding into his territory." Defendant responded by punching Jason in the mouth. Immediately thereafter, defendant whistled toward the beach and made a beckoning motion with his hands.

Jason, Billy, Zonia, and Irene then ran for Billy's truck. It appeared to them that the situation had calmed down, and Jason and Billy went down to the beach to retrieve the belongings they had left behind.

While the two girls remained in the truck, another truck pulled up alongside them containing the defendant and seven other young men. Defendant and two others began bashing the truck with a trash can, a barbell, and their fists. Irene succeeded in starting the truck and began backing it up.

Billy managed to make it back to the truck, but Jason was surrounded and could not escape. Billy, Zonia, and Irene drove to a gas station nearby and telephoned 911. The police arrived in "about 15 minutes." However, by that time Jason lay dead on the other side of the restroom, his head having been severely beaten. There was "graffiti with gang-related monikers at the scene in the vicinity of the decedent's body."

Defendant's fellow gang member Rojas testified that after the bloodied defendant told him what had happened to him in the restroom, one of the other gang members said, "F— it. Let's go get him." Thereupon, the gang members proceeded to seek out the two individuals who they believed had intruded into their territory. Was there sufficient evidence of a conspiratorial agreement and a specific intent to accomplish the aims of the conspiracy to hold the defendants liable? See *People v. Quinteros*, 16 Cal. Rptr. 2d 462 (Cal. Ct. App. 1993).

YOU DECIDE 7.6

The minors, Angel G., Jose E., Sergio G., Pedro G., and Diego G., appeal from their conviction in juvenile court of various offenses including conspiracy.

Twenty-year-old Daniel Garcia and his girlfriend, Sylvia Villa, were standing outside of Garcia's house. Several cars were parked in the driveway, including Garcia's red maroon

rental car. Garcia was wearing a red shirt. The defendants and several other juveniles were walking down the street after leaving school. Garcia testified that he saw “about 15 guys walking [in] the middle of the street.” The defendants gathered in front of Garcia’s house and began “throwing 3 signs,” gesturing with three fingers extended, and saying “sur.” Garcia interpreted these signals as indicating that the juveniles were affiliated with a Sureño gang.

Garcia told the boys to “get out of here.” The boys “stood there for a moment” and ran to a neighboring yard, where they picked up rocks. Garcia testified that they “all started running toward me and start[ed] throwing them.” Garcia picked up a plastic broomstick and chased one boy across the street. He caught up to the boy and struck him on the back of the leg. Garcia returned to his driveway and was struck by a rock, fell and hit his head on a cement pole, and lost consciousness.

When Garcia was struck by the rock, one of the boys shouted, “I hit him. I hit him. I got him. I got him.” Garcia spent a week in the hospital after undergoing surgery on his head. Doctors put three metal plates in his head and used about 30 staples to treat his injury. At the time of trial, Garcia still suffered from poor memory, a stutter, and pain in his head. He could not return to work.

Angel, Jose, Diego, and Sergio had admitted that they were members of the VML (Varrio Mexicanos Locos) gang, while Pedro had admitted he was a member of the Calle Ocho gang; both of these gangs are Sureño gangs. Sureños identify themselves with the color blue and with the number 13. Their main rivals are Norteños, who identify themselves with the color red and the number 14. Are the defendants guilty of conspiracy? See *People v. Angel G.*, Case No. 21725 (Cal. Ct. App. 2002).

SOLICITATION

Solicitation is defined as commanding, hiring, or encouraging another person to commit a crime. The crime was largely unknown until the prosecution of the 1801 English case *Rex v. Higgins*, in which Higgins was convicted of unsuccessfully soliciting a servant to steal his master’s goods.⁵⁶ A number of states do not have solicitation statutes and continue to apply the common law of solicitation. States with modern statutory schemes have adopted various approaches. Some punish solicitation of all crimes, and others limit solicitation to felonies, particular felonies, or certain classes of felonies. Solicitation generally results in a punishment slightly less severe than or equivalent to the punishment that is usual for the crime solicited.⁵⁷

We all read about the greedy spouse who approaches a contract killer to murder their partner in order to collect insurance money. The act of proposing the killing of a spouse with the intent that the murder be carried out constitutes solicitation. Solicitation is a form of accomplice liability, and in the event that the spouse is murdered, both the greedy spouse and the contract killer are guilty of homicide. In the event the assassination proves unsuccessful, both the greedy spouse and the inaccurate assassin are guilty of attempted murder. An agreement between the two that leads to an overt act that is not carried out results in liability for a conspiracy. The contract killer, of course, may refuse to become involved with the greedy spouse. Nevertheless, the spouse is guilty of solicitation; the crime of solicitation is complete when a spouse attempts to hire the killer.

Public Policy

Solicitation remains a controversial crime; this accounts for the fact that some states have not yet enacted solicitation statutes. The thinking is that there is no necessity for the crime of solicitation. Solicitation, it is argued, is not a threat to society until steps are taken to carry out the scheme. At this point, the agreement can be punished as a conspiracy. A solicitor depends on the efforts of others, and simply approaching another person to commit a crime does not present a social danger. There is also the risk that individuals will be convicted based on a false accusation or as a result of a casual remark. Lastly, punishing individuals for solicitation interferes with freedom of speech. As observed by a 19th-century court, holding every individual who “nods or winks” to a married person on the sidewalk “indictable for soliciting to adultery . . . would be a dangerous and difficult rule of criminal law to administer.”⁵⁸

On the other hand, there are convincing reasons for punishing solicitation:

- *Cooperation Among Criminals.* Individuals typically encourage and support one another, which creates a strong likelihood that the crime will be committed.
- *Social Danger.* An individual who is sufficiently motivated to enlist the efforts of a skilled professional criminal clearly poses a continuing social danger.
- *Intervention.* Solicitation permits the police to intervene before a crime is fully implemented. The police should not be placed in the position of having to wait for an offense to occur before arresting individuals intent on committing a crime.

States typically protect individuals against wrongful convictions by requiring corroboration or additional evidence to support a charge of solicitation. This might involve an email, a voice recording, or witnesses who overheard the conversation. As for the First Amendment, society possesses a substantial interest in prohibiting acts such as the solicitation of adolescents by adults for sexual activity on computer chat rooms that more than justifies any possible interference with individual self-expression.⁵⁹

The Crime of Solicitation

Solicitation involves a written or spoken statement in which an individual intentionally advises, requests, counsels, commands, hires, encourages, or incites another person to commit a crime with the purpose that the other person commit the crime. You are not liable for a comment that is intended as a joke or uttered out of momentary frustration.

The *mens rea* of solicitation requires a specific intent or purpose that another individual commit a crime. You would not be liable in the event that you humorously advised a friend to “blow up” the expensive car of a neighbor who regularly parks in your friend’s parking space. On the other hand, you might harbor a long-standing grudge against the neighbor and genuinely intend to persuade your friend to destroy the automobile.

The *actus reus* of solicitation requires an effort to get another person to commit a crime. A variety of terms are used to describe the required act, including *command*, *encourage*, and

request. The crime of solicitation occurs the moment an individual urges, asks, or encourages another to commit a crime with the requisite intent. The individual is guilty of solicitation even in those instances in which the other person rejects the offer or accepts the offer and does not commit the crime.

There are three important points on *actus reus*:

1. The crime is complete the moment the statement requesting another to commit a crime is made. This is the case despite the fact that an additional step, such as a phone call or the payment of money, is required to trigger the crime.
2. A statement justifying or hoping that the neighbor's automobile is damaged is not sufficient. There must be an effort to get another person to commit the crime. A solicitation may be direct or indirect. For instance, in cases involving the enticement of children into sexual activity, courts will consider a defendant's use of suggestive and seductive remarks and materials.
3. The Model Penal Code provides that an individual is guilty of solicitation even in instances in which a letter asking others to commit a crime is intercepted by prison authorities and does not reach gang members outside of prison. States that do not follow the Model Penal Code require that the solicitation actually be received by the intended recipient.

A number of states have statutes prohibiting gang solicitation. Virginia, in section 18.2-46.3, provides that “[a]ny person who solicits, invites, recruits, encourages or otherwise causes or attempts to cause another to actively participate in or become a member of what he knows to be a criminal street gang is guilty of a . . . misdemeanor. Any person age 18 years or older who solicits a juvenile . . . [for] what he knows to be a criminal street gang is guilty of a . . . felony.”

In reading the next case, *State v. Cotton*, compare and contrast the New Mexico statute with the Model Penal Code and ask yourself how *Cotton* would be decided under the Model Penal Code. Which of these two approaches to the crime of solicitation do you think is better as a matter of public policy?

MODEL PENAL CODE

Section 5.02. Criminal Solicitation

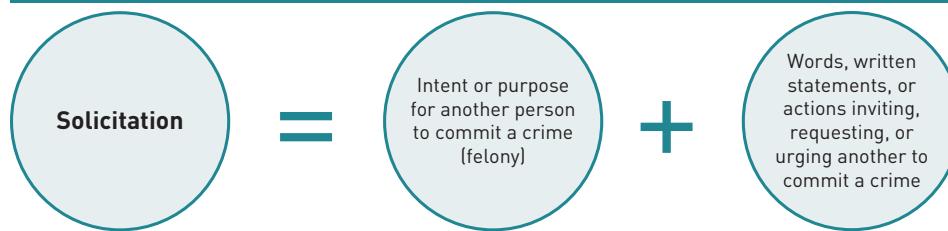
1. . . . A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission.
2. . . . It is immaterial . . . that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication.

- 3.** . . . It is an affirmative defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

Analysis

1. Solicitation for a felony or misdemeanor is a crime. This also includes solicitation for an attempt and aiding and abetting.
2. An individual is guilty of solicitation even in those instances that the solicitation is not communicated.
3. The defense of renunciation is recognized in those instances that the other person is persuaded not to commit or prevented from committing the offense.

FIGURE 7.3 ■ The Legal Equation: Solicitation



WAS COTTON GUILTY OF CRIMINAL SOLICITATION DESPITE THE FACT THAT THE SOLICITATION NEVER WAS COMMUNICATED TO HIS WIFE?

STATE V. COTTON, 790 P.2D 1050 (N.M. CT. APP. 1990)

Opinion by Donnelly, J.

Facts

Defendant appeals his convictions of two counts of criminal solicitation. . . .

In 1986, defendant, together with his wife Gail, five children, and a stepdaughter, moved to New Mexico. A few months later, defendant's wife and children returned to Indiana. Shortly thereafter, defendant's fourteen-year-old stepdaughter moved back to New Mexico to reside with him. In 1987, the Department of Human Services investigated allegations of misconduct involving defendant and his stepdaughter. Subsequently the district court

issued an order awarding legal and physical custody of the stepdaughter to the Department, and she was placed in a residential treatment facility in Albuquerque.

In May 1987, defendant was arrested and charged with multiple counts of criminal sexual penetration of a minor and criminal sexual contact with a minor. While in the Eddy County Jail awaiting trial on those charges defendant discussed with his cellmate James Dobbs, and Danny Ryan, another inmate, his desire to persuade his stepdaughter not to testify against him. During his incarceration defendant wrote numerous letters to his wife; in several of his letters he discussed his strategy for defending against the pending criminal charges.

On September 23, 1987, defendant addressed a letter to his wife. In that letter he requested that she assist him in defending against the pending criminal charges by persuading his stepdaughter not to testify at his trial. The letter also urged his wife to contact the stepdaughter and influence her to return to Indiana or that she give her money to leave the state so that she would be unavailable to testify. After writing this letter defendant gave it to Dobbs and asked him to obtain a stamp for it so that it could be mailed later. Unknown to defendant, Dobbs removed the letter from the envelope, replaced it with a blank sheet of paper, and returned the sealed stamped envelope to him. Dobbs gave the original letter written by defendant to law enforcement authorities, and it is undisputed that defendant's original letter was never in fact mailed nor received by defendant's wife.

On September 24 and 26, 1987, defendant composed another letter to his wife. He began the letter on September 24 and continued it on September 26, 1987. In this letter defendant wrote that he had revised his plans and that this letter superseded his previous two letters. The letter stated that he was arranging to be released on bond; that his wife should forget about his stepdaughter for a while and not come to New Mexico; that defendant would request that the court permit him to return to Indiana to obtain employment; that his wife should try to arrange for his stepdaughter to visit her in Indiana for Christmas; and that his wife should try to talk the stepdaughter out of testifying or to talk her into testifying favorably for defendant. Defendant also said in the letter that his wife should "warn" his stepdaughter that if she did testify for the state "it won't be nice and she'll make [New Mexico] news," and that, if the stepdaughter was not available to testify, the prosecutor would have to drop the charges against defendant.

Defendant secured his release on bail on September 28, 1987, but approximately twenty-four hours later was rearrested on charges of criminal solicitation and conspiracy. At the time defendant was rearrested, law enforcement officers discovered, and seized from defendant's car, two personal calendars and other documents written by defendant. It is also undisputed that the second letter was never mailed to defendant's wife.

Following a jury trial, defendant was convicted on two counts of criminal solicitation. . . .

The criminal solicitations were alleged to have occurred on or about September 23, 1987. Count I of the amended criminal information alleged that defendant committed the offense of criminal solicitation by soliciting another person "to engage in conduct constituting a felony, to-wit: Bribery or Intimidation of a Witness (contrary to Sec. 30-24-3, NMSA 1978)." Count II alleged that defendant committed the offense of criminal solicitation by soliciting another "to engage in conduct constituting a felony, to-wit: Custodial Interference (contrary to Sec. 30-4-4, NMSA 1978)."

The offense of criminal solicitation, as provided in New Mexico Statutes Annotated 1978, Section 30-28-3, is defined in applicable part as follows:

- A. Except as to bona fide acts of persons authorized by law to investigate and detect the commission of offenses by others, a person is guilty of criminal solicitation if, with

the intent that another person engage in conduct constituting a felony, he solicits, commands, requests, induces, employs or otherwise attempts to promote or facilitate another person to engage in conduct constituting a felony within or without the state.

Issue

Defendant contends that the record fails to contain the requisite evidence to support the charges of criminal solicitation against him because defendant's wife, the intended solicitee, never received the two letters. In reviewing this position, the focus of our inquiry necessarily turns on whether or not the record contains proper evidence sufficient to establish each element of the alleged offenses of criminal solicitation beyond a reasonable doubt. . . .

The state's brief[] states that "[n]either of these letters actually reached Mrs. Cotton, but circumstantial evidence indicates that other similar letters did reach her during this period." The state also argues that under the express language of section 30-28-3(A), where defendant is shown to have the specific intent to commit such offense and "otherwise attempts" its commission, the offense of criminal solicitation is complete. The state reasons that even in the absence of evidence indicating that the solicitations were actually communicated to or received by the solicitee, under our statute, proof of defendant's acts of writing the letters, [and] attempts to mail or forward them, together with proof of his specific intent to solicit the commission of a felony constitutes sufficient proof to sustain a charge of criminal solicitation. We disagree.

Reasoning

The offense of criminal solicitation, as defined in Section 30-28-3 by our legislature, adopts, in part, language defining the crime of solicitation as set out in the Model Penal Code promulgated by the American Law Institute. . . . "As enacted by our legislature, however, Section 30-28-3 significantly omits one section of the Model Penal Code, Section 5.02(2), which pertains to the effect of an uncommunicated criminal solicitation. . . .

Under the Model Penal Code, a person is guilty of "solicitation to commit a crime" when with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.

It is immaterial "that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication."

However, as enacted by our legislature, Section 30-28-3 sets out the offense of criminal solicitation in a manner that differs in several material respects from the proposed draft of the Model Penal Code. Among other things, . . . Section 30-28-3 specifically omits that portion of the Model Penal Code subsection declaring that an uncommunicated solicitation to commit a crime may constitute the offense of criminal solicitation. [This] omission, we conclude, indicates an implicit legislative intent that the offense of solicitation requires some form of actual communication from the defendant to either an intermediary or the person intended to be solicited, indicating the subject matter of the solicitation.

Holding

The mere writing and sending of letters by defendant to his wife, without proof of solicitation of a specific felony and proof of defendant's intent to induce another to commit such crime, is insufficient to establish proof of criminal solicitation. . . .

The state contends that under the language of Section 30-28-3, where proof is presented that defendant has the requisite intent and has "otherwise attempt[ed] to promote or facilitate another person to engage in conduct constituting a felony within or without the state," the offense of solicitation is complete. This contention must fail because Section 30-28-3 is silent as to any legislative intent to declare that uncommunicated solicitations shall constitute a criminal offense. . . .

Commission of criminal solicitation does not require, however, that defendant directly solicit another; the solicitation may be perpetrated through an intermediary. Thus if A solicits B in turn to solicit C to commit a felony, A would be liable even where he did not directly contact C because A's solicitation of B itself involves the commission of the offense. Where the intended solicitation is not in fact communicated to an intended intermediary or to the person sought to be solicited, the offense of solicitation is incomplete; although such evidence may support, in proper cases, a charge of attempted criminal solicitation. . . .

Defendant's convictions for solicitation are reversed and the case is remanded with instructions to set aside the convictions for criminal solicitation.

Questions for Discussion

1. What is the holding of the New Mexico court in *Cotton*?
2. Explain why the result likely would be different under the Model Penal Code.
3. As a legislator, would you favor the approach of the Model Penal Code or the State of New Mexico?
4. Could Cotton be held liable for attempted solicitation?
5. Do we need a crime of solicitation?

YOU DECIDE 7.7

Cassandra informed Lou Tong Saephanh, a California inmate, that she was pregnant with his child. Saephanh was excited to be a father, and they talked about the baby every week. Roughly six months later, Saephanh wrote a letter to fellow gang member Cheng Saecho: "By the way loc, could you & the homies do me a big favor & take care that white bitch, Cassie for me. ha, ha, ha!! Cuzz, it's too late to have abortion so I think a miss carriage would do just fine. I aint fista pay child sport for this bull-shit loc. You think you can get the homies or home girls do that for me before she have the baby on Aug. '98." Vicki Lawrence, a correctional officer, opened and read the letter. The letter was embargoed by prison authorities and was not sent to the addressee. Saephanh later explained that if Cassandra did not let him be a part of the baby's life, he wanted to "get rid of the baby" and did not want to pay child support. Is Saephanh guilty of solicitation? The California solicitation statute reads that "[e]very person who, with the intent that the crime be committed, solicits another to commit or join in the commission of murder shall be punished by imprisonment." See *People v. Saephanh*, 94 Cal. Rptr. 2d 910 (Cal. Ct. App. 2000).

CRIME IN THE NEWS

Pi Delta Psi is an Asian American cultural fraternity devoted to empowering Asian Americans and is based on "Academic Achievement, Cultural Awareness, Righteousness and Friendship/Loyalty."

College students pledging Pi Delta Psi at Baruch College in New York City in December 2013 were deprived of sleep for several days and transported to a rental house in the Pocono Mountains. The pledges once reaching the Poconos were subjected to a gauntlet, termed the "glass ceiling," meant to represent the challenges and difficulties the pledges confronted as Asian American men. Pledges were blindfolded and required to wear backpacks full of sand as they ran across the frozen yard. The last pledge to run the gauntlet was 18-year-old freshman Chun Hsien Deng (known as Michael), who had objected to the ritual hazing. Michael was tackled three to six times as he ran the gauntlet, and at the end of the gauntlet he was aggressively body slammed by a member of the fraternity who knocked him unconscious. Fraternity members changed Michael's clothes and placed him on a couch near a fireplace in the house they had rented. They unsuccessfully attempted to wake Michael, who was making gurgling or snoring sounds, and searched frantically on their phones under phrases like "concussion can't wake up." One fraternity member told investigators that they agreed that it was too expensive to call an ambulance and instead decided after as long as an hour to drive Michael to the hospital. They contacted the national president of the fraternity who directed them to hide any items with the national fraternity logo and to tell the police that Deng had been injured "playing a game outside." Doctors at the hospital were unable to resuscitate Michael who died as a result of a severe head injury.

Michael was the only son of Chinese immigrants and had graduated from an elite New York City public science high school. He wanted to experience the fantasy of living on a college campus, partying, and joining a fraternity.

Thirty-seven individuals were charged and convicted of crimes ranging from assault, to hindering apprehension, to hazing. Four of the fraternity members who were charged with murder pled guilty to voluntary manslaughter and to obstruction of justice. They were sentenced to between 10 months and two years in prison. Other defendants received sentences ranging from 6 months' to five years' probation.

Prosecutors took the aggressive step of bringing criminal charges against the national Pi Delta Psi fraternity. In November 2017, the fraternity was found guilty by a jury in a trial court in Monroe County, Pennsylvania, of a number of criminal charges including involuntary manslaughter, aggravated assault, criminal conspiracy, hindering apprehension, and concealing evidence. The fraternity was fined \$112,000, placed on 10 years' probation, and barred from operating in the Commonwealth of Pennsylvania for 10 years. Baruch College permanently expelled Pi Delta Psi from its campus.

The Pi Delta Psi manual contained an antihazing agreement. The fraternity's national president was aware that the "broken glass" ritual was taking place, and the Pledge Education Manual detailed the procedures including the "Gauntlet" that are required for pledge initiation. Physical pledging according to the manual was not to be undertaken in public, and the national office was to be informed of accidents and injuries to "prepare in case any action is taken against us."

A Pennsylvania superior court subsequently affirmed the verdict against Pi Delta Psi although it held that the fraternity could not be banned from the entire state because the Penn State University chapter, which is the only chapter active in the state, was not aware of or involved in the hazing.

The Baruch College case is part of a trend for prosecutors to aggressively prosecute hazing cases. In the past, felony charges in hazing cases generally have not been pursued by prosecutors, who took the attitude that “boys will be boys” and either dismissed the case or pursued misdemeanor charges. College administrators increasingly are suspending fraternities involved in hazing incidents.

According to journalism professor Hank Nuwer, roughly 40 college students have died in hazing incidents in the past decade. These deaths have occurred at a number of colleges and universities including Cornell, Florida State, Louisiana State, Northern Illinois University, San Diego State, and Washington State.

Students at most colleges and secondary schools are prohibited from participating in hazing of other students. Roughly 44 states impose criminal penalties for hazing, and 5 states specifically require educational institutions to regulate hazing. Four states require that criminal hazing involve the infliction of actual physical harm. In other states, the risk of physical harm is sufficient to constitute unlawful hazing. Eighteen states’ antihazing laws explicitly punish the infliction of emotional or psychological harm. In most states hazing is a misdemeanor, 10 states provide that hazing may be punished as either a misdemeanor or a felony, and 3 states stipulate that hazing is a mere violation carrying a fine. Various statutes limit liability to students. In every state including those without antihazing laws, individuals may be held liable for other associated criminal violations.

Several states impose liability for individuals who fail to report hazing violations. In January 2019, Florida amended the state antihazing law to provide that individuals who are not physically present during the hazing, but who participated in planning or abetted the event, are criminally liable. The law provides protection from criminal liability for “Good Samaritans” who intervene to administer medical attention or who call for assistance. The law also extends protection to members of the fraternity who are not as yet registered for classes.

The consent of the victim of hazing is not recognized as a defense in any state statute.

In most instances, fraternity members continue to be charged with minor criminal offenses and to receive lenient sentences. In February 2019, Timothy Piazza, 19, consumed 18 drinks in 82 minutes as part of a hazing ritual in a Penn State Beta Theta Pi fraternity alcohol-free house. He fell down a flight of stairs, and the fraternity brothers waited more than 12 hours before calling 911. Several individuals attempted to tamper with the security camera that recorded the incident. Timothy died of a traumatic brain injury. Magisterial District Judge Brian K. Marshall initially sentenced four former Penn State fraternity members to jail time ranging between 30 days and 10 months. The judge subsequently reduced their sentences to house arrest and probation.

What is the basis for charging the national organization with conspiracy? Why did the prosecutor charge the individuals involved in conducting the hazing that resulted in Michael’s death along with the national organization with the charge of conspiracy? Should there be antihazing laws? Why not merely punish hazing as an established crime such as battery?

CHAPTER SUMMARY

Attempt, solicitation, and conspiracy are inchoate crimes or offenses that punish the beginning steps toward a crime. All require a *mens rea* involving a specific intent or purpose to achieve a crime as well as an *actus reus* that entails an affirmative act toward the commission of a crime.

Each of these offenses is subject to the same or a lesser penalty than the crime that is the criminal objective.

An attempt involves three elements:

- an intent or purpose to commit the crime,
- an act toward the commission of the crime, and
- a failure to commit the crime.

A complete (but imperfect) attempt occurs when a defendant takes every act required to complete the offense and fails to succeed in committing the crime. An incomplete attempt arises when an individual abandons or is prevented from completing an attempt.

An individual must possess the intent to achieve a criminal objective. There are two approaches to *actus reus*, the objective and the subjective. The objective centers on the proximity of an individual's acts to the commission of a crime. The subjective approach focuses on whether an individual possesses an intent to commit a crime. Under this approach, an attempt is complete at the point that a defendant's acts are sufficient to establish a criminal intent. Objective approaches include the common law last step analysis as well as the physical proximity test. The unequivocality test is an example of the subjective approach.

The Model Penal Code adopts a substantial step test. This requires that an act must strongly support an individual's criminal purpose. The approach of the Model Penal Code extends attempt to acts that might be considered mere preparation under the objective approach. Among the acts that constitute an attempt under the substantial step test and that are considered "strongly corroborative of an actor's criminal purpose" are

- lying in wait,
- enticing a victim to go to the place contemplated for the commission of a crime,
- surveying a site contemplated for the commission of a crime,
- entering unlawfully a structure or vehicle in which a crime is contemplated,
- possessing materials to be employed in the commission of a crime, and
- soliciting an individual to engage in conduct constituting an element of a crime.

A factual impossibility does not constitute a defense to an attempt to commit a crime. This is based on the reasoning that the offender has demonstrated a dangerous criminal intent and a determination to commit an offense. The factual circumstance that prevents an individual from actually completing the offense is referred to in some state statutes as an extraneous factor. This should be distinguished from a legal impossibility that is recognized as a defense. Legal impossibility arises in those instances in which individuals wrongly believe that they are violating the law. Inherent impossibility arises where an individual undertakes an act that could not possibly result in a crime.

An individual may avoid criminal liability by abandoning a criminal attempt under circumstances manifesting a complete and voluntary renunciation of a criminal purpose. Individuals abandoning a criminal purpose based on the intervention of outside or extraneous factors remain criminally liable.

Conspiracy comprises an agreement between two or more persons to commit a criminal act. Most modern state statutes require an affirmative act in furtherance of this criminal purpose. The common law crime of conspiracy did not merge into the completed criminal act. Today an individual may be convicted both of the substantive offense that is the object of the conspiracy and of the conspiracy itself.

The centerpiece of a charge of conspiracy is an agreement. There is rarely proof of a formal agreement, and an agreement typically must be established by examining the relationship, conduct, and circumstances of the parties. The overt act requirement is satisfied by even an insignificant act in furtherance of a conspiracy. The *mens rea* of conspiracy is the intent or purpose that the object of the agreement is accomplished.

The plurality requirement provides that a conviction for conspiracy requires that at least two persons possess both the intent to agree and the intent to achieve the crime that is the object of the conspiracy. This joint or bilateral approach to conspiracy is distinguished from the Model Penal Code's unilateral approach, which examines whether a single individual agreed to enter into a conspiracy, rather than focusing on whether two or more persons entered into an agreement.

Most complex conspiracies can be categorized as either a wheel or a chain conspiracy. A chain conspiracy entails communication and cooperation by individuals linked together in a vertical relationship to achieve a criminal objective. A wheel conspiracy involves a single person or group that serves as a hub that provides a common core connecting various independent individuals or spokes.

Conspirators are liable for all criminal offenses taken in furtherance of a conspiracy. As a result, defendants will typically attempt to establish that there were multiple conspiracies rather than a single conspiracy. Wharton's rule states that individuals involved in a crime that requires the cooperative action of two persons cannot constitute a conspiracy. The *Gebardi* rule provides that an individual who is in a class of persons who are excluded from criminal liability under a statute cannot be considered a conspirator.

A conspiracy charge provides prosecutors with various advantages, such as joining the conspirators in a single trial and bringing the charges in any jurisdiction in which an agreement or act in furtherance of the conspiracy is committed.

Solicitation involves a written or spoken statement in which an individual intentionally advises, requests, counsels, commands, hires, encourages, or incites another person to commit a crime with the purpose that the other individual commit the crime. A solicitation is complete the moment the statement requesting another to commit a crime is made. The solicitation need not be actually communicated.

CHAPTER REVIEW QUESTIONS

1. What are the *mens rea* and *actus reus* of inchoate crimes?
2. Distinguish the three categories of inchoate crimes.
3. Provide an example of each crime.
4. Compare the subjective and objective approaches to criminal attempts.
5. How does the Model Penal Code substantial step test differ from the test of physical proximity to attempts? What types of acts satisfy the substantial step test?
6. Discuss and distinguish between legal and factual impossibility.
7. Why is there a defense of abandonment for attempts? What are the legal elements of this defense?
8. What are the reasons for punishing conspiracy?
9. Discuss the *mens rea* and *actus reus* of conspiracy.
10. Why do some states require an overt act for a conspiracy?
11. Is there a difference between the bilateral and unilateral approaches to a conspiratorial agreement?
12. Distinguish between the wheel and chain approaches to conspiracy. Explain why defendants may argue that there are multiple conspiracies rather than a single conspiracy.
13. How does a charge of conspiracy assist a prosecutor in convicting a defendant?
14. Why did Congress adopt the RICO statute?
15. What are the *mens rea* and *actus reus* of solicitation?
16. At what point is the crime of solicitation complete? Is a solicitation required to reach the individual to whom it is directed?
17. How does society benefit by punishing inchoate crimes? Would society suffer in the event that these offenses did not exist?

LEGAL TERMINOLOGY

abandonment	criminal attempt
attempt	extraneous factor
bilateral	factual impossibility
chain conspiracy	<i>Gebardi</i> rule
complete attempt	inchoate crimes
conspiracy	incomplete attempt

inherent impossibility	<i>res ipsa loquitur</i>
last step approach	solicitation
legal impossibility	subjective approach to criminal attempt
objective approach to criminal attempt	substantial step test
overt act	unequivocality test
physical proximity test	unilateral
plurality requirement	Wharton's rule
preparation	wheel conspiracy

TEST YOUR KNOWLEDGE ANSWERS

1. False.
2. False.
3. False.
4. True.
5. True.
6. False.

8

JUSTIFICATIONS

TEST YOUR KNOWLEDGE: TRUE/FALSE

1. A defendant is presumed guilty.
2. The justification defenses of self-defense and of necessity are based on the conditions confronting an individual, and the defense would be available to any individual confronting the same factual situation.
3. An affirmative defense is a defense that can be offered on behalf of a defendant only at sentencing.
4. An individual who reasonably believes that there is a future threat of serious physical harm would be successful in relying on self-defense.
5. An individual who reasonably, although incorrectly, believes that another person represents an imminent and immediate threat of serious physical harm under the objective test would be successful in relying on the justification of defense of others.
6. An individual inside a home who reasonably believes that an intruder climbing through a window intends to commit a forcible felony within the home may use reasonable force to prevent entry.
7. An identified police officer may use deadly force against any fleeing felon who refuses any command to surrender to the officer.
8. An individual under the law in every state may use physical force to resist an unlawful arrest.
9. The defense of necessity allows individuals who are in peril in a hurricane to take the life of another person to protect their own life.
10. An individual in most instances may not be held criminally liable if the “victim” consents to the crime.

Check your answers at the end of the chapter on page 392.

Did the Defendant Have the Right to Kill Her Husband in Self-Defense?

The trial was replete with testimony of forced prostitution, beatings, and threats on defendant's life. The defendant testified that she believed the decedent would kill her, and the evidence showed that on the occasions when she had made an effort to get away from [Judy Ann Laws] Norman, he had come after her and beat her. Indeed, within twenty-four hours prior to the shooting, defendant had attempted to escape by trying to take her own life and throughout the day on 12 June 1985 had been subjected to beatings and other physical abuse, verbal abuse, and threats on her life up to the time when decedent went to sleep. . . . [E]xperts testified that in their opinion, defendant believed killing the victim was necessary to avoid being killed. (*State v. Norman*, 366 S.E.2d 586 [1988])

INTRODUCTION

The Prosecutor's Burden

The American legal system is based on the **presumption of innocence**. Defendants may not be compelled to testify against themselves, and the prosecution is required as a matter of the due process of law to establish every element of a crime beyond a reasonable doubt to establish a defendant's guilt. This heavy prosecutorial burden also reflects the fact that a criminal conviction carries severe consequences and individuals should not be lightly deprived of their liberty. Insisting on a high standard of guilt assures the public that innocents are not being falsely convicted and that individuals need not fear that they will suddenly be snatched off the streets and falsely convicted and incarcerated.¹

The prosecutor presents the witnesses for the prosecution in the **case-in-chief**. These witnesses are then subject to cross-examination by the defense attorney. The defense also has the right to introduce evidence challenging the prosecution's case during the **rebuttal** stage at trial. A defendant, for instance, may raise doubts about whether the prosecution has established that the defendant committed the crime beyond a reasonable doubt by presenting alibi witnesses.

A defendant is to be acquitted if the prosecution fails to establish each element of the offense beyond a reasonable doubt. Judges have been reluctant to reduce the beyond a reasonable doubt standard to a mathematical formula and stress that a "high level of probability"² is required and that jurors must reach a "state of near certitude" of guilt.³ The classic definition of reasonable doubt provides that the evidence "leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."⁴

Defendants may present an **alibi** and claim that they did not commit the crime because they were somewhere else at the time the crime was committed. A defense attorney is required to

notify the prosecutor that a defendant will rely on this defense and provide the names of the witnesses who will testify. The U.S. Supreme Court has held that fairness dictates that prosecutors disclose the witnesses that they plan to present to rebut the alibi defense.⁵

A defendant is entitled to file a motion for judgment of acquittal at the close of the prosecution's case or prior to the submission of the case to the jury. This motion will be granted if the judge determines that the evidence is unable to support any verdict other than acquittal, viewing the evidence as favorably as possible for the prosecution. The judge, in the alternative, may adhere to the standard procedure of submitting the case to the jury following the close of the evidence and instructing the jurors to acquit if they have a reasonable doubt concerning one or more elements of the offense.⁶

Affirmative Defenses

In addition to attempting to demonstrate that the prosecution's case suffers from a failure of proof beyond a reasonable doubt, defendants may present **affirmative defenses**, or defenses in which the defendant typically possesses the **burden of production** as well as the **burden of persuasion**.

Justifications and excuses are both affirmative defenses. If the defendant raises an affirmative defense, the defendant possesses the burden of producing "some evidence in support of his defense." In most cases, the defendant then also has the burden of persuasion by a preponderance of the evidence, which is a balance of probabilities, or slightly more than 50%. In most jurisdictions, the prosecution retains the burden of persuasion and is responsible for negating the defense by a reasonable doubt.⁷

Assigning the burden of production to the defendant is based on the fact that the prosecution cannot be expected to anticipate and rebut every possible defense that might be raised by a defendant. The burden of rebutting every conceivable defense ranging from insanity and intoxication to self-defense would be overwhelmingly time-consuming and inefficient. Thus, it makes sense to assign responsibility for raising a defense to the defendant. The U.S. Supreme Court has issued a series of rather technical judgments on the allocation of the burden of persuasion. In the last analysis, states are fairly free to place the burden of persuasion on either the defense or the prosecution. As noted, in most instances, the prosecution has the burden of persuading the jury beyond a reasonable doubt to reject the defense.

There are two types of affirmative defenses that may result in acquittal:

- *Justifications.* These are defenses to otherwise criminal acts that society approves and encourages under the circumstances. An example is self-defense.
- *Excuses.* These are defenses to acts that deserve condemnation, but for which the defendant is not held criminally liable because of a personal disability such as infancy or insanity.

Professors Singer and La Fond illustrate the difference between these concepts by noting that justification involves illegally parking in front of a hospital in an effort to rush a sick infant

into the emergency room, and an excuse entails illegally parking in response to the delusional demand of “Martian invaders.”⁸ In the words of Professor George Fletcher, “Justification speaks to the rightness of the act; an excuse, to whether the actor is [mentally] accountable for a concededly wrongful act.”⁹

In the common law, there were important consequences resulting from a successful plea of justification or excuse. A justification resulted in an acquittal, whereas an excuse provided defendants with the opportunity to request that the king exempt them from the death penalty. Eventually, there came to be little practical difference between being acquitted by reason of a justification or an excuse.¹⁰

Scholars continue to point to differences between categorizing an act as justified as opposed to excused, but these have little practical significance for most defendants.¹¹ You nevertheless should reflect on whether you consider the acts discussed in this chapter as legally justifiable.¹² The recognition of otherwise criminal acts as justifiable constitutes a morally significant statement concerning our social values.

There are various theories for the defense of justification, none of which fully account for each and every justification defense.¹³

- *Moral Interest.* An individual’s act is justified based on the protection of an important moral interest. An example is self-defense and the preservation of an individual’s right to life.
- *Superior Interest.* The interests being preserved outweigh the interests of the person who is harmed. The necessity defense authorizes an individual to break the law to preserve a more compelling value. An example might be the captain of a ship in a storm who throws luggage overboard to lighten the load and preserve the lives of those on board.
- *Public Benefit.* An individual’s act is justified on the grounds that it is undertaken in service of the public good. This includes a law enforcement officer’s use of physical force against a fleeing felon.
- *Moral Forfeiture.* An individual perpetrating a crime has lost the right to claim legal protection. This explains why a dangerous aggressor may justifiably be killed in self-defense.

A defendant who establishes a **perfect self-defense** is able to satisfy each and every element of a justification defense and is acquitted. An **imperfect self-defense** arises in those instances in which the requirements of the defense are not fully satisfied. For instance, a defendant may use excessive force in self-defense or possess a genuine, but unreasonable, belief in the need to act in self-defense. A defendant’s liability in these cases is typically reduced, for example, in the case of a homicide to manslaughter and to a lower level of guilt in the case of other offenses.¹⁴

Mitigating Circumstances

Evidence that is not relevant for justification or excuse may still be relied on during the sentencing stage as a mitigating circumstance that may reduce a defendant’s punishment. The jury in

death penalty cases is specifically required to consider mitigating as well as aggravating circumstances in determining whether the defendant should be subject to capital punishment or receive a life sentence. An example is *State v. Moore*, in which a 19-year-old defendant was convicted of murder during an aggravated robbery and kidnapping. The Ohio Supreme Court affirmed the defendant's death sentence and ruled that the defendant's youth, lack of criminal record, remorse, and religious conversion only modestly mitigated the offense and were clearly outweighed by the aggravating circumstances of the offense. The Ohio Supreme Court also ruled that the defendant's alcohol and drug addictions were not mitigating.¹⁵

A defendant's "good motive" in committing a mercy killing of a severely sick family member may not be considered in determining guilt or innocence and is considered only at sentencing. The law is concerned with *what* crime an individual committed, not *why* the individual committed the crime. During the Vietnam conflict, the Fourth Circuit Court of Appeals ruled that a defendant's **good motive defense** of opposition to what the defendant viewed as a morally reprehensible war could not justify the destruction of draft records. The court of appeals explained that absolving the defendant from guilt based on the defendant's "moral certainty" that the war in Vietnam is wrong also would require the acquittal of individuals who might commit breaches of the law to demonstrate their sincere belief in the war. The appellate court stressed that in both cases the defendants "must answer for their acts" to avoid a breakdown in law and order.¹⁶

At times, lawyers will attempt to indirectly introduce motive by arguing for **jury nullification**. The jury historically has possessed the authority to disregard the law and to acquit sympathetic defendants. This power is based on the jury's historical role as a check on overzealous prosecutors who bring charges that are contrary to prevailing social values. Examples include the acquittal of newspaper publisher John Peter Zenger by an 18th-century American colonial jury and the acquittal of individuals who assisted fugitive slaves during the 19th century. Appellate courts, however, have consistently ruled that trial judges are not obligated to instruct jurors that they possess the power of nullification and that jurors are to be instructed that they are required to strictly apply the law in determining a defendant's guilt. The District of Columbia Circuit Court of Appeals observed that "what is tolerable or even desirable as an informal, self-initiated exception, harbors grave dangers to the system if it is opened to expansion and intensification through incorporation in the judge's instructions."¹⁷ Do you agree?

SELF-DEFENSE

It is commonly observed that the United States is a "government of law rather than men and women." This means that guilt and punishment are to be determined in accordance with fair and objective legal procedures in the judicial suites rather than by brute force in the streets. Accordingly, the law generally discourages individuals from "taking the law into their own hands." This type of "vigilante justice" risks anarchy and mob violence. One sorry example is the lynching of thousands of African Americans by the Ku Klux Klan following the Civil War.

Self-defense is the most obvious exception to this rule and is recognized as a defense in all 50 states. Why does the law concede that an individual may use physical force in self-defense? One federal court judge noted the practical consideration that absent this defense, the innocent

victim of a violent attack would be placed in the unacceptable position of choosing between “almost certain death” at the hands of the attacker and a “trial and conviction of murder later.” More fundamentally, 18th-century English jurist William Blackstone wrote that it was “lawful” for an individual who is attacked to “repel force by force.” According to Blackstone, this was a recognition of the natural impulse and right of individuals to defend themselves. A failure to recognize this right would inevitably lead to a disregard of the law.¹⁸

The Central Components of Self-Defense

The common law recognizes that an individual is justified in employing force in self-defense. This may involve deadly or nondeadly force, depending on the nature of the threat. There are a number of points to keep in mind:

- *Reasonable Belief.* Individuals must possess a reasonable belief that force is required to defend themselves. In other words, an individual must believe and a reasonable person must believe that force is required in self-defense.
- *Necessity.* The defender must reasonably believe that force is required to prevent the imminent and unlawful infliction of death or serious bodily harm.
- *Proportionality.* The force employed must not be excessive or more than is required under the circumstances.
- *Retreat.* Defendants may not resort to deadly force if they can safely **retreat**. This generally is not required when the attack occurs in the home or workplace, or if the attacker uses deadly force.
- *Aggressor.* An **aggressor**, or individual who unlawfully initiates force, generally is not entitled to self-defense. An aggressor may claim self-defense only in those instances when an aggressor who is not employing deadly force is confronted by deadly force. Some courts require that under these circumstances, the aggressor withdraws from the conflict if at all possible before enjoying the right of self-defense. There are courts willing to recognize that even an aggressor who employs deadly force may regain the right of self-defense by withdrawing following the initial attack. The other party then assumes the role of the aggressor.
- *Mistake.* An individual who is mistaken concerning the necessity for self-defense may rely on the defense so long as the individual’s belief is reasonable.
- *Imperfect Self-Defense.* Individuals who honestly, but unreasonably, believe that they confront a situation calling for self-defense and intentionally kill are held liable in many states for an intentional killing. Other states, however, follow the doctrine of imperfect self-defense. This provides that although defendants may not be acquitted, fairness dictates that they should be held liable only for the less serious crime of manslaughter.

The first case in this chapter, *State v. Marshall*, provides a review of the basic principles and application of the law of self-defense and illustrates the core components and challenges of self-defense.

MODEL PENAL CODE

Section 3.04. Use of Force in Self-Protection

1. [T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
2. Limitations on Justifying Necessity for Use of Force.
 - a. ...
 - b. The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if:
 - i. the actor, with the purpose of causing death or serious bodily injury, provoked the use of force against himself in the same encounter; or
 - ii. the actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action that he has no duty to take.

Analysis

The Model Penal Code makes some significant modifications to the standard approach to self-defense that will be discussed later in the text. The basic formulation affirms that the use of force in self-protection is justified in those instances in which an individual "employs it in the belief that it is immediately necessary for the purpose of protecting himself against the other's use of unlawful force on the present occasion." The code provides that an aggressor who uses deadly force may "break off the struggle" and retreat and regain the privilege of self-defense against the other party.

FIGURE 8.1 ■ The Legal Equation: Self-Defense



DID THE DEFENDANT CONFRONT AN IMMINENT ATTACK?

STATE V. MARSHALL, 179 S.E. 427 (N.C. 1935)

Opinion by Stacy, C.J.

Facts

The homicide occurred in the defendant's filling station. The deceased had been drinking, and, with imbecilic courtesy, undertook to engage the defendant's wife in a whispered conversation. This was repulsed and the deceased ordered to leave the building. The defendant testified: "I ordered him out two or three times; he would not leave; and the next thing he said you G—d—s—o—b— and b—; pulled off his hat and slammed it on the counter with his right hand and said you haven't got the guts to shoot me, and that he would die like a man; and when he reached to pick up the hammer in the other hand, I fired. . . . I fired because I thought he was going to kill me with the hammer, or hit me with the hammer and kill me, maybe. He cursed me; I got the pistol and ordered him out. . . . I was scared of the man. No, I was not mad. . . . When I shot him there was the width of the counter between us. We were between 2 1/2 and 3 1/2 feet apart. . . . I did not shoot to kill. . . . I saw him when he grabbed the hammer. I did not say he picked it up, but he grabbed it; he raised the hammer up when he fell back, but he did not have it in a striking position; he was reaching and he grabbed the hammer. I do not say he raised it up in a striking position before I shot. . . . I say he did not draw the hammer back to strike."

Defendant's wife testified: "When Rex shot I saw him [deceased] grab for the hammer."

Issue

It appears, therefore, from the defendant's own testimony that he was not in imminent danger of death or great bodily harm when he shot the deceased; nor did he apprehend that he was in such danger. "I did not shoot to kill" is his statement, and it appears from the record that the deceased did not reach for the hammer until after he was shot. The clear inference is that the defendant used excessive force.

Reasoning

The right to kill in self-defense or in defense of one's family or habitation rests upon necessity, real or apparent. . . . [O]ne may kill in defense of himself, or his family, when necessary to prevent death or great bodily harm. . . . [O]ne may kill in defense of himself, or his family, when not actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief. . . . [T]he jury and not the party charged is to determine the reasonableness of the belief or apprehension upon which he acted.

It is also established by the decisions that in the exercise of the right of self-defense, more force must not be used than is reasonably necessary under the circumstances, and if excessive force or unnecessary violence be employed, the party charged will be guilty of manslaughter, at least.

Holding

The defendant's conviction for manslaughter is affirmed.

Questions for Discussion

1. Was Marshall motivated by self-defense or by a desire to punish the deceased? Did Marshall have a reasonable basis for believing that the deceased planned to assault him? At what point would the defendant be justified in using his firearm? Should he wait until the trespasser was clearly ready to strike?
2. What force was Marshall justified in using under the circumstances?
3. Marshall was considered to have engaged in imperfect self-defense and was convicted of manslaughter. Explain the reasoning behind the verdict.

YOU DECIDE 8.1

Defendant Roberta Shaffer was separated from her husband and lived with her two children. Her boyfriend, to whom she was engaged, had lived in the house for roughly two years. He had beaten Shaffer on several occasions, and when she asked him to move out, he threatened to kill Shaffer and her children. She claimed that she loved her boyfriend and had urged him to seek psychiatric assistance. Shaffer and her boyfriend argued at breakfast one morning, and he allegedly angrily responded that "I'll take care of you right now." The defendant threw a cup of coffee at him and ran to the basement, where her children were playing. Shaffer's boyfriend allegedly opened the door at the top of the basement stairs and proclaimed that "[i]f you don't come up these stairs, I'll come down and kill you and the kids." She started to telephone the police and hung up when her boyfriend said that he would leave the house. He soon thereafter reappeared at the top of the stairs, and the defendant, who was fairly experienced in the use of firearms, removed a .22-caliber rifle from the gun rack and loaded the gun. Her boyfriend descended two or three stairs when the defendant shot and killed him with a single shot. Five minutes elapsed from the time she fled to the basement to the firing of the fatal shot. Was this an act of justified self-defense in response to imminent threat? Did Shaffer employ proportionate force? Was this imperfect self-defense? Was Shaffer required to retreat inside her own home? See *Commonwealth v. Shaffer*, 326 N.E.2d 880 (Mass. 1975).

THE LAW OF SELF-DEFENSE: THE REASONABLE PERSON

Reasonable Belief

The common law and most statutes and modern decisions require that an individual who relies on self-defense must act with a reasonable belief in the imminence of serious bodily harm or death. The Utah statute on self-defense (Utah Code Ann. § 76-2-402) specifies that a person

is justified in threatening or using force against another in those instances in which the person “reasonably believes that force is necessary. . . to prevent death or serious bodily injury.” The reasonableness test has two prongs:

- *Subjective.* Defendants must demonstrate an honest belief that they confronted an imminent attack.
- *Objective.* Defendants must demonstrate that a reasonable person under the same circumstances would have believed that they confronted an imminent attack.

Individuals who act with an honest and reasonable, but mistaken, belief that they are subject to an armed attack are entitled to the justification of self-defense. The classic example is the individual who kills an assailant who is about to stab the individual with a knife, a knife that later is revealed to be a realistic-looking rubber replica. As noted by Supreme Court Justice Oliver Wendell Holmes Jr., “Detached reflection cannot be demanded in the presence of an uplifted knife.”¹⁹ Absent a reasonableness requirement, it is feared that individuals might act on the basis of suspicion or prejudice or intentionally kill or maim and then later claim self-defense.

The Model Penal Code adopts a subjective approach and requires only that a defendant actually believe in the necessity of self-defense. The subjective approach has been adopted by very few courts. An interesting justification for this approach was articulated by the Colorado Supreme Court, which contended that the reasonable person standard was “misleading and confusing.” The right to self-defense, according to the Colorado court, is a “natural right and is based on the natural law of self-preservation. Being so, it is resorted to instinctively in the animal kingdom by those creatures not endowed with intellect and reason, so it is not based on the ‘reasonable man’ concept.”²⁰

A number of courts are moving to a limited extent in the direction of the Model Penal Code by providing that a defendant acting in an honest, but unreasonable, belief is entitled to claim *imperfect self-defense* and should be convicted of voluntary manslaughter rather than intentional murder.²¹ In *Harshaw v. State*, the defendant and deceased were arguing, and the deceased threatened to retrieve his gun. They both retreated to their automobiles, and the defendant grabbed his shotgun in time to shoot the deceased as he reached inside his automobile. The deceased was later found to have been unarmed. The Arkansas Supreme Court ruled that the judge should have instructed the jury on manslaughter because the jurors could reasonably have found that Harshaw acted “hastily and without due care” and that he merited a conviction for manslaughter rather than murder.²²

The New York Court of Appeals wrestled with the meaning of “reasonableness” under the New York statute in the famous “subway murder trial” of Bernhard Goetz. Did the law require a subjective standard in which the existence of the threat was “reasonable to the defendant” or an objective standard in which the existence of the threat was “reasonable to a reasonable person”? What is the best test in terms of the interests of society?

DID GOETZ REASONABLY BELIEVE THAT HE WAS THREATENED WITH DEATH OR GREAT BODILY HARM?

PEOPLE V. GOETZ, 497 N.E.2D 41 (N.Y. 1986)

Opinion by Wachtler, C.J.

A Grand Jury has indicted defendant on attempted murder, assault, and other charges for having shot and wounded four youths on a New York City subway train after one or two of the youths approached him and asked for \$5. The lower courts, concluding that prosecutor's charge to the Grand Jury on the defense of justification was erroneous, have dismissed the attempted murder, assault and weapons possession charges. We now reverse and reinstate all counts of the indictment.

Issue

Is the defense of self-defense based on a subjective standard or a reasonableness under the circumstances, objective standard?

Facts

On Saturday afternoon, December 22, 1984, Troy Canty, Darryl Cabey, James Ramseur, and Barry Allen boarded an IRT express subway train in The Bronx and headed south toward lower Manhattan. The four youths rode together in the rear portion of the seventh car of the train. Two of the four, Ramseur and Cabey, had screwdrivers inside their coats, which they said were to be used to break into the coin boxes of video machines.

Defendant Bernhard Goetz boarded this subway train at 14th Street in Manhattan and sat down on a bench towards the rear section of the same car occupied by the four youths. Goetz was carrying an unlicensed .38 caliber pistol loaded with five rounds of ammunition in a waistband holster. The train left the 14th Street station and headed toward Chambers Street.

. . . Canty approached Goetz, possibly with Allen beside him, and stated "give me five dollars." Neither Canty nor any of the other youths displayed a weapon. Goetz responded by standing up, pulling out his handgun and firing four shots in rapid succession. The first shot hit Canty in the chest; the second struck Allen in the back; the third went through Ramseur's arm and into his left side; the fourth was fired at Cabey, who apparently was then standing in the corner of the car, but missed, deflecting instead off of a wall of the conductor's cab. After Goetz briefly surveyed the scene around him, he fired another shot at Cabey, who then was sitting on the end bench of the car. The bullet entered the rear of Cabey's side and severed his spinal cord. . . . Ramseur and Canty, initially listed in critical condition, have fully recovered. Cabey remains paralyzed, and has suffered some degree of brain damage.

On December 31, 1984, Goetz surrendered to police . . . identifying himself as the gunman being sought for the subway shootings in New York nine days earlier. Later that day, after receiving *Miranda* warnings, he made two lengthy statements, both of which were tape recorded with his permission. In the statements, which are substantially similar, Goetz

admitted that he had been illegally carrying a handgun in New York City for three years. He stated that he had first purchased a gun in 1981 after he had been injured in a mugging. Goetz also revealed that twice between 1981 and 1984 he had successfully ward off assailants simply by displaying the pistol.

According to Goetz's statement, the first contact he had with the four youths came when Canty, sitting or lying on the bench across from him, asked "how are you," to which he replied "fine." Shortly thereafter, Canty, followed by one of the other youths, walked over to the defendant and stood to his left, while the other two youths remained to his right, in the corner of the subway car. Canty then said "give me five dollars." Goetz stated that he knew from the smile on Canty's face that they wanted to "play with me." Although he was certain that none of the youths had a gun, he had a fear, based on prior experiences, of being "maimed."

Goetz then established "a pattern of fire," deciding specifically to fire from left to right. His stated intention at that point was to "murder [the four youths], to hurt them, to make them suffer as much as possible." When Canty again requested money, Goetz stood up, drew his weapon, and began firing, aiming for the center of the body of each of the four. Goetz recalled that the first two he shot "tried to run through the crowd [but] they had nowhere to run." Goetz then turned to his right to "go after the other two." One of these two "tried to run through the wall of the train, but . . . he had . . . nowhere to go." The other youth (Cabey) "tried pretending that he wasn't with [the others]" by standing still, holding on to one of the subway hand straps, and not looking at Goetz. Goetz nonetheless fired his fourth shot at him. He then ran back to the first two youths to make sure they had been "taken care of." Seeing that they had both been shot, he spun back to check on the latter two. Goetz noticed that the youth who had been standing still was now sitting on a bench and seemed unhurt. As Goetz told the police, "I said '[y]ou seem to be all right, here's another,'" and he then fired the shot which severed Cabey's spinal cord. Goetz added that "if I was a little more under self-control . . . I would have put the barrel against his forehead and fired." He also admitted that "if I had had more [bullets], I would have shot them again, and again, and again."

. . . Goetz was . . . arraigned on a felony complaint charging him with attempted murder and criminal possession of a weapon. The matter was presented to a Grand Jury in January 1985, with the prosecutor seeking an indictment for attempted . . . murder, assault, reckless endangerment, and criminal possession of a weapon. . . . On January 25, 1985, the Grand Jury indicted defendant on one count of criminal possession of a weapon in the third degree . . . for possessing the gun used in the subway shootings, and two counts of criminal possession of a weapon in the fourth degree . . . for possessing two other guns in his apartment building. It dismissed, however, the attempted murder and other charges stemming from the shootings themselves.

Several weeks after the Grand Jury's action, the People, asserting that they had newly available evidence, moved for an order authorizing them to resubmit the dismissed charges to a second Grand Jury. . . . On March 27, 1985, the second Grand Jury filed a ten-count indictment, containing four charges of attempted murder, . . . four charges of assault in the first degree, . . . one charge of reckless endangerment in the first degree, . . . and one charge of criminal possession of a weapon in the second degree (possession of loaded firearm with intent to use it unlawfully against another). . . .

On October 14, 1985, Goetz moved to dismiss the charges contained in the second indictment alleging, among other things, that the evidence before the second Grand Jury was not legally sufficient to establish the offenses charged . . . and that the prosecutor's instructions to that Grand Jury on the defense of justification were erroneous and prejudicial to the defendant so as to render its proceedings defective.

On November 25, 1985, while the motion to dismiss was pending before Criminal Term, a column appeared in the *New York Daily News* containing an interview which the columnist had conducted with Darryl Cabey the previous day in Cabey's hospital room. The columnist claimed that Cabey had told him in this interview that the other three youths had all approached Goetz with the intention of robbing him. The day after the column was published, a New York City police officer informed the prosecutor that he had been one of the first police officers to enter the subway car after the shootings, and that Canty had said to him "we were going to rob [Goetz]." . . .

In an order dated January 21, 1986, [the Supreme Court] granted Goetz's motion to the extent that it dismissed all counts of the second indictment, other than the reckless endangerment charge, with leave to resubmit these charges to a third Grand Jury. The court, after inspection of the Grand Jury minutes, . . . held . . . that the prosecutor, in a supplemental charge elaborating upon the justification defense, had erroneously introduced an objective element into this defense by instructing the grand jurors to consider whether Goetz's conduct was that of a "reasonable man in [Goetz's] situation." The court . . . concluded that the statutory test for whether the use of deadly force is justified to protect a person should be wholly subjective, focusing entirely on the defendant's state of mind when he used such force. It concluded that dismissal was required for this error because the justification issue was at the heart of the case. . . .

On appeal by the People, a divided Appellate Division . . . affirmed Criminal Term's dismissal of the charges. The plurality opinion by Justice Kassal, concurred in by Justice Carro, agreed with Criminal Term's reasoning on the justification issue, stating that the grand jurors should have been instructed to consider only the defendant's subjective beliefs as to the need to use deadly force. . . . We agree with the dissenters that neither the prosecutor's charge to the Grand Jury on justification nor the information which came to light while the motion to dismiss was pending required dismissal of any of the charges in the . . . indictment.

Reasoning

[New York] Penal Law article 35 recognizes the defense of justification, which "permits the use of force under certain circumstances." . . . One such set of circumstances pertains to the use of force in defense of a person, encompassing both self-defense and defense of a third person. Penal Law § 35.15(1) sets forth the general principles governing all such uses of force: "[a] person may . . . use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person." Subdivision (1) contains certain exceptions to this general authorization to use force, such as where the actor himself was the initial aggressor. Section 35.15(2) sets forth further limitations on these general principles with respect to the use of "deadly physical force" and provides that a person may not use deadly physical force under circumstances specified in subdivision one unless "[a] He *reasonably believes* that such other person is using or about to use deadly physical force . . . or [b] He *reasonably believes* that such other person is committing or attempting to commit a kidnapping, forcible rape, forcible sodomy or robbery." Section 35.15(2)(a) further provides, however, that even under these circumstances a person ordinarily must retreat "if he knows that he can with complete safety as to himself and others avoid the necessity of [using deadly physical force] by retreating."

Thus, consistent with most justification provisions, Penal Law § 35.15 permits the use of deadly physical force only where requirements as to triggering conditions and the necessity of a particular response are met. As to the triggering conditions, the statute requires that the actor “reasonably believes” that another person either is using or about to use deadly physical force or is committing or attempting to commit one of certain enumerated felonies, including robbery. As to the need for the use of deadly physical force as a response, the statute requires that the actor “reasonably believes” that such force is necessary to avert the perceived threat.

Holding

Because the evidence before the second Grand Jury included statements by Goetz that he acted to protect himself from being maimed or to avert a robbery, the prosecutor correctly chose to charge the justification defense in section 35.15 to the Grand Jury. . . . The prosecutor properly instructed the grand jurors to consider whether the use of deadly physical force was justified to prevent either serious physical injury or a robbery, and, in doing so, to separately analyze the defense with respect to each of the charges. . . .

When the prosecutor had completed his charge, one of the grand jurors asked for clarification of the term “reasonably believes.” The prosecutor responded by instructing the grand jurors that they were to consider the circumstances of the incident and determine “whether the defendant’s conduct was that of a reasonable man in the defendant’s situation.” It is this response by the prosecutor—and specifically his use of “a reasonable man”—which is the basis for the dismissal of the charges by the lower courts. As expressed repeatedly in the Appellate Division’s plurality opinion, because section 35.15 uses the term “he reasonably believes,” the appropriate test, according to that court, is whether a defendant’s beliefs and reactions were “reasonable to him.” Under that reading of the statute, a jury which believed a defendant’s testimony that he felt that his own actions were warranted and were reasonable would have to acquit him, regardless of what anyone else in defendant’s situation might have concluded. Such an interpretation defies the ordinary meaning and significance of the term “reasonably” in a statute, and misconstrues the clear intent of the Legislature, in enacting section 35.15, to retain an objective element as part of any provision authorizing the use of deadly physical force.

Penal statutes in New York have long codified the right recognized at common law to use deadly physical force, under appropriate circumstances, in self-defense. . . . These provisions have never required that an actor’s belief as to the intention of another person to inflict serious injury be correct in order for the use of deadly force to be justified, but they have uniformly required that the belief comport with an objective notion of reasonableness. . . .

We cannot lightly impute to the Legislature an intent to fundamentally alter the principles of justification to allow the perpetrator of a serious crime to go free simply because that person believed his actions were reasonable and necessary to prevent some perceived harm. To completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force. It would also allow a legally competent defendant suffering from delusions to kill or perform acts of violence with impunity, contrary to fundamental principles of justice and criminal law.

We can only conclude that the Legislature retained a reasonableness requirement to avoid giving a license for such actions. The plurality’s interpretation, as the dissenters recognized, excises the impact of the word “reasonably.” . . . [W]e have frequently noted that

a determination of reasonableness must be based on the “circumstance” facing a defendant or his “situation.” . . . Such terms encompass more than the physical movements of the potential assailant. As just discussed, these terms include any relevant knowledge the defendant had about that person. They also necessarily bring in the physical attributes of all persons involved, including the defendant. Furthermore, the defendant’s circumstances encompass any prior experiences he had which could provide a reasonable basis for a belief that another person’s intentions were to injure or rob him or that the use of deadly force was necessary under the circumstances. . . . Accordingly, the order of the Appellate Division should be reversed, and the dismissed counts of the indictment reinstated.

Questions for Discussion

1. Goetz was acquitted of attempted murder and assault. He was found to have been justified in shooting the four young men in the subway car. Goetz was convicted of unlawful possession of a firearm and was sentenced to one year in prison. He was released after eight months in prison. The jury was composed of 8 men and 4 women, 10 whites and 2 Blacks. Do you agree that Goetz acted in self-defense? In 1996, a six-member civil jury ordered Goetz to pay \$18 million in compensatory damages and \$25 million in punitive damages. The *Goetz* case is discussed in George P. Fletcher’s *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* (New York, NY: Free Press, 1988).
2. Would problems arise in the event that the law of self-defense was based on a purely subjective test? Are there arguments in support of this approach? In most cases, would it matter whether a jury applied an objective or subjective test?
3. What circumstances should the jury consider in determining the reasonableness of Goetz’s actions? Should Goetz’s past experiences be considered? The fact that the shooting occurred in the subway? The physical size, age, dress, and behavior of the young males? What about the fact that Ramseur and Cabey had screwdrivers?
4. A number of commentators contend that any explanation of the verdict in the *Goetz* case must consider the race of the individuals involved. Goetz was white, while the four young people were Black. Professor Fletcher raises the issue whether the same verdict would have been returned had Goetz been Black and his attackers white juveniles. What is your opinion? Did Goetz stereotype the young men and assume that he was about to be robbed? Was his response based on revenge or self-defense? What would your reaction have been in the event that you found yourself in Goetz’s position?

CASES AND COMMENTS

1. **The Reasonable Woman.** Defendant Yvonne Wanrow was convicted of murder and assault. Her conviction was reversed by the Washington Supreme Court. William Wesler was accused of molestation by Ms. Hooper’s children. Hooper’s landlord shared that Wesler had earlier attempted to molest a young child who had previously lived in Hooper’s house and that Wesler had been committed to an asylum for the mentally ill; the landlord advised Ms. Hooper that she should arm herself with a baseball bat. Yvonne Wanrow’s two children were staying with Hooper at the time, and the two

women and several other adults agreed to spend the night together to provide mutual support and security against possible retaliation by Wesler. Two of the men staying with Hooper visited Wesler and persuaded him to accompany them to Hooper's house to discuss the allegations. This led to a noisy and high-pitched verbal exchange. At one point, Wesler provocatively approached a young child sleeping on the couch, and Hooper screamed for Wesler to leave her home. Ms. Wanrow, who was five foot four inches in height, had a broken leg, and was using a crutch, had placed a pistol in her purse. She testified that she turned around and found herself confronting the six-foot, two-inch Wesler and that she shot him as a reflex response.

The Washington Supreme Court determined that the judge's self-defense instructions to the jury were deficient, and that although the jury was instructed to consider the relative size and strength of the persons involved, they should also have been instructed to "afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination." The jury had been directed to evaluate the defendant's conduct in accordance with the reactions of a "reasonably and ordinarily cautious and prudent man." The Washington Supreme Court explained that women suffer from a lack of training in the skills required to "effectively repel a male assailant without resorting to the use of deadly weapons" and that the jury instructions should have directed the jury to consider the defendant's gender. The court also ruled that the trial court had properly declined to permit the defendant to rely on an expert witness to present evidence on the effects of the defendant's Indian culture on her perception and actions. Should juries be instructed to consider the reasonableness of a defendant's actions in light of the defendant's gender? What else should the jury be instructed to consider? See *State v. Wanrow*, 559 P.2d 548 (Wash. 1977).

2. **Reasonable Person.** Early one evening in June 2014, [Tameka] Parker walked out of her home where she lived with her three children. She was about to get into a friend's car, when she heard [Frederick] Powell yell from across the street that he "should go over and smack the s—t out of that b—." When Ms. Parker asked to whom he was speaking, Mr. Powell crossed the street and came onto her property, positioned himself so that he and Ms. Parker were face-to-face, and said, "b—, you." Mr. Powell's "aggressive" approach indicated to Parker that "he was trying to fight [her]," and Mr. Powell asked her "do you want that smoke," a question Ms. Parker understood as a threat to shoot her.

Mr. Powell's mother crossed the street with him, and several of his brothers joined them on Ms. Parker's property. The family surrounded her friend's car and yelled insults at Ms. Parker. They called her a "dirty b—" and accused her of being "hot," i.e., "working with the police." "[T]here were a lot of them," and Ms. Parker "fear[ed] for [her] life."

When he was less than two feet away from her, Mr. Powell spit in her face. Ms. Parker . . . "really was scared" once Mr. Powell spit on her, because she "didn't know what he was going to do next." She spit back.

At about that time . . . a police officer arrived. While sitting in his car, the officer saw Mr. Powell face-to-face with Ms. Parker, surrounded by approximately ten people, all standing near a car and yelling at each other. The officer could not hear what they were saying, but he saw Ms. Parker spit on Mr. Powell. When he spoke to her at the scene, she explained (because the officer had not seen the entire encounter and in particular, had not seen Mr. Powell spit on Ms. Parker) "that she wouldn't just spit on him for no reason, that he spit on her first." The officer then arrested Ms. Parker for simple assault.

At trial, . . . Ms. Parker conceded that she spit on Mr. Powell but claimed she was acting in self-defense. On direct and cross-examination, Ms. Parker repeatedly testified that she was afraid of Mr. Powell. On direct [examination], Ms. Parker was asked what she believed was going to happen at the time she spat back at Mr. Powell and she said, "I thought he was going to hit me, honestly that was the next thing. I was fearing for my life. . . . I am scared for my life, like I didn't know what they w[ere] going to do." On cross-examination, she specifically denied being angry: "I wasn't angry. I was scared for my life. . . . I was more scared than anything." In response to a followup question from the court—"Why is it that you spit in [Mr. Powell's] face?"—she explained that she had spit on Mr. Powell "[b]ecause he came on my property and . . . spit on me first." . . . [The trial court in rejecting Ms. Parker's claim of self-defense held that] "using a reasonable amount of force because she is angry or indignant or outraged or because of injustice, if somebody spits in your face which is what he did, that person deserves to be spit on and should expect to be spit on, [but] that is not self-defense."

Was Parker motivated by a sense of anger, retribution, and injustice or in the alternative out of both a subjective and a reasonable belief that self-defense was required because she was in imminent danger of bodily harm? If Parker acted out of anger, does this preclude her from relying on self-defense? The Washington, D.C., appellate court held that where the government "cannot disprove that the defendant subjectively and reasonably believed she was in imminent danger of bodily harm—and also fails to show that the defendant employed excessive force, the defendant must prevail on her self-defense claim." See *Parker v. United States*, 155 A.3d 835 (D.C. App. 2017).

THE LAW OF SELF-DEFENSE: JUSTIFIABLE FORCE

A defendant must reasonably believe that the threatened harm is imminent, meaning that the harm "is about to happen." The requirement that the defendant act out of necessity is based on several considerations:

- *Resolution of Disputes.* The law encourages the peaceful resolution of disputes where possible.
- *Last Resort.* Individuals should resort to self-help only when strictly required.
- *Evidence.* The existence of a clear and measurable threat provides confidence that the defendant is acting out of self-defense rather than out of a desire to punish the assailant or to seek revenge. Also, the existence of a clear threat assists in determining whether there is proportionality between the threatened harm and defensive response.

In *State v. Schroeder*, the 19-year-old defendant stabbed a violent cellmate who threatened to make Schroeder his "sex slave" or "punk." Schroeder testified that he felt vulnerable and afraid and woke up at 1:00 a.m. and stabbed his cellmate in the back with a table knife and hit him in the face with a metal ashtray. The Nebraska Supreme Court ruled that the threatened harm was not imminent and that there was a danger in legalizing "preventive assaults."²³

Some courts have not insisted on a strict imminence standard. The Illinois Supreme Court, for instance, ruled that a cab driver acted in self-defense in shooting and killing an individual who, along with other gang members, was involved in beating up an elderly man. The assailants threw a brick at the cab in retaliation for the driver's yelling at the gang and allegedly started to move toward the taxi. The court concluded that the attackers possessed the capacity and intent to attack the driver, who was carrying money and was aware that a number of drivers recently had been attacked. On the other hand, consider the fact that the driver could have fled, shot over the heads of the assailants, or waited until the young people presented a more immediate threat.²⁴

The Model Penal Code adopts this type of broad approach and provides that force is justifiable when the actor believes that an attack will occur on "the present occasion" rather than imminently. The commentary to the Model Penal Code notes that this standard would permit individuals to employ force in self-defense to prevent an individual who poses a threat from summoning reinforcements. The broad Model Penal Code test has found support in the statutes of a number of states, including Delaware, Hawaii, Nebraska, New Jersey, and Pennsylvania. A dissenting judge in *Schroeder* cited the Model Penal Code and argued that the young inmate should have been acquitted on the grounds of self-defense. After all, he could not be expected to remain continuously on guard against an assault by his older cellmate or the cellmate's friends.

The clash between the common law imminence requirement and the Model Penal Code's notion that self-defense may be justified where necessary to prevent an anticipated harm is starkly presented in cases in which defendants invoke the so-called battered spouse defense. In *State v. Norman*, the next case in the chapter, a woman who has been the victim of continual battering by her husband over a number of years kills her abusive spouse while he is sleeping. In reading this case, consider whether we should broadly interpret the imminence standard and, if not, what standard should be adopted.

DID NORMAN CONFRONT AN IMMINENT THREAT FROM HER ABUSIVE HUSBAND?

STATE V. NORMAN, 366 S.E.2D 586 (N.C. CT. APP. 1988)

Opinion by Parker, J.

The primary issue presented on this appeal is whether the trial court erred in failing to instruct on self-defense. We answer in the affirmative and grant a new trial.

Facts

At trial the State presented the testimony of a deputy sheriff of the Rutherford County Sheriff's Department who testified that on 12 June 1985, at approximately 7:30 p.m., he was dispatched to the Norman residence. There, in one of the bedrooms, he found decedent, John Thomas "J.T." Norman (herein decedent or Norman) dead, lying on his left side on a

bed. The State presented an autopsy report, stipulated to by both parties, concluding that Norman had died from two gunshot wounds to the head. . . .

Defendant and Norman had been married twenty-five years at the time of Norman's death. Norman was an alcoholic. He had begun to drink and to beat defendant five years after they were married. The couple had five children, four of whom are still living. When defendant was pregnant with her youngest child, Norman beat her and kicked her down a flight of steps, causing the baby to be born prematurely the next day.

Norman, himself, had worked one day a few months prior to his death; but aside from that one day, witnesses could not remember his ever working. Over the years and up to the time of his death, Norman forced defendant to prostitute herself every day in order to support him. If she begged him not to make her go, he slapped her. Norman required defendant to make a minimum of one hundred dollars per day; if she failed to make this minimum, he would beat her.

Norman commonly called defendant "Dogs," "Bitches," and "Whores," and referred to her as a dog. Norman beat defendant "most every day," especially when he was drunk and when other people were around, to "show off." He would beat defendant with whatever was handy—his fist, a fly swatter, a baseball bat, his shoe, or a bottle; he put out cigarettes on defendant's skin; he threw food and drink in her face and refused to let her eat for days at a time; and he threw glasses, ashtrays, and beer bottles at her and once smashed a glass in her face. . . . Norman would often make defendant bark like a dog, and if she refused, he would beat her. He often forced defendant to sleep on the concrete floor of their home and on several occasions forced her to eat dog or cat food out of the dog or cat bowl.

Norman often stated both to defendant and to others that he would kill defendant. He also threatened to cut her heart out.

. . . On or about the morning of 10 June 1985, Norman forced defendant to go to a truck stop or rest stop on Interstate 85 in order to prostitute to make some money. Defendant's daughter and defendant's daughter's boyfriend accompanied defendant. Some time later that day, Norman went to the truck stop, apparently drunk, and began hitting defendant in the face with his fist and slamming the car door into her. He also threw hot coffee on defendant. . . .

On 11 June 1985, [Norman] was extremely angry and beat defendant. . . . Defendant testified that during the entire day, when she was near him, her husband slapped her, and when she was away from him, he threw glasses, ashtrays, and beer bottles at her. Norman asked defendant to make him a sandwich; when defendant brought it to him, he threw it on the floor and told her to make him another. Defendant made him a second sandwich and brought it to him; Norman again threw it on the floor, telling her to put something on her hands because he did not want her to touch the bread. Defendant made a third sandwich using a paper towel to handle the bread. Norman took the third sandwich and smeared it in defendant's face.

On the evening of 11 June 1985, at about 8:00 or 8:30 p.m., a domestic quarrel was reported at the Norman residence. The officer responding to the call testified that defendant was bruised and crying and that she stated her husband had been beating her all day and she could not take it any longer. The officer advised defendant to take out a warrant on her husband, but defendant responded that if she did so, he would kill her. A short time later, the officer was again dispatched to the Norman residence. There he learned that defendant had taken an overdose of "nerve pills," and that Norman was interfering with emergency personnel who were trying to treat defendant. Norman was drunk and was making statements such as, "If you want to die, you deserve to die. I'll give you more pills," and "Let the bitch die. . . . She ain't nothing but a dog. She don't deserve to live." Norman also threatened to kill defendant, defendant's mother, and defendant's grandmother. The law enforcement officer reached for his flashlight or blackjack and chased Norman into the house. Defendant was taken to Rutherford Hospital. . . .

The next day, 12 June 1985, the day of Norman's death . . . [d]efendant was driving. During the ride . . . Norman slapped defendant for following a truck too closely and poured a beer on her head. Norman kicked defendant in the side of the head while she was driving and told her he would "cut her breast off and shove it up her rear end."

. . . Witnesses stated that back at the Norman residence, Norman threatened to cut defendant's throat, threatened to kill her, and threatened to cut off her breast. Norman also smashed a doughnut on defendant's face and put out a cigarette on her chest.

In the late afternoon, Norman wanted to take a nap. He lay down on the larger of the two beds in the bedroom. Defendant started to lie down on the smaller bed, but Norman said, "No bitch . . . Dogs don't sleep on beds, they sleep in [*sic*] the floor." Soon after, one of the Normans' daughters, Phyllis, came into the room and asked if defendant could look after her baby. Norman assented. When the baby began to cry, defendant took the child to her mother's house, fearful that the baby would disturb Norman. At her mother's house, defendant found a gun. She took it back to her home and shot Norman.

Defendant testified that things at home were so bad she could no longer stand it. She explained that she could not leave Norman because he would kill her. She stated that she had left him before on several occasions and that each time he found her, took her home, and beat her. She said that she was afraid to take out a warrant on her husband because he had said that if she ever had him locked up, he would kill her when he got out. She stated she did not have him committed because he told her he would see the authorities coming for him and before they got to him he would cut defendant's throat. Defendant also testified that when he threatened to kill her, she believed he would kill her if he had the chance.

The defense presented the testimony of two expert witnesses in the field of forensic psychology. . . . Dr. Tyson concluded that defendant "fits and exceeds the profile, of an abused or battered spouse." . . . Dr. Tyson stated that defendant could not leave her husband because she had gotten to the point where she had no belief whatsoever in herself and believed in the total invulnerability of her husband. He stated, "Mrs. Norman didn't leave because she believed, fully believed that escape was totally impossible. . . . When asked if it appeared to defendant reasonably necessary to kill her husband, Dr. Tyson responded, "I think Judy Norman felt that she had no choice, both in the protection of herself and her family, but to engage, exhibit deadly force against Mr. Norman, and that in so doing, she was sacrificing herself, both for herself and for her family." . . .

Issue

The State contends that since decedent was asleep at the time of the shooting, defendant's belief in the necessity to kill decedent was, as a matter of law, unreasonable. The State further contends that even assuming . . . the evidence satisfied the requirement that defendant's belief be reasonable, defendant, being the aggressor, cannot satisfy the third requirement of perfect self-defense. . . . The question then arising on the facts in this case is whether the victim's passiveness at the moment the unlawful act occurred precludes defendant from asserting perfect self-defense.

Reasoning

Applying the criteria of perfect self-defense to the facts of this case, we hold that the evidence was sufficient to submit an issue of perfect self-defense to the jury. An examination of the elements of perfect self-defense reveals that both subjective and objective standards

are to be applied in making the crucial determinations. The first requirement that it appear to defendant and that defendant believe it necessary to kill the deceased in order to save herself from death or great bodily harm calls for a subjective evaluation. This evaluation inquires as to what the defendant herself perceived at the time of the shooting. The trial was replete with testimony of forced prostitution, beatings, and threats on defendant's life. The defendant testified that she believed the decedent would kill her, and the evidence showed that on the occasions when she had made an effort to get away from Norman, he had come after her and beat her. Indeed, within twenty-four hours prior to the shooting, defendant had attempted to escape by taking her own life and throughout the day on 12 June 1985 had been subjected to beatings and other physical abuse, verbal abuse, and threats on her life up to the time when decedent went to sleep. . . . [E]xperts testified that in their opinion, defendant believed killing the victim was necessary to avoid being killed. . . .

Unlike the first requirement, the second element of self-defense—that defendant's belief be reasonable in that the circumstances as they appeared to defendant would be sufficient to create such a belief in the mind of a person of ordinary firmness—is measured by the objective standard of the person of ordinary firmness under the same circumstances. Again, the record is replete with sufficient evidence to permit but not compel a juror, representing the person of ordinary firmness, to infer that defendant's belief was reasonable under the circumstances in which she found herself. . . . [E]xpert witnesses testified that defendant exhibited severe symptoms of battered spouse syndrome, a condition that develops from repeated cycles of violence by the victim against the defendant. Through this repeated, sometimes constant, abuse, the battered spouse acquires what the psychologists denote as a state of "learned helplessness," defendant's state of mind as described by Drs. Tyson and Rollins. . . . In the instant case, decedent's excessive anger, his constant beating and battering of defendant on 12 June 1985, her fear that the beatings would resume, as well as previous efforts by defendant to extricate herself from this abuse are circumstances to be considered in judging the reasonableness of defendant's belief that she would be seriously injured or killed at the time the criminal act was committed. The evidence discloses that defendant felt helpless to extricate herself from this intolerable, dehumanizing, brutal existence. Just the night before the shooting, defendant had told the sheriff's deputy that she was afraid to swear out a warrant against her husband because he had threatened to kill her when he was released if she did. The inability of a defendant to withdraw from the hostile situation and the vulnerability of a defendant to the victim are factors considered by our Supreme Court in determining the reasonableness of a defendant's belief in the necessity to kill the victim. . . .

To satisfy the third requirement, defendant must not have aggressively and willingly entered into the fight without legal excuse or provocation. By definition, aggression in the context of self-defense is tied to provocation. The existence of battered spouse syndrome, in our view, distinguishes this case from the usual situation involving a single confrontation or affray. The provocation necessary to determine whether defendant was the aggressor must be considered in light of the totality of the circumstances. . . .

Holding

Mindful that the law should never casually permit an otherwise unlawful killing of another human being to be justified or excused, this Court is of the opinion that with the battered spouse there can be, under certain circumstances, an unlawful killing of a passive victim that does not preclude the defense of perfect self-defense. Given the characteristics

of battered spouse syndrome, we do not believe that a battered person must wait until a deadly attack occurs or that the victim must in all cases be actually attacking or threatening to attack at the very moment defendant commits the unlawful act for the battered person to act in self-defense. Such a standard, in our view, would ignore the realities of the condition. This position is in accord with other jurisdictions that have addressed the issue. . . .

In the instant case, decedent, angrier than usual, had beaten defendant almost continuously during the afternoon and had threatened to maim and kill defendant. . . . [A] jury, in our view, could find that decedent's sleep was but a momentary hiatus in a continuous reign of terror by the decedent, that defendant merely took advantage of her first opportunity to protect herself, and that defendant's act was not without the provocation required for perfect self-defense. . . . [T]he expert testimony considered with the other evidence would permit reasonable minds to infer that defendant did not use more force than reasonably appeared necessary to her under the circumstances to protect herself from death or great bodily harm.

Based on the foregoing analysis, we are of the opinion that, in addition to the instruction on voluntary manslaughter, defendant was entitled to an instruction on perfect self-defense. . . . [T]he jury is to regard evidence of battered spouse syndrome merely as some evidence to be considered along with all other evidence in making its determination whether there is a reasonable doubt as to the unlawfulness of defendant's conduct. . . . New Trial.

Questions for Discussion

1. The jury convicted Norman of voluntary manslaughter and, as a result, did not accept that the defendant's killing of her husband was a justified act of perfect self-defense. Summarize the appellate court's reasoning in ruling that the defendant was entitled to have the jury consider her claim of self-defense.
2. What are the dangers of too broad or too narrow a view of the imminence requirement for self-defense? Was the defendant's use of force proportionate to the threat that she confronted from her husband?
3. Does reliance on the "battered spouse syndrome" pose a risk that experts will attribute traits of "helplessness" to the defendant that, in fact, she does not possess?
4. Can men involved in heterosexual or homosexual relationships rely on the "battered spouse syndrome"? Can women rely on it who are involved in homosexual relationships?

CASES AND COMMENTS

1. **The North Carolina Supreme Court.** The North Carolina Supreme Court reversed the appellate court and ruled that the trial court properly declined to instruct the jury on self-defense. The supreme court ruled that the evidence did not "tend to show that the defendant reasonably believed that she was confronted by a threat of imminent death or great bodily harm." The court further observed that the "relaxed requirements" for self-defense would "legalize the opportune killing of abusive husbands by their wives solely on the basis of the wives' . . . subjective speculation as the probability of future

felonious assaults by their husbands." Do you agree? See *State v. Norman*, 378 S.E.2d 8 (N.C. 1989). An additional case on the right of an abused spouse to rely on self-defense is *State v. Stewart*, 763 P.2d 572 (Kan. 1988).

2. Domestic Violence. A World Health Organization study of women in 80 countries found that globally 30% of women "who have been in a relationship" have experienced either physical and/or sexual violence inflicted by their intimate partner. The figure is higher in Southeast Asia, portions of the Middle East, and parts of Africa. As many as 38% of all murders of women across the globe are committed by intimate partners. In the United States, a 2011 Centers for Disease Control and Prevention survey found that 1 in 4 women (22.3%) and 1 in 7 men (14.0%) have been the victim of severe physical violence by an intimate partner. Close to 1 in 10 women (8.8%) and 1 in 100 men (1.7%) have been raped by an intimate partner during their lifetime. Other forms of sexual violence inflicted by an intimate partner were experienced by 15.8% of women and 9.5% of men during their lifetime. Men and women who have been subjected to these forms of violence by an intimate partner were more likely than individuals who have not experienced these forms of violence to report negative health effects such as asthma, diabetes, depression, and post-traumatic stress disorder.²⁵

YOU DECIDE 8.2

The defendant, 17-year-old Andrew Janes, was abandoned by his alcoholic father at age 7. Along with his mother Gale and brother Shawn, Andrew was abused by his mother's lover, Walter Jaloveckas, for roughly 10 years. As Walter walked in the door following work on August 30, 1988, Andrew shot and killed him; one 9-millimeter pistol shot went through Walter's right eye and the other through his head. The previous night, Walter had yelled at Gale, and Walter later leaned his head into Andrew's room and spoke in low tones that usually were "reserved for threats." Andrew was unable to remember precisely what Walter said. In the morning, Gale mentioned to Andrew that Walter was still mad. After returning from school, Andrew loaded the pistol, drank some whiskey, and smoked marijuana.

Examples of the type of abuse directed against Andrew by Walter included beatings with a belt and wire hanger, hitting Andrew in the mouth with a mop, and punching Andrew in the face for failing to complete a homework assignment. In 1988, Walter hit Andrew with a piece of firewood, knocking him out. Andrew was subject to verbal as well as physical threats, including a threat to nail his hands to a tree, brand his forehead, place Andrew's hands on a hot stove, break Andrew's fingers, and hit him in the head with a hammer.

The "battered child syndrome" results from a pattern of abuse and anxiety. "Battered children" live in a state of constant alert ("hypervigilant") and caution ("hypermonitoring") and develop a lack of confidence and an inability to seek help ("learned helplessness"). Did Andrew believe and would a reasonable person believe that Andrew confronted an imminent threat of great bodily harm or death? The Washington Supreme Court clarified that imminent means "near at hand . . . hanging threateningly over one's head . . . menacingly near." The trial court refused to instruct the jury to consider whether Andrew was entitled to invoke self-defense. Should the Washington Supreme Court uphold or reverse the decision of the trial court? See *State v. Janes*, 850 P.2d 495 (Wash. 1993).

Excessive Force

Individuals acting in self-defense are entitled to use the force reasonably believed to be necessary to defend themselves. **Deadly force** is force that a reasonable person under the circumstances would be aware will cause or create a substantial risk of death or substantial bodily harm. This may be employed to protect against death or serious bodily harm. The application of excessive rather than proportionate force may result in a defender's being transformed into an aggressor. This is the case where an individual entitled to **nondeadly force** resorts to deadly force. The Model Penal Code limits deadly force to the protection against death, serious bodily injury, kidnapping, or rape. The Wisconsin statute authorizes the application of deadly force against arson, robbery, burglary, and any felony offense that creates a danger of death or serious bodily harm.

In *State v. DeJesus*, DeJesus was attacked by two machete-wielding assailants, and he knocked them to the ground with a metal pipe and beat them to death. The Connecticut Supreme Court held that “[t]he jury could have reasonably concluded that the defendant did not reasonably believe that the degree of deadly force he exercised, in continuing to beat the victims in the manner established by the evidence, was necessary under the circumstances to thwart any immediate attacks from either or both of the victims.”²⁶

In *State v. Pranckus*, the Connecticut Appellate Court ruled that the defendant could not have reasonably believed that the use of a kitchen knife with an 8-inch blade was required to defend himself in a fistfight. The defendant charged at the victims and stabbed each of the victims twice, killing one of them. The Connecticut court noted that both victims suffered wounds on their backs, indicating that they were fleeing and that the defendant was sufficiently confident of his ability to defend himself that he later attempted to continue the fight without a weapon.²⁷

The requirement of proportionality is not accepted in various foreign countries that stress the privilege of individuals to respond without limitation to an attack. Should there be a restriction on the right of an innocent individual to respond to an attack?²⁸

Retreat

The law of self-defense is based on necessity. Individuals may resort to self-protection when they reasonably believe it necessary to defend against an immediate attack. The amount of force is limited to that reasonably believed to be necessary. Courts have struggled with how to treat a situation in which an individual may avoid resorting to deadly force by safely retreating or fleeing. The principle of necessity dictates that every alternative should be exhausted before an individual resorts to deadly force and that an individual should be required to **retreat to the wall** (as far as possible). On the other hand, should an individual be required to retreat when confronted with a violent wrongdoer? Should the law promote cowardice and penalize courage?

Virtually every jurisdiction provides that there is no duty or requirement to retreat before resorting to **nondeadly force**. A majority of jurisdictions follow the same **stand your ground law** in the case of **deadly force**, although a “significant minority” require retreat to the wall. The stand your ground law is also followed in most former communist countries in Europe and is based on several considerations²⁹:

- the promotion of a courageous attitude,
- the refusal to protect a wrongdoer initiating an attack,
- the reluctance of courts to complicate their task by being placed in the position of having to rule on various issues surrounding the duty to retreat, and
- the likelihood that the retreat rule may endanger individuals who are required to retreat and encourage wrongdoers who have no reason to fear for their lives.

Most jurisdictions limit the right to “stand your ground” when confronted with nondeadly force to an individual who is without fault, a **true man**. An aggressor employing nondeadly force must clearly abandon the struggle, and it must be a **withdrawal in good faith** to regain the right of self-defense. Some courts recognize that even an aggressor using deadly force may withdraw and regain the right of self-defense. In these instances, the right of self-defense will limit the initial aggressor’s liability to voluntary manslaughter and will not provide a *perfect self-defense*. A withdrawal in good faith must be distinguished from a **tactical retreat** in which an individual retreats with the intent of continuing the hostilities.

The requirement of retreat is premised on the traditional rule that only necessary force may be employed in self-defense. The provision for retreat is balanced by the consideration that withdrawal is not required when the safety of the defender would be jeopardized. The **castle doctrine** is another generally recognized exception to the rule of retreat and provides that individuals inside the home are justified in “holding their ground.”³⁰

The Model Penal Code section 3.04(b)(ii) provides that deadly force is not justifiable in those instances in which an individual “knows that he can avoid the necessity of using such force with complete safety by retreating.” There is no duty to retreat under the Model Penal Code within the home or place of work unless an individual is an aggressor.

The next case in the chapter, *United States v. Peterson*, explores the right of an “aggressor” to self-defense, the duty to retreat, and the castle doctrine. Do you agree with the federal court’s decision that Peterson is not entitled to claim self-defense?

WAS PETERSON REQUIRED TO RETREAT?

UNITED STATES V. PETERSON, 483 F.2D 1222 [D.C. CIR. 1973]

Opinion by Robinson, J.

Issues

[Bennie L. Peterson was i]ndicted for second-degree murder, and convicted by a jury of manslaughter as a lesser included offense. . . . He complains . . . that the judge twice erred in the instructions given the jury in relation to his claim that the homicide was committed in self-defense. One error alleged was an instruction that the jury might consider whether

Peterson was the aggressor in the altercation that resulted in the homicide. The other was an instruction that a failure by Peterson to retreat, if he could have done so without jeopardizing his safety, might be considered as a circumstance bearing on the question whether he was justified in using the amount of force which he did.

Facts

The events immediately preceding the homicide are not seriously in dispute. The version presented by the Government's evidence follows. Charles Keitt, the deceased, and two friends drove in Keitt's car to the alley in the rear of Peterson's house to remove the windshield wipers from the latter's wrecked car. While Keitt was doing so, Peterson came out of the house. . . . Peterson went back into the house, obtained a pistol, and returned to the yard. In the meantime, Keitt had reseated himself in his car, and he and his companions were about to leave. The car was characterized by some witnesses as "wrecked" and by others as "abandoned." The testimony left it clear that its condition was such that it could not be operated. It was parked on one side of the alley about fifteen feet from the gate in the rear fence which opened into Peterson's back yard. Keitt's car was stopped in the alleyway about four feet behind it.

Upon his reappearance in the yard, Peterson paused briefly to load the pistol. "If you move," he shouted to Keitt, "I will shoot." He walked to a point in the yard slightly inside a gate in the rear fence and, pistol in hand, said, "If you come in here I will kill you." Keitt alighted from his car, took a few steps toward Peterson and exclaimed, "What the hell do you think you are going to do with that?" Keitt then made an about-face, walked back to his car and got a lug wrench. With the wrench in a raised position, Keitt advanced toward Peterson, who stood with the pistol pointed toward him. Peterson warned Keitt not to "take another step" and, when Keitt continued onward[,] shot him in the face from a distance of about ten feet. Death was apparently instantaneous. Shortly thereafter, Peterson left home and was apprehended twenty-odd blocks away. [Keitt apparently had been drinking] and an autopsy disclosed that he had a .29 percent blood alcohol content. Keitt fell in the alley about seven feet from the gate.

This description of the fatal episode was furnished at Peterson's trial by four witnesses for the Government. Peterson did not testify . . . [but provided a statement to the police in which he related that] Keitt had removed objects from his car before, and on the day of the shooting he had told Keitt not to do so. After the initial verbal altercation, Keitt went to his car for the lug wrench, so he, Peterson, went into his house for his pistol. When Keitt was about ten feet away, he pointed the pistol "away of his right shoulder"; adding that Keitt was running toward him, Peterson said he "got scared and fired the gun. He ran right into the bullet." "I did not mean to shoot him," Peterson insisted, "I just wanted to scare him."

At trial, Peterson moved for a judgment of acquittal. . . . [T]he jury returned a verdict finding Peterson guilty of manslaughter. Judgment was entered conformably with the verdict, and this appeal followed.

Reasoning

Peterson's consistent position is that as a matter of law his conviction of manslaughter—alleviated homicide—was wrong and that his act was one of self-preservation—excused homicide. The Government, on the other hand, has contended from the beginning that Keitt's slaying fell outside the bounds of lawful self-defense. The questions remaining for our decision inevitably track back to this basic dispute. . . .

"[T]he law of self-defense is a law of necessity"; the right of self-defense arises only when the necessity begins, and equally ends with the necessity; and never must the necessity be greater than when the force employed defensively is deadly. The "necessity must bear all semblance of reality, and appear to admit of no other alternative, before taking life will be justifiable as excusable." Hinged on the exigencies of self-preservation, the doctrine of homicidal self-defense emerges from the body of the criminal law as a limited though important exception to legal outlawry of the arena of self-help in the settlement of potentially fatal personal conflicts.

So it is that necessity is the pervasive theme of the well defined conditions which the law imposes on the right to kill or maim in self-defense. There must have been a threat, actual or apparent, of the use of deadly force against the defender. The threat must have been unlawful and immediate. The defender must have believed that he was in imminent peril of death or serious bodily harm, and that his response was necessary to save himself therefrom. These beliefs must not only have been honestly entertained, but also objectively reasonable in light of the surrounding circumstances. It is clear that no less than a concurrence of these elements will suffice.

Here the parties' opposing contentions focus on the roles of two further considerations. One is the provoking of the confrontation by the defender. The other is the defender's failure to utilize a safe route for retreat from the confrontation. The essential inquiry, in final analysis, is whether and to what extent the rule of necessity may translate these considerations into additional factors in the equation. To these questions, in the context of the specific issues raised, we now proceed.

The trial judge's charge authorized the jury, as it might be persuaded, to convict Peterson of second-degree murder or manslaughter, or to acquit by reason of self-defense. On the latter phase of the case, the judge instructed that with evidence of self-defense present, the Government bore the burden of proving beyond a reasonable doubt that Peterson did not act in self-defense; and that if the jury had a reasonable doubt as to whether Peterson acted in self-defense, the verdict must be not guilty. The judge further instructed that the circumstances under which Peterson acted, however, must have been such as to produce a reasonable belief that Keitt was then about to kill him or do him serious bodily harm and that deadly force was necessary to repel him. In determining whether Peterson used excessive force in defending himself, the judge said, the jury could consider all of the circumstances under which he acted.

These features of the charge met Peterson's approval, and we are not summoned to pass on them. There were, however, two other aspects of the charge to which Peterson objected, and which are now the subject of vigorous controversy. The first of Peterson's complaints centers upon an instruction that the right to use deadly force in self-defense is not ordinarily available to one who provokes a conflict or is the aggressor in it. Mere words, the judge explained, do not constitute provocation or aggression; and if Peterson precipitated the altercation but thereafter withdrew from it in good faith and so informed Keitt by words or acts, he was justified in using deadly force to save himself from imminent danger or death or grave bodily harm. And, the judge added, even if Keitt was the aggressor and Peterson was justified in defending himself, he was not entitled to use any greater force than he had reasonable ground to believe and actually believed to be necessary for that purpose. Peterson contends that there was no evidence that he either caused or contributed to the conflict, and that the instructions on that topic could only mislead the jury.

It has long been accepted that one cannot support a claim of self-defense by a self-generated necessity to kill. The right of homicidal self-defense is granted only to those free from fault in the difficulty; it is denied to slayers who incite the fatal attack, encourage the

fatal quarrel or otherwise promote the necessitous occasion for taking life. The fact that the deceased struck the first blow, fired the first shot or made the first menacing gesture does not legalize the self-defense claim if in fact the claimant was the actual provoker. In sum, one who is the aggressor in a conflict culminating in death cannot invoke the necessities of self-preservation. Only in the event that he communicates to his adversary his intent to withdraw and in good faith attempts to do so is he restored to his right of self-defense.

This body of doctrine traces its origin to the fundamental principle that a killing in self-defense is excusable only as a matter of genuine necessity. Quite obviously, a defensive killing is unnecessary if the occasion for it could have been averted, and the roots of that consideration run deep with us. A half-century ago, in *Laney v. United States*, this Court declared that, before a person can avail himself of the plea of self-defense against the charge of homicide, he must do everything in his power, consistent with his safety, to avoid the danger and avoid the necessity of taking life. If one has reason to believe that he will be attacked, in a manner which threatens him with bodily injury, he must avoid the attack if it is possible to do so, and the right of self-defense does not arise until he has done everything in his power to prevent its necessity. . . .

In the case at bar, the trial judge's charge fully comported with these governing principles. The remaining question, then, is whether there was evidence to make them applicable to the case. A recapitulation of the proofs shows beyond peradventure that there was.

It was not until Peterson fetched his pistol and returned to his back yard that his confrontation with Keitt took on a deadly cast. Prior to his trip into the house for the gun, there was, by the Government's evidence, no threat, no display of weapons, no combat. There was an exchange of verbal aspersions and a misdemeanor against Peterson's property was in progress but, at this juncture, nothing more. Even if Peterson's postarrest version of the initial encounter were accepted—his claim that Keitt went for the lug wrench before he armed himself—the events which followed bore heavily on the question as to who the real aggressor was.

The evidence is uncontradicted that when Peterson reappeared in the yard with his pistol, Keitt was about to depart the scene. Richard Hilliard testified that after the first argument, Keitt reentered his car and said "Let's go." This statement was verified by Ricky Gray, who testified that Keitt "got in the car and . . . they were getting ready to go"; he, too, heard Keitt give the direction to start the car. The uncontested fact that Keitt was leaving shows plainly that so far as he was concerned the confrontation was ended. It demonstrates just as plainly that even if he had previously been the aggressor, he no longer was.

Not so with Peterson, however, as the undisputed evidence made clear. Emerging from the house with the pistol, he paused in the yard to load it, and to command Keitt not to move. He then walked through the yard to the rear gate and, displaying his pistol, dared Keitt to come in, and threatened to kill him if he did. While there appears to be no fixed rule on the subject, the cases hold, and we agree, that an affirmative unlawful act reasonably calculated to produce an affray foreboding injurious or fatal consequences is an aggression which, unless renounced, nullifies the right of homicidal self-defense. We cannot escape the abiding conviction that the jury could readily find Peterson's challenge to be a transgression of that character.

The situation at bar is not unlike that presented in *Laney*. There the accused, chased along the street by a mob threatening his life, managed to escape through an areaway between two houses. In the back yard of one of the houses, he checked a gun he was carrying and then returned to the areaway. The mob beset him again, and during an exchange of shots one of its members was killed by a bullet from the accused's gun. In affirming a conviction

of manslaughter, the court reasoned . . . that when defendant escaped from the mob into the back yard . . . he was in a place of comparative safety, from which, if he desired to go home, he could have gone by the back way, as he subsequently did. . . . His appearance on the street at that juncture could mean nothing but trouble for him. Hence, when he adjusted his gun and stepped out into the areaway, he had every reason to believe that his presence there would provoke trouble. We think his conduct in adjusting his revolver and going into the areaway was such as to deprive him of any right to invoke the plea of self-defense. . . .

We think the evidence plainly presented an issue of fact as to whether Peterson's conduct was an invitation to and provocation of the encounter which ended in the fatal shot. We sustain the trial judge's action in remitting that issue for the jury's determination.

The second aspect of the trial judge's charge as to which Peterson asserts error concerned the undisputed fact that at no time did Peterson endeavor to retreat from Keitt's approach with the lug wrench. The judge instructed the jury that if Peterson had reasonable grounds to believe and did believe that he was in imminent danger of death or serious injury, and that deadly force was necessary to repel the danger, he was required neither to retreat nor to consider whether he could safely retreat. Rather, said the judge, Peterson was entitled to stand his ground and use such force as was reasonably necessary under the circumstances to save his life and his person from pernicious bodily harm. But, the judge continued, if Peterson could have safely retreated but did not do so, that failure was a circumstance which the jury might consider, together with all others, in determining whether he went further in repelling the danger, real or apparent, than he was justified in going.

Peterson contends that this imputation of an obligation to retreat was error, even if he could safely have done so. He points out that at the time of the shooting he was standing in his own yard, and argues he was under no duty to move. We are persuaded to the conclusion that in the circumstances presented here, the trial judge did not err in giving the instruction challenged.

Within the common law of self-defense there developed the rule of "retreat to the wall," which ordinarily forbade the use of deadly force by one to whom an avenue for safe retreat was open. This doctrine was but an application of the requirement of strict necessity to excuse the taking of human life, and was designed to insure the existence of that necessity. Even the innocent victim of a vicious assault had to elect a safe retreat, if available, rather than resort to defensive force which might kill or seriously injure.

In a majority of American jurisdictions, contrarily to the common law rule, one may stand his ground and use deadly force whenever it seems reasonably necessary to save himself. While the law of the District of Columbia on this point is not entirely clear, it seems allied with the strong minority adhering to the common law. In 1856, the District of Columbia Criminal Court ruled that a participant in an affray "must endeavor to retreat, . . . that is, he is obliged to retreat, if he can safely." The court added that "[a] man may, to be sure, decline a combat when there is no existing or apparent danger, but the retreat to which the law binds him is that which is the consequence." In a much later era this court, advertizing to necessity as the soul of homicidal self-defense, declared that "no necessity for killing an assailant can exist, so long as there is a safe way open to escape the conflict." . . . That is not to say that the retreat rule is without exceptions. Even at common law it was recognized that it was not completely suited to all situations. Today it is the more so that its precept must be adjusted to modern conditions nonexistent during the early development of the common law of self-defense. One restriction on its operation comes to the fore when the circumstances apparently foreclose a withdrawal with safety. The doctrine of retreat was never intended to enhance the risk to the innocent; its proper application has never required a faultless victim

to increase his assailant's safety at the expense of his own. On the contrary, he could stand his ground and use deadly force otherwise appropriate if the alternative were perilous, or if to him it reasonably appeared to be. A slight variant of the same consideration is the principle that there is no duty to retreat from an assault producing an imminent danger of death or grievous bodily harm. "Detached reflection cannot be demanded in the presence of an uplifted knife," nor is it "a condition of immunity that one in that situation should pause to consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him."

The trial judge's charge to the jury incorporated each of these limitations on the retreat rule. Peterson, however, invokes another—the so-called "castle" doctrine. It is well settled that one who through no fault of his own is attacked in his home is under no duty to retreat therefrom. The oft-repeated expression that "a man's home is his castle" reflected the belief in olden days that there were few if any safer sanctuaries than the home. The "castle" exception, moreover, has been extended by some courts to encompass the occupant's presence within the curtilage outside his dwelling. Peterson reminds us that when he shot to halt Keitt's advance, he was standing in his yard and so, he argues, he had no duty to endeavor to retreat.

Despite the practically universal acceptance of the "castle" doctrine in American jurisdictions wherein the point has been raised, its status in the District of Columbia has never been squarely decided. But whatever the fate of the doctrine in the District law of the future, it is clear that in absolute form it was inapplicable here. The right of self-defense, we have said, cannot be claimed by the aggressor in an affray so long as he retains that unmitigated role. It logically follows that any rule of no-retreat which may protect an innocent victim of the affray would, like other incidents of a forfeited right of self-defense, be unavailable to the party who provokes or stimulates the conflict. Accordingly, the law is well settled that the "castle" doctrine can be invoked only by one who is without fault in bringing the conflict on. That, we think, is the critical consideration here.

Holding

We need not repeat our previous discussion of Peterson's contribution to the altercation which culminated in Keitt's death. It suffices to point out that by no interpretation of the evidence could it be said that Peterson was blameless in the affair. And while, of course, it was for the jury to assess the degree of fault, the evidence well nigh dictated the conclusion that it was substantial.

The only reference in the trial judge's charge intimating an affirmative duty to retreat was the instruction that a failure to do so, when it could have been done safely, was a factor in the totality of the circumstances which the jury might consider in determining whether the force which he employed was excessive. We cannot believe that any jury was at all likely to view Peterson's conduct as irreproachable. We conclude that for one who, like Peterson, was hardly entitled to fall back on the "castle" doctrine of no retreat, that instruction cannot be just cause for complaint.

As we have stated, Peterson moved for a judgment of acquittal at trial, and in this court renews his contention that the evidence was insufficient to support a conviction of manslaughter. His position is that the evidence, as a matter of law, established a right to use deadly force in self-defense. In considering that contention, we must accept the evidence "in the light most favorable to the Government, making full allowance for the right of the jury to draw justifiable inferences of fact from the evidence adduced at trial and to assess the credibility of the witnesses before it." We have already concluded that the evidence generated

factual issues as to the effect, upon Peterson's self-defense claim, of his aggressive conduct and his failure to retreat. . . . The judgment of conviction appealed from is accordingly affirmed.

Questions for Discussion

1. Outline the facts in *United States v. Peterson*.
2. Why does the court of appeals conclude that Peterson was an aggressor who was not entitled to a claim of self-defense?
3. Explain why the court of appeals imposed an obligation on Peterson to retreat before employing deadly force. What type of acts would have fulfilled Peterson's duty to retreat?
4. Why, if Peterson was standing in his own yard, could he not rely on the castle doctrine?
5. Does it make sense to hold Peterson criminally liable for killing a trespasser who was vandalizing Peterson's automobile and whom he had warned not to enter his yard?
6. Do you believe that individuals should be authorized to "hold their ground" under all circumstances rather than retreat?
7. Are the requirements of the law of self-defense too confusing to be understood by most people?
8. Should the area surrounding the home be considered part of a dwelling for purposes of the castle doctrine? What of a porch? In *State v. Blue*, 565 S.E.2d 133 (N.C. 2002), the North Carolina Supreme Court observed that many of the same activities that take place in the home take place on a porch. Should this depend on factors such as the size of the porch, whether the porch is enclosed, and the time of year?

CASES AND COMMENTS

The Castle Doctrine and Domestic Violence. John Gartland was found to have abused his wife Ellen for some years, and the two had lived in separate bedrooms for 10 years. They fought earlier in the evening at a bar, and when they returned home, John accused Ellen of hiding the remote control to the television. John later entered her bedroom and threatened to "hurt" her. As he approached Ellen, she grabbed her son's shotgun from the bedroom closet. John vowed to kill her, and she shot and killed John as he lunged forward. Ellen was convicted of reckless manslaughter. New Jersey is among the minority of states that impose a duty to retreat on an individual in one's own home in those instances in which an individual is assaulted by a cohabitant. The New Jersey Supreme Court determined that Ellen did not have the exclusive right to occupy her bedroom and that John had regular access to the room. As a consequence, Ellen possessed a duty to retreat so long as this could have been safely accomplished prior to resorting to deadly force. See *State v. Gartland*, 694 A.2d 564 (N.J. 1997).

Rhode Island, Massachusetts, and North Dakota follow New Jersey and have statutes imposing a duty to retreat when an individual is attacked by a cohabitant of the home.

In 2009, the West Virginia Supreme Court of Appeals in *State v. Harden* reconsidered the "no retreat rule" for victims of domestic violence. On September 5, 2004, Tanya Harden was arrested for shooting and killing her husband, Danuel Harden. Tanya claimed that she

acted in self-defense and that the killing was a response to a “night of domestic terror.” The evidence indicated that her husband had been drinking heavily (his blood alcohol count at the time of death was .22%) and that his violent attack included “brutally beating the defendant with the butt and barrel of a shotgun, brutally beating the defendant with his fists, and sexually assaulting the defendant.” The “night of terror” ended when Tanya shot and killed Daniel.

The prosecutor, in addition to arguing that there was no reasonable basis for Tanya to believe that there was an imminent threat of serious injury or death, contended that Tanya’s use of deadly force was not reasonable because she could have retreated to safety. Her husband was “on that couch . . . and she has got control of that shotgun, she . . . could have called the law, and she could have walked out of that trailer. Period. But she didn’t.”

The West Virginia Supreme Court overturned existing precedent and held that “an occupant who . . . without provocation [is] attacked in his or her home, dwelling or place of temporary abode, by a co-occupant who also has a lawful right to be upon the premises, may invoke the law of self-defense” and has no duty to retreat before exercising the right of self-defense.

The court explained that women who flee the home in many instances are “caught, dragged back inside, and severely beaten again. [Even if] she manages to escape, . . . [w]here will she go if she has no money, no transportation, and if her children are left behind in the care of an enraged man?” The West Virginia Supreme Court also reasoned that it was unfair that a woman attacked in the home by a stranger may stand her ground while a woman who is attacked by her husband or partner must retreat. See *State v. Harden*, 679 S.E.2d 628 (W. Va. 2009).

DEFENSE OF OTHERS

The common law generally limited the privilege of **intervention in defense of others** to the protection of spouses, family, employees, and employers. This was based on the assumption that an individual would be in a good position to evaluate whether these individuals were aggressors or victims in need of assistance. Some state statutes continue to limit the right to intervene, but this no longer is the prevailing legal rule. The Wisconsin statute provides that a person is justified in “threatening or using force against another when . . . [the person] reasonably believes that force is necessary to defend himself . . . against such other’s imminent use of unlawful force.”

The early approach in the United States was the **alter ego rule**. This provides that an individual intervening “stands in the shoes” or possesses the “same rights” as the person whom the individual is assisting. The alter ego approach generally has been abandoned in favor of the reasonable person or **objective test for intervention in defense of others** of the Model Penal Code. Section 3.05 provides that an individual is justified in using force to protect another whom the individual reasonably believes (1) is in immediate danger and (2) is entitled under the Model Penal Code to use protective force in self-defense, and (3) such force is necessary for the protection of the other person. An intervener is not criminally liable under this test for a reasonable mistake of fact.³¹

What is the difference between the alter ego rule and the objective test? Individuals intervening under the alter ego rule act at their own peril. The person “in whose shoes [an individual]

stands” may in fact be an aggressor or may not possess the right of self-defense. The objective test, on the other hand, protects individuals who act in a “reasonable,” but mistaken, belief.

In *People v. Young*, two plainclothes detectives arrested a teenager for blocking traffic. The defendant intervened and hit one of the “two white men” who was “pulling” on the Black teenager. The defendant was convicted under the alter ego rule for intervening to defend an individual who, in fact, did not possess a right to self-defense. The New York Court of Appeals affirmed the conviction, but asked “what public interest is promoted by a principle which would deter one from coming to the aid of a fellow citizen whom he has reasonable grounds to believe is in imminent danger of personal injury at the hands of assailants?”³² The New York legislature responded by modifying the law to provide that a “person . . . may use physical force upon another person when and to the extent that he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person.”³³

Remember, you may intervene to protect another, but you are not required to intervene. George Fletcher notes that the desire to provide protection to those who intervene on behalf of others reflects the belief that an attack against a single individual is a threat to the rule of law that protects us all.³⁴ Do you agree with the New York Court of Appeals in *Young* that the law should provide protection to individuals who intervene? *State v. Fair* is a well-known case from New Jersey that explains the objective approach.³⁵

DEFENSE OF THE HOME

The home has historically been viewed as a place of safety, security, and shelter. The 18th-century English jurist Lord Coke wrote that “[a] man’s house is his castle—for where shall a man be safe if it be not his own house?” Coke’s opinion was shaped by the ancient Roman legal scholars who wrote that “one’s home is the safety refuge for everyone.” The early colonial states adopted the English common law right of individuals to use deadly force in those instances in which they reasonably believe that this force is required to prevent an imminent and unlawful entry. The common law rule is sufficiently broad to permit deadly force against a rapist, burglar, or drunk who mistakenly stumbles into the wrong house on the way to a surprise birthday party.³⁶

States gradually abandoned this broad standard and adopted statutes that restricted the use of deadly force in defense of the home. There is no uniform approach today, and statutes typically limit deadly force to those situations in which deadly force is reasonably believed to be required to prevent the entry of an intruder who is reasonably believed to intend to commit “a felony” in the dwelling. Other state statutes strictly regulate armed force and authorize deadly force only in those instances in which it is reasonably believed to be required to prevent the entry of an intruder who is reasonably believed to intend to commit a “forcible felony” involving the threat or use of violence against an occupant.³⁷ The first alternative would permit the use of deadly force against an individual who is intent on stealing a valuable painting, whereas the second approach would require that the art thief threaten violence or display a weapon.

The Model Penal Code balances the right to protect a dwelling from intruders against respect for human life and provides that deadly force is justified in those instances when the

intruder is attempting to commit arson, burglary, robbery, other serious theft, or the destruction of property and has demonstrated a threat by employing or threatening to employ deadly force. Deadly force is also permissible under section 3.06(3)(d)(ii)(A)(B) where the employment of nondeadly force would expose the occupant to substantial danger of serious bodily harm.

The most controversial and dominant trend is toward so-called **make my day laws** that authorize the use of “any degree of force” against intruders who “might use any physical force . . . no matter how slight against any occupant.” Colorado Revised Statutes section 18-1-704.5 provides as follows:

[T]he citizens of Colorado have a right to expect absolute safety within their own homes. . . . [A]ny occupant of a dwelling is justified in using any degree of physical force, including deadly physical force, against another person when that other person has made an unlawful entry into the dwelling, and when the occupant has a reasonable belief that such other person has committed a crime in the dwelling in addition to the uninvited entry, or is committing or intends to commit a crime against a person or property in addition to the uninvited entry, and when the occupant reasonably believes that such other person might use any physical force, no matter how slight against any occupant. Any occupant of a dwelling using physical force . . . shall be immune from criminal prosecution for the use of such force . . . [and immune from civil liability] for injuries or death resulting from the use of such force.

Florida Statutes section 776.013 presumes that an intruder who unlawfully enters a home, automobile, or boat intends to commit a forcible felony. An occupant may use nondeadly or deadly force and does not have the burden in court of establishing that the intruder intended to inflict death or great bodily harm.

In *State v. Anderson*, the Oklahoma Court of Criminal Appeals stressed that under the state’s make my day law, the occupant possesses unlimited discretion to employ whatever degree of force is desired based “solely upon the occupant’s belief that the intruder might use any force against the occupant.” In practice, this is a return to the original common law rule because a jury would likely find reasonable justification to believe that almost any intruder poses at least a threat of “slight” physical force against an occupant.³⁸ The make my day law raises the issue of the proper legal standard for the use of force in defense of the dwelling. Should a homeowner be required to wait until the intruder poses a threat of serious harm?

Does the defense of the home justification apply if the intruder already has entered the home when encountered by a lawful occupant? What if you are asleep and awaken in the middle of the night to discover an intruder already is in your house or if you arrive home and find an intruder already on the premises? Professor Joshua Dressler finds that the case law is divided on this question. Some courts consider the right to defend the home to apply, and the occupant retains the privilege to use force against the intruder. Other courts conclude that since the intruder already is inside the home, the occupant must rely on another defense such as self-defense.³⁹ What about the protection of property? An individual is entitled to employ reasonable and necessary nondeadly force to protect property against a thief. Deadly force in protection of property is not justifiable, although courts are divided on whether individuals may threaten deadly force to

protect their property. A victim of theft who acts “promptly” and engages in hot pursuit against an assailant may use nondeadly force to recapture stolen property. Physical force generally may not be used by a “rightful owner” to “recapture” property that has been stolen and carried away by a thief.⁴⁰

Professor Dressler argues that the various legal standards for protection of the dwelling make little difference because in an age marked by fear of “home invasion” and violent crime, a jury will almost always find the use of deadly force is justified against an intruder.⁴¹ The next case, *People v. Ceballos*, discusses whether it is legal to employ a spring gun to protect against illegal entry into the home.

WAS CEBALLOS JUSTIFIED IN DEFENDING HIS HOME WITH A SPRING GUN?

PEOPLE V. CEBALLOS, 526 P.2D 241 (CAL. 1974)

Opinion by Burke, J.

Facts

Defendant lived alone in a home in San Anselmo. The regular living quarters were above the garage, but defendant sometimes slept in the garage and had about \$2,500 worth of property there. In March 1970 some tools were stolen from defendant’s home. On May 12, 1970, he noticed the lock on his garage doors was bent and pry marks were on one of the doors. The next day he mounted a loaded .22 caliber pistol in the garage. The pistol was aimed at the center of the garage doors and was connected by a wire to one of the doors so that the pistol would discharge if the door was opened several inches.

The damage to defendant’s lock had been done by a 16-year-old boy named Stephen and a 15-year-old boy named Robert. On the afternoon of May 15, 1970, the boys returned to defendant’s house while he was away. Neither boy was armed with a gun or knife. After looking in the windows and seeing no one, Stephen succeeded in removing the lock on the garage doors with a crowbar, and, as he pulled the door outward, he was hit in the face with a bullet from the pistol.

Stephen testified: He intended to go into the garage “[for] musical equipment” because he had a debt to pay to a friend. His “way of paying that debt would be to take [defendant’s] property and sell it” and use the proceeds to pay the debt. He “wasn’t going to do it [i.e., steal] for sure, necessarily.” He was there “to look around,” and “getting in, I don’t know if I would have actually stolen.”

Defendant, testifying in his own behalf, admitted having set up the trap gun. He stated that after noticing the pry marks on his garage door on May 12, he felt he should “set up some kind of a trap, something to keep the burglar out of my home.” When asked why he was trying to keep the burglar out, he replied, “... Because somebody was trying to steal my property ... and I don’t want to come home some night and have the thief in there ... usually a thief is pretty desperate ... and ... they just pick up a weapon ... if they don’t have one ... and do the best they can.”

When asked by the police shortly after the shooting why he assembled the trap gun, defendant stated that "he didn't have much and he wanted to protect what he did have." . . . [T]he jury found defendant guilty of assault with a deadly weapon. . . .

Issue

Defendant contends that had he been present he would have been justified in shooting Stephen since Stephen was attempting to commit burglary, . . . that . . . defendant had a right to do indirectly what he could have done directly, and that therefore any attempt by him to commit a violent injury upon Stephen was not "unlawful" and hence not an assault. The People argue that . . . as a matter of law a trap gun constitutes excessive force, and that in any event the circumstances were not in fact such as to warrant the use of deadly force. . . .

Reasoning

In the United States, courts have concluded that a person may be held criminally liable under statutes proscribing homicides and shooting with intent to injure, or civilly liable, if he sets upon his premises a deadly mechanical device and that device kills or injures another. . . . However, an exception to the rule that there may be criminal and civil liability for death or injuries caused by such a device has been recognized where the intrusion is, in fact, such that the person, were he present, would be justified in taking the life or inflicting the bodily harm with his own hands. . . . The phrase "were he present" does not hypothesize the actual presence of the person . . . but is used in setting forth in an indirect manner the principle that a person may do indirectly that which he is privileged to do directly.

Allowing persons, at their own risk, to employ deadly mechanical devices imperils the lives of children, firemen and policemen acting within the scope of their employment, and others. Where the actor is present, there is always the possibility he will realize that deadly force is not necessary, but deadly mechanical devices are without mercy or discretion. Such devices "are silent instrumentalities of death. They deal death and destruction to the innocent as well as the criminal intruder without the slightest warning. The taking of human life [or infliction of great bodily injury] by such means is brutally savage and inhuman."

It seems clear that the use of such devices should not be encouraged. Moreover, whatever may be thought in torts [a civil action for damages], the foregoing rule setting forth an exception to liability for death or injuries inflicted by such devices "is inappropriate in penal law for it is obvious that it does not prescribe a workable standard of conduct; liability depends upon fortuitous results." We therefore decline to adopt that rule in criminal cases.

Furthermore, even if that rule were applied here, as we shall see, defendant was not justified in shooting Stephen. California Penal Code section 197 provides: "Homicide is . . . justifiable . . . 1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person; or, 2. When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony. . . ." Since a homicide is justifiable under the circumstances specified in section 197, [it follows that] an attempt to commit a violent injury upon another under those circumstances is justifiable.

By its terms subdivision 1 of Penal Code section 197 appears to permit killing to prevent any "felony," but in view of the large number of felonies today and the inclusion of many that do not involve a danger of serious bodily harm, a literal reading of the section is undesirable. . . . We must look further into the character of the crime, and the manner of its perpetration. When these do not reasonably create a fear of great bodily harm, as they could not if defendant apprehended only a misdemeanor assault, there is no cause for the exaction of

a human life. . . . The term "violence or surprise" in subdivision 2 is found in common law authorities . . . and, whatever may have been the very early common law, the rule developed at common law that killing or use of deadly force to prevent a felony was justified only if the offense was a forcible and atrocious crime.

Examples of forcible and atrocious crimes are murder, mayhem, rape, and robbery. In such crimes "from their atrocity and violence human life [or personal safety from great harm] either is, or is presumed to be, in peril." . . .

Burglary has been included in the list of such crimes. However, in view of the wide scope of burglary . . . it cannot be said that under all circumstances burglary . . . constitutes a forcible and atrocious crime.

Where the character and manner of the burglary do not reasonably create a fear of great bodily harm, there is no cause for exaction of human life or for the use of deadly force. The character and manner of the burglary could not reasonably create such a fear unless the burglary threatened, or was reasonably believed to threaten, death or serious bodily harm.

Holding

In the instant case the asserted burglary did not threaten death or serious bodily harm, since no one but Stephen and Robert was then on the premises. . . . There is ordinarily the possibility that the defendant, were he present, would realize the true state of affairs and recognize the intruder as one whom he would not be justified in killing or wounding.

We thus conclude that defendant was not justified under Penal Code section 197, subdivisions 1 or 2, in shooting Stephen to prevent him from committing burglary.

Questions for Discussion

1. Ceballos contends that the spring gun resulted only in the employment of the same degree of force that he would have been justified in employing had he been present. The California Supreme Court rejects this standard on the ground that the mechanism is "brutally savage and inhumane." What is the basis for this conclusion? Does this suggest that spring guns are prohibited under all circumstances? Do you agree that Ceballos is proposing an "unworkable standard"?
2. Burglary involves breaking and entering with an intent to commit a felony. Why is burglary not considered a forcible and atrocious crime? What types of offenses are considered forcible and atrocious crimes?
3. Is the standard for the use of deadly force against intruders proposed by the court too complicated to be easily understood? Should you have the right to use deadly force against intruders in your house regardless of whether they pose a threat to commit a forcible and atrocious crime?
4. The Model Penal Code section 3.06(5) provides that a "device" such as a spring gun may be employed only in the event that it is not "designed to cause or known to create a substantial risk of causing death or serious bodily injury." Do you agree?

YOU DECIDE 8.3

James Cecil Law is a 32-year-old Black man who moved into a white, middle-class neighborhood with his wife. His home was broken into within two weeks, and his clothes and personal property were stolen. Law purchased a 12-gauge shotgun and installed double locks on his

doors. One week later, a neighbor saw a flickering light in Law's otherwise darkened house at roughly 8:00 p.m., and because the home had previously been burglarized, the neighbor called the police. Officers Adams and Garrison examined whether windows in the house had been tampered with, and they shined their flashlights into the dwelling. Then they entered the back screened porch where they noticed that the windowpanes on the door to the house had been temporarily put into place with a few pieces of molding. They had no way of knowing that Law had placed the windows in the door in this fashion following the burglary. Officer Garrison removed the molding and glass and reached inside to open the door. He determined that it was a deadlock and decided that the door could not have been opened without a key. As the officer removed his hand from the window, he was killed by a shotgun blast. Officer Potts, the next officer to arrive, testified that he saw Officer Adams running to his squad car yelling that he had been shot at from inside the home. A number of officers arrived, and believing there was a burglar in the house, they unleashed a massive attack as indicated by the fact that there were 40 bullet holes in the kitchen door alone.

Law was in the bedroom with his wife and testified that he heard noise outside the house, and he went downstairs and armed himself with a shotgun he had purchased two days following the burglary. Law then went to the back door and observed a "fiddling around with the door" and then heard scraping on the windowpane along with a voice saying, "Let's go in." Law could not see the back porch because of curtains covering the window on the door. When Law heard the voice say, "Let's go in," he was admittedly scared and testified that he could have either intentionally or unintentionally pulled the trigger of the shotgun. At one point following his arrest, Law indicated to the police that he believed that the intruders were members of the Ku Klux Klan. The prosecutor conceded in closing argument that Law "probably thought he shot a burglar or whatever that was outside." Did Law act unreasonably and employ excessive force against the "intruders"? Was Law entitled to the justification of defense of habitation? See *Law v. State*, 318 A.2d 859 (Md. Ct. Spec. App. 1974). See also *Law v. State*, 349 A.2d 295 (Md. Ct. Spec. App. 1975).

EXECUTION OF PUBLIC DUTIES

The enforcement of criminal law requires that the police detain, arrest, and incarcerate individuals and seize and secure property. This interference with life, liberty, and property would ordinarily constitute a criminal offense. The law, however, provides a defense to individuals executing public duties. This is based on a judgment that the public interest in the enforcement of the law justifies intruding on individual liberty.

There are few areas as controversial as the employment of deadly force by police officers in arresting a fleeing suspect. This, in effect, imposes a fatal punishment without trial. Professor Joshua Dressler writes that until the 14th century, law enforcement officers possessed the right to employ deadly force against an individual who the officer reasonably believed had committed a felony. This was the case even in those circumstances in which a felon could have been apprehended without the use of deadly force. Dressler writes that the authorization of deadly force was based on the notion that felons were "outlaws at war with society" whose lives could be taken to safeguard society. This presumption was strengthened by the fact that felons were subject to capital punishment and to the forfeiture of property. Felons were considered to have forfeited their right to life, and the police were merely imposing the punishment that awaited them in any event.⁴² The

police officer, as noted by the Indiana Supreme Court, is a “minister of justice, and is entitled to the peculiar protection of the law. Without submission to his authority there is no security and anarchy reigns supreme. He must of necessity be the aggressor, and the law affords him special protection.”⁴³ In contrast, only reasonable force could be applied to apprehend a **misdemeanant**. Misdemeanors were punished by a modest fine or brief imprisonment and were not considered to pose a threat to the community. As a consequence, it was considered inhumane for the police to employ deadly force against individuals responsible for minor violations of the law.⁴⁴

The arming of the police and the **fleeing felon rule** were reluctantly embraced by the American public that, although distrustful of governmental power, remained fearful of crime. With a population of 3 million, Chicago was one of the most violent U.S. cities in the 1920s. A crime survey covering 1926 and 1927 concluded that although most police killings were justified, in other cases “it would seem that the police were hasty and there might be some doubt as to the justification; but in every such instance the coroner’s jury returned a verdict of justifiable homicide and no prosecutions resulted. From this we may conclude that the police of the city of Chicago incur no hazard by shooting to kill within their discretion.”⁴⁵ Some state legislatures attempted to moderate the fleeing felon rule by adopting the standard that a police officer who reasonably believed that deadly force was required to apprehend a suspect would be held criminally liable in the event that he was shown to have been mistaken.⁴⁶

The judiciary began to seriously reconsider the application of the fleeing felon rule in the 1980s. Only a small number of felonies remained punishable by death, and offenses in areas such as white-collar crime posed no direct danger to the public. The rule permitting the employment of deadly force against fleeing felons developed prior to arming the police with firearms in the mid-19th century. As a result, deadly force under the fleeing felon rule was traditionally employed at close range and was rarely invoked to apprehend a felon who escaped an officer’s immediate control.⁴⁷ An additional problematic aspect of the fleeing felon rule was the authorization for private citizens to employ deadly force, although individuals risked criminal liability in the event that they were proven to have been incorrect.⁴⁸

The growing recognition that criminal suspects retained various constitutional rights also introduced a concern with balancing the interests of suspects against the interests of the police and society.

A number of reasons are offered to justify a limitation on the use of deadly force to apprehend suspects:

1. The shooting of suspects may lead to *community alienation and anger*, particularly in instances in which the evidence indicates that there was no need to employ deadly force or the deceased is revealed to have been unarmed or innocent.
2. *Bystanders* may be harmed or injured by stray bullets.
3. *Substantial monetary damages* may be imposed on a municipality in civil suits alleging that firearms were improperly employed.
4. *Police officers* who employ deadly force can suffer *psychological stress*, strain, and low morale, and may change careers or retire.

The Modern Legal Standard

In 1985, the U.S. Supreme Court reviewed the fleeing felon rule in the next case in the chapter, *Tennessee v. Garner*. The case was brought under a civil rights statute by the family of the deceased who was seeking monetary damages for deprivation of the “rights . . . secured by the Constitution” (42 U.S.C. § 1983). The Supreme Court determined that the police officer violated Garner’s Fourth Amendment right to be free from “unreasonable seizures.” Although this was a civil rather than criminal decision, the judgment established the standard to be employed in criminal prosecutions against officers charged with the unreasonable utilization of deadly force.

We may question whether it is fair to place the fate of a police officer in the hands of a judge or jury who may not fully appreciate the pressures confronting an officer required to make a split-second decision whether to employ armed force. Others point to the fact that the use of deadly force typically occurs in situations in which there are few witnesses and the judge and jury must rely on the well-rehearsed testimony of the police. What do you think of the standard established in *Garner*?

MODEL PENAL CODE

Section 3.07. Use of Force in Law Enforcement

1. Use of Force Justifiable to Effect an Arrest. . . . The use of force upon or toward the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.
2. Limitation on the Use of Force.
 - a. The use of force is not justifiable under this section unless:
 - i. the actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and
 - ii. when the arrest is made under a warrant, the warrant is valid or believed by the actor to be valid.
 - b. The use of deadly force is not justifiable under this Section unless:
 - i. the arrest is for a felony; and
 - ii. the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and
 - iii. the actor believes that the force employed creates no substantial risk of injury to innocent persons; and
 - iv. the actor believes that:
 - A. the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or
 - B. there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

Analysis

1. The Model Penal Code substantially restricts the common law on the employment of deadly force against fleeing felons.

2. Deadly force is limited to the police or to individuals assisting an individual believed to be a police officer. This limits the utilization or supervision of the use of deadly force to individuals trained in the employment of firearms.
3. The employment of deadly force is restricted to felonies that the police officer believes involves the use or threatened use of deadly force or to situations in which the police officer believes that a delay in arrest will create a substantial risk that the person to be arrested will cause death or serious bodily harm.
4. The police officer possesses a reasonable belief that there is no substantial risk to innocent individuals.

FIGURE 8.2 ■ The Legal Equation: Deadly Force, An Arrest



WAS THE OFFICER JUSTIFIED IN KILLING THE BURGLAR?

TENNESSEE V. GARNER, 471 U.S. 1 (1985)

Opinion by White, J.

Issue

This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.

Facts

At about 10:45 p.m. on October 3, 1974, Memphis Police Officers Elton Hymon and Leslie Wright were dispatched to answer a "prowler inside call." Upon arriving at the scene they saw a woman standing on her porch and gesturing toward the adjacent house. She told them

she had heard glass breaking and that "they" or "someone" was breaking in next door. While Wright radioed the dispatcher to say that they were on the scene, Hymon went behind the house. He heard a door slam and saw someone run across the backyard. The fleeing suspect, who was appellee-respondent's decedent, Edward Garner, stopped at a 6-feet-high chain link fence at the edge of the yard. With the aid of a flashlight, Hymon was able to see Garner's face and hands. He saw no sign of a weapon, and, though not certain, was "reasonably sure" and "figured" that Garner was unarmed. He thought Garner was 17 or 18 years old and about 5'5" or 5'7" tall [in fact, Garner, an eighth grader, was 15. He was 5'4" tall and weighed around 100 or 110 pounds]. While Garner was crouched at the base of the fence, Hymon called out "police, halt" and took a few steps toward him. Garner then began to climb over the fence. Convinced that if Garner made it over the fence he would elude capture, Hymon shot him. The bullet hit Garner in the back of the head. Garner was taken by ambulance to a hospital, where he died on the operating table. Ten dollars and a purse taken from the house were found on his body. . . .

Garner had rummaged through one room in the house, in which, in the words of the owner, "[all] the stuff was out on the floors, all the drawers was pulled out, and stuff was scattered all over." The owner testified that his valuables were untouched but that, in addition to the purse and the 10 dollars, one of his wife's rings was missing. The ring was not recovered.

In using deadly force to prevent the escape, Hymon was acting under the authority of a Tennessee statute and pursuant to Police Department policy. The statute provides that "[if], after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest." Tenn. Code Ann. § 40-7-108 (1982). The Department policy was slightly more restrictive than the statute, but still allowed the use of deadly force in cases of burglary. Although the statute does not say so explicitly, Tennessee law forbids the use of deadly force in the arrest of a misdemeanor. The incident was reviewed by the Memphis Police Firearm's Review Board and presented to a grand jury. Neither took any action.

Garner's father then brought this action in the Federal District Court for the Western District of Tennessee, seeking damages under 42 U.S.C. § 1983 for asserted violations of Garner's constitutional rights. . . . After a 3-day bench trial, the District Court entered judgment for all defendants. . . . It then concluded that Hymon's actions were authorized by the Tennessee statute, which in turn was constitutional. Hymon had employed the only reasonable and practicable means of preventing Garner's escape. Garner had "recklessly and heedlessly attempted to vault over the fence to escape, thereby assuming the risk of being fired upon." . . . The Court of Appeals reversed. . . .

Reasoning

Whenever an officer restrains the freedom of a person to walk away, he has seized that person. . . . [T]here can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. A police officer may arrest a person if he has probable cause to believe that person committed a crime. . . . Petitioners and appellant argue that if this requirement is satisfied the Fourth Amendment has nothing to say about how that seizure is made. This submission ignores the many cases in which this Court, by balancing the extent of the intrusion against the need for it, has examined the reasonableness of the manner in which a search or seizure is conducted. . . .

The same balancing process . . . demonstrates that, notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him. The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own

life need not be elaborated upon. The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment. Against these interests are ranged governmental interests in effective law enforcement. It is argued that overall violence will be reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee. Effectiveness in making arrests requires the resort to deadly force, or at least the meaningful threat thereof. "Being able to arrest such individuals is a condition precedent to the state's entire system of law enforcement."

Without in any way disparaging the importance of these goals, we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects. . . . [W]hile the meaningful threat of deadly force might be thought to lead to the arrest of more live suspects by discouraging escape attempts, the presently available evidence does not support this thesis. The fact is that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects. If those charged with the enforcement of the criminal law have abjured the use of deadly force in arresting nondangerous felons, there is a substantial basis for doubting that the use of such force is an essential attribute of the arrest power in all felony cases. . . . Petitioners and appellant have not persuaded us that shooting nondangerous fleeing suspects is so vital as to outweigh the suspect's interest in his own life [the use of punishment to discourage flight has been largely ignored. The Memphis City Code punishes escape with a \$50 fine].

Holding

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.

It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. As applied in such circumstances, the Tennessee statute would pass constitutional muster. . . .

Officer Hymon could not reasonably have believed that Garner—young, slight, and unarmed—posed any threat. Indeed, Hymon never attempted to justify his actions on any basis other than the need to prevent an escape. . . . [T]he fact that Garner was a suspected burglar could not, without regard to the other circumstances, automatically justify the use of deadly force. Hymon did not have probable cause to believe that Garner, whom he correctly believed to be unarmed, posed any physical danger to himself or others.

The dissent argues that the shooting was justified by the fact that Officer Hymon had probable cause to believe that Garner had committed a nighttime burglary. While we agree that burglary is a serious crime, we cannot agree that it is so dangerous as automatically

to justify the use of deadly force. The FBI classifies burglary as a "property," rather than a "violent," crime. Although the armed burglar would present a different situation, the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous. This case demonstrates as much. Statistics demonstrate that burglaries only rarely involve physical violence. During the 10-year period from 1973 [to] 1982, only 3.8% of all burglaries involved violent crime. . . .

We hold that the statute is invalid insofar as it purported to give Hymon the authority to act as he did. . . .

Dissenting, O'Connor, J., with whom Burger, C.J., and Rehnquist, J., join.

The public interest involved in the use of deadly force as a last resort to apprehend a fleeing burglary suspect relates primarily to the serious nature of the crime. Household burglaries not only represent the illegal entry into a person's home, but also "[pose] real risk of serious harm to others." According to recent Department of Justice statistics, "[t]hree-fifths of all rapes in the home, three-fifths of all home robberies, and about a third of home aggravated and simple assaults are committed by burglars." During the period 1973 [through] 1982, 2.8 million such violent crimes were committed in the course of burglaries. Victims of a forcible intrusion into their home by a nighttime prowler will find little consolation in the majority's confident assertion that "burglaries only rarely involve physical violence." . . .

Admittedly, the events giving rise to this case are, in retrospect, deeply regrettable. No one can view the death of an unarmed and apparently nonviolent 15-year-old without sorrow, much less disapproval. . . . [T]he officer pursued a suspect in the darkened backyard of a house that from all indications had just been burglarized. The police officer was not certain whether the suspect was alone or unarmed; nor did he know what had transpired inside the house. He ordered the suspect to halt, and when the suspect refused to obey and attempted to flee into the night, the officer fired his weapon to prevent escape. The reasonableness of this action for purposes of the Fourth Amendment is not determined by the unfortunate nature of this particular case; instead, the question is whether it is constitutionally impermissible for police officers, as a last resort, to shoot a burglary suspect fleeing the scene of the crime. . . .

I cannot accept the majority's creation of a constitutional right to flight for burglary suspects seeking to avoid capture at the scene of the crime. . . . I respectfully dissent.

Questions for Discussion

1. Did Officer Hymon's shooting of the suspect comply with the Tennessee statute? How does the Tennessee statute differ from the holding in *Garner*? Do you believe that the Supreme Court majority places too much emphasis on protecting the fleeing felon?
2. Justice O'Connor writes at one point in her dissent that the Supreme Court majority offers no guidance on the factors to be considered in determining whether a suspect poses a significant threat of death or serious bodily harm and does not specify the weapons, ranging from guns to knives to baseball bats, that will justify the use of deadly force. Is Justice O'Connor correct that the majority's "silence on critical factors in the decision to use deadly force simply invites second-guessing of difficult police decisions that must be made quickly in the most trying of circumstances"?
3. Summarize the facts that Officer Hymon considered in the "split second" that he decided to fire at the suspect. Was his decision reasonable? What of Justice O'Connor's

conclusion that the Supreme Court decision will lead to a large number of cases in which lower courts are forced to “struggle to determine if a police officer’s split-second decision to shoot was justified by the danger posed by a particular object and other facts related to the crime”?

4. Is Justice O’Connor correct that the Supreme Court majority unduly minimizes the serious threat posed by burglary? Should the Supreme Court be setting standards for police across the country based on the facts in a single case?
5. The California Act to Save Lives, AB 392, adopted in 2019, states that the police only may use lethal force “when necessary in defense of human life.” The law previously provided that the police may use deadly force when “reasonable.” The revised law was inspired by the 2018 killing of Stephon Clark, a 22-year-old African American, who was killed by Sacramento police officers after they mistook Clark’s cell phone for a gun. A second California law requires the training of officers on the new deadly force standard with a stress on the need to “safeguard life, dignity, and liberty of all persons.” The law also mandates that basic training for new officers include de-escalation tactics and alternatives to violence.

CASES AND COMMENTS

1. **The Objective Test for Excessive Force Under the Fourth Amendment.** The U.S. Supreme Court clarified the standard for evaluating the use of excessive force by police under the Fourth Amendment in *Graham v. Connor* in 1989. Graham, a diabetic, asked Berry to drive him to a convenience store to purchase orange juice to counteract the onset of an insulin reaction. Graham encountered a long line and hurried out of the store and asked Berry to drive him to a friend’s house instead. This aroused the suspicion of a police officer, who pulled Berry’s automobile over and called for backup officers to assist him in investigating what occurred in the store. The backup officers handcuffed Graham and dismissed Berry’s warning that Graham was suffering from a “sugar reaction.” Graham began running around the car, sat down on the curb, and briefly collapsed. An officer, concluding that Graham was drunk, cuffed his hands behind his back, placed him face down on the hood, and responded to Graham’s pleas for sugar by shoving his face against the car. Four officers grabbed Graham and threw him headfirst into the police car. The police also refused to permit a recently arrived friend of Graham’s to give Graham orange juice. The officers then received a report that Graham had done nothing wrong at the convenience store and released him. Graham sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder, and claimed to experience a continual ringing in his ear.

The U.S. Supreme Court has ruled that claims that law enforcement officers employed excessive force in the course of an arrest, investigatory stop, or other seizure of a suspect should be analyzed under the Fourth Amendment reasonableness standard. This entails an inquiry into whether the officers’ actions were objectively reasonable in light of the facts and circumstances confronting them without regard to their underlying intent or motivation.

The reasonableness of the use of force according to the Supreme Court “must be judged from the perspective of a reasonable officer on the scene, rather than with the

20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.” This analysis should focus on the severity of the crime, whether the suspect poses an immediate threat to the safety of the officers or other individuals, and whether the suspect is actively resisting arrest or evading arrest by flight.

Would you find it difficult as a juror to place yourself in the position of an officer confronting an aggressive and possibly armed or physically imposing suspect? Is it fairer for courts to utilize a “reasonable officer under the circumstances standard” or to use a test that asks whether the degree of force is “understandable under the circumstances”? Are courts “second-guessing” the police? See *Graham v. Connor*, 490 U.S. 386 (1989).

2. Hot Pursuit. In *Scott v. Harris*, the U.S. Supreme Court confronted the question: May “an officer take actions that place a fleeing motorist at risk of serious injury or death in order to stop the motorist’s flight from endangering the lives of innocent bystanders”? In March 2001, a Georgia county deputy clocked Harris’s vehicle traveling at 73 miles per hour on a road with a 55-miles-per-hour speed limit. The deputy activated his blue flashing lights indicating that Harris should pull over to the side of the road. He instead sped away, initiating a chase down what is in most portions a two-lane road, at speeds exceeding 85 miles per hour. Deputy Timothy Scott heard the radio communication and joined the pursuit along with other officers. “Scott took over as the lead pursuit vehicle. Six minutes and nearly 10 miles after the chase had begun, Scott requested permission to terminate the episode by employing a ‘Precision Intervention Technique’ [PIT] maneuver, which causes the fleeing vehicle to spin to a stop.” Scott had received permission to execute this maneuver by his supervisor, who had told him to “go ahead and take him out.” Scott concluded that it was safer to apply his push bumper to the rear of respondent’s vehicle. As a result, Harris lost control of his vehicle, and the automobile left the roadway, ran down an embankment, overturned, and crashed. Harris was badly injured and was rendered a quadriplegic. He filed a civil suit against Deputy Scott and others alleging “violation of his federal constitutional rights, viz. use of excessive force resulting in an unreasonable seizure under the Fourth Amendment.” The U.S. Court of Appeals for the Eleventh Circuit “affirmed the District Court’s decision to allow respondent’s Fourth Amendment claim against Scott to proceed to trial.” The Court of Appeals concluded that Scott’s actions constituted “deadly force” under *Tennessee v. Garner* and that the use of such force in this context “would violate [respondent’s] constitutional right to be free from excessive force during a seizure [and] a reasonable jury could find that Scott violated [respondent’s] Fourth Amendment rights.”

In 2007, U.S. Supreme Court Justice Antonin Scalia, writing for the Supreme Court majority, held that Officer Scott had acted in a reasonable fashion. He noted that there was a videotape of the high-speed pursuit that portrays a “Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.” In evaluating the reasonableness of Officer Scott’s actions, Justice Scalia held that the Supreme Court must balance “the risk of bodily harm that Scott’s actions posed to Harris” against “the threat to the public that Scott was trying to eliminate.” Harris’s high-speed flight “posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase.” On the other hand, Officer Scott’s actions “posed a high likelihood of serious injury or death to Harris—though not the near certainty of death

posed by, say, shooting a fleeing felon in the back of the head, or pulling alongside a fleeing motorist's car and shooting the motorist." In this situation, Justice Scalia found that Officer Scott had acted reasonably to protect the innocent members of the public who were placed at risk.

What of abandoning the pursuit? Justice Scalia noted that this would not have ensured that Harris would have felt sufficiently free from apprehension by the police to slow down, and it would reward a motorist who fled from the police and who placed the public at risk. "The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness. Instead, we lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death. . . . The car chase that [Harris] initiated in this case posed a substantial and immediate risk of serious physical injury to others; no reasonable jury could conclude otherwise."

Justice Stevens, in dissent, argued that the reasonable course would have been to abandon the pursuit and proposed the following rule: "When the immediate danger to the public created by the pursuit is greater than the immediate or potential danger to the public should the suspect remain at large, then the pursuit should be discontinued or terminated. . . . Pursuits should usually be discontinued when the violator's identity has been established to the point that later apprehension can be accomplished without danger to the public." As a judge, how would you decide this case? See *Scott v. Harris*, 550 U.S. 372 (2007).

A *Washington Post* study of the PIT maneuver based on data from the 100 largest city police departments and 49 state police agencies found that since 2016 at least 30 people have died and hundreds have been injured as a result of the police use of the PIT maneuver to end pursuits. In 18 instances, the officers attempted to stop vehicles for minor traffic violations. In eight cases the police were pursuing stolen cars, and in two instances the drivers were thought to have committed serious felonies. Two drivers were reported to the police as being suicidal. Ten of the individuals killed were passengers in the vehicles, and four were bystanders. Half of the deceased were people of color, and the race of two individuals was undetermined.⁴⁹

In 2014, in *Plumhoff v. Rickard*, Rickard was pulled over because of a defective headlight, and rather than exiting his car, he led six police cruisers on a high-speed chase at over 100 miles per hour. During the chase, Rickard and the police officers passed more than a dozen vehicles. Also during the chase, Rickard exited the highway and collided with Plumhoff's cruiser. Rickard put his car into reverse to escape, and as he accelerated down the highway, two officers fired a total of 15 shots within a 10-second span at Rickard's vehicle. Rickard lost control of the car and crashed into a building. Rickard and a passenger died as a result of a combination of gunshot wounds and injuries from the crash. The Supreme Court in deciding *Plumhoff* followed the precedent in *Harris* and held that "[u]nder the circumstances at the moment when the shots were fired, all that a reasonable police officer could have concluded was that Rickard was intent on resuming his flight" and "posed a grave public safety risk." The Supreme Court noted that the officers would not have been justified in shooting Rickard had he abandoned his flight or clearly surrendered to the police. See *Plumhoff v. Rickard*, 572 U.S. 765, 134 S. Ct. 2012 (2014).

3. **Deadly Force and the Fleeing Felon.** In 2014, in *Mullenix v. Luna*, the Supreme Court decided a third hot pursuit case. Sergeant Randy Baker approached Leija's car and told him that there was an outstanding warrant against him and that he was under

arrest. Leija sped off and was pursued by Baker and by trooper Gabriel Rodriguez who were driving in separate squad cars. Leija entered the interstate and led the officers on an 18-minute chase at speeds between 85 and 110 miles per hour. Leija called the Tulia, Texas, police dispatcher two times during the pursuit claiming to have a gun and threatening to shoot at the police if they did not abandon their pursuit. The dispatcher relayed to the officers Leija's threats together with a report that Leija might be intoxicated. The police set up tire spikes at three locations. Officer Troy Ducheneaux manned the spike strip at the first location Leija was expected to reach beneath the overpass at Cemetery Road. Trooper Cadrian Mullenix drove to the Cemetery Road overpass with the intent of setting up spike strips. After learning that spikes already were being established, Mullenix radioed to Rodriguez and proposed that Mullenix shoot Leija's car and disable the automobile and requested Rodriguez to ask his supervisor, Sgt. Byrd, whether it was "worth doing." Before receiving a response, Mullenix left his vehicle and assumed a shooting position on the overpass 20 feet above the highway. Mullenix could hear Byrd's response to "stand by" and "see if the spikes work first." Mullenix had not received training in the tactic of shooting at a moving vehicle.

Approximately three minutes after Mullenix took up his shooting position, he spotted Leija's vehicle, with Rodriguez in pursuit. As Leija approached the overpass, Mullenix fired six shots. Leija's car continued forward beneath the overpass, where it engaged the spike strip, hit the median, and rolled two and a half times. It was later determined that Leija had been killed by Mullenix's shots, four of which struck his upper body. There was no evidence that any of Mullenix's shots hit the car's radiator, hood, or engine block. The Supreme Court held that "the mere fact that courts have approved deadly force in more extreme circumstances says little, if anything, about whether such force was reasonable in the circumstances here. The fact is that when Mullenix fired, he reasonably understood Leija to be a fugitive fleeing arrest, at speeds over 100 miles per hour, who was armed and possibly intoxicated, who had threatened to kill any officer he saw if the police did not abandon their pursuit, and who was racing towards Officer Ducheneaux's position." Justice Sonia Sotomayor in dissent objected that the Court's endorsement of a "shoot first" mentality had diminished Fourth Amendment protections. Do you agree with the Court's decision? See *Mullenix v. Luna*, 577 U.S. ____ (2014).

The Supreme Court in 2017 decided two police use of force cases.

4. **Officer Identification.** Officers Kevin Truesdale and Michael Mariscal arrived at the home of Daniel and Samuel Pauly around 11 p.m. to investigate Daniel's reported involvement in a "road rage" incident. The two Pauly brothers did not hear the officers identify themselves and reportedly only heard them yelling, "We're coming in. We're coming in." Samuel armed himself with a handgun, and Daniel armed himself with a shotgun. One of the brothers yelled at the intruders (police officers), "We have guns." Officer Truesdale positioned himself behind the house and shouted, "Open the door, come outside." Officer Ray White arrived at the Pauly home roughly two minutes later. Daniel stepped out of the back door and fired two shotgun blasts while screaming loudly. A moment later, Samuel opened the front window and pointed a handgun in Officer White's direction. Officer Mariscal fired immediately at Samuel and missed. "Four to five seconds" later, White shot and killed Samuel. The Supreme Court held that White acted reasonably in assuming that Officers Truesdale and Mariscal had followed the required procedures and had identified themselves as law enforcement officers. "Federal law does not prohibit a reasonable officer who arrives late to an ongoing police action in circumstances like this from assuming that proper procedures, such as officer identification, have already been followed. No settled Fourth Amendment

principle requires that officer to second-guess the earlier steps already taken by . . . fellow officers in instances like the one White confronted here." See *White v. Pauly*, 580 U.S. ___ (2017).

5. Use of Deadly Force. In *County of Los Angeles v. Mendez*, sheriff's deputies Christopher Conley and Jennifer Pederson were searching for Ronnie O'Dell, a parolee for whom they had a felony arrest warrant. The officers opened the door to a metal shack. Unknown to the officers, Angel Mendez and Jennifer Garcia (now Jennifer Mendez) lived in the shack. As the officers opened the wooden door, Mendez, thinking it was the owner of the property, got out of bed and picked up a BB gun he used to kill pests in order to place it safely on the floor. Deputy Conley yelled, "Gun!" and both deputies fired a total 15 shots, severely wounding Mendez and Garcia. Mendez's leg was amputated as a result of the wounds he suffered. The Court rejected the "provocation doctrine" established by the Ninth Circuit Court of Appeals, which provided that a police officer's use of force no matter how reasonable is excessive when based on an officer's reckless or intentional unlawful seizure or entry into the home. The Supreme Court held that the reasonableness of the use of force depends on whether the officer acted in an objectively reasonable fashion in using force, even in those situations in which the Fourth Amendment prohibition on unreasonable searches and seizures may have been violated by the police officer. See *County of Los Angeles, California, v. Mendez*, 581 U.S. ___ (2017).

6. Citizen's Arrest Laws. The Georgia citizen's arrest statute provides that "[a] private person may arrest an offender if the offense is committed in [the person's presence or within [the person's] immediate knowledge. If the offense is a felony and the offender is escaping or attempting to escape, a private person may arrest [the fleeing felon] upon reasonable and probable grounds of suspicion." The citizen is instructed to detain the suspect until the police arrive.

The Georgia citizen's arrest law was adopted in 1863 and has undergone only minor modifications since that time and has been used as a defense to various crimes including assault and murder. The justifiability of continuing the statutory provision for citizen's arrest was questioned in 2020 when Gregory McMichael, 64, and his son Travis McMichael, 34, chased down unarmed jogger Ahmaud Arbery in their truck and shot and killed him. The two white defendants explained that they thought that Arbery, a Black man, looked like a man responsible for a number of burglaries in their neighborhood. Two months following the killing of Arbery, Joyette M. Holmes was appointed to the case and arrested the McMichaels for aggravated assault and murder after a video emerged that contradicted the claim that they had acted in self-defense in making what they continued to claim was a citizen's arrest.

Several days later a third man, William Bryan, 50, who videoed Arbery's killing, was arrested on charges of felony murder and criminal attempt to commit false imprisonment.

A 911 call prior to Arbery's killing indicated that a man identified as Arbery had trespassed in a house under construction. In the event that this was an accurate report, Arbery would have been guilty of a technical misdemeanor trespass, which would not justify a citizen's arrest under Georgia law.

State statutes on citizen's arrest laws differ. Various states limit the laws to felonies, and others also allow arrests for misdemeanors that involve a breach of the peace. Some laws require that the citizen witness the crime, and other laws allow arrests for misdemeanors in circumstances in which individuals did not witness the crime themselves. There also are differing standards for making an arrest ranging from

"reasonably sure" to probable cause. A number of statutes specifically impose criminal liability for a false arrest in those instances in which a crime did not take place and the citizen who made the arrest acted in a negligent or reckless fashion. What is your view: Should citizen arrest laws be repealed? A fairly recent discussion of citizen's arrest can be found in *City of Helena v. Parsons*, 2019 MT 56 (Mt. 2014).

7. **No-Knock Warrants.** In March 2020, shortly after midnight, three Louisville Metro Police Department (LMPD) officers executed a "knock and announce" warrant and used a battering ram to enter the home of Breonna Taylor, a 26-year-old African American emergency medical technician. Taylor's boyfriend Kenneth Walker, a licensed gun owner, believed that the police were intruders and exchanged fire with the officers. The officers fired over 20 shots. Taylor was struck eight times and died. LMPD sergeant Jonathan Mattingly was injured. The police explained that they were searching for two men, one of whom was Jamarcus Glover, who they were unaware already was in custody. The police explained that Taylor had received packages for Glover who had been arrested for selling controlled substances from a drug house more than 10 miles away. The postal inspector stated that he had not been contacted by the police and that there was nothing suspicious about the packages that Taylor had received. The officers failed to find drugs in Taylor's home, and criminal charges against Walker subsequently were dismissed. The Louisville City Council subsequently adopted "Breonna's Law" prohibiting no-knock warrants and requiring officers to wear body cameras. A single officer was charged with reckless endangerment for endangering neighbors, and Louisville reached a \$12 million settlement with Ms. Taylor's family. Several other officers subsequently were terminated. A central issue was whether the police officers correctly knocked and announced their presence at the apartment door. The police generally are required to knock and announce their presence and wait a reasonable amount of time before forcibly entering a dwelling. The U.S. Supreme Court ruled in *Wilson v. Arkansas* that a no-knock warrant may be issued by a judge or undertaken by the officers at the time of search if they have a reasonable belief that announcing their presence will endanger them, result in the destruction of evidence, or lead to the flight of the suspect. See *Wilson v. Arkansas*, 514 U.S. 927 (1995).

RESISTING UNLAWFUL ARRESTS

English common law recognized the right to resist an unlawful arrest by reasonable force. The only limitation was that this did not provide a defense to the murder of a police officer.⁵⁰

The U.S. Supreme Court, in *John Bad Elk v. United States*, in 1900, recognized that this rule had been incorporated into the common law of the United States. The Supreme Court ruled that "[i]f the officer had no right to arrest, the other party might resist the illegal attempt to arrest him, using no more force than was absolutely necessary to repel the assault constituting the attempt to arrest."⁵¹ In 1948, the U.S. Supreme Court affirmed that "[o]ne has an undoubted right to resist an unlawful arrest . . . and courts will uphold the right of resistance in proper cases."⁵²

The English common law rule was recognized as the law in 45 states as late as 1963. Today, only 12 states continue to recognize the English rule and have not adopted the **American rule for resistance to an unlawful arrest**. The jurisdictions that retain the rule are generally located

in the South, perhaps reflecting the region's historical distrust of government.⁵³ The abandonment of the recognition of a right to resist by a majority of states is because of the fact that the rule is no longer thought to make much sense. The common law rule reflected the fact that imprisonment, even for brief periods, subjected individuals to a "death trap" characterized by disease, hunger, and violence. However, today, incarcerated individuals are no longer subjected to harsh, inhuman, and disease-ridden prison conditions that result in illness and death.⁵⁴

Individuals continue to retain the right to resist a police officer's application of unnecessary and unlawful force in executing arrest. Judges reason that individuals are not adequately protected against the infliction of death or serious bodily harm by the ability to bring a civil or criminal case charging the officer with the application of excessive force.⁵⁵

The **English rule for resistance to an unlawful arrest**, which provides that an individual may resist an illegal arrest, is still championed by some state courts. The Mississippi Supreme Court noted in *King v. State* that "every person has a right to resist an unlawful arrest; and, in preventing such illegal restraint of his liberty, he may use such force as may be necessary."⁵⁶ Judge Sanders of the Washington Supreme Court dissented from his colleagues' abandonment of the English rule and observed that the police power is "not measured by how hard the officer can wield his baton but rather by the rule of law. Yet by fashioning the rule as it has, the majority legally privileges the aggressor while insulting the victim with a criminal conviction for justifiable resistance."⁵⁷ The Maryland Supreme Court observed that law enforcement officers were rarely called to account for illegal arrests by civil or criminal prosecutions and that the right to resist provides an effective deterrent to police illegality.⁵⁸ The Mississippi Supreme Court also has begun to restrict the right to resist an unlawful arrest, ruling against a defendant arrested for driving while intoxicated (DWI) who threatened and assaulted uniformed officers. The court noted that "there is no judicial way that [the defendant's] resistance can be classified as privileged or condoned by a court in modern society. Conceding the appellant's right of freedom, liberty and privilege against unauthorized restraint, his greatest discomfiture would have been the possible embarrassment of arrest and detention for the remainder of the night. Moreover, there would have been available to him the legal processes of the courts for vindicating his illegal arrest if indeed it was such."⁵⁹

MODEL PENAL CODE

Section 3.04. Use of Force in Self-Defense

1. Use of Force Justifiable for Protection of the Person. . . . The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
2. Limitations on Justifying Necessity for Use of Force.
 - a. The use of force is not justifiable under this Section:
 - i. to resist an arrest that the actor knows is being made by a peace officer, although the arrest is unlawful.

Analysis

An individual is not entitled to forcefully resist an unlawful arrest by a law enforcement officer. This restriction does not apply where the aggressor “is not known to the actor to be a peace officer.” Self-defense, however, is permitted against a police officer’s use of “more force than is necessary” to arrest an individual.

FIGURE 8.3 ■ The Legal Equation: Use of Force in Self-Defense in an Arrest



NECESSITY

The **necessity defense** recognizes that conduct that would otherwise be criminal is justified when undertaken to prevent a significant harm. This is commonly called the **choice of evils** because individuals are confronted with the unhappy choice between committing a crime and experiencing a harmful event. The harm to be prevented was traditionally required to result from the forces of nature. A classic example is the boat captain caught in a storm who disregards a No Trespassing sign and docks the boat on an unoccupied pier. Necessity is based on the assumption that had the legislature been confronted with this choice, the legislators presumably would have safeguarded the human life of sailors over the property interest of the owner of the dock. As a result, elected officials could not have intended that the trespass statute would be applied against a boat captain confronting this situation.⁶⁰

English common law commentators and judges resisted recognition of necessity. The 18th-century English justice Lord Hale objected that recognizing starvation as a justification for theft would lead servants to attack their masters. Roughly 100 years later, English historian J. F. Stephen offered the often-cited observation that “[s]urely it is at the moment when temptation to crime is the strongest that the law should speak most clearly and emphatically to the contrary.”⁶¹

In 1884, English judges confronted what remains the most challenging and intriguing necessity case in history, *The Queen v. Dudley and Stephens*. The three crew members of the yacht the *Mignonette*, along with the 17-year-old cabin boy, were forced to abandon ship when a wave smashed into the stern. The four managed to launch a 13-foot dinghy with only two tins of turnips to sustain them while they drifted 1,600 miles from shore. On the fourth day, they managed to catch a turtle that they lived on for a week; they quenched their thirst by drinking their own urine and, at times, by drinking seawater. On the 19th day, Captain Thomas Dudley murdered young Richard Parker with the agreement of Edwin Stephens and over the objection of Edmund Brooks. The three survived only by eating Parker's flesh and drinking his blood until rescued four days later. The English court rejected the defense of necessity and the proposition that the members of the crew were justified in taking the life of Parker in order to survive. Lord Coleridge asked, "By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? . . . It is . . . our duty to declare that the prisoners' act in this case was willful murder. . . . [T]he facts . . . are no legal justification of the homicide. . . ."⁶² The defendants were sentenced to death, but released within six months.⁶³

The limitation of necessity to actions undertaken in response to the forces of nature has been gradually modified, and most modern cases arise in response to pressures exerted by social conditions and events. *State v. Salin* is representative of this trend. Salin, an emergency medical services technician, was arrested for speeding while responding to a call to assist a 2-year-old child who was not breathing. The Delaware court agreed that Salin reasonably assumed that the child was in imminent danger and did not have time to use his cell phone to check on the child's progress. His criminal conviction was reversed on the grounds of necessity. Judge Charles Welch concluded that Salin was confronted by a choice of evils and that his "slightly harmful conduct" was justified in order to "prevent a greater harm."⁶⁴

There are several reasons for the defense of necessity⁶⁵:

- *Respect.* Punishing individuals under these circumstances would lead to disrespect for the legal system.
- *Equity.* Necessity is evaluated on a case-by-case basis and introduces flexibility and fairness into the legal system.

The necessity defense nevertheless remains controversial and subject to criticism⁶⁶:

- *Self-Help.* Individuals should obey the law and should not be encouraged to violate legal rules.
- *Mistakes.* Society suffers when an individual makes the wrong choice in the "choice of evils."
- *Politicalization of the Law.* The defense has been invoked by antiabortion and antinuclear activists and individuals who have broken the law in the name of various political causes.

- *Irrelevancy.* Relatively few cases arise in which the necessity defense is applicable, and too much time is spent debating a fairly insignificant aspect of the criminal law.

Roughly 19 states possess necessity statutes, and the other jurisdictions rely on the common law defense of necessity. There is agreement on the central elements of the defense.⁶⁷

- *There was an immediate and imminent harm.* In *State v. Green*, the defendant was assaulted and twice sodomized in his cell. He pretended to commit suicide on two occasions so as to be removed from his cell, but was informed that he would have to “fight it out, submit to the assaults or go over the fence.” Three months later he was threatened with sexual assaults by five inmates and escaped from prison. The Missouri Supreme Court ruled that the trial court properly denied Green the defense of necessity because “[t]his is not a case where defendant escaped while being closely pursued by those who sought by threat of death or bodily harm to have him submit to sodomy.”⁶⁸
- *The defendant also must not have been substantially at fault in creating the emergency.* In *Humphrey v. Commonwealth*, the Virginia Court of Appeals recognized that the defendant, a convicted felon, was justified in violating a gun possession statute in an effort to protect himself from an armed attack. The court stressed that the appellant was “without fault in provoking the altercation.”⁶⁹

In *State v. Squires*, Squires drove to a bar with his nephew, and because he was drunk when leaving, asked his 17-year-old nephew to drive them home. His nephew was unfamiliar with the car and stalled the vehicle on a “well-travelled highway” while backing out of the parking lot. Squires took control of the automobile and was stopped by the police. He was determined to have a blood alcohol level of .24 and was arrested for operating a vehicle while under the influence of alcohol. The Vermont Supreme Court held that the defendant was not entitled to the necessity defense because “the record establishes that the defendant’s own conduct created the emergency.”⁷⁰

- *The harm created by the criminal act is less than that caused by the harm confronting the individuals.* Dale Nelson’s truck became bogged down in a marshy area roughly 250 feet from the highway. He was fearful that the truck might topple over, and he and two companions unsuccessfully sought to free the vehicle. A passerby drove Nelson to the highway department yard where he ignored No Trespassing signs and removed a dump truck that also became stuck. He returned to the heavy equipment yard and took a front-end loader that he used to remove the dump truck. He freed the dump truck, but both the front-end loader and the truck suffered substantial damage. Nelson was ultimately convicted of the reckless destruction of personal property and joyriding. The Alaska Supreme Court ruled that “the seriousness of offenses committed by Nelson were disproportionate to the situation he faced.” Nelson’s “fears about damage to his truck roof were no justification for his appropriation of sophisticated and expensive equipment.”⁷¹

In *Commonwealth v. Livingston*, the defendant after being shot fled in a car to obtain medical help. The appellate court concluded that the risk of harm posed by the

gunshot wound to the defendant's abdomen outweighed the harm posed by his having briefly driven on the wrong side of the road to reach a location to obtain assistance. The defendant drove for about one-quarter of a mile for about 30 seconds to a service station to seek assistance. Although he passed several vehicles by crossing over to the wrong side of the road, there was no evidence that he encountered a car driving in the opposite lane.⁷² In *State v. Cole*, Roger Cole was concerned about his pregnant wife who was suffering back and stomach pain. He did not have a telephone to call for help, and drove to the nearest phone booth to ask a relative to take his wife to the hospital. After making the phone call, Cole was stopped for driving with a broken taillight, and the officer discovered that Cole was driving on a suspended license. The South Carolina Supreme Court held that under the circumstances Cole was entitled to rely on the necessity defense. Do you agree?⁷³

- *An individual reasonably expected a direct causal relationship between his acts and the harm to be averted.* In *United States v. Maxwell*, the First Circuit Court of Appeals dismissed the defendant's contention that he could have reasonably believed that disrupting military exercises at a naval base would cause the U.S. Navy to withdraw nuclear submarines from the coast of Puerto Rico. The court ruled that this was "pure conjecture" and that the defendant "could not reasonably have anticipated that his act of trespass would avert the harm that he professed to fear." Political activists have been equally unsuccessful in contending that they reasonably believed that acts such as splashing blood on walls of the Pentagon or the vandalizing of government property would impede the U.S. production of military weaponry.⁷⁴
- *There were no available legal alternatives to violating the law.* The District of Columbia Court of Appeals confirmed the conviction of a defendant charged with the unlawful possession of marijuana where the defendant failed to demonstrate that she had tried the dozens of drugs commonly prescribed to alleviate her medical condition.⁷⁵ Necessity also was not considered to justify the kidnapping and "deprogramming" of a youthful member of the Unification Church. The Colorado Court of Appeals explained that even assuming that the young woman confronted an imminent harm from a religious cult, her Swedish parents might have pursued legal avenues such as obtaining a court order institutionalizing the 29-year-old church member as an "incapacitated or incompetent person."⁷⁶
- *The criminal statute that was violated does not preclude the necessity defense.* Courts examine the text or legislative history of a statute to determine whether the legislature has precluded a defendant from invoking the necessity defense. There is typically no clear answer, and judges often ask whether the legislature would have recognized that the statute may be violated on the grounds of necessity under the circumstances. In *United States v. Oakland Cannabis Buyers' Cooperative*, U.S. Supreme Court Justice Clarence Thomas ruled that "a medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act."⁷⁷ The Supreme Judicial Court of Massachusetts held that the state legislature had enacted a law providing that

individuals may obtain hypodermic needles only with a doctor's prescription, and thus the law had preempted the defendants from relying on the necessity defense to justify the distribution of hypodermic needles without a prescription to drug addicts. The court also noted that there was no reason to believe that the distribution of hypodermic needles would prevent the imminent and immediate spread of HIV.⁷⁸

- In *State v. Romano*, Romano was bloodied and battered and fleeing the scene of a fight when he was stopped by a police officer and charged with DWI. A New Jersey superior court ruled that the state legislature did not preclude the necessity defense in those cases in which an intoxicated driver was fleeing a brutal and possibly deadly attack.⁷⁹

The next case, *Commonwealth v. Kendall*, presents the issue of whether the defendant was entitled to a jury instruction on the defense of necessity.

MODEL PENAL CODE

Section 3.02. Justification Generally: Choice of Evils

1. Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
 - a. the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
 - b. neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
 - c. a legislative purpose to exclude the justification claimed does not otherwise plainly appear.
2. When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evil or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

Analysis

The commentary to the Model Penal Code observes that the letter of the law must be limited in certain circumstances by considerations of justice. The commentary lists some specific examples:

1. Property may be destroyed to prevent the spread of a fire.
2. The speed limit may be exceeded in pursuing a suspected criminal.
3. Mountain climbers lost in a storm may take refuge in a house or seize provisions.
4. Cargo may be thrown overboard or a port entered to save a vessel.
5. An individual may violate curfew to reach an air-raid shelter.
6. A druggist may dispense a drug without a prescription in an emergency.

Several steps are involved under the Model Penal Code:

A Belief That Acts Are Necessary to Avoid a Harm. The actor must "actually believe" the act is necessary or required to avoid a harm or evil to oneself or to others. A druggist who sells a drug without a prescription must be aware that this is an act of necessity rather than ordinary lawbreaking.

Comparative Harm or Evils. The harm or evil to be avoided is greater than that sought to be prevented by the law defining the offense. Human life generally is valued above property. A naval captain may enter a port from which the vessel is prohibited to save the life of a crew member. On the other hand, the possibility of financial ruin does not justify the infliction of physical harm. The question of whether an individual has made the proper choice is determined by the judge or jury rather than by the defendant's subjective belief.

Legislative Judgment. A statute may explicitly preclude necessity—for instance, prohibiting abortions to save the life of the mother.

Creation of Harm. An individual who intentionally sets a fire may not later claim necessity. However, an individual who negligently causes a fire may still invoke necessity to destroy property to control the blaze. The individual may be prosecuted for causing the fire.

FIGURE 8.4 ■ The Legal Equation: Necessity Legal Equation



WAS THE DEFENDANT ENTITLED TO A JURY INSTRUCTION ON THE NECESSITY DEFENSE?

COMMONWEALTH V. KENDALL, 883 N.E.2D 269 (MASS. 2008)

Opinion by Spina, J.

Issue

In this case, we consider whether the defendant, Clinton Kendall, was entitled to a jury instruction on the defense of necessity with respect to a charge of operating while under the influence of intoxicating liquor (OUI), where the defendant was driving in order to get his seriously injured girl friend to a hospital for medical care. A jury found the defendant guilty

of OUI, and he was sentenced to two years of probation, with conditions. In an unpublished memorandum and order pursuant to its rule 1:28, the Appeals Court affirmed the District Court judgment, concluding that the evidence at trial did not adequately raise the elements of a necessity defense, and, therefore, the trial judge did not err in refusing the defendant's request for such an instruction.

Facts

On the evening of November 25, 2001, the defendant and his girl friend, Heather Maloney, went out to the Little Pub in Marlborough for drinks. They were able to travel there on foot because the establishment was no more than a ten-minute walk from the defendant's trailer home. Over the course of several hours, the defendant and Maloney consumed enough alcohol to become intoxicated. They left the Little Pub around 10 P.M. and walked to a nearby Chinese restaurant to get something to eat. The kitchen was closed, but the bar remained open and they each consumed another drink. Maloney wanted to stay at the restaurant for additional drinks, but the defendant persuaded her that they should return to his home.

After they walked back to the defendant's trailer, he opened the door for Maloney, and she went inside, stopping at the top of the stairs to remove her shoes. As the defendant entered the trailer, he stumbled and bumped into Maloney, causing her to fall forward and hit her head on the corner of a table. The impact opened a wound on her head, and she began to bleed profusely. The defendant was unsuccessful in his efforts to stop the bleeding, so the two decided to seek immediate medical attention.

The trailer did not have a telephone, and neither Maloney nor the defendant had a cellular telephone. Approximately seventy-five to eighty other trailers were located in the mobile home park (each about twenty-five feet apart), at least one nearby neighbor (who lived about forty feet from the defendant) was at home during the time of the incident, and a fire station was located approximately one hundred yards from the neighbor's home. Nonetheless, Maloney and the defendant got into his car, and he drove her to the emergency room of Marlborough Hospital. A breathalyzer test subsequently administered to the defendant at the Marlborough police station, after he had been placed under arrest, showed a blood alcohol level of .23 per cent.

At the close of all the evidence at trial, defense counsel informed the judge that he intended to argue a defense of necessity to the charge of OUI, and he requested an appropriate jury instruction. The judge denied counsel's request for an instruction on necessity, concluding that evidence had not been presented to demonstrate that such a defense was applicable in the circumstances of this case, where the parties were in a highly populated area and the defendant could have availed himself of nearby resources to obtain medical attention for Maloney. As a consequence, during his closing statement, defense counsel did not mention the OUI charge to the jury.

The defendant now contends in this appeal that the judge erred in refusing to allow him to present a defense of necessity during his closing argument and in refusing his request for a jury instruction on such defense. The defendant asserts that, contrary to the judge's conclusion, there were no legal alternatives which would have been effective in abating the danger to Maloney given that her wound was extremely serious and time was a critical factor. Moreover, the defendant continues, by determining that alternative courses of action were available, the judge simply substituted his own judgment, with the benefit of hindsight, for that of the jury. We disagree.

"[I]n a prosecution for operating a motor vehicle while under the influence of intoxicating liquor, the Commonwealth must prove beyond a reasonable doubt that the defendant's consumption of alcohol diminished the defendant's ability to operate a motor vehicle safely. The Commonwealth need not prove that the defendant actually drove in an unsafe or erratic manner, but it must prove a diminished capacity to operate safely." It is well established that criminal conduct may be negated by compulsion.

The defense of necessity, also known as the "competing harms" defense, "exonerates one who commits a crime under the 'pressure of circumstances' if the harm that would have resulted from compliance with the law . . . exceeds the harm actually resulting from the defendant's violation of the law. At its root is an appreciation that there may be circumstances where the value protected by the law is, as a matter of public policy, eclipsed by a superseding value. . . ." In other words, "[a] necessity defense is sustainable [o]nly when a comparison of the 'competing' harms in specific circumstances clearly favors excusing' the defendant's conduct."

The common-law defense of necessity is available in limited circumstances. It can only be raised if each of the following conditions is met: "(1) the defendant is faced with a clear and imminent danger, not one which is debatable or speculative; (2) the defendant can reasonably expect that his action will be effective as the direct cause of abating the danger; (3) there is [no] legal alternative which will be effective in abating the danger; and (4) the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue." In those instances where the evidence is sufficient to raise the defense of necessity, the burden is on the Commonwealth to prove the absence of necessity beyond a reasonable doubt. Thus, if some evidence has been presented on each condition of a defense of necessity, then a defendant is entitled to an appropriate jury instruction. . . .

The only issue here is whether the defendant presented some evidence on the third element of the necessity defense, namely that there were no legal alternatives that would be effective in abating the danger posed to Maloney from her serious head wound. "Where there is an effective alternative available which does not involve a violation of the law, the defendant will not be justified in committing a crime." "Moreover, it is up to the defendant to make himself aware of any available lawful alternatives, 'or show them to be futile in the circumstances.'"

Holding

When viewing the evidence in the light most favorable to the defendant, we conclude that he failed to present any evidence to support a reasonable doubt that his operation of a motor vehicle while under the influence of intoxicating liquor was justified by necessity. There is no question that Maloney's head wound was serious and that time was of the essence in securing medical treatment. Nonetheless, the record is devoid of evidence that the defendant made any effort to seek assistance from anyone prior to driving a motor vehicle while intoxicated. The defendant did not try to contact a nearby neighbor to place a 911 emergency telephone call or, alternatively, to drive Maloney to the hospital. There is also no evidence that the defendant attempted to secure help from the fire station or Chinese restaurant, both in relatively close proximity to the defendant's trailer. This is not a case where, because of location or circumstances, there were *no* legal alternatives for abating the medical danger to Maloney. Moreover, there has been no showing by the defendant that available alternatives would have been ineffective, leaving him with no option but to drive while intoxicated.

Because the defendant did not present at least some evidence at trial that there were no effective legal alternatives for abating the medical emergency, we conclude that the judge did not err in refusing to allow counsel to present a defense of necessity and in denying his request for an instruction on such a defense. *Judgment affirmed.*

Dissenting, Cowin, J., with whom Marshall, C.J., and Cordy, J., join.

I believe that the evidence, viewed in the light most favorable to the defendant, entitled him to a jury instruction on the defense of necessity, and that the court, in affirming the denial of the defendant's request for an instruction, has construed our law on the availability of the necessity defense in an unduly restrictive manner.

The necessity defense recognizes that circumstances may force individuals to choose between competing evils. In particular, it may be reasonable at times for an individual to engage in the "lesser evil" of committing a crime in order to avoid greater harms; when this occurs, individuals should not be punished by the law for their actions. "At [the] root [of the necessity defense] is an appreciation that there may be circumstances where the value protected by the law is, as a matter of public policy, eclipsed by a superseding value which makes it inappropriate and unjust to apply the usual criminal rule."

As the court states, our common law requires a defendant to present some evidence on each of the four elements of the necessity defense before a judge is required to instruct the jury on such defense. Once a judge determines that the evidence, viewed in the light most favorable to the defendant, permits a finding that the defendant reasonably acted out of necessity, the judge must instruct on the defense. The jury then decide what the facts are, and resolve the ultimate question whether the defendant's actions were justified by necessity.

The court determined that the defendant failed to present sufficient evidence on the third element, namely that there were no legal alternatives that would be effective in abating the danger posed to Heather Maloney from her serious head wound, to entitle the defendant to an instruction on necessity. The court concluded that "[t]his is not a case where, because of location or circumstances, there were no legal alternatives for abating the medical danger to Maloney." "Moreover, there has been no showing by the defendant that available alternatives would have been ineffective, leaving him with no option but to drive while intoxicated." The court stated that the record did not indicate that the defendant made any effort to pursue legal alternatives prior to making the decision to drive. "The defendant did not try to contact a nearby neighbor to place a 911 emergency telephone call or, alternatively, to drive Maloney to the hospital. There is also no evidence that the defendant attempted to secure help from the fire station or Chinese restaurant, both in relatively close proximity to the defendant's trailer."

The problem with the court's decision is that it puts unreasonable demands on the defendant to show in every instance that he has tested the legal alternatives. In this case, the court apparently requires the defendant to have knocked on a neighbor's door, or walked to the fire station or Chinese restaurant. This is too burdensome a threshold. To get to the jury, the defendant need only present evidence that he did not explore the legal alternatives because he reasonably deemed them to have been too high a risk, and he was, applying an objective standard, entitled not to have pursued them.

The legal alternatives available to the defendant here carried considerable risk of failure. The defendant had already spent valuable time attempting to stop Maloney's bleeding using towels, but was unable to do so. The first neighbor from whom the defendant might have sought help might not have owned a car, or might have been unable or unwilling to

drive Maloney to a hospital; the defendant would then have had to proceed to other neighbors, or to the fire station, where there might not have been anyone available to help; even had there been, it could have meant unacceptable delay in getting a badly injured person to the hospital. In short, any of the alternatives proposed today by the court would have consumed valuable time to no purpose; their exploration raised the real possibility of a chain of events that could have resulted in Maloney's serious injury or death. Given the element of risk associated with the situation and the uncertain likelihood of success with respect to the legal alternatives, a jury could find that it was reasonable for the defendant to reject those alternatives and to select the unlawful solution because of the greater likelihood that it would work. The court's decision, however, punishes a reasonable person for taking the "lesser evil" of the unlawful but more effective alternative.

The court's conclusion is not supported by our case law. [In one case,] for instance, we held that an instruction regarding the necessity defense was proper where the defendant, charged with illegal possession of a firearm, presented evidence that he obtained the firearm when, during an attack, he wrestled the gun from his attacker and brought it immediately to a police station. We did not insist that availability of other alternatives, e.g., dropping the weapon and leaving, or waiting for the police, precluded assertion of a necessity defense, nor did we require that the defendant test these alternatives.

Of course, a defendant would not be entitled to an instruction on necessity if a reasonable person in his position would have found the legal alternatives to be viable. It would have been proper, for instance, for the judge to deny the defendant's request for an instruction on necessity had there been a hospital within walking distance or a neighbor who offered to drive Maloney to the hospital immediately. In most instances, the unlawful path will not be deemed to be reasonable. On this record, however, the defendant was entitled to make a case to the jury that it was reasonable for him to drive his heavily bleeding girl friend to the hospital to receive treatment without first exploring potentially ineffective alternatives. Although the jury might ultimately reject the defendant's argument, it was for them to decide whether he chose the lesser of two evils. I respectfully dissent.

Questions for Discussion

1. What are the elements of necessity under Massachusetts law?
2. Why does the Massachusetts Supreme Judicial Court uphold the decision of the trial court judge not to issue an instruction on the necessity defense?
3. Explain the reason that judges filed a dissenting opinion.
4. Should the Supreme Judicial Court in determining whether Kendall possessed alternatives to OUI consider that Kendall was intoxicated and acted out of the natural human instinct to assist Maloney? Did the court point to concrete evidence that the various alternatives would have proved effective?
5. Do you agree with the majority or with the dissenting opinions?
6. Compare Kendall with *Butterfield v. State*, 317 S.W.2d 943 (Tex. Crim. App. 1958).
Butterfield was drunk and hit his head, and when he regained consciousness, he found himself lying on the floor in a pool of blood. Butterfield realized he was bleeding from the wound and that he required immediate medical attention. Butterfield lived alone and had no telephone in his apartment. He decided to drive to the hospital, fainted while driving, and wrecked his car. Butterfield was arrested for DWI and was sentenced to 30 days in jail and fined \$50. Based on *Kendall*, was Butterfield entitled to rely on the necessity defense?

CASES AND COMMENTS

1. Matthew Ducheneaux was charged with possession of marijuana. He was arrested on a bike path in Sioux Falls, South Dakota, during the city's annual Jazz Fest in July 2000. He falsely claimed that he lawfully possessed the 2 ounces of marijuana as a result of his participation in a federal medical research project. Ducheneaux is 36 and was rendered quadriplegic by an automobile accident in 1985. He is almost completely paralyzed other than some movement in his hands. Ducheneaux suffers from spastic paralysis that causes unpredictable spastic tremors and pain throughout his body. He testified that he had not been able to treat the symptoms with traditional drug therapies, and these protocols resulted in painful and potentially fatal side effects. One of the prescription drugs for spastic paralysis is Marinol, a synthetic tetrahydrocannabinol (THC). THC is the essential active ingredient of marijuana. Ducheneaux has a prescription for Marinol, but he testified it causes dangerous side effects that are absent from marijuana. The South Dakota legislature has provided that "no person may knowingly possess marijuana" and has declined on two occasions to create a medical necessity exception. Would you convict Ducheneaux of the criminal possession of marijuana? The statute provides that the justification defense is available when a person commits a crime "because of the use or threatened use of unlawful force upon him or upon another person." The South Dakota Supreme Court ruled that Ducheneaux did not satisfy the statutory standard that required that he engaged in the crime because of the "use or threatened use of unlawful force upon him." The only force threatened or used against Ducheneaux was his medical condition. The statute clearly implies force or threat of force by another person. The court concluded that it would be a "strained interpretation of the statutory language to rule that a medical condition can exert unlawful force against a person."

The Supreme Court also held that Ducheneaux failed to demonstrate that he was unable to resist the force. His belief that he his alternative treatments containing Marinol (the legal form of THC) and Valium were not as effective as marijuana is an "insufficient justification for choosing an illegal remedy." The legislature has passed a statute that provides criminal penalties for the knowing possession of marijuana. This language precludes the defense of necessity. The South Dakota legislature has decided against creating a provision for a medical necessity for marijuana on two occasions. See *State v. Ducheneaux*, 671 N.W.2d 841 (S.D. 2003).

2. **Property Versus Human Life.** In *State v. Celli*, defendants Brooks and Celli left Deadwood, South Dakota, in search of employment in Newcastle, Wyoming, a distance of roughly 75 miles. They planned to hitchhike in the sunny but chilly weather and dressed warmly. The two defendants failed to secure a ride and by late afternoon had walked roughly 12 miles. Celli slipped in the snow along the road and grabbed Brooks, and the two then tumbled down a steep embankment. In an effort to get back to the road, they were forced to cross a frozen stream and fell through the ice. Their shoes and pants were soaked. The temperature quickly dropped to below freezing, and they unsuccessfully attempted to hitch a ride back to Deadwood. Brooks and Celli began the trek back, and when they spotted a cabin, they broke the lock on the front door and found matches to start a fire with which to dry their clothes. They spent the night in the bed and, in the morning, shared a can of beans. A neighbor noticed the smoke and notified the police.

The South Dakota Supreme Court reversed their conviction of fourth-degree burglary on a technicality and found it unnecessary to reach the issue whether the two were entitled to an instruction on the necessity defense. Were the defendants justified in breaking into the cabin and spending the night? See *State v. Celli*, 263 N.W.2d 145 (S.D. 1978).

3. **Economic Necessity.** Jesus Bernardo Fontes was arrested after he presented a false identification card to a convenience store clerk and attempted to cash a forged payroll check in the amount of \$454.75. The defendant claimed that his three children, who ranged in age from 16 months to 11 years, experienced serious health problems. The children had not eaten for more than 24 hours, and three different food banks had turned down his request for food. The defendant appealed the trial court's refusal to recognize the defense of necessity. Fontes feared that the lack of food would further complicate his children's health problems and lead to malnutrition and death. "While we are not without sympathy for the downtrodden, the law is clear that economic necessity alone cannot support a choice of crime." Should the judge have issued a jury instruction on (economic) necessity? See *People v. Fontes*, 89 P.3d 484 (Colo. App. 2003).

4. **Climate Change.** Kenneth Ward appealed his conviction for burglary in the second degree after he broke into a pipeline facility and turned off a valve, which halted the flow of Canadian tar sands oil to refineries in Skagit and Whatcom Counties in Washington State. Ward intended to protest the use of tar sands oil, which he asserted meaningfully contributes to climate change and poses a threat to Washington State. At the same time, other climate change protesters closed similar valves in North Dakota, Montana, and Minnesota. The protests temporarily stopped the flow of Canadian tar sands oil from entering into the United States.

Ward argued that he was entitled to rely on the necessity defense. He reasonably believed based on his own history of activism that civil disobedience could lead to social change. Ward also contended that the harm resulting from his actions at most was a temporary inconvenience to the employees of the plant. At trial, he introduced "voluminous scientific evidence of the harms of climate change." Ward argued that the opportunity for action on climate change has narrowed to the point that immediate, emergency action is necessary. He offered evidence of his more than 40 years of being involved in various lawful environmental movements, the many attempts he has made to petition state and local governments to address climate change, and how most of these efforts have proven unsuccessful. These efforts according to Ward have become increasingly difficult given the political power of vested interests. As a judge, how would you rule on the question of whether Ward should be permitted to rely on the necessity defense? See *State v. Ward*, No. 77044-6-1 (Wash. App. 2019). In the West Roxbury neighborhood of Boston, Massachusetts demonstrators sat in holes dug for a high-pressure fracked gas pipeline, which would have extended for five miles through West Roxbury. A Massachusetts judge held that the potential environmental and public health impacts justified the demonstrators' violating the law.⁸⁰

5. **Threat of Bodily Harm.** Oliver Gray was pulled over by Indianapolis Metropolitan Police for not having a properly displayed license plate on his vehicle. John Hernandez was the only passenger in the vehicle. Discovering that Gray was driving with a suspended license, the officer placed Gray under arrest. The police directed Hernandez, although he was not under arrest, to exit the vehicle so that the vehicle could be towed.

Immediately upon exiting the vehicle, Hernandez put his hands up and informed

police he had a handgun in his pocket. Because Hernandez was not licensed to carry a handgun, he was also placed under arrest.

Hernandez was charged with carrying a handgun without a license. At trial, Hernandez testified that during the traffic stop Gray had been in possession of the handgun and told Hernandez that Gray would not go back to jail for being a “felon in possession of a firearm” and instructed Hernandez to take the gun from him “or else.” Hernandez was aware of Gray’s criminal history and was fearful that he would be shot if he refused to take the handgun. He also feared that Gray might start shooting the officers if he allowed Gray to maintain possession of the gun. Hernandez took the handgun, but asserted at trial that he had acted out of necessity. The trial court judge held that Hernandez was not entitled to rely on the necessity defense. Do you agree? See *Hernandez v. State*, 45 N.E. 3d 373 (Ind. 2015).

YOU DECIDE 8.4

On July 26, 1997, Wesley Lee Bell, a convicted felon, was playing cards with five others at his home. They heard gunshots, went outside, and saw Bell’s neighbor, Anthony Brooks, running toward them. Brooks was being pursued by a man firing a pistol in the direction of Bell’s house. When Brooks reached Bell’s house, he stated that “a couple of dudes had jumped on him,” which prompted Bell and the other card players to accompany Brooks outside, though all were unarmed. Outside, the group was fired upon by a number of assailants. When one of the assailants stopped to reload a shotgun, Bell managed to take the shotgun away from her, and Bell’s brother took a shotgun away from a different assailant. After the melee, Bell gave one of the two shotguns to the police, but kept the other. Later that evening, the assailants returned, “shooting and getting out of their cars and making threats.”

In the days following the attack, Bell “felt that [the assailants] could come back at any time,” and his state of mind was “one of fear.” Four days later, during a search by police of Bell’s apartment pursuant to a warrant, Bell handed over the second shotgun. Was the defendant entitled to the defense of necessity? See *United States v. Bell*, 214 F.3d 1299 (11th Cir. 2000).

Would you reach the same result in *United States v. Rice*? Prior to obtaining a gun, Otis Lee Rice had been repeatedly harassed and threatened by members of a neighborhood gang called The Thug Life. In September 1996, Rice was beaten and robbed as he was leaving a grocery store. In December 1996, gang members robbed Rice as he was making a phone call from a pay phone. In April 1997, Rice was beaten with a baseball bat. After Rice reported the April 1997 attack and The Thug Life’s drug dealing to police, he was threatened for being a snitch. In May 1997, gang members confronted Rice at the beach, accused him of being a snitch, and hit him on the head with a beer bottle, causing lacerations that required hospitalization. In September 1997, he was beaten by gang members “for no reason.” In December 1997, Rice was surrounded by gun-wielding gang members at a Laundromat, but the gang fled when bystanders threatened to call the police. On one occasion in December 1997, gang members went to Rice’s home when Rice was not present. In response, Rice “changed his address” and attempted to avoid the gang. In

January 1998, Rice obtained a firearm. On February 20, 1998, Rice was walking to his job to pick up his paycheck when he encountered members of the gang. He returned home, retrieved his gun, and departed again for his job. On the way home after picking up his check, he saw gang members approaching and shot his gun in the air to frighten them away. On February 21, 1998, while walking to a store, Rice was verbally threatened by gang members. He returned home to get his gun, and departed again for the store. Shortly thereafter, police officers, who were looking for Rice for a separate offense, found him leaning over a parked car, chatting with someone inside and drinking beer. The officers discovered that Rice was in unlawful possession of a firearm and arrested him. See *United States v. Rice*, 214 F.3d 1295 (11th Cir. 2000).

Were the two defendants each entitled to the defense of necessity?

CONSENT

The fact that an individual consents to be the victim of a crime ordinarily does not constitute a defense. For example, the Massachusetts Supreme Judicial Court held that an individual's consensual participation in a sadomasochistic relationship was not a defense to charge of assault with a small whip. The Massachusetts judge stressed that as a matter of public policy, an individual may not consent to become a victim of an assault and battery with a dangerous weapon.⁸¹

Professor George Fletcher writes that although individuals are not criminally responsible for self-abuse or for taking their own life, those who assist them are criminally liable. Why does consent not constitute a justification?⁸²

The most common explanation is that the criminal law punishes acts against individuals that harm and threaten society. The fact that an individual may consent to a crime does not mean that society does not have an interest in denouncing and deterring this conduct. The famous 18th-century English jurist William Blackstone observed that a criminal offense is a "wrong affecting the general public, at least indirectly, and consequently cannot be licensed by the individual directly harmed."⁸³

1. Condoning a crime under such circumstances undermines the uniform application of the law and runs the risk that perpetrators will become accustomed and attracted to a life of crime.
2. A sane and sensible person would not consent to being a victim of a crime.
3. The victim's consent could not possibly constitute a reasonable and rational decision and may be the result of subtle coercion. Society must step in under these circumstances to ensure the safety and security of the individual.
4. The perpetrator of a crime can easily claim consent, and courts do not want to unravel the facts.

In *State v. Brown*, a New Jersey Superior Court ruled that a wife's instructions to her husband that he was to beat her in the event that she consumed alcoholic beverages did not

constitute a justification for the severe beating he administered. Judge Bachman ruled that to “allow an otherwise criminal act to go unpunished because of the victim’s consent would not only threaten the security of our society but also might tend to detract from the force of the moral principles underlying the criminal law.”⁸⁴

There are three exceptions or situations in which the law recognizes consent as a defense to criminal conduct:

- *Incidental Contact.* Acts that do not cause serious injury or harm customarily are not subject to criminal prosecution and punishment. People, for example, often are bumped and pushed on a crowded bus or at a music club.
- *Sporting Events.* Ordinary physical contact or blows are incident to sports such as football, boxing, or wrestling.
- *Socially Beneficial Activity.* Individuals benefit from activities such as medical procedures and surgery.

Consent must be free and voluntary and may not be the result of duress or coercion. An individual may also limit the scope of consent by, for instance, authorizing a doctor to operate only on three of the five fingers on one hand.

- *Legal Capacity.* Young people below the age of consent, the intoxicated, and those on drugs, as well as individuals suffering from a mental disease or abnormality, are not considered capable of consent.
- *Fraud or Deceit.* Consent is not legally binding in those instances in which it is based on a misrepresentation of the facts.
- *Forgiveness.* The forgiveness of a perpetrator by the victim following a crime does not constitute consent to a criminal act.

A Nassau County, New York, court ruled that the defendants went beyond the consent granted by fraternity pledges to “hazing.” The judge found that the intentional and severe beating administered exceeded the terms of any consent and observed that “consent obtained through fraud . . . or through incapacity of the party assaulted, is no defense. The consent must be voluntary and intelligent. It must be free of force or fraud. . . . [T]he act should not exceed the extent of the terms of consent.”⁸⁵

The next case in the chapter, *State v. Dejarlais*, involves a court order protecting a female from harassment. The case asks whether the victim’s alleged consent to the presence of her harasser in her home following the issuance of the court order constitutes a defense to the harasser’s violation of the court order.

MODEL PENAL CODE

Section 2.11. Consent

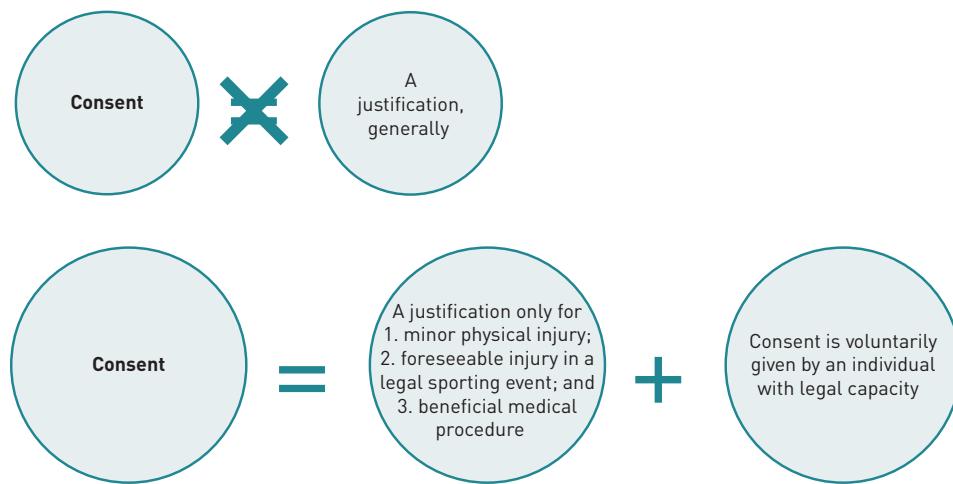
1. In General. The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.
2. Consent to Bodily Injury. When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense if:
 - a. the bodily injury consented to or threatened by the conduct consented to is not serious; or
 - b. the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law; or
 - c. the consent establishes a justification of the conduct under Article 3 of the Code.
3. Ineffective Consent. Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if:
 - a. it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or
 - b. it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmlessness of the conduct charged to constitute the offense; or
 - c. it is given by a person whose improvident consent is sought to be prevented by the law defining the offense; or
 - d. it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense.

Analysis

1. Section 2.11(1) notes that a lack of consent is an essential part of the definition of certain crimes that the prosecution must establish at trial beyond a reasonable doubt. Rape, for instance, requires the sexual penetration of a victim without her consent.
2. Section 2.11(2)(b) repeats that consent constitutes a defense in the case of an offense causing minor injury or a foreseeable injury that occurs during a lawful sporting event. Section 2.11(2)(c) provides authorization for doctors to undertake emergency medical procedures on patients incapable of consent in those instances in which a reasonable person wishing to safeguard the welfare of the patient would consent.
3. There are four situations in which consent is not a defense under Section 211(3). The first involves an individual who is not entitled to consent, such as a stranger who consents to the "removal of another's property." The second covers a lack of personal capacity to consent. The third addresses an offense, such as the molestation or rape of a minor, in

which the law seeks to protect individuals who are considered to be incapable of knowing and intelligently consenting. The last situation addresses consent obtained by fraud. A good example is a patient who consents to a medical procedure and, after the administration of an anesthetic, is sexually molested.

FIGURE 8.5 ■ The Legal Equation: Consent



MAY THE DEFENDANT RAISE THE DEFENSE OF CONSENT TO A VIOLATION OF AN ORDER OF PROTECTION?

STATE V. DEJARLAIS, 969 P.2D 90 (WASH. 1998)

Opinion by Dolliver, J.

Issue

Defendant Steven Dejarlais was convicted in Pierce County Superior Court of violating a domestic violence order for protection. . . . The Court of Appeals affirmed the Defendant's convictions, and we granted his petition for review. . . .

Facts

Ms. Shupe met the Defendant in 1993 after separating from her husband. She filed for divorce in June 1993 and began seeing the Defendant regularly. Their relationship included his frequent overnight stays at her home. Ms. Shupe testified that, during divorce proceedings with

her husband, a temporary parenting plan was filed, and she feared being found in contempt of its terms due to her relationship with the Defendant. She further testified her husband gave her \$1,500 to help her move, and requested she petition for an order for protection against the Defendant to avoid being found in contempt of the parenting plan.

On September 9, 1993, Ms. Shupe signed a declaration in support of the request for a protection order, claiming she was a victim of the defendant's harassment. She stated:

I met Steve back in February 1993. I'm married but going through a divorce. I decided to stop seeing him because it was becoming to [sic] much. He & my husband has got [sic] into it a few times also. Steve follows me, calls numerous times a day, calls my work, comes to my work. He just don't [sic] get the hint its [sic] over.

On September 23, 1993, an Order for Protection from Civil Harassment was entered. It restrained the Defendant from contacting or attempting to contact Ms. Shupe in any manner, making any attempts to keep her under surveillance, and going within "100 feet" of her residence and workplace. The order stated it was to remain in effect until September 23, 1994, and that any willful disobedience of its provisions would subject the Defendant to criminal penalties as well as contempt proceedings. Fife Police Officer Stephen Mauer served the Defendant with the order on November 23, 1993. Ms. Shupe testified her relationship with the Defendant continued despite the order.

The Defendant went to jail in May 1994, apparently for an offense unrelated to his relationship with Ms. Shupe. During that time, Ms. Shupe discovered he had been seeing another woman. Following his stay in jail, on May 22, 1994, DeJarlais went to Ms. Shupe's home and let himself in through an unlocked door. Ms. Shupe, who had been asleep on the floor by the couch, confronted the Defendant, telling him she knew about the other woman and wanted nothing more to do with him. She did not tell him to leave, fearing he would get "mad and furious," but walked back to her bedroom. The Defendant followed her, saying he would "have [her] one more time." He threw her on the bed, and, disregarding her protestations and refusals, had intercourse with her twice.

The Defendant was arrested and charged with one count of violation of a protection order and one count of rape in the second degree. At trial, the Defendant testified he was aware of the protection order and clearly understood its terms. He testified he did not rape Ms. Shupe but that the two of them had consensual sex.

The trial court declined to give defense counsel's proposed instruction, which stated:

If the person protected by a Protection Order expressly invited or solicited the presence of the defendant, then the defendant is not guilty of Violation of Protection Order.

Instead, the trial court instructed the jury as follows:

A person commits the crime of violation of an order for protection when that person knowingly violates the terms of an order for protection.

The jury found the Defendant guilty of violation of a protection order and rape in the third degree. The Court of Appeals affirmed his convictions. We granted review and now affirm, holding consent is not a defense to the charge of violating a domestic violence order for protection.

The Defendant was convicted of a misdemeanor violation of a protection order under RCW 26.50.110(1) which provides:

Whenever an order for protection is granted under this chapter and the respondent or person to be restrained knows of the order, a violation of the restraint provisions or

of a provision excluding the person from a residence, workplace, school, or day care is a gross misdemeanor. . . .

Reasoning

The Defendant contends that, where a person protected by an order consents to the presence of the person restrained by the order, the jury should be instructed that consent is a defense to the charge of violating that order. We note at the outset that, even if consent were a defense to the crime of violating a protection order, it is far from clear that the contact in this case was consensual. Contrary to the Defendant's proposed instruction, Ms. Shupe does not appear to have invited or solicited the Defendant's presence on the night in question. More importantly, the jury found the Defendant guilty of rape in the third degree, by definition nonconsensual contact. The protection order prohibited any contact; even if Ms. Shupe consented to earlier contacts or to Defendant's presence at her home that day, the rape was clearly a nonconsensual contact. We nevertheless reach the issue Defendant raises because he seems to suggest that Ms. Shupe's repeated invitations and ongoing acquiescence to Defendant's presence constituted a blanket consent or waiver of the order's terms. We disagree.

The statutory elements of the crime of violation of a protection order do not address consent. Nor did the Legislature affirmatively establish consent as a defense elsewhere in RCW 26.50. . . . A domestic violence protection order issued under RCW 26.50, on the other hand, does not protect merely the "private right" of the person named as petitioner in the order. In fact, the court recognized, the statute reflects the Legislature's belief that the public has an interest in preventing domestic violence:

The Legislature has clearly indicated that there is a public interest in domestic violence protection orders. In its statement of intent for RCW 26.50, the Legislature stated that domestic violence, including violations of protective orders, is expressly a public, as well as private, problem, stating that: Domestic violence is a problem of immense proportions affecting individuals as well as communities. Domestic violence has long been recognized as being at the core of other major social problems: Child abuse, other crimes of violence against person or property, juvenile delinquency, and alcohol and drug abuse. Domestic violence costs millions of dollars each year in the state of Washington for health care, absence from work, services to children, and more. Thus . . . DeJarlais's argument fails.

We agree. Indeed, the Legislature's intent is clear throughout the statute, and allowing consent as a defense is not only inconsistent with, but would undermine, that intent. [An order of protection specifically] states:

The order for protection form shall include, in a conspicuous location, notice of criminal penalties resulting from violation of the order, and the following statement: "You can be arrested even if the person or persons who obtained the order invite or allow you to violate the order's prohibitions. The respondent has the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order upon written application."

The "form" described above is to be used for all petitions filed and orders issued under RCW 26.50 after September 1, 1994. Because the order in this case was issued in September 1993, that provision was not yet in effect; the order served on the Defendant warned him only that any willful disobedience of the order's provisions would subject the respondent to criminal penalties and possibly contempt. Nevertheless, we are convinced the quoted subsection shows the Legislature did not intend for consent to be a defense to violating a domestic violence protection order.

The statute also requires police to make an arrest when they have probable cause to believe a person has violated a protection order. There is no exception to this mandate for consensual contacts; rather, the obligation to arrest does not even depend upon a complaint being made by the person protected under the order but only on the respondent's awareness of the existence of that order. We also note that Washington law requires officers to make an arrest whenever they have probable cause to believe someone is guilty of any crime of domestic violence, including violation of a protection order. That chapter states the Legislature "recognizes[...] the importance of domestic violence as a serious crime against society" and intends "that criminal laws be enforced without regard to whether the persons involved are or were married, cohabiting, or involved in a relationship."

Moreover, the act states modification of a protection order requires notice to all parties and a hearing. Allowing consent as a defense to violating a protection order would result in a de facto modification.

The Defendant argues such an interpretation discourages reconciliation. However, we note nothing in the statute prevents drafting a protection order which allows some contact, for instance, by telephone or through a third party. There is no requirement that all contact be prohibited. And, while modification of an order is only possible after notice and hearing, it can be accomplished any time up to the order's expiration date.

Holding

Our reading of the statute is consistent with the Legislature's intent and clear statement of policy. Requests for modification of that policy should be directed to the Legislature not this court. The statute, when read as a whole, makes clear that consent should not be a defense to violating a domestic violence protection order. The Defendant is not entitled to an instruction which inaccurately represents the law.

Questions for Discussion

1. Why did Mrs. Shupe petition for an order of protection against Steven Dejarlais? Was she motivated by a desire to prevent Dejarlais from continuing to abuse or threaten her?
2. Shupe and Dejarlais continued their relationship following the issuance of the order of protection. At one point did Shupe allege that Dejarlais was violating the order?
3. Should Dejarlais be able to use Shupe's consent as a defense to his violation of the order of protection?
4. Does society have an interest in enforcing the order of protection that should take precedence over Shupe's consent to a continuing relationship with Dejarlais? Explain your answer.

CASES AND COMMENTS

Sports. In *State v. Shelley*, Jason Shelley and Mario Gonzalez played on opposing teams during an informal basketball game at the University of Washington Intramural Activities Building. These games were not refereed, and the players called fouls on opposing players. Gonzalez had a reputation for aggressive play and fouled Shelley several times. At one point,

Gonzalez slapped at the ball and scratched Shelley's face and drew blood. Shelley briefly left and returned to the game. Shelley, after returning to the court, hit Gonzalez and broke his jaw in three places, requiring the jaw to be wired shut for six weeks. Shelley was convicted of assault in the second degree. Gonzalez testified that the assault was unprovoked. Shelley, however, contended that Gonzalez continually slapped and scratched him and that Shelley was getting increasingly angry. Shelley explained that the two went for a ball and claimed that Gonzalez raised his hand toward Shelley's face and that Shelley hit Gonzalez as a reflex reaction to protect himself from being scratched.

The Court of Appeals of Washington held that consent is a defense to assaults occurring as part of athletic contests. Absent this rule, most athletic contests would have to be prohibited. The court of appeals rejected the standard proposed by the prosecution that a victim cannot be considered to have consented to conduct that falls outside the rules of an athletic contest, explaining that various "excesses and inconveniences are to be expected beyond the formal rules of the game. . . . However, intentional excesses beyond those reasonably contemplated in the sport are not justified." The court of appeals adopted the Model Penal Code standard that "reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity are not forbidden by law." The issue is not the injury suffered by the alleged victim, but "whether the conduct of the defendant constituted foreseeable behavior in the play of the game. . . . [T]he injury must have occurred as a by-product of the game itself." The Court of Appeals of Washington affirmed Shelley's conviction and held that there is "nothing in the game of basketball" that would recognize consent as a defense to the conduct engaged in by Shelley. See *State v. Shelley*, 929 P.2d 489 (Wash. Ct. App. 1997).

Compare *Shelley* to *People v. Schacker*. In this New York hockey case, the defendant Robert Schacker struck Andrew Morenberg in the back of the neck after the whistle had blown and play had stopped. Morenberg was standing near the goal net and struck his head on the crossbar of the net, causing a concussion, headaches, blurred vision, and memory loss. This was a "no-check" hockey league that involved limited physical contact between opposing players. The District Court for Suffolk County dismissed the charges of assault in the third degree against Schacker based on the fact that Morenberg had assumed the risk of injury during the normal course of a hockey game.

Are the differing results in *Shelley* and *Schacker* based on the distinction between basketball and hockey? Is the judge in *Schacker* correct that Morenberg's injury was "connected with the competition"? See *People v. Schacker*, 670 N.Y.S.2d 308 (N.Y. Dist. Ct. 1998).

In a third case, *State v. Hiott*, Richard and Jose, two juveniles, were shooting at each other with BB guns. Jose was hit and lost his eye, and Richard was charged with third-degree assault. Richard claimed that the shooting of BB guns was comparable to "dodge-ball, football, hockey, boxing, wrestling, 'ultimate fighting,' fencing and 'paintball'" and within the "limits of games for which society permits consent." Do you agree? See *State v. Hiott*, 987 P.2d 135 (Wash. Ct. App. 1999).

YOU DECIDE 8.5

Givens Miller, an 18-year-old, 210-pound football player, had a disagreement with his parents following a high school football game. Givens's father, George, responded by taking away Givens's cell phone and car keys. Givens repeatedly shouted at his parents, telling his

father to "take your G.D. money and 'f—' yourself with it." He then baited George, uttering, "What the 'f—,' man. I'm going to—you going to hit me, man? Are you going to hit me? What the 'f—,' man."

George responded, "No, I'm not going to hit you," and shoved Givens away from him. Givens kicked and punched George in his side; and, as Givens charged toward him, George punched Givens in the face. George then threw two more punches. Givens testified that at the time of the incident, he "was all jazzed up" from the game and "in an aggressive mood" and "kind of wanted to hit [George]" and he "kind of wanted [George] to hit [him]." Givens "suffered dental fractures and loose teeth. He also received two blows to the head, and testified that he may have lost consciousness for a brief moment." At the close of evidence, George objected to the jury charge because the court did not include an instruction on the defense of consent. Was the judge correct in not issuing an instruction on consent? See *Miller v. State*, 312 S.W.3d 209 (Tex. Crim. App. 2010).

In another case, *State v. Fransua*, the defendant told the victim that "he'd shoot him if he had a gun," and the victim handed the defendant a gun and said, "There's the gun. If you want to shoot me, go ahead." The defendant shot the victim in the head and relied on the justification defense of consent. Would you hold the defendant liable? See *State v. Fransua*, 510 P.2d 106 (N.M. Ct. App. 1973).

CRIME IN THE NEWS

In 2005, Florida passed a castle doctrine law, also popularly referred to as the stand your ground law, which expands the right of self-defense. In the last five years, roughly 31 states have adopted some or all provisions of the Florida law. These laws are inspired by the common law doctrine that authorizes individuals to employ deadly force without the obligation to retreat against individuals unlawfully entering their home who are reasonably believed to pose a threat to inflict serious bodily harm or death. Individuals under the castle laws possess the right to stand their ground whether they are inside the home or in the curtilage outside the home. The Florida stand your ground law extends the right to stand your ground to individuals outside the home and includes the privilege to fire a "warning shot" at an assailant.

The National Rifle Association (NRA) has been at the forefront of the movement to persuade state legislatures to adopt these castle laws. The NRA argues that it is time for the law to be concerned with the rights of innocent individuals rather than to focus on the rights of offenders. The obligation to retreat before resorting to deadly force, according to the NRA, restricts the ability of innocent individuals to defend themselves against wrongdoers. The law of self-defense places victims in the position of having to make a split-second decision about whether they are obligated to retreat and whether they are employing proportionate force. The preamble to the Florida law states that "no person . . . should be required to surrender his or her personal safety to a criminal . . . nor . . . be required to needlessly retreat in the face of intrusion or attack." In the words of the spokesperson for the National Association of Criminal Defense Lawyers, "Most people would rather be judged by 12 [a jury] than carried by six [pallbearers]."

The Florida castle law modified the state's law of self-defense and has three central provisions.

Public Place. Individuals in any location where they have "a right to be" and who are not engaged in criminal activity are presumed to be justified in the use of deadly force or threatened use of deadly force and have no duty to retreat and have the right to stand their ground. The individuals must reasonably believe that such force is required to prevent imminent death or great bodily harm or to prevent the imminent commission of a forcible felony to themselves or to another. Three questions are involved. Did the defendant have a right to be in the location? Was the defendant engaged in lawful activity? Was the defendant in reasonable fear of death or great bodily harm?

Home. Individuals are presumed to be justified in using deadly force against intruders who forcefully and unlawfully enter their residence or automobile. In the past under the Florida law, a jury when confronted with a claim of self-defense by an individual in the home who employed deadly force was asked to decide whether the defendant reasonably believed that an intruder threatened death or serious bodily injury. Under the new Florida law, the issue is whether an intruder forcibly and unlawfully entered the defendant's home.

Immunity. Individuals who are authorized to use deadly force are immune from criminal prosecution.

Prosecutors after reviewing a case may decide against bringing charges, despite a police decision to arrest an individual, because the prosecutor concludes that the individual has a valid claim of self-defense. Claims of self-defense are adjudicated in a preliminary hearing in which the prosecutor is required to establish a lack of self-defense by "clear and convincing evidence." The immunity provision prevents an individual who possesses a credible claim of self-defense from being brought to trial in criminal or civil court (a separate hearing is conducted in civil court in which an individual is required to establish entitlement to stand one's ground based on a preponderance of the evidence). The failure of a court to find that a defendant is immune from prosecution may be appealed. The individual whose claim is rejected in a preliminary hearing also may seek a plea bargain or rely on self-defense at trial. In some instances, the stand your ground law may influence the decision making of jurors despite the fact that the defense does not explicitly rely on the law.

The stand your ground law also subjects a law enforcement agency to civil liability that is responsible for arresting an individual who successfully relies on a stand your ground defense. At the same time, the Florida Supreme Court held in 2018 that police officers are entitled to rely on the stand your ground defense and to avoid a criminal trial.

The central criticism of castle doctrine laws is that the laws create a climate in which people will resort to deadly force in situations in which they previously may have avoided armed violence. This, according to critics, threatens to turn communities into "shooting galleries" reminiscent of the "old West," in which a significant percentage of people feel the need to carry firearms. Since the passage of the Florida law in 2005, the number of individuals with concealed-carry permits has increased by more than three times to more than 1.1 million permits.

There is evidence that in stand your ground states roughly 8% or 600 more homicides have been committed than otherwise would be expected. Researchers speculate that this results from the fact that ordinary interpersonal conflicts escalate into violent confrontations. This in turn has led to an increase in the number of cases in which individuals claim that the violence was justified on the grounds of self-defense.

The *Tampa Bay Times* has compiled a database of stand your ground cases and has published several informative studies. Because of the failure of localities to keep accurate

records, there is no fully accurate compilation of cases. Among the most important findings are these:

Number of Cases. The stand your ground law is being applied in a growing number of cases. The *Tampa Bay Times* database of nonfatal cases increased five times between 2008 and 2011. Several hundred defendants are invoking the law each year. As a result, the court system is overburdened with expensive and time-consuming cases. On the other hand, individuals who acted in justifiable self-defense are able to avoid prosecution.

Acquittal. As of July 2012, 67% of defendants who invoked the law were exonerated.

Background. Individuals with “records of crime and violence . . . have benefited most from the . . . law.” In the study of 100 fatal stand your ground cases, more than 30 of the defendants had been accused of violent crimes, and 40% had three or more arrests.

Race. Individuals asserting self-defense against African Americans were more successful than individuals who relied on self-defense against assailants of other races. Of individuals who killed an African American, 73% were not punished as compared to 59% of individuals killing an individual of another race. The race of the defendant appears to play little role in the result of cases. Proponents of the law claim that African American offenders are more likely to be armed.

Age. In February 2014, the *Tampa Bay Times* reported that 19% of stand your ground cases resulted in the deaths of children or teens. Another 14% involved individuals who were either 20 or 21.

In 2015, the American Bar Association (ABA), following a detailed study of stand your ground laws, determined that the laws had no deterrent impact on crime and had negatively impacted members of minority and ethnic groups. The ABA called on states to repeal and to refrain from adopting these laws.

The *Tampa Bay Times* notes that although stand your ground generally is applied in a responsible fashion by Florida prosecutors, there are a number of similar cases treated differently by local prosecutors. The newspaper also found cases that make a “mockery” of the law. “In nearly a third of the cases . . . defendants [who] initiated the fight, shot an unarmed person or pursued their victim . . . still went ‘free.’”

In 2006, Jason Rosenbloom was shot by his neighbor Kenneth Allen in the doorway to Allen’s home. Allen had complained about the amount of trash that Rosenbloom was putting out to be picked up by the trash collectors. Rosenbloom knocked on Allen’s door, and the two engaged in a shouting match. Allen claimed that Rosenbloom prevented Allen from closing the door to his house with his foot and that Rosenbloom tried to push his way inside the house. Allen shot the unarmed Rosenbloom in the stomach and then in the chest. Allen claimed that he was afraid and that “I have a right to keep my house safe.”

The case came down to a “swearing contest” between Rosenbloom and Allen. Allen claimed that the unarmed Rosenbloom “unlawfully” and “forcibly” attempted to enter his home. Rosenbloom’s entry created a presumption that Allen acted under reasonable fear of serious injury or death, and the prosecutors did not pursue the case. Under the previous law, the prosecution may have attempted to establish that Allen unlawfully resorted to deadly force because he lacked a reasonable fear that the unarmed Rosenbloom threatened serious injury or death.

The Florida stand your ground law became the topic of intense national debate when George Zimmerman, a neighborhood watch coordinator, was acquitted of the second-degree murder of 17-year-old Trayvon Martin. The controversy over stand your ground was further fueled by the conviction of Michael Dunn for the killing of 17-year-old Jordan Davis stemming from Dunn's complaint that Davis and his friends were playing music too loudly. Judge Russell Healey in sentencing Dunn to life imprisonment stated that this "exemplifies that our society seems to have lost its way. . . . We should remember that there's nothing wrong with retreating and deescalating the situation."

In 2017, a Florida judge rejected the stand your ground defense of Curtis Reeves, a retired Tampa, Florida, police officer who shot and killed Chad Oulson. Reeves confronted Oulson about the decedent's texting during a film. The judge determined that Oulson's throwing a bag of popcorn at Reeves did not constitute a basis for immunity under the stand your ground law.

Despite the controversy over the provisions of the Florida law, a Florida gubernatorial task force reported in 2012 that the castle law has been effective in protecting citizens and in inspiring confidence in the criminal justice system, and that it should be retained as part of the Florida Criminal Code.

In one of the latest controversies surrounding the Florida stand your ground law, Brittany Jacobs, 25, was sitting in a car parked in a handicapped space. Michael Drejka approached the automobile and determined that the vehicle did not display a handicap permit. Jacobs's boyfriend Markeis McGlockton, a Black man, along with their five-year-old son, exited a nearby convenience store and witnessed Jacobs and Drejka yelling at one another about whether the car was legally parked in the space. McGlockton, 28, approached Drejka, who is white, and shoved the 47-year-old to the ground. Drejka pulled out a gun and fatally shot McGlockton in the chest. The surveillance footage showed that McGlockton backed away after pushing Drejka to the ground although Drejka reported that he feared that McGlockton would attack him again. The sheriff of Pinellas County stated that Jacobs possessed a concealed carry permit and that his killing of McGlockton was justified under the stand your ground law. He described McGlockton as using a "violent push" that "slammed" Drejka to the ground. This decision evoked a rising chorus of protest, and Pinellas County prosecutor Bernie McCabe after interviewing witnesses and evaluating the evidence subsequently charged Drejka with manslaughter.

Stand your ground cases have been equally controversial in other states. In 2015, Wayne Burgarello, 74, was acquitted by a Nevada jury for firing five shots and killing one intruder and seriously wounding another intruder—both of whom were breaking into a vacant rental unit. Burgarello was tired of the burglary and vandalism of the empty rental unit and had lain in wait for the intruders.

A Nevada jury rejected a stand your ground defense by Markus Kaarma, who baited an intruder by placing a purse in an open garage. After being alerted by motion sensors that an intruder was entering the garage, Kaarma killed the 17-year-old burglar with four shots from a pump action shotgun. The jury rejected Kaarma's defense that he was protecting his home, and he was sentenced to 70 years' imprisonment.

In Montana, in September 2012, Dan Fredenberg was fatally shot by Brice Harper. Fredenberg suspected that Harper was having an affair with Fredenberg's wife. The unarmed Fredenberg decided to confront Harper and was shot dead by Harper as he entered Harper's garage. Dan Corrigan, the local prosecutor, concluded that Harper had been justified in killing Fredenberg, under the Montana stand your ground law, and decided against pressing charges. Corrigan explained, "You don't have to claim that you were afraid for your life. You just have to claim that he [the assailant] was in the house illegally. If you think someone's

going to punch you in the nose or engage you in a fistfight, that's sufficient grounds to engage in lethal force." Do you believe it is time to reconsider stand your ground laws? Would you be influenced in your view by evidence that stand your ground laws increase or decrease the willingness of individuals to resort to armed force to settle disputes?

CHAPTER SUMMARY

Justification defenses provide that acts that ordinarily are criminal are justified or carry no criminal liability under certain circumstances. This is based on the fact that a violation of the law under these conditions promotes important social values, advances the social welfare, and is encouraged by society.

Self-defense, for instance, preserves the right to life and bodily integrity of an individual confronting an imminent threat of death or serious bodily harm. Individuals are also provided with the privilege of intervening to defend others in peril. Defense of the dwelling preserves the safety and security of the home. The execution of public duties justifies the acts of individuals in the criminal justice system that ordinarily would be considered criminal. A police officer, for instance, may use deadly force against a "fleeing felon" who poses an imminent threat to the police or to the public. The right to resist an illegal arrest is still recognized in various states, but has been sharply curtailed based on the fact that the state and federal governments provide effective criminal and civil remedies for the abuse of police powers. Necessity or "choice of evils" justifies illegal acts that alleviate an imminent and greater harm. The defense of consent is recognized in certain isolated instances in which the defendant's criminal conduct advances the social welfare. These include incidental contact, sports, and medical procedures.

The justifiability of a criminal act is ultimately a matter for the finder of fact, either the judge or jury, rather than the defendant. The law generally requires that individuals relying on self-defense or necessity believe their acts are justified and that a reasonable person would find that the act is justified under the circumstances.

CHAPTER REVIEW QUESTIONS

1. Distinguish the affirmative defenses of justification and excuse.
2. List the elements of self-defense. Explain the significance of reasonable belief, imminence, retreat, withdrawal, the castle doctrine, and defense of others.
3. What are the two approaches to intervention in defense of another? Which test is preferable?
4. What is the law pertaining to the defense of the home? Discuss the policy behind this defense. Compare the laws pertaining to defense of habitation and self-defense.

5. How does the rule regulating police use of deadly force illustrate the defense of execution of public duties? Does this legal standard “handcuff” the police?
6. Why have the overwhelming majority of states abandoned the defense of resistance to an illegal arrest? Distinguish this from the right to resist excessive force.
7. What are the elements of the necessity defense? Provide some examples of the application of the defense.
8. Why do most state legal codes provide that an individual cannot consent to a crime? What are the exceptions to this rule?
9. Write a brief essay outlining justification defenses.

LEGAL TERMINOLOGY

affirmative defenses	
aggressor	jury nullification
alibi	justifications
alter ego rule	make my day laws
American rule for resistance to an unlawful arrest	misdemeanant
burden of persuasion	necessity defense
burden of production	nondeadly force
case-in-chief	objective test for intervention in defense of others
castle doctrine	perfect self-defense
choice of evils	presumption of innocence
deadly force	rebuttal
English rule for resistance to an unlawful arrest	retreat
fleeing felon rule	retreat to the wall
good motive defense	self-defense
imperfect self-defense	stand your ground law
intervention in defense of others	tactical retreat
	true man
	withdrawal in good faith

TEST YOUR KNOWLEDGE ANSWERS

1. False.
2. True.
3. False.
4. False.
5. False.

6. True.
7. False.
8. False.
9. False.
10. False.

9

EXCUSES

TEST YOUR KNOWLEDGE: TRUE/FALSE

1. The *M'Naghten* test for insanity requires a jury to determine whether a defendant possesses an uncontrollable impulse to commit a crime.
2. An individual who is found legally insane is not sentenced to prison and is released.
3. Alcohol and narcotics intoxication does not constitute a criminal defense.
4. Individuals under the age of 14 cannot be held criminally liable.
5. Individuals who voluntarily join a gang and are threatened with a severe beating unless they participate in an armed robbery likely will be able to rely on the defense of duress.
6. Individuals who are able to demonstrate that they were paid a significant amount of money by a government informant to commit a crime will be successful in relying on the defense of entrapment based on this fact alone.
7. Defendants who recently immigrated to the United States will be successful in relying on the defense that although they broke American law, their conduct was considered lawful in the country in which they were raised.

Check your answers at the end of the chapter on page 467.

Was Michael Moler Legally Insane When He Killed Nina Wright Because He Thought She Was a Witch?

[Michael] Moler told the two officers that he had “just killed that woman.” Moler then told the officers that “she had turned into a witch and that he twisted her head around and killed her.” (*Moler v. State*, 782 N.E.2d 454 [Ind. Ct. App. 2003])

INTRODUCTION

An act that is ordinarily subject to a criminal penalty is considered to be *justified* and carries no criminal liability when it preserves an important value and benefits society. Self-defense, for instance, protects human life against wrongdoers. The defendant insists, “I broke the law, but I did nothing wrong. Society benefited from my act.”

Excuses, in contrast, provide a defense based on the fact that although a defendant committed a criminal act, the defendant is not considered responsible. The defendant claims that although “I broke the law and my act was wrong, I am not responsible. I am not morally blameworthy.” This is illustrated by legal insanity that excuses criminal liability based on a mental disease or defect. Individuals are also excused due to youth or intoxication or in those instances when they lack a criminal intent as a result of a mental disease or defect. Defendants are further excused in those instances when they commit a criminal act in response to a threat of imminent harm or a mistake of fact or are manipulated and entrapped into criminal conduct.

Excuses are very different from one another, and each requires separate study. The common denominator of excuses is that the defendants are not morally blameworthy and therefore are excused from criminal liability.

THE INSANITY DEFENSE

English common law initially did not consider a mental disturbance or insanity as relevant to an individual’s guilt. In the 13th century, it was recognized that a murderer of “unsound mind” was deserving of a royal pardon, and as the century drew to a close, “madness” was recognized as a complete defense.¹ This more humanistic approach reflected the regrettable “wild beast” theory that portrayed “madmen” as barely removed from “the brutes who are without reason.”²

The **insanity defense** is one of the most thoroughly studied and hotly debated issues in criminal law. The debate is not easy to follow because the law’s reliance on concepts drawn from mental health makes this a difficult area to understand. Texas residents must have scratched their heads in 2004 when Deanna Laney was acquitted by reason of insanity for crushing the skulls of her three sons with heavy stones. After committing the crime, she had called the police to inform them that “I just killed my boys.” The youngest at the time was a 14-month-old who was left-brain injured and nearly blind. Two years earlier, another Texas mother, Andrea Yates, received a life sentence for drowning her five children in a bathtub. Yates told the police that the devil had told her to kill her children; and despite Yates’s history of mental problems and claim of insanity, the jury found that she was able to distinguish right from wrong. Yates’s conviction was overturned on appeal, and in July 2006, a Texas jury ruled Yates not guilty by reason of insanity. Laney reportedly believed that she and Yates had been selected by God to be witnesses to the end of the world.

In 2015, Eddie Ray Routh was convicted of the murder of famed former Navy SEAL Chris Kyle and Kyle’s friend Chad Littlefield. Kyle is credited with being the most deadly sniper in U.S. military history and the subject of the film *American Sniper*. The jury rejected Routh’s insanity defense because they determined that he knew the difference between right and wrong at the time of the murders. The defense relied on family members who testified that the former Marine

suffered from post-traumatic stress disorder (PTSD) and engaged in erratic behavior, threatening to kill his girlfriend one day and asking her to marry him the next day. The defense also presented a psychiatrist who testified that Routh had delusions and believed that Kyle and Littlefield were “pig assassins” sent to kill people. The prosecution experts, on the other hand, testified that Routh was an alcohol and drug abuser who feigned PTSD whenever he got in trouble with the law. He was sufficiently coherent to stop at a fast-food restaurant following the killings.

In 2012, James Holmes, 27, entered an Aurora, Colorado, movie theater showing the film *The Dark Knight Rises*. Holmes was equipped with protective gear and carried an AR-15, a shotgun, and two Glock pistols. He opened fire on a crowd of midnight moviegoers killing 12 and wounding 70. Holmes pled not guilty by reason of insanity. The prosecution alleged that Holmes had engaged in meticulous planning in carrying out the attack that was inconsistent with his claim of insanity. Two court-appointed psychiatrists concluded that Holmes was fully capable of “forming the intent and knowing what he was doing and the consequence of what he was doing.” There was evidence that Holmes had a family history of mental illness, had been haunted by ghosts as a child, and had attempted to commit suicide at age 11. A defense expert testified that Holmes was driven by a psychotic urge to kill. The jury found Holmes guilty on 165 criminal counts, although one juror refused to endorse capital punishment. As a result, Holmes was sentenced to life imprisonment.³

Defendants who rely on the insanity defense are typically required to provide notice to the prosecution. They are then subject to examination by a state-appointed mental health expert, and they will usually hire one or more of their own “defense experts.” These experts will interview the defendant and conduct various psychological tests. The prosecution and defense experts will then testify at trial, and additional testimony is typically offered on behalf of the defendant by people who are able to attest to the defendant’s mental disturbance.

The nature of a defendant’s criminal conduct is also important. The prosecutor may argue that a well-planned crime is inconsistent with a claim of insanity. The jury is then asked to return a verdict of “guilty,” “not guilty,” or “not guilty by reason of insanity” (NGRI). In some jurisdictions, the jury considers the issue of insanity in a separate hearing in the event that the defendant is found guilty.

Defendants found NGRI in some states are subject to immediate committal to a mental institution until they are determined to be sane and no longer pose a threat to society. In most states, a separate **civil commitment** hearing is conducted to determine whether the defendant poses a danger and should be interned in a mental institution. Keep in mind that this period of institutionalization may last longer than a criminal sentence for the crime for which the defendant was convicted.

Why do we have an insanity defense? Experts cite three reasons:

- *Free Will.* The defendant did not make a deliberate decision to violate the law. The defendant’s criminal act resulted from a disability.
- *Theories of Punishment.* Defendants who are unable to distinguish right from wrong or to control their conduct cannot be deterred by criminal punishment, and it would be cruel to seek retribution for acts that result from a disability.

- *Humanitarianism.* An individual found not guilty by reason of insanity may pose a continuing danger to society. This individual is best incapacitated and treated by doctors in a noncriminal rather than in a criminal environment.

In the United States, courts and legislators have struggled with balancing the protection of society against the humane treatment of individuals determined to be NGRI. There have been several tests for insanity, and in most instances states combine these tests in their statutory law. These tests are

- *M'Naghten*,
- irresistible impulse,
- *Durham* product test, and
- American Law Institute Model Penal Code standard.

Supreme Court Justice Stephen Breyer in his dissenting opinion in *Kahler v. Kansas* provides a comprehensive analysis of the insanity *defense* in each state. As you can see, there are significant differences in defining the test for insanity.⁴

- Forty-five states, the federal government, and the District of Columbia retain some inquiry into moral incapacity (defendant did not know right from wrong).
- Seven states and the federal government use some variant of the *M'Naghten* test with its alternative cognitive (not understanding the nature of the act) and moral incapacity prongs.
- Three states provide for the *M'Naghten* test along with the irresistible impulse test.
- Ten states base legal insanity on moral incapacity alone.
- Thirteen states and the District of Columbia have adopted variants of the Model Penal Code test, which combines the volitional incapacity with an expanded version of the moral incapacity test.
- New Hampshire alone relies on mental disease or product test.
- North Dakota has a unique formulation that asks whether the defendant “lacks substantial capacity to comprehend the harmful nature or consequences of the conduct, or the conduct is the result of a loss or serious distortion of the individual’s capacity to recognize reality.”

The vast majority of states in determining legal insanity focus on defendants’ ability to know right from wrong and secondarily on whether the defendants possessed the ability to control their behavior. You might gain some appreciation of what is considered an inability to tell right from wrong by considering a young child who has not been taught right from wrong and takes an object from a store without realizing that this is improper. As an example of an inability

to control behavior, think about a motorist who suddenly erupts in “road rage” and violently threatens you for driving too slowly.

Keep in mind that an individual who is “mentally challenged” may not necessarily meet the legal standard for insanity. A serial killer, for instance, may be mentally disturbed but still not considered to be so impaired by a mental illness as to be considered legally insane. Juries generally find the determination of insanity to be highly complicated, and they experience difficulty in following the often technical testimony of experts. As a result, jurors often follow their own judgment in determining whether a defendant should be determined to be NGRI.

You also should be aware that insanity is distinct from **competence to stand trial**. Due process of law requires that defendants should not be subjected to a criminal trial unless they possess the ability to intelligently assist their attorney and to understand and follow the trial. The prosecution of an individual who is found incompetent is suspended until the individual is found competent.

The Right-Wrong Test

Daniel M’Naghten was an ordinary English citizen who was convinced that British prime minister Sir Robert Peel was conspiring to kill him. In 1843, M’Naghten retaliated by attempting to assassinate the British leader and, instead, mistakenly killed Sir Robert’s private secretary. The jury acquitted M’Naghten after finding that he “had not the use of his understanding, so as to know he was doing a wrong or wicked act.” This verdict sent shock waves of fright through the British royal family and political establishment, and the judges were summoned to defend the verdict before Parliament. The judges articulated a test that continues to be followed by roughly half of American states.⁵

- At the time of committing the act, the party accused must have been suffering from a defect of reason, or from a disease of the mind, as a result of which
 - the defendant “did not know what he was doing” (did not know the “nature and quality” of the act), or
 - the defendant “did not know he was doing wrong.”

The “mental disease or defect” requirement is satisfied by any organic (physical) damage, psychological disorder, or intellectual deficiency (e.g., a low IQ or feeble-mindedness) that results in individuals’ either not knowing what they were doing or not knowing they were doing wrong.

The most common mental disorder or defect that results in legal insanity under the **M’Naghten test** for insanity is psychosis, a psychological disorder that results in an inability to distinguish between reality and fantasy. Another frequent mental disorder is neurosis, which is simply a compulsive drive to engage in certain behavior. The mental conditions that are generally not considered to fall within the notion of a mental disease or defect are sociopathic or personality disorders that lead individuals to engage in patterns of antisocial or criminal conduct. These people are generally aware of the difference between right and wrong and believe that they are above the law and the rules that apply to other people.⁶ A Georgia appellate court offered a fairly straightforward definition of mental disease or defect. The court stated that the “term *mentally ill* means having a disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality,

or ability to cope with the ordinary demands of life. The term *mentally ill* does not include a mental state shown only by repeated unlawful or antisocial conduct.”⁷

The requirement that the defendant did not know the “nature and quality” of the act is extremely difficult to satisfy. The common example is that an individual squeezing a victim’s neck must be so detached from reality as to believe that the victim’s neck is a lemon. Individuals suffering this level of mental disturbance are extremely rare, and the *M’Naghten* test assumes that these individuals should be detained and receive treatment and that criminal incarceration serves no meaningful purpose and is inhumane.⁸

Courts differ on what it means for a defendant to “know” that an act “was wrong.” Some judges interpret “know” to require an understanding that to kill is prohibited. Others demand a demonstration that the defendant fully comprehends that the reason killing is wrong is that it causes pain, hurt, and harm to the victim and to the victim’s family. Professor Arnold Loewy explains that “one may ‘know’ that it is wrong to kill in the sense that he can articulate these words, but lack the capacity to really feel or appreciate the wrongfulness of killing.”⁹

There also is an ongoing debate over whether a defendant must know that an act is a “legal wrong” or whether the defendant must know that the act is a “moral wrong.”

State v. Crenshaw attempted to resolve this conflict. The defendant Rodney Crenshaw was honeymooning with his wife in Canada and suspected that she was unfaithful. Crenshaw beat his wife senseless, stabbed her 24 times, and then decapitated the body with an axe. He then drove to a remote area and disposed of his wife’s body and cleaned the hotel room. Crenshaw claimed to be a member of the Muscovite religious faith, a religion that required a man to kill a wife guilty of adultery. He claimed he believed that his act, although illegal, was morally justified. Was Crenshaw insane based on his belief that his act was morally justified? Did he possess the capacity to distinguish between right and wrong?

Crenshaw was convicted. He appealed on the grounds that the judge improperly instructed the jury that insanity required a finding that as a result of a mental defect or disease, Crenshaw believed that his act was lawful rather than moral. The Washington Supreme Court, however, concluded that under either a legal or a moral wrongfulness test, Crenshaw was legally sane. The court noted that Crenshaw’s effort to conceal the crime indicated that he was aware that killing his wife was contrary to society’s morals as well as the law.

The Washington Supreme Court ruled that in the future, courts should not define “wrongfulness,” and that jurors should be left free to apply either a societal morality or a legal wrongfulness approach. Some states create an exception and consider individuals legally insane who believe that their actions resulted from a direct command from God (a “deific decree”).¹⁰

In *Clark v. Arizona*, the U.S. Supreme Court upheld the constitutionality of an Arizona statute that limited the insanity defense to individuals who did not know that “what [they were] doing was wrong” (moral incapacity). The statute did not include within the definition of insanity the other part of the *M’Naghten* test that takes in individuals who do not know the “nature and quality of the act” (cognitive or mental incapacity). The Supreme Court held that Arizona’s formulation satisfied the requirements of due process because evidence introduced to establish that Clark did not know the nature and quality of his act also would establish that he did not know that his act was wrong. The trial court heard evidence that Clark shot a police officer who he believed was an alien from outer space. Clark appealed on the grounds that the

trial court should have considered this evidence to determine whether Clark knew the nature and quality of his act. The Supreme Court held that Clark was not denied fundamental justice because this very same evidence was considered by the court in deciding whether Clark knew that his act was wrong.¹¹

In 2020, the Supreme Court revisited the insanity defense in *Kahler v. Kansas*. James Kahler on Thanksgiving shot and killed his estranged wife, the couple's two daughters, and his wife's grandmother. Kahler was convicted of four counts of capital murder and was sentenced by a jury to death. Kahler claimed that he had been denied due process of law by a Kansas law that prohibited him from raising the defense that his mental illness prevented him from distinguishing right from wrong (the moral incapacity test). In 1995, Kansas adopted a "cognitive incapacity law" that allows defendants to argue that as a result of a mental disease or defect they lacked the required criminal intent for the crime with which they are charged. Defendants, for instance, could raise the defense under Kansas law that they lacked a cognitive capacity because they did not know "what they were doing." Kahler, for example, could argue that he did now know the consequences of firing a gun at the victim or believed that he was shooting a wild boar. Kansas also allows defendants to present any type of mental health evidence at sentencing in an effort to reduce their punishment or to be committed to a mental health facility instead of a prison.¹²

Justice Elena Kagan explained that the Constitution does not require a specific test for insanity and that states are free in accordance with their view of the nature of criminal responsibility to make a choice about the version of the insanity defense that they adopt. The Supreme Court's endorsement of a single standard would prevent states from experimenting with various approaches to the insanity defense based on the evolving state of psychiatric knowledge. Justice Kagan noted that mandating states to adopt a moral incapacity standard would require striking down the five state laws that are similar to the Kansas law as well as possibly overturning the laws of 16 other states.

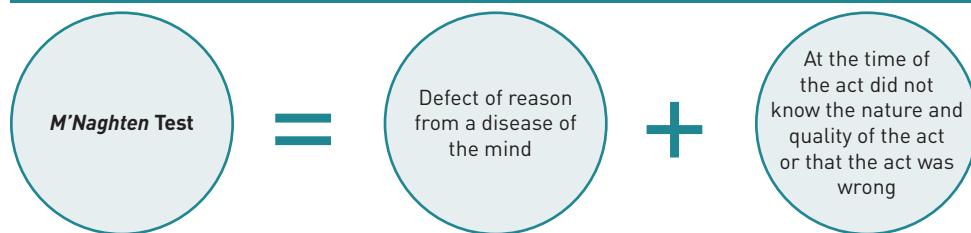
Justice Stephen Breyer in a dissent joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor agreed that "the Constitution gives the States broad leeway to define state crimes and criminal procedures, including leeway to provide different definitions and standards related to the defense of insanity." Kansas, however, has "not simply redefined the insanity defense"; it has "eliminated the core of a defense that has existed for centuries" that an individual should not be held criminally culpable who lacks the ability to distinguish right from wrong. This principle is so fundamental according to Breyer that eliminating the moral incapacity test violated Kahler's constitutional right to due process of law. Justice Breyer offered the somewhat less than clear example of a defendant who because of severe mental illness believed that he was killing a dog rather than a human being as compared to a defendant in a second case who believed, as a result of severe mental illness, that a dog had told him to kill the murder victim. Justice Breyer noted that "[u]nder the insanity defense as traditionally understood . . . the government cannot convict" defendants who did not understand that their actions were wrong. Breyer, however, noted that under Kansas law the first defendant would be considered legally insane because this defendant did not possess the criminal intent to kill a human being while the second defendant could be criminally convicted of murder because this defendant complied with the demand made by the dog to unlawfully kill the victim.

The Supreme Court has held that an inmate who does not recall the details of a crime may be considered legally competent and executed by Alabama although an inmate who does not understand the reason for the execution is legally insane and it would be cruel to execute this

individual. In other words, in the latter instance, the individual does not appreciate the difference between right and wrong, and the execution would serve no retributive purpose.¹³

It's likely you are fairly confused at this point. The right-wrong test is clearly much too difficult to be easily applied by even the most educated and sophisticated juror. In the end, juries tend to follow their commonsense notion of whether the defendant was legally sane or insane.

FIGURE 9.1 ■ The Legal Equation: *M'Naghten* Right-Wrong Test



The Irresistible Impulse Test

The *M'Naghten* test is criticized for focusing on the mind and failing to consider emotions. Critics point out that an individual may be capable of distinguishing between right and wrong and still may be driven by emotions to steal or to kill. Many of us are aware of the dangers of smoking, drinking, or eating too much and yet continue to indulge in this behavior. Various states responded to this criticism by broadening the *M'Naghten* standard and adopting the irresistible impulse test. This is often referred to as the “third branch of *M'Naghten*.” The irresistible impulse theory was articulated as far back as 1887 when an Alabama court ruled that Nancy Parsons had been driven to assist in the killing of her husband by the delusion that he had cast an evil spell that caused her to suffer from a prolonged and life-threatening illness.

The **irresistible impulse test** requires the jury to find defendants NGRI in the event that the jurors find that the defendants possessed a mental disease that prevented them from curbing their criminal conduct. Defendants may be found legally insane under this test despite the fact that they are able to tell right from wrong. Individuals are not required to act in an explosive or impulsive manner under the irresistible impulse test and may calculate, plan, and perfect their crime. The central consideration is whether the disease overcame a defendant’s capacity to resist the impulse to kill, rape, maim, or commit any other crime. Most courts also do not require that individuals lack total capacity to control their criminal impulses.¹⁴ In 1887, in *Parsons v. State*, the Alabama Supreme Court articulated the irresistible impulse test¹⁵:

1. At the time of the crime, was the defendant afflicted with a “disease of the mind”?
2. If so, did the defendant know right from wrong with respect to the act charged? If not, the law excuses the defendant.
3. If the defendant did have such knowledge, the law will still excuse the defendant if two conditions concur:

- A. if mental disease caused the defendant to so far lose the power to choose between right and wrong and to avoid doing the alleged act that the disease destroyed the defendant's free will, and
- B. if the mental disease was the sole cause of the act.

John Hinckley's acquittal by reason of insanity for the attempted assassination of Ronald Reagan sparked a reconsideration and rejection of the irresistible impulse test. After all, why should Hinckley be ruled legally insane because he attempted to kill President Reagan to fulfill an uncontrollable impulse to attract the attention of Jodie Foster, a young female film star?

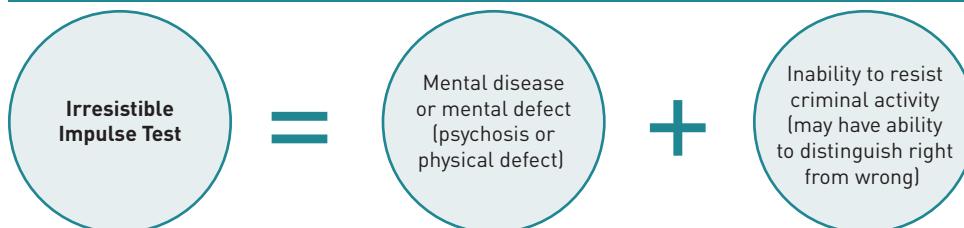
There was also a recognition that psychiatrists simply were unable to determine whether an individual experienced an irresistible impulse. The Fifth Circuit Court of Appeals concluded that the lack of knowledge concerning human impulses dictated that all criminal impulses should be considered "resistible." The court reasoned the irresistible impulse test had "cast the insanity defense adrift upon a sea of unfounded scientific speculation."¹⁶

Critics claimed that defendants were regularly making false claims of an irresistible impulse in an attempt to gain an acquittal. In *State v. Quinet*, the defendant conceded that he was able to distinguish right from wrong, but contended that he was unable to control himself and that he was driven to plan the rape and murder of 27 of his former female classmates and an escape to Australia where he planned to commit suicide. The Connecticut Supreme Court rejected the defendant's claim and called attention to his demonstrated ability to plan and patiently wait to initiate the attacks, his reliance on videos to put himself in the proper mood to carry out the sexual assaults, and the emotional stability that enabled him to enjoy a dinner with friends several days prior to his unsuccessful effort to carry out the first attack.¹⁷

As a result, several jurisdictions abolished the irresistible impulse defense. The U.S. Congress adopted the so-called John Hinckley Amendment that eliminated the defense in federal trials and adopted a strict *M'Naghten* standard.¹⁸

- *Affirmative Defense.* It is an affirmative defense to a prosecution under any federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.
- *Burden of Proof.* The defendant has the burden of providing the defense of insanity by clear and convincing evidence.

FIGURE 9.2 ■ The Legal Equation: Irresistible Impulse Test



The *Durham Product Test*

The **Durham product test** was intended to simplify the determination of legal insanity by eliminating much of the confusing terminology. The “product” test was first formulated by the New Hampshire Supreme Court in *State v. Pike* in 1869.¹⁹ This standard was not accepted or even considered by any other jurisdiction until it was adopted in 1954 by the U.S. Court of Appeals for the District of Columbia.²⁰

Durham v. United States provided that an accused is “not criminally responsible if his unlawful act was the product of mental disease or mental defect.” This permitted expert witnesses to provide a broad range of information concerning a defendant’s mental health and simplified the task of the jury, which now was required to determine only whether the defendant acted as a result of a mental disease or defect. Jurors no longer were placed in the position of making the difficult determination whether the defendant knew the difference between right and wrong or acted as a result of an irresistible impulse. The only requirement was to evaluate whether the accused was suffering from a disease or defective mental condition at the time the criminal act was committed and whether the criminal act was the product of such mental abnormality. However, the decision left the definition of a mental disease or defect undefined.

The District of Columbia Court of Appeals abandoned this experiment after 18 years, in 1972, after realizing that the “product test” had resulted in expert witnesses playing an overly important role at trial.²¹ In *Blocker v. United States*, two experts from St. Elizabeth’s Hospital concluded that Blocker suffered from a sociopathic personality disorder and testified that this did not amount to a mental disease or defect. Blocker was granted a new trial after pointing out that less than a month following the verdict in his case, another defendant was ruled legally insane as a result of a decision by the psychiatrists at St. Elizabeth’s to change their position and to accept that a sociopathic personality disorder did indeed constitute a mental disease or defect.²²

FIGURE 9.3 ■ The Legal Equation: Durham Product Test



The Substantial Capacity Test

Psychiatric experts urged the American Law Institute (ALI) to incorporate the *Durham* product test into the Model Penal Code. The ALI, instead, adopted a modified version of the *M’Naghten* and irresistible impulse tests. Section 4.01(1)(2) provides that

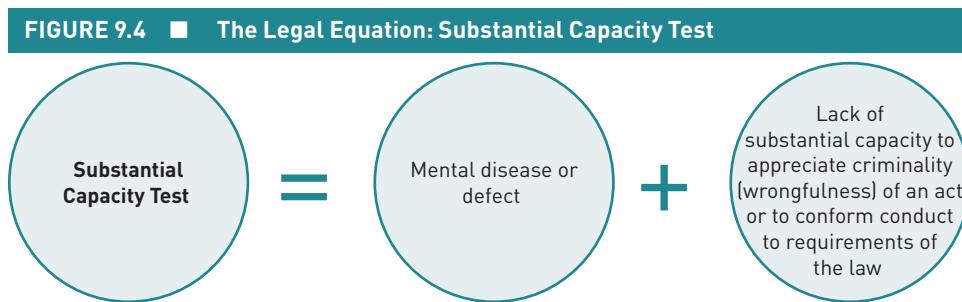
- [a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the

criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law. . . . The terms “mental disease or defect” do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

The important point is that the ALI **substantial capacity test** significantly broadens the test for legal insanity and increases the number of defendants who may be judged to be legally insane.

- *Appreciate.* The ALI test modifies *M'Naghten* by providing that defendants may lack a substantial capacity to appreciate rather than know the criminality of their conduct. This is intended to highlight that defendants may be declared legally insane and still know that an act is wrong because they still may not appreciate the full harm and impact of their criminal conduct. In other words, a defendant may know that sexual molestation is wrong without appreciating the harm a sexual attack causes to the victim.
- *Substantial Capacity.* The ALI test requires that defendants lack a substantial capacity to appreciate the criminality of their conduct or to conform their conduct to the requirements of the law. The ALI observes that a test calling for total impairment is not “workable” because it limits the application of legal insanity to individuals suffering from a delusional psychosis or to individuals who have absolutely no capacity to conform their conduct to the requirements of the law.
- *Conform Conduct to the Requirements of the Law.* The ALI standard does not use the word *impulse* in order to avoid the suggestion that individuals who are driven by emotions to break the law must act immediately and spontaneously and may not reflect and brood over and plan their criminal conduct.
- *Wrongfulness.* The ALI defines wrongfulness as an inability to appreciate that the community morally disapproves of an act and explains that, in most cases, an individual will be unaware that such an act is also contrary to the criminal law. In order to be considered legally insane, defendants who believe that their criminal conduct is justified must possess an inability to appreciate that the community would view their act as immoral. In other words, the accused must believe that the community would endorse the murder of an individual who, in fact, is a messenger of “Satan the devil.” The test also stresses that mental disease or defect does not include sociopaths or an abnormality that causes repeated criminal or antisocial conduct.

The ALI test was adopted by a majority of states and all but one of the federal circuit courts of appeals. The ALI’s more tolerant and broader view of legal insanity was abandoned by all but a handful of states following Hinckley’s attempted assassination of President Reagan in 1981. The trend is to follow the lead of the U.S. Congress and to return to *M'Naghten*. These revised statutes typically integrate aspects of the substantial capacity test.



Burden of Proof

The defendant possesses the initial burden of going forward in every state. The defendant is presumed sane until some evidence is produced challenging this assumption. The defendant's burden varies and ranges from a "reasonable doubt" to "some evidence," "slight evidence," or a "scintilla of evidence." In roughly half of the states, the prosecution then possesses the burden of persuasion to establish sanity beyond a reasonable doubt. The defendant possesses the burden of persuasion in other jurisdictions by a preponderance of the evidence. In the federal system and in a small number of states, the defendant has the burden of establishing insanity by "clear and convincing evidence." A defendant must meet this burden in order for the issue of insanity to be presented to the jury.²³

The Future of the Insanity Defense

Critics contend that the insanity defense undermines the functioning of the criminal justice system.

- *Bias.* Wealthy defendants are able to hire experts and are advantaged over the indigent. The insanity defense may also be exploited by perfectly sane defendants who have the resources to mount a credible insanity defense.
- *Theories of Punishment.* The insanity defense undermines the criminal justice system's concern with deterrence, retribution, and incapacitation by acquitting legally guilty defendants by reason of insanity.
- *Moral Blameworthiness.* The legally insane are not considered morally blameworthy and, as a consequence, are not incarcerated. On the other hand, there typically is a fine line between the legally sane and insane. Yet, the legally insane avoid imprisonment. The insanity defense also results in special treatment for individuals who are psychologically disadvantaged, while the law ignores disabilities such as economic deprivation.
- *Experts.* The insanity defense typically involves a battle of experts who rely on technical language that is difficult for jurors to understand. As a result, decisions on legal insanity may be based more on subjective impressions than on reasoned analysis.

Defenders of the insanity defense point out that critics exaggerate the significance of the insanity defense for the criminal justice system and that only a small number of deserving defendants are generally evaluated as legally insane. Statistics suggest that the defense results in an acquittal by reason of insanity in less than 1% of all criminal trials per year; this translates into an average of 33 defendants. These individuals may also spend more time institutionalized in a mental institution than they would serve were they criminally convicted.²⁴

Idaho, Montana, Kansas, and Utah have abolished the insanity defense and, instead, permit defendants to introduce evidence of a mental disease or defect that resulted in a lack of criminal intent. Idaho, for example, provides that a “[m]ental condition shall not be a defense to any charge of criminal conduct.” Evidence of state of mind is admissible in Idaho to negate criminal intent, and a judge who finds that a defendant convicted of a crime suffers from a mental condition requiring treatment shall incarcerate the defendant in a facility where the defendant will receive treatment.²⁵ State supreme courts have ruled that the insanity defense is not fundamental to the fairness of a trial and that the alternative of relying on evidence of a mental disease or defect to negate criminal intent is consistent with due process. Defendants under this alternative approach, however, continue to rely on experts and highly technical evidence.²⁶

In 2012, the U.S. Supreme Court denied a request to review the Idaho law. Justices Breyer, Ginsburg, and Sotomayor dissented from the decision. They pointed to what they argued was a problem with the Idaho law and with other laws abolishing the insanity defense, which you may find somewhat confusing. In example one, a defendant believes that the person killed is a wolf, and the defendant thus lacks a criminal intent to kill a human being. In example two, the defendant due to insanity believes that a supernatural wolf orders that an individual be killed. In this instance, the defendant possesses the criminal intent to kill a human being. In both examples, the defendant is unable due to insanity to appreciate that the homicide is wrong. In Idaho, the defendant in example one could argue that there was a lack of a criminal intent to kill an individual because the defendant believed that the victim was a wolf. In contrast, the defendant in example two would not be able to argue that there was a lack of criminal intent to kill an individual because this defendant believed that the victim was a human being.²⁷

Thirteen states have adopted a verdict of **guilty but mentally ill (GBMI)**. Eleven of these states continue to retain the insanity defense; and in these states, jurors may select from among four verdicts: guilty, not guilty, NGRI, and GBMI. A verdict of GBMI applies when the jury determines beyond a reasonable doubt that a defendant was mentally ill, but not legally insane, at the time of the criminal act. The defendant receives the standard criminal sentence of confinement and is provided with psychiatric care while interned. The intent is to provide jurors with an alternative to the insanity defense that provides greater protection to the public.

The GBMI verdict has thus far not decreased findings of legal insanity. Nevertheless, advocates of the insanity defense remain fearful that jurors will find the GBMI verdict more attractive than verdicts of NGRI.²⁸

In the last analysis, is it realistic to ask judges and juries to evaluate a defendant's mental stability? The Fifth Circuit Court of Appeals questioned whether we are serving the purpose of protecting society and deterring crime by introducing confusing medical concepts into criminal trials. At present, the law limits legal insanity to individuals who are unable to distinguish

"right from wrong" while, in most states, refusing to recognize legal insanity in the case of individuals driven by an irresistible impulse. Is this a proper place to draw the line? Do we need an excuse of legal insanity?²⁹

The first case in this chapter, *Moler v. State*, asks whether juries may place more weight on the testimony of lay witnesses than on the expert opinion of mental health professionals in determining whether a defendant was mentally insane at the time of a killing. The question is whether jurors who give limited importance to the testimony of a psychiatrist risk sending an individual who is mentally challenged to prison where the individual may receive little treatment and pose a behavior problem.

WAS THE JURY JUSTIFIED IN DISREGARDING PSYCHIATRIC TESTIMONY?

MOLER V. STATE, 782 N.E.2D 454 (IND. CT. APP. 2003)

Opinion by Baker, J.

Issue

Appellant-defendant Michael L. Moler appeals his conviction for Murder, a felony, challenging sufficiency of the evidence. . . . Specifically, Moler argues that his conviction may not stand because the State presented no evidence demonstrating that he was sane at the time of the crime. Specifically, Moler notes that while both expert witnesses testified that he was mentally ill at the time he killed Cummins, the State was unable to present witnesses to testify about his mental state at the time he committed the crime.

Facts

Moler was living with Neil Wright and Neil's mother, Nina Wright. Both Neil and Nina knew that Moler had schizophrenia, but both also knew that Moler functioned normally while on medication. Six months prior to the murder, Nina's mother, Ethel Cummins, moved into Nina's residence. Moler helped care for the elderly Cummins, and Neil and Nina trusted him to care for her.

On the morning of January 6, 1998, Jean Sarver and her husband dropped Moler off at Lifespring Mental Health Services for an injection of anti-psychotic medication. During the drive, Moler appeared normal and spoke with the Sarvers as usual. The Sarvers then drove to their shop, not far from Lifespring. After Moler received his medication, he walked to the Sarvers' shop, whereupon Mr. Sarver drove Moler home.

That afternoon, Moler picked Neil up from work and drove him home. Moler, Neil, and Cummins spent the afternoon watching television. During this time, Moler appeared fine and behaved normally. When Neil and Nina had to run an errand that evening, they left Cummins in Moler's care.

Upon returning, however, Neil and Nina found Cummins lying next to the couch with blood everywhere. When Moler, standing at the kitchen sink, shirtless, saw Neil, he said, "I

didn't mean to do it. She's a witch. She turned into a witch." Neil hit Moler, who ran out of the house. Neil called for an ambulance, which soon arrived. Police officers also appeared on the scene. Cummins was transported to a hospital.

After the ambulance left, Officer Keith Hartman of the Jefferson County Sheriff's Department was speaking with Indiana State Trooper George True. Moler approached the officers. Officer Hartman noticed that Moler was shirtless, had stains on his jeans, and had scratches on his knuckles and hands. Moler told the two officers that he had "just killed that woman." Moler then told the officers that "she had turned into a witch and that he twisted her head around and killed her." Madison Police Captain Daniel Stephan, who knew Moler and was also at the scene, heard his name being called by Moler. Captain Stephan walked to where Moler, Officer Hartman, and Officer True were standing. Moler went on to tell Captain Stephan that he had killed a witch....

Captain Stephan drove Moler to the Jefferson County Sheriff's Department. During the drive Moler appeared normal. Moler then began telling Captain Stephan how he attacked Cummins, though Captain Stephan repeatedly told Moler that Moler did not have to speak. After arriving at the Jefferson County Sheriff's Department, Moler was read his *Miranda* rights and signed a waiver form. Moler told Chief Deputy Sheriff Steve Henry that Cummins's hair "stood straight up." Moler then "went over and started to twist her head around." While he was doing this, "she turned into a witch, so he had to go ahead and kill her then."

The State initially charged Moler with attempted murder and aggravated battery. However, Cummins died six days after the attack. As a result, the State amended the information and charged him with murder. On March 18, 1998, Moler filed a notice of an insanity defense. On May 19, 1998, the trial court found Moler competent to stand trial. Moler was tried three times: the first verdict of guilty but mentally ill was vacated by the trial court as a result of juror misconduct; the second trial commenced but was terminated due to media coverage, and venue was transferred to Ripley County; the third trial, held in Ripley County, ended with a hung jury.

A fourth trial began on February 19, 2002. Prior to trial, the court had appointed two mental health professionals to evaluate Moler's mental state. At trial, Dr. Don A. Olive—who met with Moler several times—testified that "as a result of [the] mental disease [Moler] was unable to appreciate the wrongfulness of his conduct." Dr. Rodney Deaton testified, after interviewing Moler and reviewing Moler's medical records, that Moler was insane at the time of the killing.

Even though both experts testified that Moler could not grasp the unlawfulness of his acts, Moler's account to police regarding a "witch" remained consistent, and the forensic evidence showed that Cummins's head had indeed been "twisted," Moler was found guilty but mentally ill of both murder and aggravated battery. The trial court merged the aggravated battery conviction with the murder conviction. Moler was sentenced to the Department of Correction for fifty-five years, three of which were suspended. He now appeals.

Reasoning

Moler argues that his conviction may not stand because the State presented no evidence demonstrating that he was sane at the time of the crime. Specifically, Moler notes that while both expert witnesses testified that he was mentally ill at the time he killed Cummins, the State was unable to present witnesses to testify about his mental state at the time he committed the crime.

We first note that Moler never denied actually striking and killing Cummins. Rather, Moler's theory of defense was that he was insane at the time of the offense, thereby vitiating his culpability. For his insanity defense to succeed, Moler had to prove by a preponderance of the evidence that "as a result of mental disease or defect, he was unable to appreciate the wrongfulness of the conduct at the time of the offense." Ind. Code § 35-41-3-6(a). . . .

The facts of this case are remarkably similar to those in *Barany v. State*, where our supreme court upheld a conviction notwithstanding unanimous expert opinion that the defendant was insane at the time he killed his live-in companion. 658 N.E.2d 60, 64 (Ind. 1995). In *Barany*, neighbors saw the defendant, naked, sitting on the end of a pier. Barany's live-in companion, Judith Tomlinson, placed a blanket on Barany, whereupon Barany bit Tomlinson's finger off. Tomlinson quickly ran back into her house. After a short while, Barany followed Tomlinson into the house and discovered that she was on the phone. He shot her eight times, used a splitting maul to destroy household appliances, and struck Tomlinson's body with the maul. At trial, three court-appointed psychiatrists testified that at the time of the murder, Barany was unable to understand the wrongfulness of his conduct. However, a police detective testified that a few hours after the crime, Barany told him that the victim nagged and complained. One of Barany's friends testified that Barany "seemed O.K." to him. Barany's sister testified that Barany had related to her that he believed Tomlinson was calling the police when he killed her. The jury found Barany guilty but mentally ill. On direct appeal, our supreme court upheld the conviction, finding that "the jury could have decided that [the lay] testimony about [Barany's] behavior was more indicative of his actual mental health at the time of the killing than medical examinations." [In other words, the jury may discount the testimony of experts in determining whether the defendant was insane at the time of the crime and rely on the testimony of lay witnesses.]

Here, as in *Barany*, the medical experts unequivocally testified that Moler was insane at the time he killed the victim. However, lay witnesses testified about Moler's behavior before the crime occurred. Neil testified that Moler "seemed to be fine" during the afternoon of January 6, 1998. Nina testified that she saw nothing unusual in Moler's behavior the afternoon before the murder occurred. Jean Sarver testified that her conversation with Moler was normal during the morning drive to Lifespring. Sheri Goode, who gave Moler the injection at Lifespring, testified that "every time" a patient came for a shot, the patient was asked questions about suicidal or homicidal ideas. Goode also testified that nothing unusual was detected during Moler's January 6, 1998[,] visit.

Lay witnesses also testified about Moler's demeanor following the attack on Cummins. Captain Stephan, who had known Moler for twelve years, testified that Moler seemed "pretty normal" after the attack. Officer Hartman testified that Moler's general demeanor was "very calm, very relaxed" except for Moler's anxiety about not being allowed into the Wright residence to retrieve some cigarettes. Officer True observed that Moler's demeanor remained calm while Moler told him about how he killed Cummins.

While both medical experts concluded that Moler could not appreciate the wrongfulness of his conduct at the time of the crime, we are forced to follow the rule enunciated by our supreme court in *Barany*. Because lay witnesses testified to his normal demeanor before and after the crime, "the jury could have decided that [the lay] testimony about [Moler's] behavior was more indicative of his actual mental health at the time of the killing than medical examinations." Consequently, we are compelled to hold that sufficient evidence was presented to convict Moler of murder. . . .

[W]e note that *Barany* has made it very difficult even for defendants with well-documented mental illnesses to successfully raise the insanity defense. Under the rule of *Barany*, even if all expert testimony regarding a defendant's state of mind points to the fact that the defendant could not have appreciated the wrongfulness of his actions at the time of a crime, the jury is free to disregard the experts' opinions in favor of lay evidence of the defendant's demeanor before and after the crime.

While the jury is the ultimate finder of fact, we fail to see how evidence of a defendant's demeanor before and after a crime can have much probative value when a schizophrenic defendant is involved. Persons that suffer from schizophrenia can experience unpredictable delusions and hallucinations. A delusion is "a false belief based on incorrect inference about external reality that is firmly sustained despite what almost everyone else believes and despite what constitutes incontrovertible and obvious proof or evidence to the contrary." A hallucination involves "a sensory perception that has the compelling sense of reality of a true perception but that occurs without external stimulation of the relevant sensory organ."

During Moler's attack on Cummins, he "saw" her turn into a witch, according to several lay witnesses who related what Moler told them. Witnesses also testified that Moler told them he had "heard" someone tell him to "kill her and to send her home." Both court-appointed psychiatrists testified that Moler could not appreciate the wrongfulness of his conduct at the time of the attack. Although Neil and Nina testified to his apparent normality before the murder, the stark fact remains that his schizophrenia required periodic injected anti-psychotic medication, and he had just received such an injection the morning of the day the murder took place. Under these facts and circumstances, it is difficult to escape the conclusion that Moler suffered an unexpected and unpredictable hallucination and delusion at the time he attacked Cummins. It seems that Moler had a "firmly sustained" belief that Cummins was a witch from which he needed to protect himself. It also appears that what he saw before he attacked Cummins had a sufficient "compelling sense of reality" to cause him to use physical force against Cummins. Indeed, even after the attack, Moler did not recant his statement that Cummins had turned into a witch.

Holding

The proposition that a jury may infer that a person's actions before and after a crime are "indicative of his actual mental health at the time of the" crime is logical when dealing with a defendant who is not prone to delusional or hallucinogenic episodes. However, when a defendant has a serious and well-documented mental disorder, such as schizophrenia, one that causes him to see, hear, and believe realities that do not exist, such logic collapses. In the interests of justice, we hope that our supreme court will revisit this rule.

[The trial court verdict of guilty but mentally ill is] affirmed.

Questions for Discussion

1. What was the legal test for legal insanity in Indiana?
2. Summarize the evidence supporting that Moler was legally insane and the evidence supporting that Moler was legally sane.
3. The Indiana appellate court upholds the trial court's verdict that Moler is "guilty but mentally ill." Why do you think the trial court jury reached this decision rather than ruling that Moler was legally insane?

4. Why is the appellate court critical of the rule of evidence that a jury may examine a defendant's behavior before and after a crime as evidence of "actual mental health"?
5. How can we determine whether a defendant who was acting normally before and after a killing was legally insane at the time of the killing?
6. As a juror in the *Moler* case, would you pay more attention to the testimony of lay witnesses who observed Moler's behavior or to the testimony of psychiatrists? Is it significant that the State of Indiana did not call a psychiatrist to testify that Moler was legally sane at the time he killed Cummins?

CASES AND COMMENTS

1. In *Galloway v. State*, the Indiana Supreme Court overturned a trial judge's decision that Galloway should be found GBMI for the murder of his grandmother. The trial court judge explained that the evidence indicated that Galloway was NGRI and should be sentenced to long-term institutionalization in a mental care facility. The judge, however, regretted that this was not a realistic option. The Indiana health care system lacked the resources to institutionalize the population of mentally challenged individuals in the state on a long-term basis. Once stabilized, Galloway as in the past would be released from a mental health facility back into the community. The judge predicted that it only would be a matter of time before Galloway stopped taking his medicine and suffered yet another violent episode that would endanger the public. As a result, the judge explained that the only way to protect the community was to find Galloway GBMI and to sentence him to prison.

The Indiana Supreme Court in finding that Galloway was legally insane relied on expert testimony and numerous medical records substantiating that the defendant suffered from bipolar disorder. Galloway had a lengthy history of mental illness and had numerous contacts with the mental health system prior to killing his grandmother. He had been diagnosed with bipolar disorder by 20 different physicians and had been voluntarily and involuntary detained in a mental health facility for short-term treatment more than 15 times. The court, though sympathizing with the dilemma confronting the trial court judge, found that Galloway was NGRI.

In a dissenting opinion, Randall T. Shepard, chief justice of the Indiana Supreme Court, wrote that Galloway had been institutionalized in the past and then released based on the conclusion of mental health professionals that he had been stabilized. The only way to protect the public, in Judge Shepard's opinion, was to find Galloway GBMI, which would result in his imprisonment rather than institutionalization in a psychiatric facility. Do you agree with Judge Shepard? Does the insanity defense run the risk that dangerous individuals after being institutionalized will be found to be healthy and released back into the community after a relatively brief period of institutionalization? Consider whether states should abolish the insanity defense and instead allow juries and judges to return a verdict of GBMI. See *Galloway v. State*, 938 N.E.2d 699 (Ind. 2010).

2. On January 24, 1992, Freddie Armstrong went to Loche's Mortuary to obtain a copy of his father's death certificate and left while Mrs. Loche searched for the certificate. Armstrong returned to the business office after about 45 minutes with a briefcase. Mrs.

Loche, who had been joined in the office by Rev. Fred Neal, asked Armstrong if he still wanted the certificate. Armstrong without replying opened the briefcase and removed a large butcher knife. Mrs. Loche ran for help, leaving Rev. Neal alone in the office with defendant.

Shortly thereafter, Officer Billy Womack arrived at the mortuary and found Rev. Neal on the floor of the office with Armstrong standing over him with a bloody knife. Officer Womack drew his firearm and ordered Armstrong to drop the knife. He disregarded Womack and walked up the nearby stairway as additional officers arrived. Defendant then turned and descended the stairs, while the officers tried unsuccessfully to communicate with him. Armstrong severed Rev. Neal's head from his body. Armstrong with a grin on his face picked up the head by the ears and held it up for the officers to see. According to Officer Womack's account the defendant "appeared to be a person possessed." Armstrong then put the head down, picked up Rev. Neal's headless body and placed it in a chair, picked up the head, and walked upstairs and dropped it in the toilet. Returning downstairs, defendant put the knife in the briefcase, put on his hat, and walked toward the entrance door as if nothing had happened. The officers thereupon arrested Armstrong for murder. Officer Womack stated that he continually attempted to communicate with Armstrong, who did not respond, and that the officers never felt threatened by him. Rev. Neal had been stabbed more than 20 times, and the cause of his death was multiple chest wounds.

Armstrong explained that he was sitting in his car outside the building listening to music on the radio when he saw Rev. Neal enter the mortuary, and a voice said, "That's him." Believing that Rev. Neal was the anti-Christ and complying with the hallucinatory command, Armstrong decided to cut Rev. Neal's head from his body to prove that, as an anti-Christ, that Rev. Neal would not bleed. Armstrong stated that Rev. Neal was one of a group of preachers who had "taken his stone" while he was hospitalized a week earlier. Following the killing, Armstrong was taken by the police from the jail to the doctor to treat a cut on his hand of unknown origin. After the visit, defendant tore off the bandages and bit his wound, causing the officer to place him in restraints.

Medical evidence established that defendant, himself a minister, had been medically discharged from military service as a paranoid schizophrenic in the late 1960s during the Vietnam conflict. Defendant had been admitted to mental institutions in 1969, 1970, 1973, 1974, 1980, 1983, 1987, and 1992 and had been released three days before the killing of Rev. Neal. Four of the five psychiatric and psychological experts at trial concluded that defendant's mental illness rendered him unable to distinguish right from wrong at the time of the offense. On the other hand, the prosecutor presented evidence that defendant behaved normally on the morning of the homicide and that even a paranoid schizophrenic in a psychotic state can know the difference between right and wrong.

Because of the severity of defendant's condition, he had been required to visit a medical clinic every two weeks and to have shots of long-acting (over a period of two to three weeks) prolixin-D on every visit. On January 10, 1992, defendant had his maintenance therapy injection of prolixin-D. Three days later and eleven days before the killing of Rev. Neal, Armstrong was committed involuntarily to a psychiatric facility on an emergency basis. He was found to be psychotic, suicidal, gravely disturbed and agitated, dangerous, hyperalert, insomniac, and possessing an extremely impaired judgment. During the first three days, he physically attacked staff members, resulting in his being placed in restraints. After his violent behavior was under control, the

defendant was released from the hospital on January 21, three days before he killed Rev. Neal. Armstrong was to return on Friday (the day of the killing) for an injection and to discuss his desire to transfer his treatment to a private physician. While in jail following the killing of Rev. Neal awaiting a sanity hearing, the defendant refused to take his medication, and he continued to exhibit odd behavior. He stopped up the urinal and flooded his cell. He walked around naked carrying a bible, and he expressed his fear that the federal government had been trying to kill him for several years. Was Armstrong legally insane under the various tests for legal insanity? See *State v. Armstrong*, 671 So.2d 307 (La. 1996).

YOU DECIDE 9.1

Andrea Yates in February 1999, after six years of marriage, gave birth to her fourth child. She suffered severe depression and in June 1999 tried to commit suicide by taking an overdose of antidepressants. Yates was admitted to a psychiatric unit and released after six days. A month later she was discovered in the bathroom by her husband holding a knife to her neck. Yates again was admitted to a psychiatric hospital against her wishes. She told a psychologist that she had visions and had heard voices since the birth of her first child in 1994. The therapist ranked her at the time among the five "sickest" patients he had ever examined; and on her release, Andrea's husband was told that Andrea had a high risk of another psychotic episode if she had another child. In January 2000 she told her therapist that she had not taken the medication he prescribed since November 1999. In November 2000, Andrea gave birth to her fifth child. In March 2001, Andrea's father died, causing her severe depression. At the end of March 2001, Andrea was again admitted to a psychiatric hospital and was analyzed as being "catatonic or nearly catatonic and possibly delusional or having bizarre thoughts," and she was placed on suicide watch. Roughly two weeks later, Andrea was released at her request and at the request of her husband. The therapist recommended that Andrea not be left alone with her children. In April 2001, Andrea's mother observed that Andrea was almost catatonic, "stared into space, trembled, scratched her head until [she] created bald spots, and did not eat." On May 3, Andrea filled a bathtub with water for no apparent reason and explained that she "might need it." On May 4, Andrea was once again admitted to the hospital and released 10 days later with prescribed medication. Although she remained uncommunicative and withdrawn and smiled infrequently and appeared to have no emotion, Andrea assured her doctor on June 4 and again on June 18 that she did not harbor suicidal thoughts. On June 20, 2001, Andrea called 911 and requested that the police come to her home. She also called her husband and told him it was important that he come home because all of the kids were hurt. The police "discovered four dead children, soaking wet, and covered with a sheet" lying on Andrea's bed. A fifth child was floating face down in the bathtub. Yates, according to testimony, was a "wonderful mother" although she believed that her children were not developing mentally, were destined for horrible fates later in their life, and "were not righteous" and would "burn in hell." She reportedly had considered killing her kids for at least two months. There also was testimony that Yates was focused on a biblical verse from Luke 17:2 that "it would be better for him if a millstone was hung around his neck and

he were thrown in the sea than that he should cause one of the little ones to stumble.” Was Andrea Yates legally insane under the *M’Naghten* test? See *Yates v. State*, 171 S.W.3d 215 (Tex. App. 2005).

DIMINISHED CAPACITY

Diminished capacity is recognized in roughly 15 states. This permits the admission of psychiatric testimony to establish that a defendant suffers from a mental disturbance that *diminishes* the defendant’s capacity to form the required criminal intent. Diminished capacity merely recognizes that individuals have the right to demonstrate that they are incapable of forming the intent required for the offense. This is a compromise between finding an individual either NGRI or fully liable. Some states confine diminished capacity to intentional murder and provide that an accused may still be convicted of second-degree murder, which does not require premeditation.

This often is referred to as the *Wells-Gorshen* rule based on two California Supreme Court decisions.³⁰ Gorshen, a dock worker, reacted violently when ordered to “get to work” and then precipitated a fight when he was told that he was drunk and should go home. The defendant later returned to work and shot and killed his foreman, Joseph O’Leary. The California Supreme Court affirmed the trial court’s decision to convict Gorshen of second- rather than first-degree murder, which requires a premeditated intent to kill. Psychiatric testimony indicated that the defendant suffered from chronic paranoiac schizophrenia, a “disintegration of mind and personality . . . [involving] trances during which he hears voices and experiences visions, particularly of devils in disguise committing abnormal sexual acts, sometimes upon the defendant.” According to a psychiatrist, Gorshen believed that O’Leary’s remarks demeaned his manliness and sexuality, and this sparked enormous rage and anger. The defendant was reportedly out of control and felt that he was slipping into permanent insanity. He blamed O’Leary and developed an obsession with killing him. The appellate court ruled that Gorshen possessed a driving and overwhelming obsession with murdering O’Leary and that he did not make a reasoned and conscious decision to kill.³¹

The diminished capacity defense has been rejected by some state courts that point out that psychiatric testimony is unreliable and too confusing for jurors and that the “medical model” is contrary to the notion that individuals are responsible for their actions.³² The far-reaching implications of the diminished capacity defense became apparent when a San Francisco jury convicted city official Dan White of manslaughter for the killings of his colleague Harvey Milk and Mayor George Moscone. The defense argued that White’s depressions were exaggerated by junk food, diminishing his capacity to form a specific intent to kill. In reaction to this “Twinkie defense,” California voters adopted a statute that provides that the “defense of diminished capacity is hereby abolished” and shall not be admissible “to show or negate capacity to form the . . . intent . . . required for the commission of the crime charged.”³³ The Model Penal Code, however, provides that evidence that a defendant suffers from a mental disease or defect is admissible “whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense.” In other words, under this approach a defendant may introduce psychiatric evidence to negate the required intent in a prosecution for any criminal offense.³⁴

INTOXICATION

Alcoholic beverages and drugs are commonly used to relax and to enhance enjoyment. These substances, however, can impede coordination and alertness, distort judgment, and cause impulsive and emotional reactions. It is not surprising that some studies suggest that more than half of those arrested for felonies have been drinking or using drugs. Should the law limit the legal responsibility of individuals who are drunk or are “high” on drugs, or treat them more harshly? The law has struggled to find a balance between “conflicting feelings” of concern and condemnation for the “intoxicated offender.”³⁵

Voluntary Intoxication

Voluntary intoxication was not recognized as a defense under the early common law in England. Lord Hale proclaimed that the intoxicated individual “shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses.” William Blackstone went beyond this neutral stance and urged that intoxication should be viewed “as an aggravation of the offense, rather than as an excuse for any criminal behavior.”³⁶

The common law rule was incorporated into U.S. law. An 1847 textbook recorded that this was a “long established maxim of judicial policy, from which perhaps a single dissenting voice cannot be found.”³⁷

The rule that intoxication was not a defense began to be transformed in the 19th century. Judges attempted to balance their disapproval toward alcoholism against the fact that inebriated individuals often lacked the mental capacity to formulate a criminal intent. Courts created a distinction between offenses involving a specific intent for which voluntary intoxication was an excuse and offenses involving a general intent for which voluntary intoxication was not recognized as an excuse. Individuals charged with a crime requiring a specific intent were able to introduce evidence that the use of alcohol prevented them from forming a specific intent to assault an individual with the intent to kill. A defendant who proved successful would be held liable for the lesser offense of simple assault. As noted by the California Supreme Court, the difference between an intent to commit a battery and an intent to commit a battery for the purpose of raping or killing “may be slight, but it is sufficient to justify drawing a line between them and considering evidence of intoxication in the one case and disregarding it in the other.”³⁸

The Model Penal Code section 2.08(1)(2) accepts the common law’s distinction between offenses based on intent and substitutes “knowledge” or “purpose” for a specific intent and “negligence or recklessness” for a general intent. The commentary to the code notes that it would be unfair to punish an individual who, due to inebriation, lacks “knowledge or purpose,” even when this results from voluntary intoxication.³⁹

Professor Jerome Hall observes that *in practice*, the hostility toward the inebriated defendant has resulted in the voluntary intoxication defense being recognized only in isolated instances, typically involving intentional killing.⁴⁰ Courts have placed a heavy burden on defendants seeking to negate a specific intent. Even the consumption of large amounts of alcohol is not sufficient. The New Jersey Supreme Court observed that there must be a showing of such a “great prostration of the faculties that the requisite mental state was totally lacking. . . . [A]n accused

must show that he was so intoxicated that he did not have the intent to commit an offense. Such a state of affairs will likely exist in very few cases.” This typically requires an evaluation of the quantity and period of time that an intoxicant was consumed, blood alcohol content, and the individual’s conduct and ability to recall events.⁴¹

The contemporary trend is to return to the original common law rule and refuse to recognize a defense based on voluntary alcoholism. The Arizona Criminal Code section 13-503 of the Arizona Revised Statutes Annotated provides that “[t]emporary intoxication resulting from the voluntary ingestion . . . of alcohol . . . or other psychoactive substances or the abuse of prescribed medications . . . is not a defense for any criminal act or requisite state of mind.” The Texas Penal Code Annotated section 8.04 provides that “[v]oluntary intoxication does not constitute a defense to the commission of crime.” The right of states to deny defendants the intoxication defense was affirmed by the U.S. Supreme Court in 1996, in *Montana v. Egelhoff*; Justice Antonin Scalia noted that Montana was merely returning to the law at the time of the drafting of the U.S. Constitution and that this rule served to deter excessive drinking.⁴²

The abolition of the intoxication defense in addition to deterring excessive drinking is based on the danger that intoxicated individuals present to the public. There also is the risk that an intoxicated individual who is not held fully accountable may continue to drink to excess and pose a threat to society in the future. The counterargument is that individuals who lack the required state of mind for the violation of a law should not be held legally responsible.

Involuntary Intoxication

Involuntary intoxication is a defense to any and all criminal offenses in those instances when the defendant’s state of mind satisfies the standard for the insanity defense in the state. The Model Penal Code section 2.08(4) requires that individuals “lack[] substantial capacity” to distinguish right from wrong or to conform their behavior to the law. The code also recognizes “pathological intoxication.” This arises in those instances when an individual voluntarily consumes a substance and experiences an extreme and unanticipated reaction. Involuntary intoxication can occur in any of four ways⁴³:

- *Duress*. An individual is coerced into consuming an intoxicant.
- *Mistake*. An individual mistakenly consumes a narcotic rather than prescribed medicine.
- *Fraud*. An individual consumes a narcotic as a result of a fraudulent misrepresentation of the nature of the substance.
- *Medication*. An individual has an extreme and unanticipated reaction to medication prescribed by a doctor.

The proliferation of drugs, medicine, and newly developed therapies promises to lead to involuntary intoxication being increasingly raised as a defense in criminal prosecutions. Consider the next case, *State v. Donner*, in which Donner claims on appeal that the trial court improperly ruled that he was not entitled to present the defense of involuntary intoxication to the jury.

WAS THE DEFENDANT ENTITLED TO THE DEFENSE OF INVOLUNTARY INTOXICATION?

STATE V. DONNER, A18-1054 (MINN. APP. 2019)

Opinion by Hooten, J.

Issue

Appellant [Donner] argues that his convictions for driving while impaired and careless driving should be reversed because the district court erroneously refused to instruct the jury on his affirmative defense of involuntary intoxication.

Facts

Shortly after midnight on August 7, 2016, while going home from a nightclub, appellant Anthony Derek Donner was arrested for driving while intoxicated. Earlier that evening, appellant drove to pick up a friend, parked in a parking garage in downtown Minneapolis, and went to a nightclub. He was familiar with the parking garage because he had previously worked in the attached building for three years.

Appellant testified that once at the club, he ordered a club soda to drink at the bar while his friend went to the dance floor. Appellant had been in a car accident roughly a week before the arrest, and so, following his doctor's recommendation, he did not have any alcoholic beverages to drink that night. He was also carrying about \$300 in cash because he had been paid earlier that day.

Appellant testified that after his friend went to dance, he was approached at the bar by a woman he did not know. He purchased a drink for this woman. After chatting with this woman, appellant left his club soda at the bar while he went to the bathroom, and then came back and continued his conversation with the same woman at the bar for approximately 20 or 30 more minutes.

Appellant then ended this conversation and joined his friend on the dance floor. After a short time, appellant "started to feel funny," so he went back to the bar to buy a bottle of water. At this point, appellant noticed that most of the \$300 in cash he had been carrying was gone. After looking and asking around for his missing money, appellant got upset and decided to leave the club.

On his way back to his car, appellant was "feeling groggy and kind of slow-paced," but thought that he might be feeling that way as a side effect of his car accident the week before. Appellant testified that he did not remember getting back to his car, and that the next thing he did remember was waking up in jail, scared and confused about why he was there.

R.A., a security guard at the parking lot appellant parked at, testified that appellant walked to the garage around 2:00 a.m. on August 7, 2016. Appellant appeared drunk, and R.A. told him to take a nap before driving. A.S., a second security guard at the parking garage, testified that he saw appellant get into his car, sit without driving for four or five minutes, start driving, and almost immediately hit a parked car. R.A. then called 911 to summon the police.

Officer Ross Blair was one of the officers who responded to the call. When Officer Blair arrived, appellant was asleep in his car and had to be woken up. Officer Blair testified that

appellant showed signs of intoxication and failed multiple field sobriety tests, but did not smell like alcohol. Appellant also took a preliminary breath test for the presence of alcohol which did not detect any alcohol in appellant's system. Police arrested appellant based on his failed sobriety tests and took him to get tested for the presence of other chemicals in his system.

Police obtained a warrant for appellant's blood, had a sample taken at a nearby hospital, and sent it to the Bureau of Criminal Apprehension to be tested for the presence of intoxicants. The test revealed that appellant had a significant amount of alprazolam, more commonly known as Xanax, in his system. The therapeutic range for alprazolam is between .02 and .06 milligrams per liter, while the testing revealed appellant had a concentration of .074 milligrams per liter in his bloodstream. Appellant was eventually charged with second-degree driving while impaired and careless driving. . . .

At trial, appellant did not contest the fact that he drove while impaired, but testified that he did not knowingly consume any intoxicating substances the evening of his arrest. At the close of evidence, the district court considered whether to instruct the jury on the affirmative defense of involuntary intoxication. Though the district court noted that it was a "close call," it elected not to include this instruction. . . .

Reasoning

The affirmative defense of involuntary intoxication . . . has three elements. First, the intoxication must have been involuntary. This can consist of intoxication that is: coerced, pathological, by innocent mistake, or that is unexpected from the ingestion of a medically prescribed drug. Second, "the defendant must show that [his] intoxication was caused by the intoxicating substance in question and not by some other intoxicant." Third, the defendant must, due to the involuntary intoxication, be temporarily insane. Minnesota law interprets this requirement as meaning that "at the time of committing the alleged criminal act the person was laboring under such a defect of reason . . . as not to know the nature of the act, or that it was wrong." . . .

Appellant argues that the following evidence is sufficient to at least establish a . . . case for the first element, that he was involuntarily intoxicated by innocent mistake. Appellant testified that at the nightclub, he ordered a club soda to drink at the bar, while his friend went to the dance floor. He was carrying about \$300 in cash that night. After his friend went to dance, he was approached at the bar by a woman whom he did not know. He purchased a drink for this woman. After chatting for a while, Donner left his club soda at the bar and went to the bathroom. He then came back and kept chatting with the same woman at the bar for approximately 20 or 30 minutes.

Appellant next testified that he stopped talking to this woman when his friend came back and asked appellant to join him on the dance floor. Appellant did, and the woman with whom he had been talking did not join them. Appellant testified that after some time, he got thirsty, so he went back to the bar to buy a bottle of water. At this point, appellant noticed that the \$300 in cash he had been carrying was gone. Appellant also testified that he did not knowingly consume any substances the evening of his arrest. And appellant also testified by affirmation that he "must have been slipped something because [he didn't] remember the incident." This chain of events, appellant argues, gave the unknown woman both motive and opportunity to drug appellant. Crucially, in our analysis, we must view this evidence in the light most favorable to appellant.

The district court concluded that because appellant did not directly testify that he drank from his club soda after he got back from the bathroom or that he "felt weird" shortly after

drinking the water, and there was no direct testimony from someone who saw something get slipped in appellant's drink, appellant had failed to establish . . . a . . . case that he unintentionally consumed alprazolam. . . .

The second element of the defense of involuntary intoxication is that the consumed drug, and not any "other intoxicant, is in fact the cause of defendant's intoxication at the time of his alleged criminal conduct." The state drew appellant's blood and tested it for intoxicants. Alprazolam was the only drug that was present in appellant's system. The state conceded at trial that this element was met and does not change its position on appeal. We agree with the parties that this element was met.

The third element of involuntary intoxication is that the defendant must meet the legal definition of temporary insanity in that he or she did not know the nature of the act or that it was wrong. The district court concluded that appellant did not establish a . . . case for this element. While it again noted that this element was a "close call," the district court based its ruling primarily on the fact that no expert testified that appellant was legally insane at the time he was arrested. It also reasoned that if expert testimony were not required, "then that means anyone who ingests some substance unknowingly can simply testify, 'I don't remember anything,' and it would generate this defense."

Appellant argues that the evidence of his behavior while he was intoxicated, both from the security guards and the police, establishes that he did not know the nature of his act or that it was wrong. He notes that . . . his erratic behavior supports his claim that he was unable to understand what he was doing or that it was wrong and that his interactions with authority figures do not show that he believed that he had done anything wrong. In support of his claims, appellant also cites testimony from the prosecution's expert about the effect that alprazolam can have on a person. Finally, appellant argues that his testimony regarding his inability to remember what happened that night leads to a reasonable inference that he did not understand the nature of his actions.

[The prosecution argues that] appellant's behavior shows that he knew right from wrong. It also adopts the district court's reasoning that allowing appellant's argument "would allow strategic memory loss advanced through testimony of a defendant to equate to involuntary intoxication in virtually every criminal case." . . .

First, appellant testified that he did not know that he was intoxicated when he left the club and thought that any odd feelings he was having were the result of the car accident that he had been in the week before. Appellant testified that as he was walking to his car he felt groggy, but explained that, "All I knew was I hadn't taken anything that day for me to be feeling like this, you know." After leaving the nightclub and starting to walk back to the car, appellant did not remember anything else until he woke up in a jail cell.

If the jury believed appellant, it could conclude that he did not understand that he was getting behind the wheel of his car while intoxicated because he did not know that he was intoxicated. This is corroborated by the prosecution's expert, who testified that, among other symptoms, alprazolam could cause impairment of reasoning and judgment. This could explain why appellant might not have believed he was intoxicated even when he was feeling groggy.

Both parties argue that appellant's behavior on the night of his arrest supports their differing conclusions regarding whether or not he understood the nature of what he was doing or whether it was right or wrong. Because appellant testified that he did not remember getting back to the parking garage, the evidence of appellant's behavior comes in the form of testimony from the police officers and security guards who were at the scene where appellant was arrested. This uncontested testimony indicated that: after being directed to not drive

right away by the security guard, appellant sat in his car for roughly five minutes before driving; after appellant immediately crashed his car into another car in the parking ramp and the security guards waved him down, appellant stopped his car and waited for police to arrive; and he complied with the police officers' requests including that he take field sobriety tests. In viewing this behavior in the light most favorable to appellant, along with appellant's testimony that he had no memory of what transpired after he left the bar, we conclude that the evidence was sufficient to meet the very low bar of a *prima facie* showing that appellant did not understand the nature of what he was doing, or that he did not know it was wrong.

Respondent argues that appellant took "coherent steps" indicating that he was not temporarily insane. Respondent cites to *State v. Voorhees*, a 1999 case where the defendant read an owner's manual for a rifle, figured out how to load it, parked his car away from his intended victim, navigated a dark path to get to his victim, and shot the victim 11 times pulling the trigger after each shot. But *Voorhees* is distinguishable on its facts because *Voorhees*'s actions required problem solving and concentration. Appellant's actions that respondent points to, i.e., making his way back to his car, which was parked in a parking garage located in a building where appellant had previously worked for three years, and then complying with instructions from authority figures, simply did not require the same level of cognitive activity. Furthermore, the discussion in *Voorhees* that respondent cites to does not come from the court's analysis of the element of mental defect, it comes from the section where the court concluded that there was no evidence *Voorhees* was even intoxicated at all.

Respondent also cites to [the 2019 case of *State v. Jama*], but that case is equally unhelpful to its position. In that case, the court found that the fact that Jama, who was charged with indecent exposure, tried to hide his exposed penis when police showed up contradicted his claim that he did not know that what he was doing was wrong. Respondent claims that this case supports its argument, but the case actually supports appellant's claim. *Jama* stands for the proposition that a suspect trying to hide his guilt might be indicative of an awareness that his behavior was wrong. But here, appellant did not try to hide his guilt. He complied with the security guards' requests, as well as those of the police. When police arrived, appellant offered to take a breath test. Respondent argues that these actions show an awareness that appellant knew what he was doing was wrong, but, again, the opposite is true. Appellant's offer to take a breath test does show that he knows that drinking and driving is wrong, but construing the evidence in the light most favorable to appellant, it also could show that he believed that he had done nothing wrong because he did not believe that he was intoxicated.

Next, the district court correctly noted that there was no direct expert testimony that appellant met the legal definition of insanity when he got in his car to drive home. . . . [T]he prosecution's expert testified that alprazolam would be expected to cause symptoms of "drowsiness, tired, dizziness, you might have impairment of your cognition, which is reasoning and judgment as well as psychomotor skills, which is taking your thought and putting that thought into motion." Those are symptoms expected in any person who uses alprazolam, particularly here where appellant had a concentration of the drug in his bloodstream above the therapeutic range.

Finally, respondent reasons that allowing appellant's argument here to prevail would allow the use of the involuntary intoxication defense in "virtually every criminal case." This is clearly untrue. There are three elements that must be demonstrated before a defendant is entitled to an instruction on involuntary intoxication. Even if a defendant could establish a case on the third element through their own testimony, they still would have to establish

involuntarily] intoxication, and that the specific substance they involuntarily imbibed was the substance that caused them to become temporarily insane to even receive the instruction.

Holding

We conclude that, when viewing the evidence in the light most favorable to appellant, appellant did establish . . . the affirmative defense of involuntary intoxication. Therefore, the district court abused its discretion when it declined to instruct the jury on involuntary intoxication. . . . Reversed and remanded.

Questions for Discussion

1. What are the facts in *Donner*?
2. State the legal test for the involuntary intoxication defense.
3. Why does Donner claim that the facts support his claim that he was entitled to raise the involuntary intoxication defense at his trial?
4. How does the prosecution respond to Donner's claim?
5. Explain the distinction the court makes between *Donner* and the precedents relied on by the prosecution on appeal.
6. In your view, what is the most important fact(s) to consider in determining whether Donner was entitled to the involuntary intoxication defense?
7. What of the possibility that Donner voluntarily took Xanax? Would his voluntary intoxication constitute an affirmative defense?
8. In your view, did Donner know the difference between right and wrong at the time he was arrested?

YOU DECIDE 9.2

Robert Low was president and general manager of a trucking company in Springfield, Missouri. Low and his 14-year-old stepson, Shane Low, arranged a hunting trip with two friends, including A. D. McCowan. The group met in Creede, Colorado, and drove to the campsite. Robert became increasingly disoriented and asked his stepson why he was being "tricked." The drivers of two trucks stopped to check on Robert's health. Robert then demanded that they all kneel in prayer. This was unusual because Robert was not particularly religious. During the remainder of the ride, Robert speculated on whether he was alive or dead. They arrived at the campsite, and Robert was convinced that he was dead and had gone to hell. He requested that his tent be set up on a knoll and stated that this would provide the foundation for a divine temple. Robert then accused McCowan of being the devil, and the three others realized that he was disturbed and prevented him from loading his rifle. He then stabbed McCowan in the upper back, and McCowan was taken by some hunters to the hospital. Robert then unsuccessfully attempted to stab himself and poured kerosene on the floor of the tent and ignited a fire. The police arrived and arrested Robert.

Low had ingested 40 to 50 cough drops a day for the past several months. He initially took the cough drops to combat a cold and then continued to ingest these as a substitute for chewing tobacco and to help him to quit smoking. On his trip to Colorado, Robert consumed

roughly 120 cough drops within a 24-hour period. A psychiatrist testified that the cough drops contain a drug called dextromethorphan hydrobromide. This caused a psychotic disorder known as "organic delusional syndrome" or "toxic psychosis." The symptoms include a distorted perception of reality, paranoia, hallucinations, and delusions. The psychiatrist testified that Low was incapable of knowing right from wrong at the time of the hunting trip and did not have the ability to formulate a specific intent to commit a criminal act. A doctor at the Colorado State Hospital testified that Low tested negative for marijuana, alcohol, cocaine, and most other narcotics.

The cough drops were sold over the counter without prescription. The customary warnings included on the label proclaimed, "Not Habit Forming contains 7.5 milligrams of dextromethorphan HBr per lozenge." Robert was charged with first-degree assault that requires a specific intent to cause serious bodily injury or disfigurement by a dangerous weapon or knowingly engaging in conduct that creates a grave risk of death. Second-degree assault involves recklessly causing serious bodily injury by means of a deadly weapon. Third-degree assault is committed when the accused knowingly or recklessly causes bodily injury to another or with criminal negligence causes bodily injury to another person by means of a deadly weapon. Should the jury have been given an instruction on the defense of involuntary intoxication? Would you convict Low of first-degree assault? See *People v. Low*, 732 P.2d 622 (Colo. 1987).

AGE

The early common law did not recognize **infancy** as a defense to criminal prosecution. Youthful offenders, however, were typically pardoned. A 10th-century statute softened the failure to recognize infancy as a defense by providing that individuals younger than the age of 15 were not subject to capital punishment unless they made an effort to elude authorities or refused to surrender. A further refinement occurred in the 14th century when children younger than 7 were declared to be without criminal capacity.

The common law continued to develop and reached its final form by the 17th century. Juveniles were divided into three categories based on the capacity of adolescents at various ages to formulate a criminal intent. Individuals were categorized on the basis of their actual rather than their mental age at the time of the offense.⁴⁴

- *Children younger than 7* lacked a criminal capacity. There was an *irrebuttable presumption*, an assumption that cannot be overcome by facts, that children younger than 7 lack the ability to formulate a criminal intent.
- *Children older than 7 and younger than 14* were presumed to be without capacity to form a criminal intent. This was a *rebuttable presumption*; the prosecution could overcome the presumption by evidence that the juvenile knew the act was wrong. The older the child and the more atrocious the crime, the easier to overcome the presumption. Factors to be considered include the age of the child, efforts to conceal the crime and to influence witnesses, and the seriousness of the crime.

- *Children 14 and older* possessed the same criminal capacity as adults. Juveniles capable of forming a criminal intent may be prosecuted as adults rather than remaining in the juvenile system. Today, the age when a juvenile may be criminally prosecuted as an adult rather than being brought before a juvenile court is determined by state statute. There is no standard approach. One group of states maintains a conclusive presumption of incapacity for juveniles younger than a particular age (usually 14); however, other states provide that juveniles regardless of age may be treated as an adult.⁴⁵
- Roughly 25 states continue to follow the tripartite common law scheme while modifying the age categories. These states provide that a presumption of incapacity may be overcome when juveniles are demonstrated to have known the wrongfulness of their actions.
- Others specify an age, typically 14, younger than which there is a conclusive presumption that a juvenile cannot form a criminal intent.
- A third group of state statutes provides for exclusive jurisdiction by the juvenile court until a specified age. These states typically provide that cases involving individuals between 16 and 18 charged with serious crimes may be transferred to adult court.
- Another set of statutes recognizes that the jurisdiction of the juvenile court is not exclusive and that juveniles charged with serious offenses may be subject to criminal prosecution.
- A fifth group of states merely provides that the jurisdiction of the juvenile court does not prevent the criminal prosecution of juveniles.
- In 2020, Vermont became the first state to expand juvenile jurisdiction to age 18.

The common law presumptions of incapacity are not applicable to proceedings in juvenile court because the purpose of the court is treatment and rehabilitation rather than the adjudication of moral responsibility and punishment.⁴⁶

There is a growing trend for state statutes to permit the criminal prosecution of any juvenile as an adult who is charged with a serious offense. These “transfer statutes” adopt various schemes, vesting “waiver authority” in juvenile judges or prosecutors or providing for automatic transfer for specified crimes.⁴⁷ The standard to be applied by judges was articulated by the U.S. Supreme Court in *Kent v. United States*. The factors to be considered in the decision whether to prosecute a juvenile as an adult include the seriousness and violence of the offense, the background and maturity of the juvenile, and the ability of the juvenile justice system to protect the public and rehabilitate the offender.⁴⁸ The controversial question of certifying juveniles for trial as adults is explored in the next case, *Brazill v. State*.

In the second case in this section, *State v. A.R.*, a Washington appellate court is asked to determine whether the 11-year-old defendant knew that his rape of a child was wrong.

CAN FLORIDA CONSTITUTIONALLY PROSECUTE JUVENILES AS ADULTS?

BRAZILL V. STATE, 845 SO. 2D 282 (FLA. DIST. CT. APP. 2003)

Opinion by Gross, J.

On the last day of the 1999–2000 school year, thirteen-year-old Nathaniel Brazill shot and killed a teacher at his middle school, Barry Grunow.

The state charged Brazill with first-degree murder and aggravated assault with a firearm. The jury convicted him of second-degree murder and aggravated assault with a firearm. The trial judge sentenced him to concurrent sentences: a mandatory minimum sentence of twenty-eight years in prison on the murder charge and five years in prison, with a three year mandatory minimum, on the assault charge.

We affirm in all respects.

Facts

In the early afternoon of May 26, 2000, Brazill and Michelle Cordovaz were suspended for the remainder of the day as the result of a water balloon fight. School counselor Kevin Hinds escorted the two students off campus. Brazill asked Hinds what time he was going home. Hinds indicated that he was leaving around 4:15 to 4:30 p.m. and asked why Brazill wanted to know. Brazill shrugged and did not respond.

As he was walking away with Cordovaz, Brazill told her that he had a gun and was going to return to shoot Hinds. Cordovaz asked: "You wouldn't do that, Nate, would you?" Brazill answered: "Watch. I'm going to be all over the news."

On the way home, Brazill made several stops. Near his grandmother's house, Brazill spoke to Brandon Spann. He asked if Spann was part of a gang or had a gun. Spann asked him why he needed a gun. Brazill replied that he was "going to fuck up the school" because of the suspension.

At his home, Brazill retrieved a gun from his bedroom. The previous weekend, Brazill was at his grandfather's house and found the gun in a cookie jar in his grandfather's bureau. At that time, he loaded the gun, pulled the slide back, engaged the safety, and placed it in his overnight bag. When Brazill left his grandfather's house, he took the gun home with him; upon returning home he hid the gun in his room.

Taking the gun from his bedroom, Brazill rode his bike back to school. On the way, he stopped by his aunt's house and left a note.

Brazill entered the school grounds near the rear parking lot, a designated teachers' area. School security officer Matt Baxter saw him. Baxter followed him, but found only an abandoned bike. After leaving his bike, Brazill ran to the school building. On the way, he advised a student sitting outside to go home.

Once inside the school, Brazill went directly to Barry Grunow's classroom to speak with two friends, Dinora Rosales and Vonae Ware. He had once dated Ware for a time, and was romantically interested in Rosales. Earlier in the day, Brazill gave Rosales two cards and a bouquet of flowers.

When Brazill knocked on Grunow's door, the students in the class were already standing, because they were about to go outside. Brazill sternly asked to speak to Rosales and Ware, who were standing on either side of Grunow. The teacher did not allow the girls to

leave the classroom, but said that Brazill could come inside. Brazill refused to enter the classroom. Three more times he asked to see the girls. Each time Grunow calmly declined and told him to go back to class.

Brazill then pulled out the gun and aimed it at Grunow's head. He was in the hallway, approximately an arm's length from Grunow. He backed up slightly and assumed a shooter's stance with his legs apart.

Grunow told Brazill to stop pointing the gun, but he continued to point the gun at the teacher's head. Brazill appeared to be angry but calm; he was not crying or shaking. Brazill pulled the slide back on the gun.

[A crime scene investigator testified that pulling the slide back on this gun put a bullet in the chamber. If a bullet was already in the chamber when the slide was pulled, then a live round would eject. At the crime scene, the investigator found a live cartridge, along with a discharged shell casing.]

As Grunow attempted to close the classroom door, Brazill pulled the trigger and Grunow fell to the floor, with a gunshot wound between the eyes. A school surveillance videotape of the hallway revealed that Brazill had pointed the gun at Grunow for nine seconds before shooting. Brazill exclaimed: "Oh s—," and fled.

On the way out, Brazill used both hands to aim the gun at math teacher, John James, who was conducting class next door to Grunow. As Brazill aimed the gun, he told James not to bother him, that he was going to shoot. James immediately turned around and led his students back into his classroom.

Brazill ran out of the building. To one teacher, Brazill did not appear to be visibly upset. He was not sweating. He was not crying. Near the school, Officer Michael Mahoney observed Brazill walk into the street, put his hands on his head, and kneel. When the officer asked what he was doing, Brazill stated that he had shot someone at school and the gun was in his pocket. Brazill was then arrested. He acknowledged that he had shot Grunow. Brazill was taken to the police station, where he gave a videotaped statement.

A firearms expert with the FBI testified that the gun used in the shooting had a safety that functioned normally. The gun had a trigger pull that required five and one-half pounds of pressure to fire. It would not discharge unless the trigger was pulled.

Issue

Brazill argues that section 985.225, Florida Statutes (1999), is unconstitutional as a violation of due process, equal protection, and separation of powers. In pertinent part, section 985.225 provides:

1. A child of any age who is charged with a violation of state law punishable by death or by life imprisonment is subject to the jurisdiction of the [juvenile] court . . . unless and until an indictment on the charge is returned by the grand jury. When such indictment is returned, the petition for delinquency, if any, must be dismissed and the child must be tried and handled in every respect as an adult:
 - a. On the offense punishable by death or by life imprisonment; and
 - b. On all other felonies or misdemeanors charged in the indictment which are based on the same act or transaction as the offense punishable by death or by life imprisonment or on one or more acts or transactions connected with the offense punishable by death or by life imprisonment.
2. . . .
3. If the child is found to have committed the offense punishable by death or by life imprisonment, the child shall be sentenced as an adult. If the juvenile is not found to have committed the indictable offense but is found to have committed a lesser included

offense or any other offense for which [the juvenile] was indicted as a part of the criminal episode, the court [also] may sentence [as an adult]. . . .

Reasoning

Brazill first contends that his due process rights were violated because he was denied the “rehabilitative aspect of juvenile court” solely because the state decided to procure an indictment.

However, there is no absolute right conferred by common law, constitution, or otherwise, requiring children to be treated in a special system for juvenile offenders. . . . Under Article I, Section 15(b) [of the Florida Constitution], a “child,” as defined by “law,” may be charged “with a violation of law as an act of delinquency instead of [a] crime.” As the supreme court has explained, this provision means that “a child has the right to be treated as a juvenile delinquent only to the extent provided by our legislature.” . . .

Holding

[Florida Statutes s]ection 985.225 is related to the state’s interest in crime deterrence and public safety. The statute provides treatment as an adult for those offenses serious enough to be punishable by life imprisonment or death. Such crimes are the most violent or dangerous offenses against persons. It is not unreasonable for the state legislature to treat children who commit serious crimes as adults in order to protect societal goals. The legislature could reasonably have determined that for some crimes the rehabilitative aspect of juvenile court must give way to punishment. . . .

[T]he Florida legislature considered carefully the rise in the number of crimes committed by juveniles as well as the growing recidivist rate among this group. The legislature was entitled to conclude that the... juvenile system would not work for certain juveniles, or that society demanded greater protection from these offenders than that provided by that system.

Raising a procedural due process argument, Brazill cites *Kent v. United States*, 383 U.S. 541 (1966), to support his argument that a hearing is required before adult sanctions may be imposed upon a child. He attacks FS section 985.225 because it allows the state to bypass a hearing on the suitability of adult sanctions by securing an indictment. . . .

[Florida Statutes s]ection 985.225 does not require a court to hold a hearing to decide whether adult sanctions are appropriate. . . . [The Florida Supreme Court] discussed *Kent* and found that: “Whatever its constitutional ramifications, we do not believe they extend to the statutory provision under consideration here where discretion to prosecute a juvenile as an adult is vested in the prosecutor rather than in a judge.” Brazill was afforded the same procedural rights as anyone else charged with first-degree murder by indictment. Due process does not require anything more because of his status as a child. . . .

Brazill complains that because the statute contains no criteria “to steer prosecutorial discretion,” arbitrariness is injected into the decision-making process. . . . These attacks must fail because of the broad discretion accorded a prosecutor under our legal system. As the [Florida Supreme Court] has written, “the discretion of a prosecutor in deciding whether and how to prosecute is absolute in our system of criminal justice.” . . .

[Florida Statutes s]ection 985.225(1) applies to “[a] child of any age who is charged with a violation of state law punishable by death or by life imprisonment. . . .” It does not differentiate between age groups. The statute equally applies to any child who commits an offense punishable by death or by life imprisonment. Additionally, a child transferred to the criminal

court becomes similarly situated with defendants in that court, rather than those still in the juvenile system. . . .

[T]he state points out, the statutory "requirement of an indictment is for the protection of the accused juvenile," because the grand jurors must concur in the prosecutor's charging decision. When the grand jury does not return an indictment, a juvenile thirteen and under is not subject to [Florida Statutes] section 985.226(2).

Holding

. . . The twenty-eight year mandatory minimum sentence was lawful. The jury's verdict was sufficient to support the mandatory minimum sentence. An enhanced sentence is proper when it is based on a jury verdict that specifically refers to the use of a firearm, either as a separate finding or by including a reference to a firearm when identifying the specific crime. . . .

[Florida Statutes s]ection 775.087(2)(a) provides that if during the course of the commission of the felony such person discharged a "firearm" . . . and, as a result of the discharge, death or great bodily harm was inflicted upon any person, the convicted person shall be sentenced to a minimum term of imprisonment of not less than 25 years and not more than a term of imprisonment of life in prison. The indictment in this case charged the crime of first-degree murder and alleged that Brazill "did use and have in his possession a handgun, a firearm as defined in Florida Statute [section] 790.001(6)."

Questions for Discussion

1. As a prosecutor, would you have treated the 13-year-old Brazill as an adult?
2. What is the basis for the Florida court's conclusion that Brazill does not possess a constitutional right to be treated as a juvenile?
3. Brazill argued that he should have been given a hearing to determine whether he should be treated as an adult. The court, however, ruled that this decision was within the discretion of the prosecutor and that Brazill was protected by the fact that a grand jury of ordinary citizens determined that there was sufficient evidence to indict him for murder. Is it preferable to have an individual's adult status determined by a court or by a prosecutor?

DID 11-YEAR-OLD A.R. POSSESS THE LEGAL CAPACITY TO KNOW THAT THE RAPE OF A CHILD WAS WRONG?

STATE V. A.R., NO. 27501-5-11 (WASH. CT. APP. 2002)

Opinion by Seinfeld, J.

Issue

The State charged 11-year-old A.R. with first degree rape of a child. A Thurston County Superior Court commissioner concluded that the State had rebutted the presumption that A.R. lacked the capacity to commit the crime but on A.R.'s motion for revision, the trial court reversed. The State appeals. [Was there clear and convincing evidence of capacity?]

Facts

The State charged 11-year-old A.R. with two counts of first degree rape of a child based upon allegations that A.R. had sexual contact with a 7-year-old boy, Z.P.G. A.R. was living with the boy's family at the time.

The State moved for a capacity hearing to overcome the presumption that A.R., as a child under the age of twelve, lacked the capacity to commit a crime.

Four witnesses testified at the capacity hearing. The detective who had interviewed A.R. testified that A.R.'s mother and her friend brought A.R. to the police station. The friend told the detective that A.R. and his siblings were living at her house and that one of the children saw A.R. in the bathroom with his arm around the victim, Z.P.G.

When the friend questioned A.R., he denied that there was anything going on. But after Z.P.G. told the friend that A.R. had placed his penis inside of Z.P.G.'s "butt," A.R. admitted to engaging in this behavior.

The detective testified about her conversation with A.R. at the police station. A.R. said he was there "because we were touching each other's privates" and that "privates" meant "butt" and "penis." A.R. admitted that he had touched Z.G.P. two times a week and that they touched each other with their mouths and privates. Regarding the charged incident, A.R. said that he tried to stick his "dick" into Z.G.P.'s butt but he "didn't get it all the way in." A.R. said he had begun this conduct when Z.G.P. was one, two, or three years old and that he also would "stick my penis in [his younger sister's] pussy and in her mouth."

A.R. explained that he had grown up knowing words like "dick" and "pussy" and he accurately described an "erection" when asked if he knew what the term meant. When the detective asked A.R. if he thought what he did to his sister and Z.G.P. was right or wrong, A.R. responded, "kind of sort of wrong" because "[w]e're just children and he's younger than me." But A.R. then backtracked and said "[i]t wasn't wrong because he [Z.G.P.] was into it too." A.R. gave the detective examples of conduct that he considered to be wrong, including stealing, murder, and poaching.

Dr. Brett Trowbridge testified as an expert for the defense. He explained that A.R. had an average to slightly above average IQ and was reading above his current grade level. He also testified that A.R. had been involved in two earlier incidents of sexual contact with other children, that law enforcement had been contacted both times, and that A.R. had been told not to engage in sexual contact with anyone.

Trowbridge testified that he believed A.R. knew his actions were morally wrong because A.R.'s mother and her friend had previously told him that any kind of sexual contact with anyone was wrong. But Trowbridge nonetheless opined that A.R. did not have capacity to commit the charged crimes because at the time of the incidents, A.R. did not understand the gravity of what would happen to him or that consent would not exculpate him. Trowbridge opined that A.R.'s lack of understanding as to the relevance of the age difference between himself and Z.G.P. was the key to A.R.'s incapacity:

He may have had some concept that it was wrong to have sex on some level with anybody but he didn't really understand the concept that it was much more wrong if you have sex with someone who is much younger than you and was especially confused about the issue about if they enjoyed it or liked it or consented or participated, whether that kept it from being wrong. . . .

Peg Cain, a mental health specialist who performs "safe to be at large" evaluations for Thurston County, interviewed A.R. several days after the incident. She said that A.R. did not understand why he was charged with rape, which he understood to mean penetration of a

vagina by a penis, and that he had no concept of the seriousness of the charges, asking her, “[w]hy is it rape if it felt good?” According to Cain, A.R. said that he thought it would be okay if someone his own age or older wanted to engage in sexual behavior with him “because it felt good.” Based on A.R.’s comments that Z.G.P. really liked it and “always wanted to do it,” Cain believed that A.R. did not understand the relevance of consent. Cain also noted that A.R. knew that his father and stepfather had both allegedly molested his sister and possibly himself although he had no memory of that.

In rebuttal, the State called Thurston County Juvenile Court probation counselor Thomas Nore who had met with A.R. on several occasions. Nore testified that he had been a probation counselor for 26 years during which time he had contact with hundreds of juveniles under the age of 12. Nore testified that A.R. knew that engaging in sex was wrong because A.R. had been told that many times. Nore said that A.R. “had knowledge and experience far beyond any 11-year-old I’ve ever met. In fact, far beyond some 16-, 17-year-olds.” Nore opined that A.R. did have the capacity to commit the charged crimes.

Based on this evidence, the Thurston County Superior Court commissioner found that A.R. “understood the act of Rape of a Child first degree and he knew it was wrong.”

The commissioner concluded that the State had rebutted the presumption of incapacity by clear and convincing evidence. On revision, the trial court reviewed the record and heard argument from counsel. It then found that A.R. “did not understand the act of Rape of a Child first degree nor did he know it was wrong. [A.R.] was a highly sexualized young person who clearly was confused about appropriate sexual behaviors and could not understand the prohibitions on sexual behavior with other children.”

On appeal, the State argues that it produced clear and convincing evidence that A.R. understood the act of sexual intercourse and that, at the time he committed the charged acts, he knew they were wrong. . . .

Children under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong.

As the State charged A.R. with first degree rape of a child, the question on review is whether he “understood the act of sexual intercourse and knew it was wrong at the time the alleged conduct occurred.” In determining whether A.R. knew that the act he committed was wrong, we consider “[1] the nature of the crime; [2] the child’s age and maturity; [3] whether the child showed a desire for secrecy; [4] whether the child admonished the victim not to tell; [5] prior conduct similar to that charged; [6] any consequences that attached to the conduct; and [7] acknowledgment that the behavior was wrong and could lead to detention.” . . .

A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

We pay particular attention to the nature of the crime charged because proof that a child understood the wrongfulness of a sexual offense may be more difficult to provide than for other crimes: “It is very difficult to tell if a young child . . . understands the prohibitions on sexual behavior with other children.” As Division I of this court has explained:

To the extent that society’s moral judgment does not necessarily coalesce with its legal standards, the nature of the charged crime is relevant to the evaluation of a child’s appreciation of the wrongfulness of his or her conduct. The more intuitively obvious the wrongfulness of the conduct, the more likely it is that a child is aware

that some form of societal consequences will attach to the act. By way of example, a lesser amount of evidence may be required to rebut the presumption that a child does not appreciate the wrongfulness of stealing than to rebut the presumption where certain sexual offenses are involved.

But although the State's burden may be more difficult when the State charges a sexual offense, the burden is not insurmountable. In analyzing A.R.'s knowledge, we are particularly mindful that capacity does not require an understanding of the legal consequences of the conduct: "[it] does not require that the child know the act was illegal or understand the legal consequences of the act. The Legislature has chosen to frame the test as a capacity to understand the conduct was wrong."

Here, we accept Trowbridge's observations about A.R. But those observations do not support his opinion that A.R. lacked capacity. Trowbridge mistakenly focused on A.R.'s lack of understanding about the legal consequences of the conduct. The basis for his opinion was that A.R. did not know the legal relevance of the children's age difference or the significance of consent.

The proper question in this case is whether A.R. "understood the act of sexual intercourse and knew it was wrong at the time the alleged conduct occurred." The detective, Trowbridge, and Nore all provided testimony that showed that A.R. clearly understood the act of sexual intercourse. Further, the evidence compellingly demonstrated that he knew it was wrong at the time of the charged conduct.

We note that A.R. was 11 years old at the time, close to the age when capacity is presumed; he had an average to slightly above average IQ, and he was reading above his current grade level. . . . And his familiarity with sexual terms and sexual behavior suggests a greater maturity level.

Further, the evidence showed that A.R. had engaged in this type of conduct on at least two prior occasions, that law enforcement was contacted each time, and that A.R. was subsequently told that sexual contact with anyone was wrong. And although A.R.'s acknowledgment to the detective of the wrongfulness of his conduct cannot alone prove capacity, it is a factor to consider. Unlike in other cases, A.R. did not merely acknowledge after-the-fact that his conduct was wrong, he had been told before the charged incidents that any kind of sexual contact with anyone was wrong.

We also note that A.R. initially attempted to deny the conduct, indicating a knowledge of its wrongfulness. Similarly, the evidence that the conduct occurred in the bathroom suggests a desire for secrecy, which may also indicate an appreciation of the wrongfulness of the conduct. Although A.R. was troubled by the concept of rape and the issue of consent, that confusion seemed to relate to the act's legal consequences rather than knowledge that it was "wrong."

Moreover, even Trowbridge, the defense expert, testified that A.R. knew that his actions were morally wrong. The difference of opinions in this case seemed to turn on differences in defining the word "wrong" in the context of determining capacity. But the State does not need to prove that the child understood why society chose to criminalize particular conduct or to be able to state the elements and degrees of a crime. We expect that most adults who are not involved in the legal profession would lack knowledge of these specifics of sexual offense crimes.

Holding

Here, when we apply the correct definition of "wrong," the evidence of capacity is clear and convincing that A.R. knew the sexual conduct was wrong at the time it occurred. Thus, the State has rebutted the presumption of incapacity.

Questions for Discussion

1. What is the issue and the facts in *State v. A.R.*?
2. Discuss the legal test for the capacity of a juvenile in Washington State. Why does the court note that it is more difficult to prove that a juvenile knew that a sexual offense was "wrong"?
3. Summarize the arguments for and against A.R. possessing the capacity to form a criminal intent.
4. Do you agree that A.R. knew that the sexual contact was "wrong at the time it occurred?"
5. How would you sentence A.R. if found guilty of first-degree rape of a child?

CASES AND COMMENTS

The facts in *State v. Ramer* generally parallel the facts in *State v. A.R.* Andrew Ramer at age 11 was found to lack the capacity to be held responsible for two counts of first-degree rape of a 7-year-old child. The court appeared to rely on the testimony of police and social service professionals who generally concluded that Ramer lacked the capacity to form a criminal intent. Ramer reportedly had been "rubbing the butt" of the 7-year-old and had placed his "penis inside" of the child's "butt." A disconcerting aspect of the case is that Ramer knew that his biological father had been incarcerated for molesting Ramer's younger sister. Ramer may have been molested as well. After his father's incarceration, Ramer's mother remarried. The man she married subsequently committed suicide when he learned that he would be prosecuted for molesting Ramer's sister. What do these facts suggest about Ramer's capacity to understand whether his conduct was right or wrong? See *State v. Ramer*, 86 P.3d 132 (Wash. 2004).

YOU DECIDE 9.3

K.R.L., 8 years and 2 months old, was playing with a friend behind a building. Catherine Alder heard the boys playing and directed them to leave because the area was dangerous. K.R.L. responded in an angry manner and replied that he would leave "in a minute." Alder, with obvious irritation, told the two boys, "No, not in a minute, now, get out of there now." The boys then ran off.

Three days later K.R.L. entered Alder's home without her permission. He removed a goldfish from a fishbowl, chopped it into several pieces with a steak knife, and "smeared it all over the counter." He then went into Alder's bathroom and "clamped a 'plugged in' hair curling iron onto a towel." K.R.L.'s mother testified that he admitted to her that entering Alder's home was wrong after she had beaten him "with a belt, black and blue." He told her that the "Devil was making him do bad things."

K.R.L. subsequently was charged with residential burglary. Earlier, he had taken "Easter candy" from a neighbor's home without permission. K.R.L. admitted to the police that he "knew it was wrong and he wouldn't like it if somebody took his candy." The same officer testified that on an earlier occasion, K.R.L. had been caught riding the bicycles of two neighbor children without having their permission. K.R.L. told the police officer that he "knew it was wrong" to ride the bicycles.

The assistant principal of K.R.L.'s elementary school testified that K.R.L. was of "very normal" intelligence. K.R.L.'s first-grade teacher said that K.R.L. had "some difficulty" in school and that he would place K.R.L. in a "lower age academically."

In Washington State, children younger than 8 are incapable of a criminal intent. Children between 8 and 12 years of age are presumed to be incapable of committing crime. This presumption may be overcome by proof that they have "sufficient capacity to understand the act or neglect, and to know that it was wrong."

The Washington Court of Appeals was asked to decide whether the trial court was correct in concluding that there was clear and convincing evidence that K.R.L. had the capacity to commit residential burglary. What is your opinion? See *State v. K.R.L.*, 840 P.2d 210 (Wash. Ct. App. 1992).

DURESS

The common law excused an individual from guilt who committed a crime to avoid a threat of imminent death or bodily harm. In several 17th- and 18th-century cases involving treason or rebellion against the king, defendants were excused who joined or assisted the rebels in response to a threat of injury or death. The common law courts stressed that individuals were obligated to desert the rebels as soon as the threat of harm was removed.⁴⁹

There are various explanations for the **duress** defense:

- *Realism.* The law cannot expect people to act in a heroic fashion and resist threats of death or serious bodily harm.
- *Criminal Intent.* An individual who commits a crime in response to a severe threat lacks a criminal intent.
- *Criminal Act.* Individuals who commit crimes under duress act in an involuntary rather than voluntary fashion.

Realism may be the most persuasive justification for duress. An English court nicely captured this concern in the observation that in the "calm of the courtroom, measures of fortitude or of heroic behavior are surely not to be demanded when they could not in moments for decision reasonably have been expected even of the resolute and the well-disposed."⁵⁰

The Elements of Duress

The defense of duress involves several central elements.

- *The defendant's actions are to be judged in accordance with a reasonable person standard.* In *State v. Van Dyke*, the defendant, Sheryl Van Dyke, was a 34-year-old mother of two who had

been married for 15 years. She was convicted of the sexual assault and endangerment of the welfare of J.M., a 13-year-old male with whom she had a sexual affair. Van Dyke claimed that she entered into and continued the relationship out of fear resulting from J.M.'s periodic physical abuse and threats to seriously assault her daughter and to choke her son to death. A New Jersey Superior Court ruled that society could reasonably expect that the will of the average member of the community would not be overwhelmed by the type of threats directed at Sheryl Van Dyke and her family.⁵¹

- *There must be a threat of death or serious bodily harm that causes an individual to commit a crime.* Most states also recognize that a threat directed against a member of the defendant's family or a third party may constitute duress. Psychological pressure or blackmail does not amount to a threat for purposes of duress.

- *Duress does not excuse the intentional taking of the life of another.* In the California case of *People v. Anderson*, the defendant Robert Anderson, along with Ron Kiern, abducted Margaret Armstrong, who was suspected of molesting Kiern's daughter. Anderson testified that when he objected to Kiern's request that Anderson give him a rock with which to beat Armstrong, Kiern responded, "[G]ive me the rock or I'll beat the s— out of you." The defendant testified that he gave Kiern the rock because he was "not 'in shape' to fight" and he feared that if he refused, Kiern would "punch me out, break my back, break my neck." The California Supreme Court held that the intentional taking of a life was not excused by duress and that the law "should require people to choose to resist rather than kill an innocent person." The majority opinion noted that California is "tormented by gang violence" and "persons who know they can claim duress will be more likely to follow a gang order to kill instead of resisting."⁵²

- *The threat must be immediate and imminent.* Judges have insisted on an imminent threat that compels an individual to "involuntarily" commit a crime; a threat of future harm is not considered to prevent an individual from making a reasoned choice whether to violate the law. In *Commonwealth v. Perl*, the defendant, Dr. Alan Perl, was a physician who provided LaCorte, described as a "longtime criminal," with prescriptions and pills after LaCorte mentioned in August 1993 that he knew where Perl's daughter attended school. This was followed by threats in January, March, and July 1994. On the last occasion, LaCorte told Perl that if he did not provide him with pills, "I will see your daughter." Perl continued to provide LaCorte's pills between August 1993 and October 1994. The Massachusetts Appeals Court denied Perl the defense of duress because LaCorte's threats were of future harm and were not "present, immediate, and impending."⁵³

- *An individual must have exhausted all reasonable and available alternatives to violating the law.* A defendant must reasonably believe that the criminal act is the only means of preventing imminent death or great bodily harm. Jon Barreau hit Robert Hansen with a bat, knocking him to the floor. Barreau's bat broke, and he directed Jeffery Keeran to hit Hansen "or I'm hitting you." Keeran testified that he grabbed the bat with two hands and struck Hansen twice and then went outside and vomited and waited roughly 45 minutes for Barreau to complete the robbery. A Wisconsin appellate court noted that Keeran offered no explanation of why he did not run out the back door, threaten Barreau, refuse to hit Hansen, or object that Hansen already was incapacitated. Judge Stuart Schwartz recognized that Keeran was afraid of Barreau, but nevertheless stressed that the duress defense requires that a criminal act is the "only course" and that duress is not a "license to take the safest course." Keeran reasonably believed that Barreau

would hunt him down if he refused to cooperate in the criminal enterprise. This, however, would not support a finding of duress, which requires the prevention of “imminent” death or great bodily harm.⁵⁴

- *The defendant must not create or assist in creating the circumstances leading to the claim of duress.* An individual must not intentionally or recklessly become involved in an enterprise in which it is foreseeable that the individual will be coerced into criminal activity. Drug dealer Luis Rafael Santiago Rodríguez approached Cesar Castro-Gomez and insisted that Castro-Gomez “solve his transportation problem.” Castro-Gomez testified that he felt threatened and drove with Santiago and one of his lieutenants to the dock where they boarded Castro-Gomez’s boat to retrieve the drugs. Castro-Gomez testified that he managed to frustrate the sale by deliberately steering the boat far from the drop point for the drugs. He was subsequently threatened by Santiago and feared that he would be killed. Several days later, Castro-Gomez agreed to meet Santiago at a local pizza parlor where Castro-Gomez testified that he again was intimidated into cooperating with the drug dealers. Castro-Gomez was apprehended several miles off the coast of Puerto Rico while piloting two other passengers in a ship carrying roughly 762 kilograms of cocaine and was charged with various drug offenses. The First Circuit Court of Appeals concluded that by returning to the pizza parlor, Castro-Gomez “recklessly placed himself in a situation in which it was probable that he would be subjected to duress” and that he was not entitled to raise the duress defense.⁵⁵

- *Married women were exempted from liability under the common law.* The common law presumed that a woman who committed a crime in the presence of her husband acted under his direction and she was not responsible. This is no longer the law.

Keep in mind that the individual exerting the coercion is liable as a principal in the crime despite the fact that the perpetrator may be excused on the basis of duress.

Duress and Correctional Institutions

The most controversial duress cases involve prison escapes in which inmates threatened with physical assault offer the defense of duress to excuse their escape. In *State v. Unger*, the defendant, Francis Unger, a 22-year-old full-blooded Crete Indian, pled guilty to a theft charge and was imprisoned for one to three years in Stateville Penitentiary in Joliet, Illinois. During the first two months of Unger’s imprisonment, he was threatened by an inmate wielding a 6-inch knife who demanded that the defendant engage in homosexual activity. Unger was transferred to a minimum-security honor farm and one week later was beaten and sexually assaulted by a gang of inmates.

Unger was warned against informing authorities and several days later received a phone call informing him that he would be killed in retribution for having allegedly contacted correctional officials. Unger responded by escaping from the honor farm, and he was apprehended two days later while still wearing his prison clothes. He claimed that he had intended to return to the institution.

The court determined that the correctional system was dominated by gangs that were too powerful to be controlled by prison officials. Unger, under these circumstances, was entitled to a jury instruction on duress because he may have reasonably believed that he had no alternative other than to escape or to be killed or to suffer severe bodily harm. The Illinois appellate court

held that it was unrealistic to require that a prisoner wait to escape until the moment that he was being “immediately pursued by armed inmates,” and it was sufficient that Unger was threatened that he would be dead before the end of the evening.⁵⁶

Inmates relying on duress must establish that they did not use force or violence toward prison personnel or other innocent individuals in the escape and that they immediately contacted authorities once having reached a position of safety. *Unger* is only one of a number of cases that have recognized that inmates are entitled to rely on duress. Do you believe that the judiciary acted correctly in recognizing Unger’s claim of duress? Are you confident that he was “telling the truth”? What about his failure to “turn himself in” to correctional authorities?

The Duress Defense

The defense of duress is not fully embraced by all commentators. The famous 19th-century English commentator Sir James Stephen argued that the law should stand firm against human frailty and weakness and insist that individuals follow legal rules, even under conditions of stress and strain. Sir James also contended that duress opens the door to individuals committing crimes and later claiming that they had been threatened and were entitled to the defense of duress. In the last analysis, critics argue that the law should encourage people to resist rather than conform to the demands of violent and forceful individuals. Do you agree? In reading the next case, *United States v. Contento-Pachon*, consider whether the trial court judge should have allowed the jury to consider Contento-Pachon’s defense of duress.

WAS THE DEFENDANT THREATENED WITH IMMEDIATE HARM BY THE DRUG DEALER?

UNITED STATES V. CONTENTO-PACHON, 723 F.2D 691 (9TH CIR.
1984)

Opinion by Boochever, J.

This case presents an appeal from a conviction for unlawful possession with intent to distribute a narcotic controlled substance in violation of 21 U.S.C. § 841(a)(1) (1976). At trial, the defendant attempted to offer evidence of duress and necessity defenses. The district court excluded this evidence on the ground that it was insufficient to support the defenses. We reverse because there was sufficient evidence of duress to present a triable issue of fact.

Facts

The defendant-appellant, Juan Manuel Contento-Pachon, is a native of Bogota, Colombia and was employed there as a taxicab driver. He asserts that one of his passengers, Jorge, offered him a job as the driver of a privately owned car. Contento-Pachon expressed an interest in the job and agreed to meet Jorge and the owner of the car the next day.

Instead of a driving job, Jorge proposed that Contento-Pachon swallow cocaine-filled balloons and transport them to the United States. Contento-Pachon agreed to consider the

proposition. He was told not to mention the proposition to anyone, otherwise he would "get into serious trouble." Contento-Pachon testified that he did not contact the police because he believes that the Bogota police are corrupt and that they are paid off by drug traffickers.

Approximately one week later, Contento-Pachon told Jorge that he would not carry the cocaine. In response, Jorge mentioned facts about Contento-Pachon's personal life, including private details that Contento-Pachon had never mentioned to Jorge. Jorge told Contento-Pachon that his failure to cooperate would result in the death of his wife and three-year-old child.

The following day the pair met again. Contento-Pachon's life and the lives of his family were again threatened. At this point, Contento-Pachon agreed to take the cocaine into the United States.

The pair met two more times. At the last meeting, Contento-Pachon swallowed 129 balloons of cocaine. He was informed that he would be watched at all times during the trip, and that if he failed to follow Jorge's instruction he and his family would be killed.

After leaving Bogota, Contento-Pachon's plane landed in Panama. Contento-Pachon asserts that he did not notify the authorities there because he felt that the Panamanian police were as corrupt as those in Bogota. Also, he felt that any such action on his part would place his family in jeopardy.

When he arrived at the customs inspection point in Los Angeles, Contento-Pachon consented to have his stomach x-rayed. The x-rays revealed a foreign substance which was later determined to be cocaine.

At Contento-Pachon's trial, the government moved to exclude the defenses of duress and necessity. The motion was granted. We reverse.

Issue

There are three elements of the duress defense: (1) an immediate threat of death or serious bodily injury, (2) a well-grounded fear that the threat will be carried out, and (3) no reasonable opportunity to escape the threatened harm. Sometimes a fourth element is required: the defendant must submit to proper authorities after attaining a position of safety.

Factfinding is usually a function of the jury, and the trial court rarely rules on a defense as a matter of law. If the evidence is insufficient as a matter of law to support a duress defense, however, the trial court should exclude that evidence.

The trial court found Contento-Pachon's offer of proof insufficient to support a duress defense because he failed to offer proof of two elements: immediacy and inescapability.

Reasoning

We examine the elements of duress.

Immediacy: The element of immediacy requires that there be some evidence that the threat of injury was present, immediate, or impending. "[A] veiled threat of future unspecified harm" will not satisfy this requirement. The district court found that the initial threats were not immediate because "they were conditioned on defendant's failure to cooperate in the future and did not place defendant and his family in immediate danger."

Evidence presented on this issue indicated that the defendant was dealing with a man who was deeply involved in the exportation of illegal substances. Large sums of money were at stake and, consequently, Contento-Pachon had reason to believe that Jorge would carry out his threats. Jorge had gone to the trouble to discover that Contento-Pachon was married, that he had a child, the names of his wife and child, and the location of his residence.

These were not vague threats of possible future harm. According to the defendant, if he had refused to cooperate, the consequences would have been immediate and harsh.

Contento-Pachon contends that he was being watched by one of Jorge's accomplices at all times during the airplane trip. As a consequence, the force of the threats continued to restrain him. Contento-Pachon's contention that he was operating under the threat of immediate harm was supported by sufficient evidence to present a triable issue of fact.

Escapability: The defendant must show that he had no reasonable opportunity to escape. The district court found that because Contento-Pachon was not physically restrained prior to the time he swallowed the balloons, he could have sought help from the police or fled. Contento-Pachon explained that he did not report the threats because he feared that the police were corrupt. The trier of fact should decide whether one in Contento-Pachon's position might believe that some of the Bogota police were paid informants for drug traffickers and that reporting the matter to the police did not represent a reasonable opportunity of escape.

If he chose not to go to the police, Contento-Pachon's alternative was to flee. We reiterate that the opportunity to escape must be reasonable. To flee, Contento-Pachon, along with his wife and three-year-old child, would have been forced to pack his possessions, leave his job, and travel to a place beyond the reaches of the drug traffickers. A juror might find that this was not a reasonable avenue of escape. Thus, Contento-Pachon presented a triable issue on the element of escapability.

Surrender to Authorities: As noted above, the duress defense is composed of at least three elements. The government argues that the defense also requires that a defendant offer evidence that he intended to turn himself in to the authorities upon reaching a position of safety. . . . [T]his fourth element seems to be required only in prison escape cases. Under other circumstances, the defense has been defined to include only three elements. . . .

In cases not involving escape from prison, there seems little difference between the third basic requirement that there be no reasonable opportunity to escape the threatened harm and the obligation to turn oneself in to authorities on reaching a point of safety. Once a defendant has reached a position where he can safely turn himself in to the authorities he will likewise have a reasonable opportunity to escape the threatened harm.

That is true in this case. Contento-Pachon claims that he was being watched at all times. According to him, at the first opportunity to cooperate with authorities without alerting the observer, he consented to the x-ray. We hold that a defendant who has acted under a well-grounded fear of immediate harm with no opportunity to escape may assert the duress defense, if there is a triable issue of fact whether he took the opportunity to escape the threatened harm by submitting to authorities at the first reasonable opportunity.

Holding

Contento-Pachon presented credible evidence that he acted under an immediate and well-grounded threat of serious bodily injury, with no opportunity to escape. Because the trier of fact should have been allowed to consider the credibility of the proffered evidence, we reverse . . . and remand.

Dissenting, Coyle, J.

The government also contends that the defense of duress includes a fourth element: That a defendant demonstrate that he submitted to proper authorities after attaining a position of safety. This is not an unreasonable requirement and I believe it should be applied. . . .

In granting the government's motion . . . excluding the defense of duress, the trial court specifically found Contento-Pachon had failed to present sufficient evidence to establish the necessary elements of immediacy and inescapability. In its Order the district court stated:

The first threat made to defendant and his family about three weeks before the flight was not immediate; the threat was conditioned upon defendant's failure to cooperate in the future and did not place the defendant and his family in immediate danger or harm. . . .

The defendant was outside the presence of the drug dealers on numerous occasions for varying lengths of time. There is no evidence that his family was ever directly threatened or even had knowledge of the threats allegedly directed against the defendant.

. . . [T]he trial court found that the defendant and his family enjoyed an adequate and reasonable opportunity to avoid or escape the threats of the drug dealers in the weeks before his flight. Until he went to the house where he ingested the balloons containing cocaine, defendant and his family were not physically restrained or prevented from seeking help. The record supports the trial court's findings that the defendant and his family could have sought assistance from the authorities or have fled. Cases considering the defense of duress have established that where there was a reasonable legal alternative to violating the law, a chance to refuse to do the criminal act and also to avoid the threatened danger, the defense will fail. Duress is permitted as a defense only when a criminal act was committed because there was no other opportunity to avoid the threatened danger . . . [I]t also is reasonable to require a defendant to demonstrate that he submitted to proper authorities after attaining a position of safety.

Questions for Discussion

1. What are the elements of the duress defense according to the majority decision in *Contento-Pachon*?
2. Why did the appellate court hold that Contento-Pachon should have been allowed to rely on the defense of duress?
3. What is the basis of Judge Coyle's dissent?
4. As a judge, how would you rule in this case?

CASES AND COMMENTS

1. Contento-Pachon Precedent and Threats Within the United States by Foreign Drug Dealers.

Pakistani authorities arrested a drug courier with several kilograms of heroin on his way to New York City. The Pakistanis reported to U.S. Drug Enforcement Administration officials that the courier planned to contact the defendant, Subhan. Agents arranged to meet Subhan and arrested him after he took possession of a bag that he believed contained drugs. Subhan claimed that his son had been kidnapped in Pakistan and that the kidnappers had written a note, which Subhan had destroyed, stating that his son would be returned after their "business" with Subhan had been concluded. Various friends and family members supported Subhan's story. Subhan claimed that he had been instructed to pick up the drugs and that he did not approach American authorities because he feared that they would contact the Pakistani

police. Subhan presented a report from the U.S. Department of State in his defense documenting that the Pakistani police were corrupt and involved with the drug dealers. He testified that he had reason to believe that the Pakistani authorities would contact the kidnappers, who would kill his son. Subhan relied on the precedent of *Contento-Pachon*. A federal district court ruled that this precedent was inapplicable since Subhan was in the United States at the time of the coercion and could have approached American law enforcement whereas Contento-Pachon was in Colombia, where the authorities were "allegedly corrupt." See *United States v. Subhan*, 38 Fed. App'x 89 (2d Cir. 2002).

Consider *Stannard v. State*, in which Brian Robert Stannard appealed his conviction for trafficking in more than 14 grams of oxycodone and obtaining a prescription by fraud. A Florida appellate court held that the trial court had improperly refused to allow Stannard to rely on the duress defense. Stannard had been taking oxycodone for knee pain. The prescription ran out, and Stannard did not have a job and alleged that he obtained oxycodone on credit from a drug dealer named Pops. When Stannard failed to pay the \$150 he owed, Pops and his friends came by several times a month demanding payment. Stannard and his mother were fearful and moved residences although Pops soon thereafter located Stannard at his new address and continued to threaten him. One evening Pops and his friends appeared at Stannard's home and grabbed him and said "come on, it's time to pay up." They placed Stannard in the back of their car and told him that he either was "going to pay up or was going to be beat bad enough that his mom wouldn't recognize [him]." They took Stannard to a pharmacy and handed him a forged prescription filled out with Stannard's name and other information. Pops and the other men accompanied Stannard into the pharmacy and remained within sight of Stannard during the entire time they were in the store. Stannard later testified that he believed that if he did not hand over the prescription Pops would follow through with the threat to injure Stannard, and Stannard also feared that Pops would threaten his mother. Stannard filled the prescription and handed the drugs over to Pops before they left the store. The trial court held that Stannard was not entitled to rely on the defense of duress because he did not confront an imminent or impending threat, he failed to exhaust the lawful alternatives of alerting the pharmacist or contacting the police after being threatened, and his testimony lacked credibility. A Florida appellate court held that Stannard confronted an imminent and immediate threat, had no reasonable opportunity to avoid the harm, and was entitled for the jury to hear the defense of duress. Stannard's credibility was a matter for the jury rather than the trial court judge. What is your view? See *Stannard v. State*, 113 So.3d 929 (Fla. App. 2013).

2. In *State v. Richter*, Sophia Leeann Richter was sentenced to 20 years on various charges including child abuse. Twelve-year-old A.A. and 13-year-old B.A. fled from the home they shared with their mother and stepfather, Sophia and Fernando Richter. They ran to a nearby house, shouting that their "stepfather [was] after them with a knife." Neighbors telephoned 911. According to the neighbors, the girls looked disheveled, their hair was matted, and they had body odor.

When police arrived, the girls reported having fled by climbing through a window after Fernando had broken down their bedroom door wielding a knife. Officers went to the home and found 17-year-old M.P., Sophia's oldest daughter, locked inside a bedroom. Officers discovered another bedroom that A.A. and B.A. shared, with two beds and "very [few] belongings"; the bottom half of the door had been kicked in, and the doorknob was damaged. Officers also observed bottles filled with urine throughout the house, video cameras and covered air-conditioning vents in the girls' rooms, a knife

near the master bedroom, and a five-gallon bucket with a rancid-smelling pasta mix in the refrigerator. According to the girls, Sophia and Fernando confined them to their bedrooms at all times—most recently, with M.P. in her own room and A.A. and B.A. sharing a room. The day of the incident was the first time M.P. had seen her sisters in more than a year. The girls had to ask permission to leave their bedroom, even to use the bathroom, by signaling to Sophia and Fernando by means of the cameras. They ate their meals, which mostly consisted of the pasta mix in the refrigerator, in their rooms; they each had one plate and one bowl, which they used for every meal and would either lick clean or wipe with a shirt or towel. Sophia and Fernando had taken the girls out of school several years before, and they never returned. The girls rarely brushed their teeth or bathed. They also described being spanked and hit with various objects.

Sophia maintained that the threat of physical harm was “ongoing,” over a period of three months. She maintained that “she was under immediate threat of physical harm to herself and/or her children” because “Fernando set the rules of the house.” Sophia was abused, as evidenced by the photographs of her knife injuries, “if she in any way challenged his authority.” In addition, Sophia offered evidence to rebut the defense attorney’s suggestion that the threat was not immediate because she could have escaped or otherwise alerted someone of their situation without injury. She testified that she was “tied down and not allowed to leave a certain room or the residence.” Sophia asserted that, while she was occasionally “allowed out for brief periods of time” to go grocery shopping, Fernando’s mother, who was “part of the controlling behavior,” accompanied her. In addition, she testified that “her phone was required to be on at all times in order that [Fernando] could hear what was going on.” The Arizona Supreme Court held that this kind of pervasive and continuous threat of harm can be considered to be “present, imminent and impending.” Richter initially had been sentenced to 20 years in prison, and following the reversal of her conviction, she entered into a plea bargain providing for a probationary sentence of 10 years on child abuse and kidnapping. Fernando was sentenced to 58 years in prison. See *State v. Richter*, No. CR-17-0452-PR, 2018 WL 4039523 (Ariz. Aug. 24, 2018).

YOU DECIDE 9.4

Georgia Carradine was held in contempt of court based on her refusal to testify after witnessing a gang-related homicide, explaining that she was in fear for her life and the lives of her children. Carradine was sentenced to six months in the Cook County jail. She persisted in this refusal despite the government’s offers to relocate her and her family to other areas in Chicago, Illinois, or the continental United States. Carradine had been separated from her husband for roughly four years and supported her six children aged 5 to 18 through payments from her husband and supplemental welfare funds. She explained that she distrusted the State’s attorney and doubted that law enforcement authorities could protect her from the Blackstone Rangers youth gang. Carradine’s fear was so great that she was willing to go to jail rather than to testify. The Illinois Supreme Court, in affirming the sentence, stated that criminals could not be brought to the bar of justice “unless citizens stand up to be counted.” Do you agree with the decision to deny Carradine the defense of duress? See *State v. Carradine*, 287 N.E.2d 670 (Ill. 1972). For a similar case see *United States v. Hernandez*, 237 Md. App. 540 (Ct. Spec. App. 2018).

MODEL PENAL CODE

Section 2.09. Duress

1. It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.
2. The defense . . . is unavailable if the actor recklessly . . . [or negligently] placed himself in such a situation. . . .
3. It is not a defense that a woman acted on the command of her husband.

Analysis

The Model Penal Code significantly amends the common law standard:

1. The threat need not be limited to death or serious bodily harm. The commentary provides for a threat of unlawful force against the individual or another that would coerce an individual of “reasonable firmness” in the defendant’s situation. Only threats to property or reputation are excluded in the commentary.
2. The threat is not required to be imminent or immediate.
3. Duress may be used as an excuse for homicide.
4. The threat may be to harm another person and is not limited to friends or relatives.

FIGURE 9.5 ■ The Legal Equation: Duress



MISTAKE OF LAW AND MISTAKE OF FACT

A core principle of the common law is that only “morally blameworthy” individuals should be subject to criminal conviction and punishment. What about individuals who commit an act that they do not realize is a crime? Consider a resident of a foreign country who is flying to the United States for a vacation and is asked by a new American acquaintance to bring a

vial of expensive heart medicine to the new friend's parents in the United States. The visitor is searched by American customs officials upon entry to the United States, and the heart medicine is discovered to be an illegal narcotic. Should the victim be held criminally liable for the knowing possession of narcotics despite this "mistake of fact"? What if the visitor was asked by the American friend to transport cocaine and was assured that there was nothing to worry about because the importation and possession of this narcotic is legal in the United States? How should the law address this "mistake of law"? We will be addressing these questions throughout the textbook, and this section merely provides you with an outline of the central issues.

In the previous two hypothetical examples, the question is whether individuals who mistakenly believe that their behavior is legal should be held liable for violating the law. Professor Wayne R. LaFave has observed that no area has created "more confusion" than mistakes of law and fact⁵⁷—a confusion that has caused "ulcers in law students."⁵⁸

Mistake of Law

The conventional wisdom is that *ignorantia legis non excusat*: "Ignorance of the law is no excuse." The rule that a **mistake of law** does not constitute a defense is based on several considerations⁵⁹:

- *Knowledge*. People are expected to know the law.
- *Evidence*. Defendants may falsely claim that they were unaware of the law. This claim would be difficult for the prosecution to overcome.
- *Public Policy*. The enforcement of the law ensures social stability.
- *Uniformity*. Individuals should not be permitted to define for themselves the legal rules that govern society.

The expectation that individuals know the law may have made sense in early England. Critics contend, however, that people cannot realistically be expected to comprehend the vast number of laws that characterize modern society. An individual who, through a lack of knowledge, violates highly technical statutes regulating taxation or banking can hardly be viewed as "morally blameworthy."⁶⁰

Consider *United States v. Hutzell*. Hutzell pled guilty to the state misdemeanor crime of "domestic abuse assault," and six months later Congress enacted 18 U.S.C. § 922(g)(9), which made it unlawful for anyone "who has been convicted in any court of a misdemeanor crime of domestic violence, to . . . possess . . . any firearm." Hutzell during an argument with his girlfriend two years after Congress passed § 922(g)(9) fired a gun and was subsequently charged with a violation of the federal felon in possession of a firearm law. Could Hutzell reasonably be expected to know that a state conviction for domestic abuse would result in his being charged with a violation of federal criminal law? The Eighth Circuit Court of Appeals rejected Hutzell's defense of mistake of law and held that "[n]o one can reasonably claim . . . to be unaware of the current level of concern about domestic violence; it is the subject of daily news reports and other

media attention. . . . [W]e believe that it is simply disingenuous for Mr. Hutzell to claim that his conviction under § 922(g)(9) involved . . . unfair surprise.” What if Hutzell fired the weapon during a domestic dispute one day after Congress passed § 922 (g)(9)?⁶¹

The result of the rule that a mistake of law does not constitute a defense may not always appear to be entirely fair. In the well-known case of *People v. Marrero*, a federal prison guard was arrested for carrying an unlicensed .38-caliber automatic handgun into a bar. He appealed on the grounds that the statute exempted “peace officers” from liability. “Peace officers” were defined in the law as any official or guard of “any state prison or of any penal correctional institution.” A New York court ruled by a vote of 3–2 that Marrero had misinterpreted the law and that the legislature intended that only New York State correctional officers were entitled to carry unlicensed handguns. Although two judges agreed with Marrero’s reading of the plain meaning of the law, the majority of the judges on New York’s highest court held that an individual who misinterprets a statute is never excused from criminal liability, no matter how reasonable the interpretation. The majority of the judges reasoned individuals are not permitted to substitute their personal view of the meaning of a law for the meaning of the law intended by the state legislature. Do you agree with the outcome of this case?⁶²

Some observers note that courts seem to have taken this criticism seriously and, in several instances, have relaxed the rule that individuals are presumed to “know the law.”⁶³ Three U.S. Supreme Court decisions illustrate this trend:

1. *Notice.* In *Lambert v. California*, the defendant was convicted of failure to adhere to a law that required a “felon” resident in Los Angeles to register with the police within five days. The U.S. Supreme Court found that convicting Lambert would violate due process because the law was unlikely to have come to his attention.⁶⁴
2. *Intent.* In *Cheek v. United States*, an airline pilot was counseled by antitax activists and believed that his wages did not constitute income and therefore he did not owe federal tax. He was convicted of willfully attempting to evade or defeat his taxes. The U.S. Supreme Court ruled that Congress required a showing of a willful intent to violate tax laws because the vast number of tax statutes made it likely that the average citizen might innocently fail to remain informed of the provisions of the tax code.⁶⁵

In *Miller v. Commonwealth*, Miller, a convicted felon, was arrested for “knowingly and intentionally” possessing a muzzle-loading rifle. The appellate court held that Miller had appropriately relied on the affirmative assurance of his probation officer who specifically was charged with legal responsibility for defining the terms of Miller’s probation. As a result, the court overturned Miller’s conviction. The legislature granted the probation officer supervisory responsibility for Miller’s conduct and treatment during the course of his probation, including the responsibility for arresting him for a violation of his probation. Miller could reasonably rely on his probation officer’s advice regarding whether he was legally authorized to possess the rifle. Miller, however, could not reasonably rely on the defense that he had consulted the Virginia Department of Game and Inland Fisheries, whose legal authority was limited to developing and regulating regulations for hunting and fishing.⁶⁶

3. *Reliance.* In the civil rights–era case of *Cox v. Louisiana*, the defendants were convicted of picketing a courthouse with the intent of interfering, obstructing, or influencing the administration of justice. The U.S. Supreme Court reversed the students’ convictions on the grounds that the chief of police had instructed them that they could legally picket at a location 101 feet from the courthouse steps.⁶⁷

The Model Penal Code section 2.04(3) recognizes an “ignorance of the law defense” when the defendant does not know the law and the law has not been published or made reasonably available to the public (notice). This defense also applies where the defendant has relied on an official statement of the law (reliance).

Mistake of Fact

A **mistake of fact** constitutes a defense in those instances when the defendant’s mistake results in a lack of criminal intent. The Model Penal Code section 2.04(1) states that “ignorance or mistake is a defense when it negatives the existence of a state of mind that is essential to the commission of an offense.” As a first step, determine the intent required for the offense and then compare this to the defendant’s state of mind. A defendant may take an umbrella from a restaurant during a rainstorm believing that this is the umbrella that the defendant left at the restaurant two years ago. The accused will be acquitted of theft because of the lack of intent to take, carry away, and permanently deprive the owner of the umbrella. Some courts require that a defendant’s mistake must be objectively reasonable, meaning that a reasonable person would have made the same mistake. A trial court, for instance, might conclude that it was unreasonable for the defendant to believe after two years that the umbrella was still at the restaurant.⁶⁸

Another aspect of the mistake of fact defense is that an individual may be mistaken but nonetheless will be held criminally liable in the event that the facts as perceived by the defendant still comprise a crime. For example, a defendant may be charged with receiving stolen umbrellas and contend to believe that the package contained stolen raincoats. This would not exonerate the defendant. The charge is based on the receipt of stolen property, not stolen umbrellas.⁶⁹ Let us return to the issue of whether a mistake of fact must be reasonable. Clearly an honest and good-faith mistake of fact, however misguided, negates a criminal intent. Should the law, however, insist that mistakes meet a reasonableness standard?

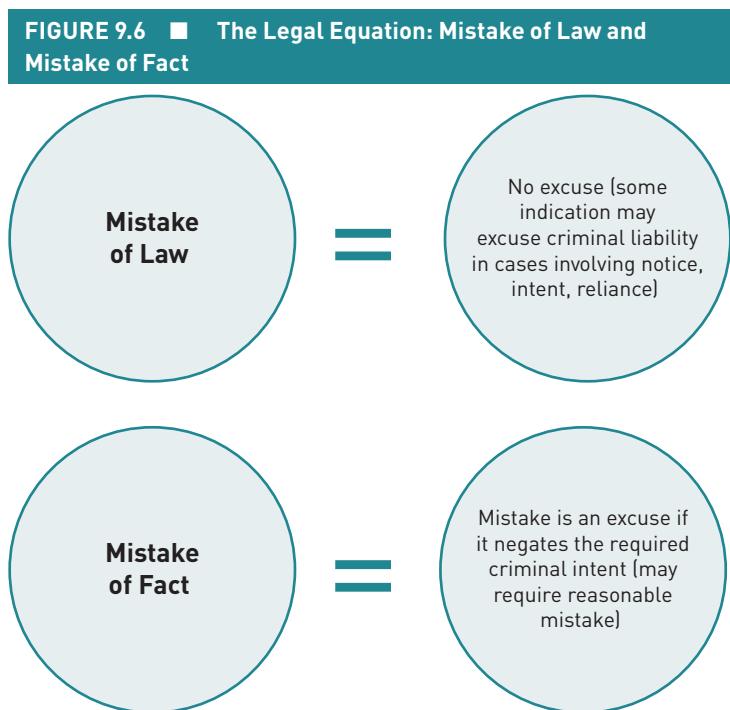
In *Commonwealth v. Liebenow*, the defendant was convicted of larceny for the theft of steel pipes and metal plates from a construction site. The defendant claimed that he lacked the specific intent to steal because he honestly believed that the metal property was abandoned. The Massachusetts Appeals Court concluded that the defendant’s belief, however sincere, was unreasonable because the metal materials were stored on private property with No Trespassing signs posted throughout the property and there was ongoing construction on the site.⁷⁰

In *People v. Atherton*, an Illinois appellate court held that a jury could reasonably conclude that a defendant arrested for residential burglary believed that he was helping a friend move.⁷¹

In the well-known English case of *Director of Public Prosecutions v. Morgan*, the appellant, Morgan, invited his three male co-appellants to have sexual relations with his wife. He led them to believe that Mrs. Morgan would consent to this group activity. Morgan cautioned that Mrs. Morgan was “kinky” and that she may “struggle a bit” in order to enhance her sense of

excitement. She was held down while each of the three men engaged in intercourse with her in the presence of the other appellants. The three were convicted of rape. The judge instructed the jury that the defendants must have reasonably believed that despite Mrs. Morgan's resistance, she consented to the rape. The British Law Lords (the equivalent of our U.S. Supreme Court) overturned the convictions and ruled that a male who acts on an unreasonably mistaken belief in the female's consent does not possess the required criminal intent and should be acquitted. Lord Hailsham observed that "either the prosecution proves that the accused had the requisite intent, or it does not." This decision resulted in Parliament's enacting a statutory amendment providing that the mistake of fact defense requires an honest and reasonable mistake. Could the appellants in *Morgan* credibly contend that they honestly and reasonably believed that Mrs. Morgan consented? Should we convict individuals who make a factual but unreasonable mistake, and who lack a criminal intent?⁷²

The Model Penal Code section 2.04(1)(a)(b) diverges from the English parliamentary rule and accepts that a mistake of fact constitutes a defense so long as it "negatives" the intent required under the statute. In other words, the Model Penal Code would acquit the defendants in *Morgan* if the jury believed that the defendants did not "purposely, knowingly, or recklessly" rape Mrs. Morgan.



YOU DECIDE 9.5

The defendant and his cousin, knowing that their marriage would be illegal in Nebraska, married in Iowa, where such unions are not prohibited. The county prosecutor informed the defendant that he would be prosecuted for sexual relations without marriage ("fornication") in the event that the couple continued to live in Nebraska because the marriage was not recognized in the state. Three private attorneys confirmed that the Iowa marriage was not valid in Nebraska. The defendant subsequently "separated" from his pregnant cousin and remarried another woman. It later was determined that, in fact, the Iowa marriage was valid in Nebraska, and the defendant was charged with bigamy (simultaneous marriage to more than a single spouse). Is the defendant guilty of bigamy? See *Staley v. State*, 89 Neb. 701 (1911).

ENTRAPMENT

American common law did not recognize the defense of **entrapment**. The fact that the government entrapped or induced a defendant to commit a crime was irrelevant in evaluating a defendant's guilt or innocence.

The development of the defense is traced to the U.S. Supreme Court's 1932 decision in *Sorrells v. United States*. In *Sorrells*, an undercover agent posing as a "thirsty tourist" struck up a friendship with Sorrells and was able to overcome Sorrells's resistance and persuaded him to locate some illicitly manufactured alcohol. Sorrells's conviction for illegally selling alcohol was reversed by the U.S. Supreme Court.⁷³

The decision in *Sorrells* defined entrapment as the "conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer." The essence of entrapment is the government's inducement of an otherwise innocent individual to commit a crime. Decisions have clarified that the prohibition on entrapment extends to the activities of undercover government agents, confidential informants, and private citizens acting under the direction of law enforcement personnel. The defense has been raised in cases involving prostitution; the illegal sale of alcohol, cigarettes, firearms, and narcotics; and public corruption. There is some indication that the defense may not be invoked to excuse a crime of severe violence.

There are good reasons for the government to rely on undercover strategies:

- *Crime Detection.* Certain crimes are difficult to investigate and to prevent without informants. This includes narcotics, prostitution, and public corruption.
- *Resources.* Undercover techniques, such as posing as a buyer of stolen goods, can result in a significant number of arrests without expending substantial resources.
- *Deterrence.* Individuals will be deterred from criminal activity by the threat of government involvement in the crime.

Entrapment is also subject to criticism:

- The government may “manufacture crime” by individuals who otherwise may not engage in such activity.
- The government may lose respect by engaging in lawbreaking.
- The informants who infiltrate criminal organizations may be criminals whose own criminal activity often is overlooked in exchange for their assistance.
- Innocent individuals are often approached in order to test their moral virtue by determining whether they will engage in criminal activity. They likely would not have committed a crime had they not been approached.

The Law of Entrapment

In developing a legal test to regulate entrapment, judges and legislators have attempted to balance the need of law enforcement to rely on undercover techniques against the interest in ensuring that innocent individuals are not pressured or tricked into illegal activity. As noted by U.S. Supreme Court Chief Justice Earl Warren in 1958, “[A] line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal.”⁷⁴

There are two competing legal tests for entrapment that are nicely articulated in the 1958 U.S. Supreme Court case of *Sherman v. United States*. Sherman’s conviction on three counts of selling illegal narcotics was overturned by the Supreme Court; and the facts, in many respects, illustrate the perils of government undercover tactics. Kalchinian, a government informant facing criminal charges, struck up a friendship with defendant Sherman. They regularly talked during their visits to a doctor who was assisting both of them to end their addiction to narcotics. Kalchinian eventually was able to overcome Sherman’s resistance and persuaded him to obtain and to split the cost of illegal narcotics.⁷⁵

The U.S. Supreme Court unanimously agreed that Sherman had been entrapped. Five judges supported a *subjective test* for entrapment, and four supported an *objective test*. The federal government and a majority of states follow a subjective test, whereas the Model Penal Code and a minority of states rely on the objective test. Keep in mind that the defense of entrapment was developed by judges, and the availability of this defense has not been recognized as part of a defendant’s constitutional right to due process of law. Entrapment in many states is an affirmative defense that results in the burden being placed on the defendant to satisfy a preponderance of the evidence standard. Other states require the defendant to produce some evidence, and then they place the burden on the government to rebut the defense beyond a reasonable doubt.⁷⁶

The Subjective Test

The subjective test focuses on the defendant and asks whether the accused possessed the criminal intent or “predisposition” to commit the crime or whether the government “created” the offense. In other words, “but for” the actions of the government, would the accused have broken the law? Was the crime the “product of the creative activity of the government” or the result of the defendant’s own criminal design?

The first step is to determine whether the government induced the crime. This requires that the undercover agent or informant persuade or pressure the accused. A simple offer to sell or to purchase drugs is a “mere offer” and does not constitute an “inducement.” In contrast, an inducement involves appeals to friendship, compassion, promises of extraordinary economic or material gain, sexual favors, or assistance in carrying out the crime.

The second step is the most important and involves evaluating whether the defendant possessed a “predisposition” or readiness to commit the crime with which the defendant is charged. The law assumes that a defendant who is predisposed is ready and willing to engage in criminal conduct in the absence of governmental inducements and, for this reason, is not entitled to rely on the defense of entrapment. In other words, the government must direct its undercover strategy against the unwary criminal rather than the unwary innocent. How is predisposition established? A number of factors are considered⁷⁷:

- the character or reputation of the defendant, including prior criminal arrests and convictions for the type of crime involved;
- whether the accused suggested the criminal activity;
- whether the defendant was already engaged in criminal activity for profit;
- whether the defendant was reluctant to commit the offense; and
- the attractiveness of the inducement.

In *Sherman*, the purchase of the drugs was initiated by the informant, Kalchinian, who overcame Sherman’s initial resistance and persuaded him to obtain drugs. Kalchinian, in fact, had instigated two previous arrests and was facing sentencing for a drug offense himself. The two split the costs. There is no indication that Sherman was otherwise involved in the drug trade, and a search failed to find drugs in his home. Sherman’s nine-year-old sales conviction and five-year-old possession conviction did not indicate that he was ready and willing to sell narcotics. In other words, before Kalchinian induced Sherman to purchase drugs, he seemed to be genuinely motivated to overcome his dependency on narcotics.

The underlying theory is that the jury, in evaluating whether the defendant was entrapped, is merely carrying out the intent of the legislature. The “fiction” is that the legislature did not intend for otherwise innocent individuals to be punished who were induced to commit crimes by government trickery and pressure. The issue of entrapment under the subjective test is to be decided by the jury.

The Objective Test

The objective test focuses on the conduct of the government rather than on the character of the defendant. Justice Felix Frankfurter, in his dissenting opinion in *Sherman*, explained that the crucial question is “whether police conduct revealed in the particular case falls below standards to which common feelings respond, for the proper use of governmental power.” The police, of course, must rely on undercover work, and the test for entrapment is whether the government, by offering inducements, is likely to attract those “ready and willing” to commit crimes

“should the occasion arise” or whether the government has relied on tactics and strategies that are likely to attract those who “normally avoid crime and through self-struggle resist ordinary temptations.”

The subjective test focuses on the defendant; the objective test focuses on the government’s conduct. Under the subjective test, if an informant makes persistent appeals to compassion and friendship and then asks a defendant to sell narcotics, the defendant has no defense if predisposed to selling narcotics. Under the objective test, there would be a defense because the conduct of the police, rather than the predisposition of the defendant, is the central consideration.⁷⁸

Justice Frankfurter wrote that public confidence in the integrity and fairness of the government must be preserved and that government power is “abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law.”⁷⁹ These unacceptable methods lead to a lack of respect for the law and encourage criminality. Frankfurter argued that judges must condemn corrupt and uncivilized methods of law enforcement even if this judgment may result in the acquittal of the accused. Frankfurter criticized the predisposition test for providing protection for “innocent defendants” while permitting the government to employ various unethical strategies and schemes against defendants who are predisposed.

In *Sherman*, Frankfurter condemned Kalchinian’s repeated requests that the accused assist him to obtain drugs. He pointed out that Kalchinian took advantage of Sherman’s susceptibility to narcotics and manipulated Sherman’s sympathetic response to the pain Kalchinian was allegedly suffering in withdrawing from drugs. The *Sherman* and *Sorrells* cases suggest that practices prohibited under the objective test include

- taking advantage of weaknesses;
- repeating appeals to friendship or sympathy;
- promising substantial economic gain;
- employing pressure or threats;
- providing the equipment required for carrying out a crime; and
- uttering false representations designed to induce a belief that the conduct is not prohibited.

The question is whether the inducements would tempt an “ordinarily law-abiding” person to commit a crime. A defendant may rely on the objective test even if the defendant is predisposed to commit the crime.

Critics complain that the objective test has not resulted in clear and definite standards to guide law enforcement. Can you determine at what point Kalchinian crossed the line? Critics also charge that it makes little sense to acquit a defendant who is “predisposed” based on the fact that a “mythical innocent” individual may have been tricked into criminal activity by the government’s tactics. However, the objective test was adopted by the Model Penal Code, which follows Justice Frankfurter in assigning the determination of entrapment to judges rather than

juries based on the fact that judges are responsible for safeguarding the integrity of the criminal justice process and deterring “unsavory police methods.”

Due Process

Various defendants have unsuccessfully argued that entrapment tactics violate the Due Process Clause of the U.S. Constitution. In other words, the contention is that the government’s conduct is so unfair and outrageous that it would be unjust to convict the defendants under the U.S. Constitution.

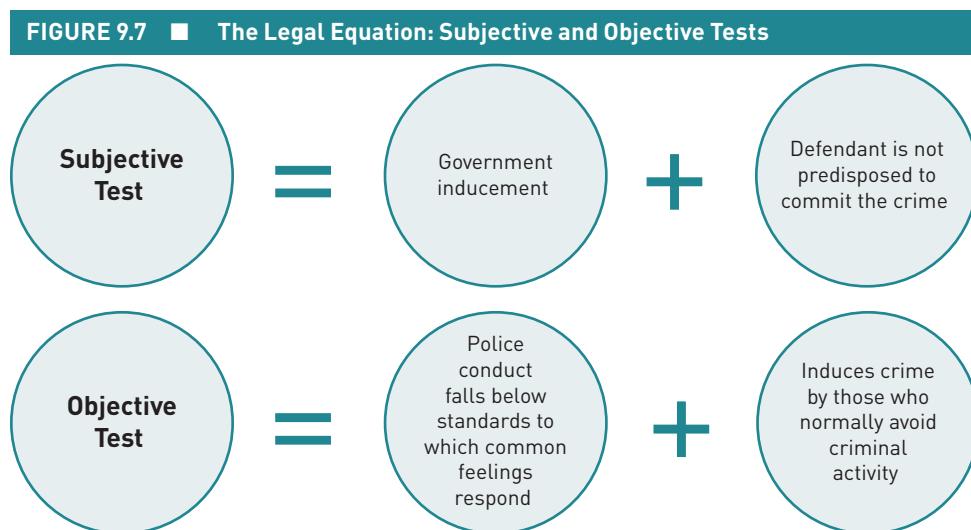
The U.S. Supreme Court rejected this argument in *United States v. Russell*. Joe Shapiro, an undercover agent for the federal Bureau of Narcotics and Dangerous Drugs, met with Richard Russell and his co-defendants John and Patrick Connolly. Shapiro offered to provide them with the chemical phenyl-2-propanone, an essential element in the manufacture of methamphetamine, in return for half of the drugs produced. The three provided Shapiro with a sample of their most recent batch and showed him their laboratory, where Shapiro observed an empty bottle of phenyl-2-propanone. The next day Shapiro delivered 100 grams of phenyl-2-propanone and watched as two of the defendants begin to manufacture methamphetamine. Shapiro later was given half of the drugs, and he purchased a portion of the remainder. A warrant was obtained, and a search revealed two bottles of phenyl-2-propanone, neither of which had been provided by Shapiro.

The defendants, although certainly predisposed to manufacture and sell narcotics, creatively claimed that the government violated due process by prosecuting them for a crime in which the government had been intimately involved. The U.S. Supreme Court rejected this argument and stressed that although phenyl-2-propanone was “difficult to obtain, it was by no means impossible” as indicated by the fact that the defendants had been manufacturing “speed” without the phenyl-2-propanone provided by Shapiro. The court concluded that “[w]hile we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction, . . . the instant case is distinctly not of that breed.” The Supreme Court stressed that the investigation of drug-related offenses often requires infiltration and cooperation with narcotics rings and that the law enforcement tactics employed in *Russell* were neither in violation of “fundamental fairness” nor “shocking to the universal sense of justice.”⁸⁰

The Entrapment Defense

We might question whether courts should be involved in evaluating law enforcement tactics and in acquitting individuals who are otherwise clearly guilty of criminal conduct. Can innocent individuals really be pressured into criminal activity? Do we want to limit the ability of the police to use the techniques they believe are required to investigate and punish crime? There also appear to be no clear judicial standards for determining predisposition under the subjective test and for evaluating acceptable law enforcement tactics under the objective test. This leaves the police without a great deal of guidance or direction. On the other hand, we clearly are in need

of a legal mechanism for preventing government abuse. The next case, *Miller v. State*, raises the issue of whether there should be limits on governmental approaches to criminal investigation. This is a *per curiam* decision, meaning that it is a judgment issued by an entire appellate court as an “institution” without identifying a particular judge as the author.



WAS MILLER ENTRAPPED BY THE UNDERCOVER POLICE DECOY?

MILLER V. STATE, 110 P.3d 53 (NEV. 2005)

Per curiam.

Issue

This appeal arises out of an undercover decoy program initiated by the Las Vegas Metropolitan Police Department (LVMPD). The decoy program was designed to combat an increase in street-level robberies occurring in downtown Las Vegas. A street-level robbery is a person-to-person crime where one person walks up to another and either robs them or picks their pocket.

Facts

As part of the decoy operation, Detective Jason Leavitt disguised himself as an intoxicated vagrant to blend in with transient persons who reside in certain areas of Las Vegas. Detective Leavitt carried twenty one-dollar bills in a pocket and left a small portion of the bills exposed. This allowed someone standing close to him to see the money, but the bills

were hidden well enough that they did not attract the attention of every passerby. Detective Leavitt wore a monitoring device that allowed surveillance and arrest teams to hear what Detective Leavitt heard and said. When Detective Leavitt gave a predetermined signal, arrest teams would approach the scene and apprehend the suspect.

On July 29, 2003, Detective Leavitt was dressed in black jeans, a dirty t-shirt, a short-sleeved flannel shirt, and a baseball cap. Twenty one-dollar bills were folded inside the breast pocket of the flannel shirt so that only the tips of the bills were exposed. Detective Leavitt rubbed charcoal on his face to appear dirty and wiped beer on his neck to give off the odor of alcohol. He also walked with a limp and carried a can of beer to appear intoxicated.

Detective Leavitt positioned himself on the 200 block of Main Street across from the Greyhound Bus Station and leaned against a chain link fence. Appellant Richard Miller, who was walking southbound on Main Street, approached Detective Leavitt and asked him for money. When Detective Leavitt told Miller that he would not give him any money, Miller put his arm around Detective Leavitt and invited him to get a drink.

Miller stood to the left of Detective Leavitt with his right arm around Detective Leavitt's shoulders. Miller then pulled Detective Leavitt closer to him, quickly reached his hand into Detective Leavitt's pocket, and took the twenty dollars. Miller then loosened his grip on Detective Leavitt and again asked for money. Detective Leavitt said that he could not give Miller any money because his money was gone. The undercover arrest team then converged on the location and took Miller into custody.

The State charged Miller, by information, with larceny from the person. After a two-day trial, the jury convicted Miller, and the district court sentenced him to a maximum of 32 months and a minimum of 12 months imprisonment. On appeal, Miller argues that he was entrapped, that the prosecutor impermissibly commented on his decision not to testify, and that the prosecutor committed other misconduct.

Reasoning

Miller argues that police officers entrapped him by improperly tempting him with exposed money and a helpless victim. We disagree.

"The entrapment defense is made available to defendants not to excuse their criminal wrongdoing but as a prophylactic device designed to prevent police misconduct. . . . [E]ntrapment encompasses two elements: (1) an opportunity to commit a crime is presented by the state (2) to a person not predisposed to commit the act. . . ." [T]he Government may use undercover agents to enforce the law." Nevertheless, undercover agents "may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute."

In *DePasquale v. State*, 757 P.2d 367 (Nev. 1988), we discussed our prior entrapment jurisprudence where an undercover officer posed as a decoy. We cited three earlier cases that collectively held that the defendant was entrapped where the undercover decoy "was apparently helpless, intoxicated, and feigned unconsciousness with cash hanging from his pocket." Specifically, we noted that the "degree of vulnerability, exemplified in [those prior cases] by the decoy's feigned lack of consciousness, . . . cloaks any suggestion of the defendant's predisposition."

However, in *DePasquale*, we held that the defendant was not entrapped when he stole from a female undercover police officer who was walking along open sidewalks around a casino with money zipped into her purse. Thus, we have drawn a clear line between a realistic decoy who poses as an alternative victim of potential crime and the helpless, intoxicated,

and unconscious decoy with money hanging out of a pocket. The former is permissible undercover police work, whereas the latter is entrapment.

The opportunity presented to commit a crime was not improper. The theft in this case occurred across from the Greyhound Bus Station at the 200 block of South Main Street in Las Vegas. Twenty one-dollar bills were folded inside the breast pocket of Detective Leavitt's flannel shirt so that only the tips of the bills were exposed. Miller, who was walking south-bound on Main Street, approached Detective Leavitt and asked him for money. When Detective Leavitt told Miller that he would not give him any money, Miller put his arm around Detective Leavitt and invited him to get a drink. Miller stood to the left of Detective Leavitt with his right arm around Detective Leavitt's shoulders. Miller then pulled Detective Leavitt closer to him, quickly reached his hand into Detective Leavitt's pocket, and took the twenty dollars.

The police committed no misconduct in this operation. The opportunity presented was sufficient to lead to a criminal act only by a person predisposed to commit a crime. Though a suspect is entrapped when the decoy officer poses as an unconscious vagrant with exposed money hanging from his pockets, Detective Leavitt did not feign unconsciousness nor was his money readily accessible. Only a portion of the bills were exposed; a passerby could see the edges of currency, but not the denominations. Detective Leavitt did not entice Miller into stealing the money. Rather, Miller approached Detective Leavitt and asked him for money. When Detective Leavitt refused to give him money, Miller picked his pocket.

It is clear that Miller was predisposed to commit larceny from the person. We have recognized five factors that, though not exhaustive, are helpful to determine whether the defendant was predisposed: (1) the defendant's character, (2) who first suggested the criminal activity, (3) whether the defendant engaged in the activity for profit, (4) whether the defendant demonstrated reluctance, and (5) the nature of the government's inducement. "Of these five factors, the most important is whether the defendant demonstrated reluctance which was overcome by the government's inducement."

Miller's character is unclear from the record, but it is clear that Miller initiated the conversation and engaged in the larceny for profit. Furthermore, Miller exhibited no reluctance about his actions. Finally, the critical balance between government inducement and Miller's reluctance weighs in favor of predisposition here. Miller approached Detective Leavitt, initiated a conversation, and asked for money. When Detective Leavitt told Miller he would not give him any money, Miller picked his pocket. These facts demonstrate a predisposition to commit the crime of larceny from the person. Since Miller was predisposed to commit the crime, he was not entrapped.

Holding

We conclude that Miller was not entrapped because he was predisposed to commit the crime of larceny from the person. Furthermore, the State did not improperly comment on Miller's failure to testify, nor did the State commit prosecutorial misconduct by implying that Miller was dangerous and preyed upon vulnerable persons. Accordingly, we affirm the conviction.

Questions for Discussion

1. Summarize the facts in *Miller*.
2. Why does the Nevada Supreme Court conclude that Miller was not entrapped?
3. How does the court distinguish *Miller* and *DePasquale* from earlier cases that held that the defendant was entrapped?
4. Was this entrapment under the objective test?

CASES AND COMMENTS

Betty Jean Phillips contacted the Grand Rapids Police Department when she sought help to "kick" a drug habit. Questioned by officers of the vice squad, she named Dr. Wisneski as one of her suppliers. At the officers' request, Phillips went to the doctor's office to try to get a prescription for drugs. Dr. Wisneski refused to write the requested prescription, and Phillips left. She returned the next day and was instructed by the police to do only what she would normally do when she went to the defendant's office and "not to go in and do that [oral sexual contact] unless that's what she had to do." Before entering the doctor's office, she was equipped with a tape recorder and transmitter. The transcript of this encounter indicates that Dr. Wisneski asked her to leave and threatened to evict her from his office. Although Phillips explained that she was there to pay her medical bill, she later admitted she had no money on her at the time. After making several ambiguous sexual overtures that Wisneski failed to understand, Phillips made a visual sexual gesture that he did comprehend. Phillips then performed oral sex on Wisneski. At this point Phillips asked and Wisneski agreed to write Phillips a prescription for 30 Preludin in her maiden name.

Michigan uses the objective test for entrapment, which focuses on police conduct rather than the individual defendant's predisposition to commit the offense. The character or propensities of a particular defendant are totally irrelevant to the entrapment determination. The real concern in entrapment cases under the objective test is "whether the actions of the police were so reprehensible under the circumstances, that the Court should refuse, as a matter of public policy, to permit a conviction to stand."

A Michigan appellate court held that police encouragement of an agent's use of sex to induce one who is unwilling and unready to commit a crime constitutes entrapment. Although the relationship between Phillips and Dr. Wisneski was created independent of any police involvement, it was at the direction of the police that this friendship was "kept alive solely for the purpose of inducing defendant to sell drugs." See *People v. Wisneski*, 22 N.W.2d 196 (Mich. App. 1980).

NEW DEFENSES

The criminal law is based on the notion that individuals are responsible and accountable for their decisions and subject to punishment for choosing to engage in morally blameworthy behavior. We have reviewed a number of circumstances in which the law has traditionally recognized that individuals should be excused and should not be held fully responsible. In the last decades, medicine and the social sciences have expanded our understanding of the various factors that influence human behavior. This has resulted in defendants offering various new defenses that do not easily fit into existing categories. These defenses are not firmly established and have yet to be accepted by judges and juries. Most legal commentators dismiss the defenses as "quackery" or "science" and condemn these initiatives for undermining the principle that individuals are responsible for their actions.

One of the foremost critics is Professor Alan Dershowitz of Harvard Law School, who has pointed to 50 "abuse excuses." Dershowitz defines an **abuse excuse** as a legal defense in which defendants claim that the crimes with which they are charged result from their own

victimization and that they should not be held responsible. Examples are the “battered wife” and “battered child syndromes” (discussed in Chapter 8).⁸¹ A related set of defenses are based on the claim that the defendant’s biological or genetic heredity caused the defendant to commit a crime. Professor George Fletcher has warned that these types of defenses could potentially undermine the assumption that all individuals are equal and should be rewarded or punished based on what they do, not on who they are. On the other hand, proponents of these new defenses argue that the law should evolve to reflect new intellectual insights.⁸²

Some New Defenses

Four examples of **biological defenses** are as follows:

- *XYY Chromosome.* This is based on research that indicates that a large percentage of male prison inmates possess an extra Y chromosome that results in enhanced “maleness.” (Each fetus has two sex chromosomes, one of which is an X. A female has two X chromosomes; a male a Y and an X chromosome.) A Maryland appeals court dismissed a defendant’s claim that his robbery should be excused based on the presence of an extra Y masculine chromosome that allegedly made it impossible for him to control his antisocial and aggressive behavior.⁸³
- *Premenstrual Syndrome (PMS).* Many women experience cramps, nausea, and discomfort prior to menstruation. PMS has been invoked by defendants who contend that they suffered from severe pain and distress that drove them to act in a violent fashion. Geraldine Richter was detained by an officer for driving while intoxicated, and she verbally attacked and threatened the officer and kicked the Breathalyzer. A Fairfax County, Virginia, judge acquitted Richter of driving while intoxicated and resisting arrest and other charges after an expert testified that her premenstrual condition caused her to absorb alcohol at an abnormally rapid rate.⁸⁴
- *Postpartum Psychosis.* This is caused by a drop in the hormonal level following the birth of a child. The result can be depression, suicide, and—in its extreme manifestations—delusions, hallucinations, and violence. Stephanie Molina reportedly was a happy and outgoing young woman who suffered severe depression and a paranoid fear of being killed. She subsequently killed her child, attempted suicide, and made an effort to burn her house down. A California appellate court ruled that the jury should have been permitted to consider evidence of Molina’s condition in evaluating her guilt for the intentional killing of her child.⁸⁵
- *Environmental Defense.* The Massachusetts Supreme Judicial Court rejected a defendant’s effort to excuse a homicide based on the argument that the chemicals he used in lawn care work resulted in involuntary intoxication and led him to violently respond to a customer’s complaint.⁸⁶

Brainwashing is an example of a **psychological defense** in which an individual claims to have been placed under the mental control of others and to have lost the capacity to make

independent decisions. A well-known example is newspaper heiress Patricia Hearst who, in 1974, was kidnapped by a small terrorist group, the Symbionese Liberation Army (SLA). Several months later, she entered a bank armed with a machine gun and assisted the group in a robbery. Hearst testified at trial that she had been abused and brainwashed by the SLA and had been programmed to assume the identity of “Tanya the terrorist.” The jury dismissed this claim and convicted Hearst.⁸⁷ Another example of a psychological defense is **post-traumatic stress disorder (PTSD)**. A Tennessee court of appeals ruled that a veteran of the Desert Shield and Desert Storm military campaigns who recently had returned to the United States should be permitted to introduce evidence demonstrating that his wartime experiences led him to react in an emotional and violent fashion to his wife’s romantic involvement with the victim.⁸⁸

Defendants relying on **sociological defenses** claim that their life experiences and environment have caused them to commit crimes. These include the following:

- *Black Rage.* Colin Ferguson, a 35-year-old native of Jamaica, boarded a commuter train in New York City in December 1993 and embarked on a shooting spree against white and Asian passengers that left 6 dead and 19 wounded. The police found notes in which Ferguson expressed a hatred for these groups as well as for “Uncle Tom Negroes.” His lawyer announced that Ferguson would offer the defense of extreme racial stress precipitated by the destructive racial treatment of Black Americans. Ferguson ultimately represented himself at trial and did not raise this defense, which nonetheless has been the topic of substantial discussion and debate.⁸⁹
- *Urban Survivor.* Daimion Osby, a 17-year-old student, shot and killed two unarmed cousins who had been demanding that Osby provide them with the opportunity to win back the money they had lost to him while gambling. At one point, a white pickup apparently belonging to one of the cousins pulled alongside Osby’s automobile, and a rifle barrel was allegedly pointed out the window. Two weeks later, the same truck approached, and Osby shot and killed the occupants, Marcus and Willie Brooks, neither of whom were armed. The defense offered the “urban survivor defense” during Osby’s first trial. This resulted in a hung jury. Osby then was retried and convicted. The defense unsuccessfully appealed the fact that Osby was prohibited from introducing experts supporting his claim of the “urban survivor syndrome” at the second trial. The “urban survivor defense” consists of the contention that young people living in poor and violent urban areas do not receive adequate police protection and develop a heightened awareness and fear of threats.⁹⁰
- *Media Intoxication.* Defendants have claimed that their criminal conduct is caused by “intoxication” from television and pornography. Ronald Ray Howard, 19, unsuccessfully argued in mitigation of a death sentence that he had killed a police officer while listening to “gangsta rap.”⁹¹
- *Rotten Social Background.* In *United States v. Alexander*, the defendant shot and killed a white Marine who had uttered a racial epithet. The Black American defendant claimed that he had shot as a result of an irresistible impulse that resulted from his

socially deprived childhood. Alexander's early years were marked by abandonment, poverty, discrimination, and an absence of love. This "rotten social background" (RSB) allegedly created an irresistible impulse to kill in response to the Marine's remark.

The U.S. Court of Appeals for the District of Columbia Circuit affirmed the trial judge's refusal to issue a jury instruction on RSB. Judge David Bazelon dissented and questioned whether society had a right to sit in judgment over a defendant who had been so thoroughly mistreated.⁹²

- *Post-Traumatic Stress Disorder (PTSD).* Defendant Bruce Franklin Jerrett was charged with first-degree murder, breaking and entering, kidnapping, and armed robbery. Jerrett and his mother testified to six or seven incidents following the Vietnam War in which he "blacked out," and on one occasion he attacked his sister. He attributed the incidents to the downward spiral of his health as a result of having been exposed to the chemical Agent Orange. Following his blackouts, Jerrett had no memory of what he had done. Jerrett appealed his conviction, and the North Carolina Supreme Court overturned his conviction on the grounds that the jurors should have received an instruction that if they found that the defendant suffered from PTSD and was unconscious at the time of his crime, he should be acquitted.⁹³

CASES AND COMMENTS

Consider the case of Ethan Couch and the notion of an "abuse excuse." On June 15, 2013, 16-year-old Couch and seven friends stole beer from a store and went to Couch's parents' house to party. Later that night Couch and seven friends took a Ford F-350 owned by his father's company and headed for the store. Couch had a blood alcohol content of over .24, three times the legal limit for an adult in Texas, and accelerated the Ford F-350 to 70 miles per hour in a 40-miles-per-hour zone. The truck swerved off the road killing four pedestrians, three of whom were assisting a stranded motorist. Two teenagers riding in the bed of the pickup were thrown from the vehicle. One of the young men, Sergio Molina, 14, suffered a severe brain injury and was paralyzed.

Couch's parents lived in a wealthy suburb of Fort Worth, Texas, with a median income of \$250,000. Couch pled guilty, and his lawyer at the sentencing hearing called psychologist G. Dick Miller to testify. Miller diagnosed Couch as suffering from "affluenza" or a diminished sense of responsibility associated with being the pampered child of wealthy parents who are too busy to properly parent their child. Miller explained that Couch "never learned to say that you're sorry if you hurt someone. If you hurt someone, you sent him money." Miller testified that Couch possessed an emotional age of 12 and that he never learned that "sometimes you don't get your way. He had the cars and he had the money. He had freedoms that no young man would be able to handle."

Prosecutors asked for the maximum sentence of 20 years in prison. They pointed out that a court had never before recognized the "affluenza" defense and that "affluenza" is not recognized as an illness by the American Psychiatric Association. Judge Jean Boyd decided

against following the prosecutors' recommendation and sentenced Couch to 10 years' probation and ordered Couch to receive treatment at a high-priced California drug facility where he was to have no contact with his parents. Couch's parents were to pay the cost of the treatment, which is estimated to be roughly \$450,000 per year. Judge Boyd noted that it would be difficult for Couch to receive this type of high-caliber, intensive treatment in the underfunded Texas correctional system.

Defense attorneys explained that it was good social policy to sentence a young person to probation rather than to condemn him to prison and that the judge acted appropriately in giving Ethan a chance to rehabilitate himself. The prosecutor and families of the victims were outraged and asked whether a defendant from a low-income family would have received the same consideration if a lawyer pled that the defendant's crime was a product of the individual's impoverished background. On the other hand, defenders of the sentence pointed out that the court had acted appropriately because the Texas juvenile justice system is built on the notion of rehabilitation rather than punishment of youthful offenders. One journalist for the *Dallas Observer* noted that "[b]ecause we condemn everybody else's kid to violent prisons, does that mean it is unjust to let any one kid go [outside the system]?" Couch's parents reached a \$2 million settlement with the family of Molina, who was paralyzed in the crash. Five other families also are known to have reached confidential financial settlements. Do you agree with Judge Boyd's sentence? When Couch turned 19, his case was transferred to adult court; and based on his drinking and fleeing to Mexico along with his mother in violation of his conditions of parole, he was sentenced to 720 days in prison.

THE CULTURAL DEFENSE

Defendants in several cases have invoked the "cultural defense." This involves arguing that foreign-born defendants were following their culture and were understandably unaware of the requirements of American law. Those in favor of the "cultural defense" argue that it is unrealistic to expect that new immigrants will immediately know or accept American practices in areas as important as the raising and disciplining of children.

The acceptance of diversity, however, may breed a lack of respect for the law among immigrant groups and lead Americans who are required to conform to legal standards to believe that they are being treated unfairly. Judges and juries may also lack the background to determine the authentic customs and traditions of various immigrant groups and may be forced to rely on expert witnesses to understand different cultures.

Multiculturalism may be in conflict with important American values regarding respect for women and children. Various Laotian American tribal groups continue the practice of "marriage by capture," in which a prospective bride is expected to protest sexual advances and the male is required to compel the woman to submit in order to establish his courage and ability to be a strong and suitable husband. In one California case, a young woman who did not accept her parents' Hmong cultural practice alleged that she had been raped by her new husband, who invoked a cultural defense.⁹⁴

Maine and Hawaii have *de minimis* statutes that authorize a judge to dismiss charges against a defendant whose actions under the specific circumstances, though violative of a criminal

statute in the view of the judge, are not the type of conduct that the legislature intended to punish. Maine Revised Statutes title 17-1, section 12(B)(C), provides in part that a court may dismiss a prosecution if it finds the defendant's conduct

- A. did not actually cause or threaten the harm sought to be prevented by the law defining the crime or did so only to an extent too trivial to warrant the condemnation of conviction; or
- B. presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in defining the crime.

Mohammad Kargar, an immigrant from Afghanistan who had resided in the United States for roughly five years, was arrested for kissing the penis of his 18-month-old son. Kargar explained that this was a customary method of displaying affection in Afghanistan. Members of the Afghan community, all of whom were recent emigrants to the United States, testified that the penis is considered a "dirty" portion of the human anatomy and as a result kissing this area of a male child's anatomy is a selfless display of affection. Kargar did not conceal his displays of affection for his son and had photographs of him kissing his son in a photo album.

The Maine Supreme Judicial Court recognized that Kargar violated the sexual assault statute that makes criminal any sexual act with a minor under the age of 14. A sexual act is defined among other things as "direct physical contact between the genitals of one and the mouth . . . of the other." The Supreme Judicial Court dismissed the charge against Kargar, because the judges concluded that Kargar did not act out of a sexual motive or sexual feelings and his child was not subjected to pain or embarrassment and the legislature had not intended to punish this type of "nonsexual behavior."⁹⁵ In *State v. Ramirez*, the next case in the chapter, a Maine superior court relied on *Kargar* in deciding whether to apply the *de minimis* statute and to dismiss the charges against a mother from the Dominican Republic.

WAS THE DEFENDANT GUILTY OF GROSS SEXUAL ASSAULT AND UNLAWFUL SEXUAL CONTACT?

STATE V. RAMIREZ, CR 04-213 (MAINE SUPERIOR CT. 2005)

Opinion by Mills, J.

Issue

The defendant is charged with Gross Sexual Assault and Unlawful Sexual Contact. The offense is alleged to have occurred between 9/24/03 and 1/31/04. . . . The court [considered whether] the State has proved beyond a reasonable doubt that the defendant committed Gross Sexual Assault.

Facts

... There is no question on this record that the culture of the Dominican Republic recognizes an extremely nurturing relationship among mothers and their young children. Children are a mother's most important priority and mothers are open and affectionate in every way with their children. Mothers interact physically and emotionally on a regular basis with their children. Touching and kissing all parts of a child's body are common ways for a mother to express her love and affection. Touching, kissing, and caressing a male or female child's genitals, including a male child's erect penis, are included in this common intimate interaction between a mother and her child. Placing a child's penis inside the mother's mouth is more sexual in nature and is not considered part of the common interaction between mother and child.

Touching and kissing a child's genitals are not intended as sexual and are not sexual. Dominican Republic society considers the mother's conduct as normal and not harmful to the child. In fact, this behavior signifies the love and trust of a mother for her child and is a method of making bathing and diaper changing an enjoyable occasion for the child.

Dominican mothers living in the United States interact with their children according to the traditions of their cultural heritage. There is no difference in the behavior of mothers who have been in the United States for a long period of time and those who have just arrived in this country.

The defendant is 26 years old and a citizen of the Dominican Republic. She moved to the United States at age six and lived in Florida, New York, and Massachusetts with her mother, brother, and sister and surrounded by relatives until her junior year of high school. She returned to the Dominican Republic for her senior year of high school and two semesters of college. She resided with a friend of her mother's and with nuns at the Catholic college she attended. She returned to the United States after finishing school in the Dominican Republic and lived again with relatives. Just before the birth of her third child, Isaac, she moved to Maine.

During her childhood years, the defendant learned that physical intimacy between a mother and her young child was appropriate and helpful to their relationship. She observed her aunts interact with their children according to the tradition of the Dominican culture.

The defendant's mother had taught the defendant about improper touching. The defendant knew that placing a child's penis in her mouth was wrong but she believed that her contact with Isaac, which did not include placing his penis in her mouth, was appropriate.

The defendant has two children with Kevin Francoeur, Taylor, born 9/13/99, and Isaac, born on 7/14/02, the alleged victim of the charges pending against the defendant. The defendant's oldest child, Abbey, is from a different relationship.

The defendant could not recall every instance of her interaction with her son, Isaac, which forms the basis of the indictment, because such behavior was not her focus until this court case began. She did not form lasting memories of her routine daily mothering of Isaac as she did with his first steps and first words. She did recall kissing Isaac's penis on two occasions, which she could describe in detail. The first occurred in her bedroom when Isaac was seven or eight months old. The defendant was changing Isaac's diaper and she and Mr. Francoeur were laughing about Isaac's erect penis. The defendant touched her son's penis with a "wipey," cleaned him, kissed his feet, tummy, and penis, and put a diaper on.

The second occasion occurred in the living room when Mr. Francoeur, his brother Rodney Boisvert, Abbey, and Taylor were present. The defendant was again changing Isaac's diaper.

Mr. Francoeur commented that his son was not as well endowed as his father. The defendant cleaned her son, held him up in her arms, and kissed his penis and his tummy, which made Isaac laugh. The defendant placed Isaac on the couch and put his diaper on.

The defendant did not place Isaac's penis in her mouth, which she knew was inappropriate. She made no attempt to hide her contact with Isaac and did not intend through her contact to arouse or gratify sexual desire or to cause bodily injury or offensive physical contact.

Eventually, the defendant's relationship with Mr. Francoeur deteriorated. In 2000, . . . [a] court awarded the primary physical residence of [the children] to the defendant and visitation rights to Mr. Francoeur. In late 2003, although the police were called to their residence, Mr. Francoeur did not tell the police about any inappropriate sexual contact between the defendant and Isaac, although he now alleges that contact had occurred prior to the contact with the police . . .

At a court hearing in Arkansas on January 26, 2004[,] on the defendant's request for a protection order against Mr. Francoeur, attended by Mr. Francoeur and his attorney, the defendant admitted, as in this trial, that she kissed Isaac's penis.

Reasoning

Based on the defendant's own testimony, the court concludes that she committed Gross Sexual Assault as alleged in the indictment by placing her mouth on Isaac's penis and kissing it. Because she did not intend to subject Isaac to any sexual contact for the purpose of arousing or gratifying sexual desire or for the purpose of causing bodily injury or offensive physical contact, the court concludes she did not commit Unlawful Sexual Contact. . . .

[The *de minimis* statute] provides a safety valve for circumstances that could not have been envisioned by the Legislature. It is meant to be applied on a case-by-case basis to unanticipated "extenuations," when application of the criminal code would lead to an "ordered but intolerable" result. Because the Legislature did in fact allow for unanticipated "extenuations," the trial court was required to consider the possibility that . . . a conviction in this case could not have been anticipated by the Legislature when it defined the crime of gross sexual assault.

In order to determine whether this defendant's conduct was anticipated by the Legislature when it defined the crime of gross sexual assault, it is instructive to review the not-so-distant history of that crime. Maine Revised Statutes Annotated title 17-A, section 253(1)(B), makes criminal any sexual act with a minor (non-spouse) under the age of fourteen. A sexual act is defined as, among other things, "direct physical contact between the genitals of one and the mouth . . . of the other." Prior to 1985 the definition of this type of sexual act included a sexual gratification element. The Legislature removed the sexual gratification element because, "given the physical contacts described, no concern exists for excluding 'innocent' contacts." . . . Thus, the 1985 amendment to section 251(1)(C) illuminates the fact that an "innocent" touching such as occurred in this case has not forever been recognized as inherently criminal by our own law. The Legislature's inability to comprehend "innocent" genital-mouth contact is highlighted by reference to another type of "sexual act," namely, "any act involving direct physical contact between the genitals . . . of one and an instrument or device manipulated by another." Me. Rev. Stat. Ann. tit. 17-A,

§ 251(1)(C)(3). The legislature maintained the requirement that for this type of act to be criminal it must be done for the purpose of either sexual gratification or to cause bodily injury or offensive physical contact. Its stated reason for doing so was that "a legitimate concern exists for excluding 'innocent' contacts, such as for proper medical purposes or other valid reasons." (*State v. Kargar*, 679 A.2d 81 [1996])

Pursuant to the *Kargar* analysis,

1. the court concludes that the defendant did not know that kissing her son's penis as she did was illegal and that she had no knowledge of the possible consequences resulting from a violation of the statute.
2. the defendant interacted with her son openly, as did Mr. Kargar.
3. no harm was caused to Isaac by her conduct.
4. there is no impact on the community from the violation. The State's argument about harm to those witnessing this conduct could have been made in *Kargar*, where a young neighbor reported what she had seen to her mother, who also had seen a photo of Mr. Kargar kissing his son's penis. In *Kargar*, the Law Court noted that the State conceded that dismissing the case would pose little harm to the community.
5. this crime is serious, indeed, and even with a suspended jail sentence, the defendant would be subject to sex offender registration and to potential deportation.
6. The defendant appears to have little support from friends or relatives in Maine. Her only witnesses traveled from the Dominican Republic and Massachusetts to testify about her culture.

Holding

The court concludes that the Gross Sexual Assault charge must be dismissed as *de minimis*. As in *Kargar*, the defendant's conduct was not sexual in nature and was within the accepted practice in her country.

Questions for Discussion

1. Are you persuaded that Ramirez's conduct was a central part of her culture? Should Ramirez's cultural background be relied on by a court to excuse her behavior? What of a defendant who committed the same acts and did not possess a culturally diverse background?
2. In *Kargar*, the defendant presented witnesses, all of whom were recent emigrants from Afghanistan, to testify that Kargar's acts were customary practice in Afghanistan. What evidence does the court rely on in *Ramirez* in asserting that Ramirez's actions were customary in the Dominican Republic?
3. Should the cultural concern be raised at sentencing rather than when considering guilt or innocence? Was the Maine court influenced by the fact that Ramirez, if convicted of a sexual offense, would be required to register as a sex offender, risk the loss of her children, and possibly be deported from the United States?
4. Do you agree with the decision in *Ramirez*? Are there culturally specific practices that violate American laws and should not result in criminal penalties?

CRIME IN THE NEWS

On May 31, 2014, two 12-year-old females, Anissa Weier and Morgan Geyser, together with their classmate Payton Leutner, went to play in a suburban Milwaukee, Wisconsin, park where Geyser urged on by Weier stabbed Leutner 19 times. One wound missed Leutner's heart by less than a millimeter, and another penetrated her diaphragm and cut her liver and stomach. Weier and Geyser then left Leutner for dead. The stabbing was an effort to impress the fictional character Slender Man. Weier and Geyser were subsequently located by the police during what they explained was a 300-mile trek in the woods to Slender Man's mansion.⁹⁶

Leutner survived the attack but was left with significant physical and emotional injuries, and Weier and Geyser later were found not guilty by reason of insanity and were sentenced to institutionalization in mental health facilities.

Slender Man was first created in 2009 for an online forum contest involving the depiction of paranormal images. Eric Knudsen, the originator of Slender Man, intended to "formulate something whose motivations can barely be comprehended, and [which caused] unease and terror in a general population." The original rendition of Slender Man subsequently was refined by other individuals' versions of Slender Man. He typically is pictured as a tall, thin, and faceless male dressed in black with tentacles on his back that he uses to capture children. Slender Man, in most instances, is portrayed in the woods or stalking children and is described as being able to cause memory loss, insomnia, and paranoia.

Weier and Geyser first encountered Slender Man on the Creepypasta Wiki. Following the stabbing, they said that they believed that Slender Man was real and that the only way they could protect their families from him was to kill a victim and become his servants and live in his mansion in Nicolet National Forest in the Wisconsin northwoods. Weier and Geyser reportedly reinforced one another's delusions.

Both Weier and Geyser were tried as adults in a Wisconsin court. Weier was diagnosed with a delusional disorder and schizotypy, or a diminished ability to distinguish what is real from what is unreal. Although Weier underwent therapeutic treatment and reportedly made good progress toward improving her mental health, she continued to believe in delusions such as that an "evil spirit" had escaped a homemade Ouija board and at one point had pushed her onto her bed.

Geyser was found to have the early onset of schizophrenia and reportedly continued to believe that Slender Man was a real figure. There was testimony that Geyser heard voices from someone named "Maggie." A psychiatrist retained by her attorney testified that Geyser believed she could telepathically communicate with Slender Man and was able to see and hear characters from the Harry Potter books and from the Teenage Mutant Ninja Turtles. She also claimed to have "Vulcan mind control."

Payton Leutner's mother, Stacie Leutner, wrote the judge that the trauma of the attack "has defined our lives" and that her daughter still feared for her life. Payton, according to her mother, slept with scissors under her pillow for protection and kept her bedroom windows closed and locked. Stacie wrote that Payton "will struggle with the events of that day and physical and emotional scars it left for the rest of her life."

In 2017, Weier pled guilty to being an accessory to attempted second-degree murder, and a jury found her "not guilty by mental disease or defect." She was sentenced to 25 years in a state mental institution and after three years would be eligible to petition to spend the remainder of her sentence under supervised release. Judge Michael Bohren in sentencing Weier in December 2017 rejected the defense plea that she should not be institutionalized beyond her 25th birthday and stated that "[c]onsidering the nature and gravity of this offense,

being supervised until the age of 37 is not all that long . . . in terms of the fact that Payton is looking at a lifetime of scars, physical scars and psychological scarring."

Geyser agreed to waive a criminal trial and to be evaluated by a psychiatrist to determine the appropriate time she should spend in a mental institution. Geyser subsequently pled guilty and was determined to be not guilty as a result of a mental disease or defect and in February 2018 was sentenced to a maximum of 40 years in a state mental institution. Geyser will be eligible for a conditional release before completing her sentence. Geyser subsequently unsuccessfully appealed her conviction on the grounds that she should have been charged with second- rather than first-degree murder, which would have resulted in the case being tried in juvenile rather than in adult court.

The Waukesha, Wisconsin, School District following the stabbing blocked access to the Creepypasta Wiki. Knudsen, the creator of Slender Man, extended his condolences, and the administrator of the Creepypasta Wiki stated that the stabbing did not represent the Creepypasta community, which held a streaming event to raise money for Payton Leutner. The city of Madison, Wisconsin, also held a fund-raising event.

In the aftermath of the Slender Man stabbing, local law enforcement said that the stabbing of Payton Leutner was a wake-up call for parents on the danger of the internet. Other individuals asserted that Creepypasta is no more threatening than stories about zombies or vampires.

In 2019, 16-year-old Aaron Campbell abducted, abused, and killed 6-year-old Alesha MacPhail on the Scottish island of Bute. Campbell was sentenced to life imprisonment with a minimum sentence of 27 years. Investigators determined that Campbell was obsessed with Slender Man, that he had searched online for Slender Man before the crime, and that his abduction and murder of Alesha was a "carbon copy" of the criminal conduct of Slender Man. The police believed that Campbell had been desensitized to violence after "immersing himself in the disturbing world of Slender Man."

Were Anissa Weier and Morgan Geyser legally insane? Do you agree that the acts of Anissa Weier and Morgan Geyser are a warning about the negative impact of the internet on juveniles? Do you agree with the sentencing of Anissa Weier and Morgan Geyser?

Should Aaron Campbell have been criminally prosecuted and punished, or should he have been found to be legally insane?

CHAPTER SUMMARY

Excuses comprise a broad set of defenses in which defendants claim a lack of responsibility for their criminal acts. This lack of "moral blameworthiness" is based on a lack of criminal intent or on the involuntary nature of the defendant's criminal act.

The *M'Naghten* "right-wrong" formula is the predominant test for *legal insanity*. The criminal justice system has experimented with broader approaches that resulted in a larger number of defendants being considered legally insane.

1. *Irresistible Impulse*. Emotions cause loss of control to conform behavior to the law.
2. *Durham Product Test*. The criminal act was the product of a mental disease or defect.
3. *Substantial Capacity*. The defendant lacks substantial (not total) capacity to distinguish right from wrong or to conform behavior to the law.

The diminished capacity defense permits defendants to introduce evidence of mental defect or disease to negate a required criminal intent. This typically is limited to murder. Other excuses include the following:

1. *Duress.* Defendants are excused who commit a crime under a reasonable belief that they are threatened with imminent and unavoidable serious bodily harm. Duress does not excuse homicide.
2. *Infancy.* The common law and various state statutes divide age into three distinct periods. Infancy is an excuse (younger than 7 at common law). There is a rebuttable presumption that adolescents in the middle period lack the capacity to form a criminal intent (between 7 and 14 at common law). Individuals older than 14 are considered to have the same capacity as adults.
3. *Intoxication.* Voluntary intoxication is recognized as a defense to a criminal charge requiring a specific intent. The trend is for abolition of the excuse of voluntary intoxication. Involuntary intoxication is a defense where, as a result of alcohol or drugs, the individual meets the standard for legal insanity in the jurisdiction.
4. *Mistake.* A mistake of law is never a defense; a mistake of fact may be relied on to demonstrate a lack of a specific criminal intent. Some courts require that the mistake of fact is reasonable.
5. *Entrapment.* Entrapment asks whether the government “implanted a criminal intent” in an otherwise innocent individual. The subjective approach to entrapment focuses on the defendant. This requires that the government induce an individual who lacks a criminal predisposition to commit a crime. The objective test centers on the government. This asks whether the government’s conduct falls below accepted standards and would have induced an otherwise innocent individual to engage in criminal conduct. Courts have been reluctant to find that the Due Process Clause protects individuals against outrageous governmental misconduct.

The new defenses surveyed illustrate the effort to base excuses on new developments in biology, psychology, and sociology. Critics contend that many of these are “abuse excuses,” in which defendants manipulate the law by claiming that they are victims. On the other hand, defendants ask why some traits and conditions are considered to excuse criminal activity while factors such as poverty, inequality, or abuse are not recognized as a defense. The general trend is for the law to limit rather than to expand criminal excuses.

CHAPTER REVIEW QUESTIONS

1. Define and distinguish between the four major approaches to legal insanity.
2. Discuss the purpose of the diminished capacity defense. What is the result of the application of the defense to a defendant charged with a crime requiring a specific intent?

3. Distinguish between the defenses of voluntary and involuntary intoxication.
4. Describe the common law defense of infancy. How has this been modified under contemporary statutes?
5. What are the elements of the duress defense?
6. Discuss the difference between the mistake of law and mistake of fact defenses.
7. What are the two tests of entrapment? How do these two tests differ from one another? Explain the relationship between these two tests for entrapment and the due process approach.
8. Provide some examples of the “new defenses.” How do these differ from established criminal law defenses? Do you agree that some of these defenses deserve to be criticized as “abuse excuses”?
9. Outline the debate over the insanity defense and various efforts at reform. Would you favor abolishing the insanity defense?
10. Under what conditions should defendants younger than 18 be prosecuted as “adult offenders”?
11. Discuss the arguments for and against the police reliance on entrapment.
12. Write a brief essay summarizing the law of excuses and stress their common characteristics.

LEGAL TERMINOLOGY

abuse excuse	infancy
civil commitment	insanity defense
competence to stand trial	involuntary intoxication
diminished capacity	irresistible impulse test
duress	mistake of fact
<i>Durham</i> product test	mistake of law
entrapment	<i>M'Naghten</i> test
excuses	<i>per curiam</i>
guilty but mentally ill (GBMI)	substantial capacity test
<i>ignorantia legis non excusat</i>	voluntary intoxication

TEST YOUR KNOWLEDGE ANSWERS

1. False.
2. False.

- 3. False.
- 4. False.
- 5. False.
- 6. False.
- 7. False.

10

HOMICIDE

TEST YOUR KNOWLEDGE: TRUE/FALSE

1. The distinction in the law of homicide between murder and manslaughter was introduced in the 1960s as part of an effort to reform the criminal law.
2. The law of murder in every state provides full protection for human beings as well as fetuses.
3. First-degree murder involves the intentional, deliberate, and premeditated killing of another. Premeditation according to a number of state courts can occur in an instant and does not require a period of reflection.
4. In states that continue to use capital punishment, every defendant convicted of murder or manslaughter is subject to the death penalty.
5. There is no significant difference between capital murder and second-degree murder.
6. Individuals who are unaware of the risk created by their dangerous act satisfy the intent requirement of depraved heart murder.
7. Under the agency theory of felony murder, all the felons involved in the felony may be held liable for any deaths that occur in the course of committing the felony.
8. Individuals working for a corporation, as well as the corporation itself, may be held criminally liable for homicide.
9. Involuntary manslaughter is defined as murder in the heat of passion, while voluntary manslaughter entails the negligent taking of the life of another individual.

Check your answers at the end of the chapter on page 548.

Did the Defendant Kill His Wife in the Heat of Passion?

[The defendant, Steven,] testified that he was enraged and that he kept waiting for Joyce to say she was kidding, but Joyce continued talking. She said she had learned a lot from the marriage and that it had been a mistake. . . . Joyce reiterated that the marriage was a big mistake, that she did not love him, and that the divorce would be better for her.

After pausing for a moment, Joyce asked what Steven was going to do. What he did was lunge at her with the kitchen knife he had hidden behind the pillow and stab her 19 times. [*Girouard v. State*, 583 A.2d 718 [Md. 1991]]

INTRODUCTION

Why is homicide considered the most serious criminal offense? What is the reason that it is the only crime subject to the death penalty?

Supreme Court Justice William Brennan noted that in a society that “so strongly affirms the sanctity of life,” it is not surprising that death is viewed as the “ultimate” harm. Justice Brennan went on to observe that death is “truly awesome” and is “unusual in its pain, in its finality, and in its enormity. . . . Death, in these respects, is in a class by itself. . . . [It is] degrading to human dignity. It is this regard for life that reminds us to respect one another and to treat each individual with dignity and regard.”¹ In *Coker v. Georgia*, Supreme Court Justice Byron White, in explaining why the death penalty is imposed for murder while it is not imposed for rape, noted that the “murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair.”²

There are also religious grounds for treating murder as the most serious of crimes. The influential 18th-century English jurist William Blackstone observed that murder is a denial of human life and that human life is a gift from God. He stressed that a mere mortal has no right to take a life and to disrupt the divine order of the universe. Professor George Fletcher expands on this notion and explains that in the view of the Bible, a killer was thought to acquire control over the blood of the victim. The execution of the killer was the only way that the blood could be returned to God.³

At common law, murder was defined as the unlawful killing of another human being with malice aforethought. (We will discuss the meaning of malice aforethought in the next section.) Initially the common law did not distinguish between types of **criminal homicide**. The taking of a life was treated equally as serious whether committed intentionally, in the heat of passion, recklessly, or negligently.

The development of the modern law of homicide can be traced to 15th-century England. Members of the clergy were prosecuted for homicide before ecclesiastical or religious courts

that, unlike royal courts, were not authorized to impose the death penalty. Offenders, instead, were subject to imprisonment for a year, the branding of the thumb, and the forfeiture of goods. Judges in the religious courts gradually expanded the **benefit of clergy** to any individual who could read, in order to avoid the harshness of the death penalty. Defendants who could not read typically claimed the benefit of clergy by memorizing passages from the Bible in order to prove that they were literate.

The English monarchy resisted expanding the power of religious courts and enacted a series of statutes that established the jurisdiction of royal courts over the most atrocious homicides. These statutes denied the benefit of clergy and provided for the death penalty. The royal courts began to distinguish between murder, which was committed with malice aforethought and was not eligible for the benefit of clergy, and manslaughter, which was committed without malice aforethought and was eligible for the benefit of clergy. This distinction persisted even after royal courts asserted jurisdiction over all homicides. Murder under the royal courts was subject to the death penalty unless a royal pardon was issued, whereas manslaughter was viewed as a less serious offense that did not result in capital punishment. Most state statutes continue to recognize the distinction between murder and manslaughter. Over time, judges created several other categories of homicide, a process that culminated in modern homicide statutes.

In this chapter, we will review the distinction between these various grades of criminal homicide. Your challenge is to understand the distinctions between these various types of criminal homicide.

TYPES OF CRIMINAL HOMICIDE

By the 18th century, the law recognized four types of homicide:

- **Justifiable homicide** includes self-defense, defense of others, defense of the home, and police use of deadly force.
- **Excusable homicide** is murder committed by individuals who are considered to be legally insane, by individuals with a diminished capacity, or by infants.
- **Murder** includes all homicides that are neither excused nor justified, and are not considered manslaughter.
- **Manslaughter** includes all homicides without malice aforethought that are committed without justification or excuse.

As we have seen, by the end of the 15th century, criminal homicide had been divided into murder, or the taking of the life of another with malice aforethought, and manslaughter, or the taking of the life of another without malice aforethought. **Malice aforethought** is commonly defined as an intent to kill with an ill will or hatred. Aforethought requires that the intent to kill is undertaken with a design to kill. The classic example of a plan to kill is murder committed while “lying in wait” for the victim.⁴

The commentary to the Model Penal Code notes that judges gradually expanded malice aforethought to include various types of murder that have little relationship to the original definition. As observed by the Royal Commission on Capital Punishment in England, malice aforethought has come to be a general name for “a number of different mental attitudes which have been variously defined at different stages in the development of the law, the presence of any one of which has been held by the courts to render a homicide particularly heinous and therefore to make it murder.”⁵ The Model Penal Code notes that as the common law developed, malice aforethought came to be divided into several different mental states, each of which was subject to the penalty of death. The first is intent to kill or murder. A second category of murder entails knowingly causing grievous or serious bodily harm. A third category of murder is termed **depraved heart murder** or killing committed with extreme recklessness or negligence. This involves a “depraved mind” or an “abandoned and malignant heart” and entails a wanton and willful disregard of an unreasonable human risk. A fourth category involves an intent to resist a lawful arrest. There is one additional category of murder committed with malice aforethought. This is murder committed during a felony, which today is termed **felony murder**.

Remember that murder requires a demonstration of malice. The Nevada Criminal Code states that murder is the “unlawful killing of a human being, with malice aforethought, either express or implied. . . . The unlawful killing may be effected by any of the various means by which death may be occasioned.”⁶ Individuals who have a deliberate intent to kill possess **express malice**. An **implied malice** exists in those cases in which an individual possesses an intent to cause great bodily harm or the intent to commit an act that may be expected to lead to death or great bodily harm. Nevada defines express malice as a “deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances.” The Nevada law goes on to provide that malice may be implied “when all the circumstances of the killing show an abandoned and malignant heart.”⁷ What about manslaughter? The common law of manslaughter developed into two separate categories. The first entails an intentional killing committed without malice in the heat of passion upon adequate provocation. Murder was also considered manslaughter when it was committed without malice as a result of conduct that was insufficiently reckless or negligent to be categorized as depraved heart murder. Courts typically describe the first category as **voluntary manslaughter** and the second as **involuntary manslaughter**.

In 1794, Pennsylvania adopted a statute creating separate grades of murder and manslaughter that continue to serve as the foundation for a majority of state statutes today. The Pennsylvania statute divided homicide into two separate categories and limited the death penalty to first-degree murder, the most serious form of homicide. Second-degree murder was punishable by life imprisonment.

All murder, which shall be perpetrated by means of poison, by lying in wait, or by any other kind of willful, deliberate, or premeditated killing or which shall be committed in perpetration or attempt to perpetrate any arson, rape, robbery, or burglary shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree.⁸

Modern state statutes typically divide murder into first- and second-degree murder, both of which require the prosecutor to establish intent and malice. **First-degree murder** is the most serious form of murder, and the prosecutor has the burden of establishing **premeditation and deliberation**. This involves demonstrating that the defendant reflected for at least a brief period of time before intentionally killing another individual. **Second-degree murder** usually includes all murders not involving premeditation and deliberation. Manslaughter typically comprises an additional grade or grades of homicide. These general categories are described in the following list, starting with the most serious degree of homicide. Keep in mind that state statutes differ widely in their approach to defining homicide.⁹

- *First-Degree Murder.* Premeditation and deliberation and murder committed in the perpetration of various dangerous felonies. Some statutes explicitly include the killing of a police officer and murder committed while lying in wait or as a result of torture or poison.
- *Second-Degree Murder.* Killing with malice but without premeditation. This may include a death resulting from an intent to cause serious bodily harm and reckless, depraved heart murders.
- *Voluntary Manslaughter.* Murder in the heat of passion.
- *Involuntary Manslaughter.* Gross negligence.

Some states also single out vehicular manslaughter as a special form of involuntary manslaughter.

ACTUS REUS AND CRIMINAL HOMICIDE

State statutes define the *actus reus* of criminal homicide as the “unlawful killing of a human being” or “causing the death of a person.” This may involve an infinite variety of acts, including shooting, stabbing, choking, poisoning, beating with a bat or axe, and “a thousand other forms of death.”¹⁰ Homicides can also be carried out without landing a single blow. A wife, for instance, was found to have engaged in a pattern of constant criticism and threats of violence against her husband, weakening him mentally and worsening his heart condition. He died after she coerced him into walking in the deep snow.¹¹ In another case, a husband was held criminally liable for the murder of his young wife when he threatened to beat her unless she jumped into a stream that subsequently carried her away in the current.¹²

There are two preliminary issues that we must address before examining the various grades of homicide. The first is at what point does life begin for purposes of homicide? This is important in determining whether an assailant can be held criminally liable for the death of a fetus. The question at the opposite end of the scale is at what point does life end? What if a grieving son and daughter “pull the plug” on a sick parent whose brain no longer functions and who is being kept artificially alive on a life support machine?

FIGURE 10.1 ■ The Legal Equation: Criminal Homicide

THE BEGINNING OF HUMAN LIFE

We have seen that murder entails the killing of a human being. At what point does life begin? The common law rule adopted in 1348 provided that a defendant only was criminally responsible for killing a fetus in the mother's womb if the fetus subsequently was "born alive." This required that (1) the fetus was completely expelled from the womb; (2) the fetus demonstrated the capacity for "independent vitality," such as breathing or crying; (3) the defendant's act was determined to be the proximate cause of the death of the newly born child. This rule reflected the fact that the criminal law punished the death of a human being and a fetus was not considered to be a human being until born alive.

Roughly 12 states continue to follow some form of the born alive rule. In *State v. Lamy*, the New Hampshire Supreme Court reversed a defendant's manslaughter and negligent homicide conviction. The inebriated defendant drove at 100 miles per hour down the wrong side of the street, hit a taxi, and killed a passenger who was seven months pregnant. The state was unable to demonstrate that the fetus was born alive because the prosecutor failed to demonstrate that the child was able to live on its own without a life support machine. D.E. "was never able to breathe without the aid of a respirator, required medication to maintain his blood pressure and never acquired . . . any brain function. D.E. never exhibited any spontaneous sign of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles."¹³

The common law rule has been abandoned in 15 states in the last few decades in favor of a rule that imposes criminal liability when the prosecution is able to establish beyond a reasonable doubt that the fetus was viable, meaning that it was capable of living separate and apart from the mother. In *Commonwealth v. Cass*, in 1984, the Massachusetts Supreme Judicial Court ruled that the "infliction of prenatal injuries resulting in the death of a viable fetus, before or after it is born, is homicide. . . . We believe that our criminal law should extend its protection to viable fetuses."¹⁴

Roughly 23 states have feticide laws that impose criminal liability for homicide when a fetus is at any stage of development (e.g., "conception"). The federal Unborn Victims of Violence Act of 2004, 18 U.S.C. § 1841, protects an embryo or fetus in utero if injured or killed during the commission of any of over 60 listed federal crimes of violence. A child *in utero* is defined as "a member of the species *Homo sapiens*, at any stage of development, who is carried in the womb."

Keep in mind that the U.S. Supreme Court recognized in *Roe v. Wade*, in 1973, that women have a right to an abortion as part of their constitutional right to privacy. A state may limit this

right during the last phase of pregnancy, other than in those instances where an abortion is necessary to protect the health or life of the mother. The decision to hold an attacker criminally responsible for the death of a viable fetus does not limit the right of a woman to voluntarily consent to an abortion by a licensed physician. The Model Penal Code maintains the common law born alive rule in order to avoid a possible conflict between the law of abortion and the criminal law rule concerning the fetus.¹⁵

In *People v. Davis*, the California Supreme Court considered whether to limit criminal liability for the murder of a fetus to viability or to extend criminal liability to the postembryonic stage of pregnancy, seven or eight weeks following fertilization.

DID DAVIS MURDER A NONViable FETUS?

PEOPLE V. DAVIS, 872 P.2D 591 (CAL. 1994)

Opinion by Lucas, C.J.

California Penal Code (CPC) section 187, subdivision (a), provides that "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." . . . In this case, we consider and reject the argument that viability of a fetus is an element of fetal murder under the statute. . . .

Facts

On March 1, 1991, Maria Flores, who was between 23 and 25 weeks pregnant, and her 20-month-old son, Hector, went to a check-cashing store to cash her welfare check. As Flores left the store, defendant pulled a gun from the waistband of his pants and demanded the money (\$378) in her purse. When she refused to hand over the purse, defendant shot her in the chest. Flores dropped Hector as she fell to the floor and defendant fled the scene.

Flores underwent surgery to save her life. Although doctors sutured small holes in the uterine wall to prevent further bleeding, no further obstetrical surgery was undertaken because of the immaturity of the fetus. The next day, the fetus was stillborn as a direct result of its mother's blood loss, low blood pressure and state of shock. Defendant was soon apprehended and charged with assaulting and robbing Flores, as well as murdering her fetus. The prosecution charged a special circumstance of robbery-murder.

At trial, the prosecution's medical experts testified the fetus's statistical chances of survival outside the womb were between 7 and 47 percent. The defense medical expert testified it was "possible for the fetus to have survived, but its chances were only 2 or 3 percent." None of the medical experts testified that survival of the fetus was "probable."

Although section 187, subdivision (a), does not expressly require a fetus be medically viable before the statute's provisions can be applied to a criminal defendant, the trial court followed several Court of Appeal decisions and instructed the jury that it must find the fetus was viable before it could find defendant guilty of murder under the statute. The trial court did not, however, give the standard viability instruction, CALJIC No. 8.10, which states: "A viable human fetus is one who has attained such form and development of organs as to be normally capable of living outside of the uterus." The jury, however, was given an instruction that allowed it to convict defendant of murder if it found the fetus had a possibility of

survival: "A fetus is viable when it has achieved the capability for independent existence; that is, when it is possible for it to survive the trauma of birth, although with artificial medical aid."

The jury convicted defendant of murder of a fetus during the course of a robbery, assault with a firearm, and robbery. The jury found that, in the commission of each offense, defendant personally used a firearm. The jury found true the special circumstance allegation. Accordingly, because the prosecutor did not seek the death penalty, defendant was sentenced to life without possibility of parole, plus five years for the firearm use.

Issue

On appeal, defendant contended that the trial court prejudicially erred by not instructing the jury pursuant to CALJIC No. 8.10. . . . [D]efendant claimed, rather than defining viability as a "reasonable possibility of survival," the trial court should have instructed the jury under the higher "probability" threshold described in CALJIC No. 8.10.

The People argued that no viability instruction was necessary because prosecution under section 187, subdivision (a), does not require that the fetus be viable. After reviewing the wording of section 187, subdivision (a), its legislative history, the treatment of the issue in other jurisdictions, and scholarly comment on the subject, the Court of Appeal agreed with the People that contrary to prior California decisions, fetal viability is not a required element of murder under the statute. . . .

As explained below, we agree with the People and the Court of Appeal that viability is not an element of fetal murder under section 187, subdivision (a), and conclude therefore that the statute does not require an instruction on viability as a prerequisite to a murder conviction. In addition, because every prior decision that had addressed the viability issue had determined that viability of the fetus was prerequisite to a murder conviction under section 187, subdivision (a), we also agree . . . that application of our construction of the statute to defendant would violate due process and *ex post facto* principles.

Reasoning

In 1970, section 187, subdivision (a), provided: "Murder is the unlawful killing of a human being, with malice aforethought." In *Keeler v. Superior Court*, 470 P.2d 617 (Cal. 1970), a majority of the court held that a man who had killed a fetus carried by his estranged wife could not be prosecuted for murder because the Legislature (consistent with the common law view) probably intended the phrase "human being" to mean a person who had been born alive.

The Legislature reacted to the *Keeler* decision by amending the murder statute, section 187, subdivision (a), to include within its proscription the killing of a fetus. The amended statute reads: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." The amended statute specifically provides that it does not apply to abortions complying with the Therapeutic Abortion Act, performed by a doctor when the death of the mother was substantially certain in the absence of an abortion, or whenever the mother solicited, aided, and otherwise chose to abort the fetus.

The legislative history of the amendment suggests the term "fetus" was deliberately left undefined after the Legislature debated whether to limit the scope of statutory application to a viable fetus. The Legislature was clearly aware that it could have limited the term "fetus" to "viable fetus," for it specifically rejected a proposed amendment that required the fetus be at least 20 weeks in gestation before the statute would apply.

In 1973, the United States Supreme Court issued a decision that balanced a mother's constitutional privacy interest in her body against a state's interest in protecting fetal life, and determined that in the context of a mother's abortion decision, the state had no legitimate interest in protecting a fetus until it reached the point of viability, or when it reached the "capability of meaningful life outside the mother's womb." *Roe v. Wade*, 410 U.S. 113 (1973). The court explained that "[v]iability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." At the point of viability, the court determined, the state may restrict abortion.

Thereafter . . . the Court of Appeal construed the term "fetus" in section 187, subdivision [a], to mean a "viable fetus" as defined by *Roe v. Wade*. . . . Defendant asserts that section 187, subdivision [a], has no application to a fetus not meeting *Roe v. Wade*'s definition of viability. Essentially, defendant claims that because the fetus could have been legally aborted under *Roe v. Wade*, at the time it was killed, it did not attain the protection of section 187, subdivision [a] and he therefore cannot be prosecuted. . . .

But *Roe v. Wade* does not hold that the state has no legitimate interest in protecting the fetus until viability. . . . As observed by one commentator: ". . . The *Roe* decision, therefore, forbids the state's protection of the unborn's interests only when these interests conflict with the constitutional rights of the prospective parent. The Court did not rule that the unborn's interests could not be recognized in situations where there was no conflict." . . . Thus when the state's interest in protecting the life of a developing fetus is not counterbalanced against a mother's privacy right to an abortion or other equivalent interest, the state's interest should prevail.

We conclude, therefore, that when the mother's privacy interests are not at stake, the Legislature may determine whether, and at what point, it should protect life inside a mother's womb from homicide. Here, the Legislature determined that the offense of murder includes the murder of a fetus with malice aforethought. Legislative history suggests "fetus" was left undefined in the face of divided legislative views about its meaning. Generally, however, a fetus is defined as "the unborn offspring in the postembryonic period, after major structures have been outlined." This period occurs in humans "seven or eight weeks after fertilization" and is a determination to be made by the trier of fact. Thus, we agree with the above cited authority that the Legislature could criminalize murder of the postembryonic product without the imposition of a viability requirement. . . .

As the Court of Appeal below observed, the wording of CALJIC No. 8.10, defining viability as "normally capable of living outside of the uterus," while not a model of clarity, suggests a better than even chance—a probability—that a fetus will survive if born at that particular point in time. By contrast, the instruction given below suggests a "possibility" of survival, and essentially amounts to a finding that a fetus incapable of survival outside the womb for any discernible time would nonetheless be considered "viable" within the meaning of section 187, subdivision [a]. Because the instruction given by the trial court substantially lowered the viability threshold as commonly understood and accepted . . . we conclude that the trial court erred in instructing the jury pursuant to a modified version of CALJIC No. 8.10.

The question then is whether it is reasonably probable a result more favorable to defendant would have been reached absent the instructional error. The record shows the weight of the medical testimony was against the probability of the fetus being viable at the point it was killed. Defendant's medical expert opined that it was "possible" for the fetus to have survived the trauma of an early birth, but that its chances for survival were about 2 or 3 percent. . . . [N]one of the medical experts who testified at defendant's trial believed that the fetus had a "probable" chance of survival. Accordingly, because the evidence on the issue of viability erroneously supported the concept of the "possibility" of survival, and the jury

was then instructed that viability means "possible survival," the jury was misinformed that it could find the fetus was viable before it "attained such form and development of organs as to be normally capable of living outside the uterus." Had the jury been given CALJIC No. 8.10, it is reasonably probable it would have found the fetus not viable. We conclude, therefore, that defendant was prejudiced by the instructional error and the conviction of fetal murder must be reversed.

Holding

We conclude that viability is not an element of fetal homicide under section 187, subdivision (a). The third-party killing of a fetus with malice aforethought is murder under section 187, subdivision (a), as long as the state can show that the fetus has progressed beyond the embryonic stage of seven to eight weeks.

We also conclude that our holding should not apply to defendant and that the trial court committed prejudicial error by instructing the jury pursuant to a modified version of CALJIC No. 8.10. We therefore affirm the judgment of the Court of Appeal.

Dissenting, Mosk, J.

I dissent. I believe the Legislature intended the term "fetus" in its 1970 amendment to [California] Penal Code section 187 to mean a *viable* fetus. . . . [T]he statutory language in issue here—the 1970 amendment to section 187 extending the crime of murder to the killing of "a fetus"—was itself enacted in direct and vigorous response to a judicial opinion (*Keeler*) with which the Legislature disagreed. If the Legislature had also disagreed a few years later with subsequent judicial opinions limiting the statutory prohibition against killing "a fetus" to the killing of a viable fetus, surely it would have spoken again, and equally vigorously. To this day, however, the Legislature has remained silent and taken no remedial action. In these circumstances its acquiescence is persuasive evidence of its intent. . . .

Having erroneously concluded that the Legislature had no intent with respect to the meaning of the key word "fetus" in the 1970 amendment to section 187, the lead opinion proceeds to legislate on the subject by supplying the assertedly missing definition: "[A] fetus," says the lead opinion, "is defined as 'the unborn offspring in the postembryonic period, after major structures have been outlined.' This period occurs in humans 'seven or eight weeks after fertilization.' . . ." The lead opinion repeats its new definition in concluding that the malicious killing of a fetus is murder under section 187 as long as the state can show the fetus has progressed "beyond the embryonic stage of seven to eight weeks." . . . [I]t is highly unlikely that such was the Legislature's intent. . . .

Yet that is the least of the problems with the lead opinion's new definition of "fetus" in section 187. Because liability after seven weeks necessarily includes liability after eight weeks, we may fairly assume that prosecutors faced with the lead opinion's imprecise definition will opt for the more inclusive figure and charge murder when the fetal death occurs at seven weeks. Do my colleagues have any idea what a seven-week-old product of conception looks like?

To begin with, it is tiny. At seven weeks its "crown-rump length"—the only dimension that can be accurately measured—is approximately 17 millimeters, or slightly over half an inch. It weighs approximately three grams, or about one-tenth of an ounce. In more familiar terms, it is roughly the size and weight of a peanut.

If this tiny creature is examined under a magnifying glass, moreover, its appearance remains less than human. Its bulbous head takes up almost half of its body and is bent

sharply downward; its eye sockets are widely spaced; its pug-like nostrils open forward; its paddle-like hands and feet are still webbed; and it retains a vestigial tail. . . . And as concluded in the Comment relied on by the lead opinion, "A being so alien to what we know to be human beings seems hardly worth being made the subject of murder." . . .

The contrast between such a tiny, alien creature and the fully formed "5-pound, 18-inch, 34-week-old, living, viable child" in *Keeler* is too obvious to be ignored. I can believe that by enacting the 1970 amendment the Legislature intended to make it murder to kill a fully viable fetus like Teresa Keeler's baby. But I cannot believe the Legislature intended to make it murder—indeed, capital murder—to cause the death of an object the size of a peanut. . . .

[U]nder the lead opinion's definition a person may be subject to a conviction of capital murder for causing the death of an object that was literally invisible to everyone, and hence that the person had no reason to know even existed. A woman whose reproductive system contains an immature fetus a fraction of an inch long and weighing a fraction of an ounce does not, of course, appear pregnant. In fact, if she is one of many women with some irregularity in her menstrual cycle, she herself may not know she is pregnant: "quicken" does not occur until two or three months later. Unless such a woman knows she is pregnant and has disclosed that fact to the defendant, the defendant has no way of knowing she is carrying a fetus.

Nor is this problem limited to fetuses that are "seven or eight" weeks old. Although the length of time that a woman can be pregnant without her condition's becoming noticeable varies according to such factors as her height and weight, the size of her fetus, and even the style of her clothing, the case at bar demonstrates that it can extend well into her pregnancy. Here Flores testified that in her opinion her pregnancy "showed" on the date of the shooting, March 1, 1991; but defendant testified to the contrary, and there was persuasive evidence to support him. . . . Thomas Moore, M.D., an experienced perinatologist, testified that in his opinion it is "not likely" that on the date of the shooting a woman of Flores's stature would have showed her pregnancy when clothed and standing upright. . . .

Yet the expert testimony agreed that Flores was between 23 and 25 weeks—approximately 6 months—pregnant on the date of the shooting. This is the very threshold of viability: an expert witness reported on a recent study showing that at 23 weeks the survival rate of the fetus is approximately 7 percent, at 24 weeks 35 percent, and at 25 weeks 47 percent. The case at bar thus demonstrates how long the risk of liability for fetal murder may run under the lead opinion's view before the actor either knows or has reason to know that the victim of the offense even exists. I cannot believe the Legislature intended such an enlargement of liability for the crime of capital murder. . . .

Questions for Discussion

1. Why is the wording of the jury instruction significant in this case? How does it impact the defendant's guilt or innocence? What is the holding of the California Supreme Court?
2. Courts are criticized for "judicial legislation," making the law rather than interpreting statutes passed by the legislative branch. In interpreting the term *fetus*, did the California Supreme Court follow the intent of the California legislature or impose its own view?
3. What is the relationship between *Davis* and *Keeler v. Superior Court*? How does the California Supreme Court distinguish the decision in *Davis* from the U.S. Supreme Court's holding in *Roe v. Wade*?
4. Judge Mosk argues that the defendant could not have reasonably been aware that Maria Flores was pregnant. Why is this significant?

5. How does the approach of the California Supreme Court in defining a fetus differ from that of other states? In your opinion, is the California Supreme Court being directed by science, religion, or politics? Do you agree with the decision of the California Supreme Court?

CASES AND COMMENTS

1. *Killing of a Fetus That Would Not Have Survived.* In *People v. Valdez*, defendants Elisio Valdez and Johnnie Ray Peraza were convicted of the murders of Andrea Mestas and her fetus and various other serious felonies. Mestas was shot in the chest at close range. The bullet penetrated Mestas's heart and killed her and her 16- to 17-week-old male fetus. The prosecutor theorized that the defendants were ordered to kill her and her boyfriend on the orders of a prison gang, Nuestra Familia. The gang allegedly viewed Mestas as a "rat" and a "snitch." The two defendants received multiple life sentences as well as additional prison time. A medical examination of the fetus revealed that there was "chronic inflammation of the implantation site where the placenta attaches to the uterine wall as well as acute inflammation of the membrane surrounding the fetus." As a result, doctors concluded that it was "unlikely that the fetus would have survived." The defendants appealed on the grounds of "survivability," meaning that they should have been acquitted based on the fact that it was unlikely that the fetus would have completed gestation and been born in any event. In other words, the "killing of a non-survivable" fetus is "not comparable to murder; it is a much less serious offense because the non-survivable fetus is not a potential human life." The Court of Appeal of California, Third Appellate District, ruled that "just as the state may penalize an act that unlawfully shortens the existence of a terminally ill human being, it may penalize an act that unlawfully shortens the existence of a fetus which later would have perished before birth due to natural causes." Was the fetus a "potential life"? Do you agree with the court's decision? See *People v. Valdez*, 23 Cal. Rptr. 3d 909 [Cal. Ct. App. 2005].

2. *Alcohol Abuse and the Attempted Murder of a Fetus by the Mother.* Deborah J.Z. was drinking in a local bar one week before her due date. She believed that she was about to give birth and called her mother, who drove her to the hospital. Deborah was "uncooperative, belligerent at times and very intoxicated." Her blood alcohol concentration exceeded .30%. She reportedly told the nurse that "if you don't keep me here, I'm just going to go home and keep drinking and drink myself to death and I'm going to kill this thing because I don't want it anyways." Deborah also expressed anxiety concerning the baby's "race, an abusive relationship she was in, and the pain of giving birth." Deborah consented to a cesarean section and gave birth to a baby girl, M.M.Z. M.M.Z. was extremely small, "she had no subcutaneous fat and her physical features—mild dysmorphic abnormalities—presented fetal alcohol effects." M.M.Z.'s blood alcohol level was .119%. The baby recovered after several weeks. Deborah was subsequently charged with attempted first-degree murder and first-degree reckless injury. Deborah appealed the trial court's denial of her motion to dismiss the charges.

A Wisconsin appellate court rejected the prosecution's contention that the murder statute's punishment of an individual who caused the death of a "human being" or

who caused great bodily harm to a “human being” included a fetus. The court noted that Wisconsin law defined a human being as “one who has been born alive.” A broad interpretation of the statute, noted the court, would risk criminal charges against a woman whose behavior during a pregnancy placed an unborn child at risk. A woman under these circumstances might be reluctant to seek prenatal care, fearing that she may be accused of endangering her unborn child. The court also suggested that prosecuting a woman for the treatment of her unborn fetus threatened to burden a woman’s right to seek an abortion.

The Wisconsin court concluded that the decision whether to extend protection to an “unborn child” was a matter to be decided by the state legislature. See *State v. Deborah J.Z.*, 596 N.W.2d 490 [Wis. Ct. App. 1999]. The South Carolina Supreme Court, on the other hand, ruled that a woman was properly convicted of child neglect who caused her baby to be born with cocaine metabolites in its system by reason of her ingestion of crack cocaine during the third trimester of her pregnancy. See *Whitner v. State*, 492 S.E.2d 777 [S.C. 1997]; *Bei Bei Shuai v. State*, 966 N.E.2d 619 [Ind. Ct. App. 2012]. The Maryland Court of Appeals determined that a pregnant woman may not be held criminally liable for negligent endangerment of a fetus. The court reasoned that holding a woman responsible would potentially subject her to prosecution for a range of activities, including drinking alcohol or smoking in moderation as well as skiing or riding horses. See *Kilmon v. State*, 905 A.2d 306 [Md. 2006]. A good review of the case law on holding a mother responsible for her prenatal conduct that caused the death of a fetus is *State v. Aiwohi*, 123 P.3d 1210 (Hawaii 2005).

YOU DECIDE 10.1

Jaclyn Kurr killed her boyfriend, Antonio Pena, with a knife. She argued with him over cocaine use, and Pena punched her twice in the stomach. She warned him not to hit her since she was pregnant with their babies. Pena came toward her once again, and she killed him. Kurr claimed the right to “intervene” to protect the fetuses that were 16 or 17 weeks in gestation. Did this defense prove successful? See *People v. Kurr*, 654 N.W.2d 651 [Mich. Ct. App. 2002].

THE END OF HUMAN LIFE

The question of when life ends seems like a technical debate that should be the concern of doctors and philosophers rather than lawyers and criminal justice professionals.

The traditional definition of death required the total stoppage of the circulation of the blood and the cessation of vital functions, such as breathing. This definition was complicated by technology that, over the last decades, developed to the point that a “brain dead” individual’s breathing and blood flow could be maintained through artificial machines despite the fact that the brain had ceased to function.

In 1970, Kansas became the first state to legislate that death occurs when an individual experiences an irreversible cessation of breathing and heartbeat or there is an absence of brain activity. A majority of state legislatures and courts now have adopted a **brain death test** for

death.¹⁶ The circulatory and respiratory and brain death tests are incorporated as alternative approaches in the Uniform Determination of Death Act, a model law developed by the American Bar Association and American Medical Association.

The brain death test has also been adopted by courts in states without a statute defining death. In the Arizona case of *State v. Fierro*, the deceased, Victor Corella, was shot in the chest and head by a rival gang member. Corella was rushed to the hospital where he was operated on and, although his brain had ceased to function, he was placed on a life support system. The doctors, convinced that nothing could be done to save Corella's life, removed him from the life support machine after four days. The defendant argued that the removal of Corella from the life support machine was the proximate cause of death. The Arizona Supreme Court ruled that under Arizona law, death could be shown by either a lack of bodily function or brain death and concluded that the victim was legally dead before being placed on life support.¹⁷

The year-and-a-day rule provides that an individual is criminally responsible only for a death that occurs within one year of a criminal act. This common law standard is still followed in several states. Note that in these states, under the traditional vital function test, a defendant could not be held legally responsible for the death of an individual who is maintained on a life support machine for longer than a year.

MENS REA AND CRIMINAL HOMICIDE

The *mens rea* of criminal homicide encompasses all of the mental states that we discussed in Chapter 5. The Utah Criminal Code provides that an individual commits criminal homicide “if he intentionally, knowingly, recklessly, with criminal negligence” or acting with the “mental state . . . specified in the statute defining the offense, causes the death of another human being, including an unborn child at any stage of development.”¹⁸ Two forms of criminal homicide that we will review later in the chapter, felony murder and misdemeanor manslaughter, involve strict liability. The **grading**, or assignment of degrees to homicide, is based on a defendant’s criminal intent. As we shall see, an individual who kills as a result of premeditation and deliberation is considered more dangerous and morally blameworthy than an individual who kills as a result of a reckless disregard or negligence.

MURDER

We have seen that murder is the unlawful killing of an individual with malice aforethought. Several types of murder are discussed in this chapter, and your challenge is to learn the difference between each of these categories of homicide:

- First-degree murder
- Capital and aggravated first-degree murder
- Second-degree murder

- Depraved heart murder
- Felony murder
- Corporate murder

FIRST-DEGREE MURDER

First-degree murder is the most serious form of homicide and can result in the death penalty in 27 states, the federal government, and the U.S. military.

The *mens rea* of first-degree murder requires deliberation and premeditation as well as malice. Premeditation means the act was thought out prior to being committed. Deliberation entails an intent to kill that is carried out in a cool state of mind in furtherance of the design to kill. An intent to kill without deliberation and premeditation is second-degree murder.

Why is first-degree murder treated more seriously than other forms of homicide? First, an individual who is capable of consciously devising a plan to take the life of another obviously poses a threat to society. A harsh punishment both is deserved and may deter others from cold and calculated killings. Some commentators dispute whether a deliberate and premeditated murderer poses a greater threat than the impulsive individual who lacks self-control and may explode at any moment in reaction to the slightest insult. Assuming that you were asked to formulate a sentencing scheme, which of these two killers would you punish most severely?

The general rule is that premeditation may be formed in the few seconds it takes to pull a trigger or deliver a fatal blow. A West Virginia court observed that the “mental process necessary to constitute ‘willful, deliberate and premeditated’ murder can be accomplished very quickly or even in the proverbial ‘twinkling of an eye.’”¹⁹

In *Young v. State*, the defendant had a disagreement with two men in a card game. The defendant fired and killed the two men. An appellate court affirmed the defendant’s murder convictions, noting that “[no] appreciable space of time [is required] between the formation of the intention to kill and the act of killing.”²⁰

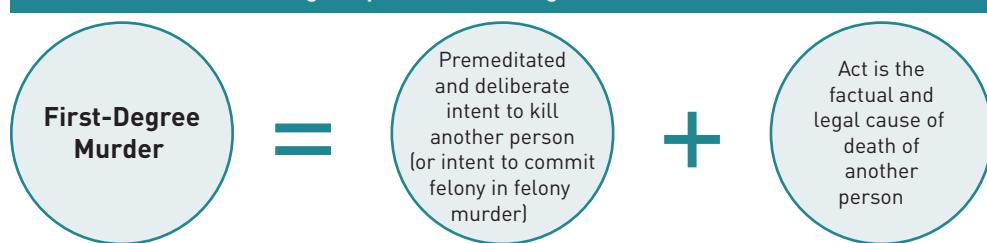
A somewhat smaller number of judges continue to resist the trend toward recognizing that a premeditated intent to kill need exist only for an instant. These jurists point out that unless the prosecution is required to produce proof of premeditation and deliberation, it is difficult to tell the difference between first- and second-degree murder.

In *State v. Guthrie*, the defendant was being teased by one of his coworkers in a restaurant kitchen, who accidentally hit Guthrie on the nose with a towel. Guthrie, enraged, removed his gloves and took a knife from his pocket and stabbed and killed the victim. The West Virginia Supreme Court of Appeals held that “[t]here must be some evidence that the defendant considered and weighed his decision to kill . . . to establish premeditation and deliberation.”²¹ The Michigan Court of Appeals was even clearer in defining premeditation as to “think about beforehand . . . to measure and evaluate. . . . [T]he interval between initial thought and ultimate action should be long enough to afford a reasonable man time to subject the nature of his response to a ‘second look.’”²²

In *State v. Bingham*, the Washington Supreme Court reversed a defendant's conviction for aggravated first-degree murder. The court held that the fact that the assailant choked the female victim for three to five minutes during an act of sexual intercourse did not constitute sufficient evidence that the defendant premeditated and deliberated the victim's death. In the view of the court, manual strangulation alone is not enough to support a finding of premeditation. The defendant might have placed his hand around the victim's neck to quiet her, and there also is a question whether the defendant had the capacity to deliberate while engaged in sexual activity.²³ What evidence might have established premeditation? In order to establish premeditation and deliberation, judges generally require either evidence of planning or evidence that the defendant possessed a motive to kill and that the killing was undertaken in a fashion that indicates that it was planned, such as "lying in wait" or the use of a bomb or poison.²⁴

State v. Forrest raises the issue of whether all killings involving premeditation and deliberation should be harshly punished.

FIGURE 10.2 ■ The Legal Equation: First-Degree Murder



SHOULD THE DEFENDANT BE HELD RESPONSIBLE FOR THE PREMEDITATED AND DELIBERATE KILLING OF HIS FATHER?

STATE V. FORREST, 362 S.E.2d 252 (N.C. 1987)

Opinion by Meyer, J.

Defendant was convicted of the first-degree murder of his father, Clyde Forrest. The . . . defendant was sentenced . . . to life imprisonment. In his appeal to this Court, defendant brings forward three assignments of error. . . . [W]e find no error in defendant's trial. We therefore leave undisturbed defendant's conviction and life sentence.

Facts

The facts of this case are essentially uncontested, and the evidence presented at trial tended to show the following series of events. On 22 December 1985, defendant John Forrest admitted his critically ill father, Clyde Forrest, Sr., to Moore Memorial Hospital. Defendant's father, who had previously been hospitalized, was suffering from numerous serious ailments, including severe heart disease, hypertension, a thoracic aneurysm, numerous

pulmonary emboli, and a peptic ulcer. By the morning of 23 December 1985, his medical condition was determined to be untreatable and terminal. Accordingly, he was classified as "No Code," meaning that no extraordinary measures would be used to save his life, and he was moved to a more comfortable room.

On 24 December 1985, defendant went to the hospital to visit his ailing father. No other family members were present in his father's room when he arrived. While one of the nurse's assistants was tending to his father, defendant told her, "There is no need in doing that. He's dying." She responded, "Well, I think he's better." The nurse's assistant noticed that defendant was sniffling as though crying and that he kept his hand in his pocket during their conversation. She subsequently went to get the nurse.

When the nurse's assistant returned with the nurse, defendant once again stated his belief that his father was dying. The nurse tried to comfort defendant, telling him, "I don't think your father is as sick as you think he is." Defendant, very upset, responded, "Go to hell. I've been taking care of him for years. I'll take care of him." Defendant was then left alone in the room with his father.

Alone at his father's bedside, defendant began to cry and to tell his father how much he loved him. His father began to cough, emitting a gurgling and rattling noise. Extremely upset, defendant pulled a small pistol from his pants pocket, put it to his father's temple, and fired. He subsequently fired three more times and walked out into the hospital corridor, dropping the gun to the floor just outside his father's room.

Following the shooting, defendant, who was crying and upset, neither ran nor threatened anyone. Moreover, he never denied shooting his father and talked openly with law enforcement officials. Specifically, defendant made the following oral statements: "You can't do anything to him now. He's out of his suffering." "I killed my daddy." "He won't have to suffer anymore." "I know they can burn me for it, but my dad will not have to suffer anymore." "I know the doctors couldn't do it, but I could." "I promised my dad I wouldn't let him suffer."

Defendant's father was found in his hospital bed, with several raised spots and blood on the right side of his head. Blood and brain tissue were found on the bed, the floor, and the wall. Though defendant's father had been near death as a result of his medical condition, the exact cause of the deceased's death was determined to be the four point-blank bullet wounds to his head. Defendant's pistol was a single-action .22-calibre five-shot revolver. The weapon, which had to be cocked each time it was fired, contained four empty shells and one live round.

At the close of the evidence, defendant's case was submitted to the jury for one of four possible verdicts: first-degree murder, second-degree murder, voluntary manslaughter, or not guilty. After a lengthy deliberation, the jury found defendant guilty of first-degree murder. Judge Cornelius accordingly sentenced defendant to the mandatory life term. . . .

Issue

In his second assignment of error . . . defendant argues that the trial court's submission of the first-degree murder charge was improper because there was insufficient evidence of premeditation and deliberation presented at trial. We do not agree, and we therefore overrule defendant's assignment of error. . . .

Reasoning

First-degree murder is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time

is necessary for the mental process of premeditation. Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. The phrase "cool state of blood" means that the defendant's anger or emotion must not have been such as to overcome his reason.

Premeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence. Among other circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the course of the occurrence giving rise to the death of the deceased; (4) ill will or previous difficulty between the parties; (5) the dealing of lethal blows after the deceased has been felled and rendered helpless; and (6) evidence that the killing was done in a brutal manner. We have also held that the nature and number of the victim's wounds is a circumstance from which premeditation and deliberation can be inferred....

Here, many of the circumstances that we have held to establish a factual basis for a finding of premeditation and deliberation are present. It is clear, for example, that the seriously ill deceased did nothing to provoke defendant's action. Moreover, the deceased was lying helpless in a hospital bed when defendant shot him four separate times. In addition, defendant's revolver was a five-shot single-action gun which had to be cocked each time before it could be fired. Interestingly, although defendant testified that he always carried the gun in his job as a truck driver, he was not working on the day in question but carried the gun to the hospital nonetheless.

Holding

Most persuasive of all on the issue of premeditation and deliberation, however, are defendant's own statements following the incident. Among other things, defendant stated that he had thought about putting his father out of his misery because he knew he was suffering. He stated further that he had promised his father that he would not let him suffer and that, though he did not think he could do it, he just could not stand to see his father suffer any more. These statements, together with the other circumstances mentioned above, make it clear that the trial court did not err in submitting to the jury the issue of first-degree murder based upon premeditation and deliberation. Accordingly, defendant's . . . assignment of error is overruled....

Dissenting, Exum, C.J.

Almost all would agree that someone who kills because of a desire to end a loved one's physical suffering caused by an illness which is both terminal and incurable should not be deemed in law as culpable and deserving of the same punishment as one who kills because of unmitigated spite, hatred, or ill will. Yet the Court's decision in this case essentially says there is no legal distinction between the two kinds of killing. Our law of homicide should not be so roughly hewn as to be incapable of recognizing the difference. I believe there are legal principles which, when properly applied, draw the desirable distinction and that both the trial court and this Court have failed to recognize and apply them.

Questions for Discussion

1. What circumstantial evidence supports the conclusion that Forrest acted with premeditation and deliberation in killing his father?
2. Do you agree with Chief Judge Exum in his dissent that the law should distinguish between a killing that is intended to end the suffering of a loved one and a killing that is motivated by “unmitigated spite, hatred, or ill will”?
3. Does *Forrest* suggest that a murder committed with premeditation and deliberation is not necessarily more deserving of punishment than a crime committed out of passion?

CASES AND COMMENTS

Assisted Suicide. Suicide at common law was considered the felony of “self murder” because it deprived the King of one of his subjects and therefore was a crime against the Crown and against God. The punishment for suicide entailed forfeiture of the deceased person’s estate and loss of the right to a formal burial. In 1961, England abolished the offense of suicide, although assisting suicide remains a crime.

In the United States, suicide in most states also no longer is considered a criminal offense. Assisting suicide, however, remains a crime. New York provides that an individual who “intentionally causes or aids another person to commit suicide” is guilty of manslaughter in the second degree. N.Y. Penal Law § 125.15. Several other states do not have specific laws prohibiting assisting suicide and prosecute assisting suicide under other types of criminal statutes.

In November 1997, the Oregon “death with dignity” law went into effect. The law provides for physician-assisted suicide. Ore. Rev. Stat. §§ 127.800, et seq. In 2006, the United States Supreme Court held that the federal government had no legal authority under the Controlled Substances Act (CSA) to prevent Oregon doctors from prescribing drugs to be used in suicide. The Court held that the CSA was intended to combat drug abuse and that writing a prescription for drug abuse did not fall within the scope of the statute. Roughly 600 individuals have made use of the Oregon law.

Washington passed a similar law in 2008. Wash. Rev. Code section 70.122.070(1) provides that the withholding or withdrawal of life-sustaining treatment at a patient’s request “shall not . . . constitute a suicide or a homicide.” In May 2009, a 66-year-old woman suffering from pancreatic cancer became the first person in Washington to make use of the law to end her life. Approximately 150 persons have made use of the law in Washington.

In both Oregon and Washington, two doctors are required to certify that a patient has six months or less to live. After receiving those separate, independent certifications, such patients are eligible to terminate their life. Then they must request lethal drugs on two occasions, 15 days apart. The fatal dose must be self-administered.

The Oregon and Washington laws are opposed by various religious organizations and by the American Medical Association, which believes that doctors should not be involved in assisting in the taking of human life.

In Oregon, an equal number of men and women have made use of the law, and the median age was 71 years of age. Of these individuals, 81% were suffering from cancer.

Studies determined that most of these individuals were motivated by a desire to control their fate rather than to eliminate pain. There was apprehension that poor individuals would be pressured into suicide because of the cost of their care. The studies, however, indicate that most people employing the law were solidly middle class.

In 2013, in Oregon, prescriptions for lethal medications were written for 122 people as compared to 116 in 2012. There were 71 “assisted deaths” during 2013, nearly all of which involved individuals who were over 65 years of age and died at home. These people expressed concern for a loss of autonomy, for decreasing capacity to participate in activities that made life enjoyable, and for a loss of dignity.

In 2009, in *Baxter v. State*, 224 P.3d 1211 (Mont. 2009), the Montana Supreme Court held that a doctor is not criminally liable for assisting mature, aware, and terminally ill patients to take their life. The court reasoned that the state public policy respected the end-of-life autonomy of patients and that doctors had an ethical obligation to respect a patient’s wishes. The Alaska Supreme Court earlier had held that terminally ill patients have no right to a physician’s assistance in committing suicide. See *Sampson v. State*, 31 P.3d 88 (Alaska 2001). In 2016, in *Morris v. Brandenburg*, the New Mexico Supreme Court reached a similar result. See *Morris v. Brandenburg*, 376 P.3d 836 (N.M. 2016).

In May 2014, the Vermont legislature recognized that terminally ill patients have a right to assistance in dying. Colorado voted, in 2016, to permit adults suffering from terminal illness to take life-ending, doctor-prescribed sleeping medication. In the same year, the District of Columbia adopted a Death With Dignity Act.

In 2016, Washington, D.C., adopted a “death with dignity” law, and in 2019, Maine and New Jersey adopted similar laws.

In other states in the United States, the law continues to treat aiding and abetting a suicide as a crime. In 1999, the late Dr. Jack Kevorkian was convicted of the second-degree murder of Thomas Youk and was sentenced to serve from 10 to 25 years in prison. Youk was in the final stages of Lou Gehrig’s disease and had signed a consent form authorizing Kevorkian to take his life. See *People v. Kevorkian*, 642 N.W.2d 681 (Mich. 2002). Kevorkian had videotaped the process leading to Youk’s death. The tape was played on CBS’s *60 Minutes* and was used by the prosecution at trial. Kevorkian was unrepentant and claimed that he was providing a “medical service for an agonized human being.” Michelle Carter, a Massachusetts teenager, was indicted by a grand jury of involuntary manslaughter for placing “constant pressure” on her severely depressed boyfriend to follow through on his stated intent to commit suicide. She filed a motion to dismiss the indictment, which the juvenile court judge denied. The Supreme Judicial Court agreed with the juvenile court judge that, absent her “admonishments, pressure, and instructions, the [18-year-old] victim on the night he killed himself would not have gotten back into the truck and poisoned himself to death.” A year later, at a bench trial before the juvenile court judge, Carter pled guilty to involuntary manslaughter. In August 2017, the juvenile court judge imposed a 15-month sentence in the county jail; he stayed the sentence pending her appeal in the state courts. The Massachusetts Supreme Judicial Court subsequently affirmed Carter’s conviction. See *Commonwealth v. Carter*, 115 N.E.3d 557 (Mass. 2019).

The U.S. Supreme Court in two decisions has upheld the constitutionality of a state’s criminally punishing assisted suicide. See *Vacco v. Quill*, 521 U.S. 793 (1997), and *Washington v. Glucksberg*, 521 U.S. 702 (1997). The Court noted in *Washington v. Glucksberg* that an examination of “our Nation’s history, legal traditions, and practice demonstrates that Anglo-American common law has punished . . . assisting suicide for over seven hundred years.”

In 2014, 29-year-old newlywed Brittany Maynard was diagnosed with incurable brain cancer and moved from California to Oregon in order to end her life in what she viewed as

a humane fashion. In a video released in March 2015, following her death five months earlier, Brittany stated that “no one should have to leave their home and community for peace of mind, to escape suffering, and to plan for a gentle death.” Brittany’s death led to the California legislature’s adoption in 2015 of the End of Life Option Act, which legalized physician-assisted suicide. The California law requires two doctors to certify that a patient has six months or less to live before lethal drugs may be prescribed. Patients are required to be physically able to swallow the medication themselves and must have the mental capacity to make medical decisions. Do you support “death with dignity” laws?

Capital and Aggravated First-Degree Murder

Twenty-seven states, the federal government, and the U.S. military authorize the death penalty. In some states, this is called **capital murder**. The statutes in these jurisdictions typically provide for the death penalty or a life sentence in the case of a first-degree murder committed under conditions that make the killing deserving of the punishment of death or life imprisonment. Other states create a category termed **aggravated murder** that is subject to the death penalty or to life imprisonment. Those states that do not possess the death penalty punish aggravated murder by life imprisonment rather than death. Twenty-three states and Washington, D.C., reject capital punishment.

State capital murder or aggravated murder statutes typically reserve this harsh punishment for premeditated killings committed with the presence of various **aggravating factors** or special circumstances. The Virginia capital murder statute, for instance, includes willful, deliberate, and premeditated killing of a police officer, a killing by an inmate, and killing in the commission of or following a rape or sexual penetration, along with other factors.²⁵ These statutes differ from one another, but typically include the following aggravating circumstances:

- *Victim.* A killing of a police officer, a juvenile 13 years of age or younger, or more than one victim.
- *Offender.* An escaped prison inmate or an individual previously convicted of an aggravated murder.
- *Criminal Act.* Terrorism, murder for hire, or killing during a prison escape or to prevent a witness from testifying.
- *Felony Murder.* Killing during a dangerous felony.

The jury, in order to sentence a defendant to death, must find one or more aggravating circumstances and is required to determine whether these outweigh any **mitigating circumstances** that may be presented by the defense attorney. Some statutes list mitigating circumstances that the jury should consider. The Florida death penalty statute specifies a number of mitigating circumstances, including the fact that the defendant does not possess a significant history of criminal activity or suffered from a substantially impaired mental capacity, the defendant was

under the influence of extreme mental or emotional disturbance or acted under duress, the victim participated in the defendant's conduct or consented to the act, and the defendant's participation was relatively minor.²⁶

Owen v. State illustrates a murder that is considered to be deserving of the death penalty.

DID THE DEFENDANT KILL IN A HEINOUS, ATROCIOS, OR CRUEL FASHION?

OWEN V. STATE, 862 So. 2d 687 (FLA. 2003)

Per curiam.

Facts

This is the second appearance of Duane Owen before this Court to review a conviction and sentence of death for the murder of fourteen-year-old Karen Slattery. In 1990, we reversed his original conviction and sentence of death and remanded for a retrial. See *Owen v. State*, 560 So.2d 207, 212 (Fla. 1990).

[The victim was baby-sitting for a married couple on the evening of March 24, 1984, in Delray Beach. During the evening, she called home several times and spoke with her mother, the last call taking place at approximately 10 p.m. When the couple returned home, just after midnight, the lights and the television were off and the baby-sitter did not meet them at the door as was her practice. The police were summoned and the victim's body was found with multiple stab wounds. There was evidence that the intruder entered by cutting the screen to the bedroom window. He then sexually assaulted the victim. A bloody footprint, presumably left by the murderer, was found at the scene.]

In early 1999, following retrial, Owen was again found guilty by a jury of the offense of first-degree murder, and was further found guilty of attempted sexual battery with a deadly weapon or force likely to cause serious personal injury and burglary of a dwelling while armed. In March 1999, the same jury recommended, by a ten-to-two vote, that Owen should be sentenced to death. The judge followed the jury's recommendation, and on March 23, 1999, Owen was adjudicated guilty and sentenced to death for the murder of Karen Slattery.

In support of the sentence of death, the trial court found that four aggravating circumstances existed to support the death sentence: (1) the defendant had been previously convicted of another capital offense or a felony involving the use of violence to some person; (2) the crime for which the defendant was to be sentenced was committed while he was engaged in the commission of or an attempt to commit or flight after committing or attempting to commit the crime of burglary; (3) the crime for which the defendant was to be sentenced was especially heinous, atrocious, or cruel (HAC); and (4) the crime for which the defendant was to be sentenced was committed in a cold and calculated and premeditated (CCP) manner without any pretense of moral or legal justification. In mitigation, the trial judge considered three statutory mitigating factors: (1) the crime for which the defendant was to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance; (2) the capacity of the defendant to appreciate the criminality of his

conduct or to conform his conduct to the requirement of the law was substantially impaired; and (3) the age of the defendant at the time of the crime was twenty-three. . . .

The facts surrounding the death of [Georgianna] Worden were substantially similar to those of the Slattery murder. As this Court detailed, "The body of the victim, Georgianna Worden, was discovered by her children on the morning of May 29, 1984, as they prepared for school. An intruder had forcibly entered the Boca Raton home during the night and bludgeoned Worden with a hammer as she slept, and then sexually assaulted her. This Court affirmed the conviction and sentence of death in that case and, notably, held that there was sufficient evidence to support the trial court's findings that the murder was especially heinous, atrocious, or cruel and that the murder was committed in a cold, calculated, and pre-meditated manner.

We have on appeal the judgment and sentence entered in the Fifteenth Judicial Circuit Court imposing the death penalty upon Duane Owen. For the reasons stated below, we affirm the judgment and sentence under review.

Issue

Owen next challenges the trial court's application of the aggravating factors of HAC and CCP. The law is well settled regarding this Court's review of a trial court's finding of an aggravating factor. . . . Judge Cohen found the State had proven the heinous, atrocious, or cruel aggravating factor beyond a reasonable doubt and applied great weight to that factor. . . .

Reasoning

Karen Slattery was stabbed or cut eighteen times. She was alive when all the wounds were inflicted. She was in terror. She undoubtedly had a belief of her impending doom. Her fear and heightened level of anxiety occurred over a period of time. Most important, the defendant told Dr. McKinley Cheshire that fear in his victim was necessary. The defendant stated that causing deliberate pain and fear would increase the flow of female bodily fluids which he needed for himself. The puncturing of Karen Slattery's lung caused her to literally drown in her own blood. She experienced air deprivation. Each of the eighteen cuts, slashes, and/or stab wounds caused pain by penetrating nerve endings in Miss Slattery's body. The crime of murdering Miss Slattery evidenced extreme and outrageous depravity. The defendant desired to inflict pain and fear on Miss Slattery "to increase the flow of her female bodily fluids which he needed for himself." The defendant showed an utter indifference to Karen Slattery's suffering. He was conscienceless and pitiless and unnecessarily torturous to Miss Slattery. She had an absolute full knowledge of her impending death with unimaginable fear and anxiety.

. . . This Court has consistently upheld the HAC aggravator where the victim has been repeatedly stabbed. Furthermore, we have reasoned that the HAC aggravator is applicable to murders that "evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." The HAC aggravator focuses on the means and manner in which death is inflicted. . . .

Here, the medical examiner testified that Slattery suffered eighteen stab wounds—eight to her upper back, four cutting wounds to the front of her throat, and six stab wounds to her neck. Five of the wounds penetrated her lungs, causing them to collapse, making it

impossible for Slattery to breathe or speak. She would have experienced “air hunger”—the feeling of needing to breathe but not being able to do so. The doctor estimated that Slattery lost nearly her entire blood volume. The result of severe blood loss is shock, an involuntary and uncontrollable condition that causes high anxiety and terror. The doctor explained that pain is a result of the nerve receptors in the skin being injured, and that people can experience a substantial amount of pain without suffering a lethal injury.

Although Slattery did not appear to have any defensive wounds, seven of the stab wounds were lethal and could have produced death. While the medical examiner could not determine which wounds were inflicted first, he believed they were all inflicted in rapid succession and all while Slattery was alive. The doctor opined that Slattery would have been capable of feeling pain as long as she was conscious, which he estimated would have been for between twenty seconds and two minutes, depending upon which wound was inflicted first. He testified that one minute was a reasonable estimate for how long Slattery remained conscious, as twenty seconds was too short, but two minutes would have been a “little long.” During that time she would have felt pain, experiencing the additional stab wounds, would have felt terror and shock, would have been aware of her impending doom, would have become weaker as a result of blood loss, and would have been unable to cry out. Finally, according to the medical examiner, although she may have been dead prior to the occurrence, Slattery was sexually assaulted, and semen was found on both her internal and external genitalia.

In addition to the evidence presented by the medical examiner, the testimony of Owen’s own mental health expert supports the finding of HAC. Dr. Frederick Berlin testified that Owen believed that by having sex with a woman he could obtain her bodily fluids, and that this would assist him in his transformation from a male to a female. Owen believed that if he had sex with a woman who was near death, his penis would act as a hose, and her soul would enter his body and they would “become one.” Importantly, Owen believed that the more frightened the victim was, the better. This express need to cause his victim extreme fear clearly evinces an utter indifference to his victim’s torture. On the basis of the entire record, Owen’s killing of Karen Slattery unquestionably satisfies the requirements of HAC.

Owen’s challenge to the finding of the CCP aggravator is likewise misplaced. This Court has established a four-part test to determine whether the CCP aggravating factor is justified: (1) the killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); (2) the defendant must have had a careful plan or prearranged design to commit murder before the fatal incident (calculated); (3) the defendant must have exhibited heightened premeditation (premeditated); and (4) the defendant must have had no pretense of moral or legal justification.

In 1992, we held that the finding of CCP was properly applied to the murder of Georgianna Worden, a second murder for which Owen was convicted and sentenced to death. Although Worden was bludgeoned to death and not stabbed, the remaining facts of that murder were virtually identical to those of the Slattery homicide. . . .

Owen’s confession to the Slattery murder demonstrates the similarities between the two murders. Owen admitted to cutting a screen out of a window to gain access to the home where Slattery was babysitting. . . .

According to Owen, he confronted Slattery near the phone as she was concluding a telephone conversation. He ordered her to return the phone to its cradle, and when she did not, he dropped his hammer, grabbed the phone from her hand, returned it to its base, and immediately began stabbing her. After Owen had stabbed Slattery, he checked on the children to ensure they had not awakened during the attack, and he then proceeded to lock the doors and turn off all the lights and the television. Owen then dragged Slattery by her

feet into the bedroom, removed her clothes, and sexually assaulted her. He explained to the officer questioning him that he had only worn a pair of "short-shorts" into the house. After he sexually assaulted Slattery, Owen showered to wash the blood from his body, and then exited the house through a sliding glass door. He then returned to the home where he was staying and turned the clocks back to read 9:00 p.m. According to Owen, he did this to provide an alibi based on time. He admitted that after he turned the clocks back, he purposely asked his roommate the time. Owen bragged to the officers about his plan to turn back the clocks, explaining that he "had to be thinking."

Clearly, as with the Worden murder, the murder of Karen Slattery satisfies the requirements of CCP. The fact that Owen stalked Slattery by entering the house, observing her, leaving, and then returning after the children were asleep demonstrates that this murder was the "product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage." . . . Further, Owen unquestionably had "a careful plan or prearranged design to commit murder," as evidenced by the fact that he removed his clothing prior to entering the house, wore socks and then gloves on his hands, confronted the fourteen-year-old girl with a hammer in one hand and a knife in the other, and, by his own admission, did not hesitate before stabbing Slattery eighteen times.

The third element of CCP, heightened premeditation, is also supported by competent and substantial evidence. We have previously found the heightened premeditation required to sustain this aggravator to exist where a defendant has the opportunity to leave the crime scene and not commit the murder but, instead, commits the murder. When Owen first entered the home and saw the fourteen-year-old babysitter styling the hair of one of her charges, he had the opportunity to leave the home and not commit the murder. While he did exit the home at that time, he did not decide against killing Slattery. Instead, he returned a short time later, armed himself, confronted the young girl, and stabbed her eighteen times. Owen clearly entered the home the second time having already planned to commit murder. Heightened premeditation is supported under these facts.

Finally, the appellant unquestionably had no pretense of moral or legal justification. Notably, Owen never even suggested to the officers who questioned him, and to whom he confessed, in 1984 that a mental illness caused him to kill. He did not attempt to justify his actions, as he does in the after-the-fact manner he advances today, by explaining to the officers that he needed a woman's bodily fluids to assist in his transformation from a male to a female. He did not explain or disclose in any way that the more frightened the woman, the more bodily fluids she would secrete, and the more satisfying it would be for him. In fact, during his interrogation, Owen in no way attempted to justify his actions. Also, there is no indication in either of Owen's previous direct appeals to this Court, first for the Slattery murder and then for the Worden murder, that he has ever raised this justification in the past. Although the trial court determined that the statutory mental health mitigators were proven, the court also held that Owen had no pretense of legal or moral justification to rebut the finding of CCP. The trial court's ruling is supported by competent and substantial evidence.

Owen's claim that his mental illness must negate the CCP aggravator is unpersuasive. We have held: "A defendant can be emotionally and mentally disturbed or suffer from a mental illness but still have the ability to experience cool and calm reflection, make a careful plan or prearranged design to commit murder, and exhibit heightened premeditation." . . . Here, the evidence clearly demonstrates that Owen entered the home where Slattery was babysitting with a definite plan to murder the victim and then sexually abuse the body. CCP was properly applied to the Slattery murder.

Holding

Having determined the legitimacy of the conviction, we turn next to the sentence of death. It is well settled that the purpose of our proportionality review is to “foster uniformity in death-penalty law.” Further, the number of aggravating factors cannot simply be compared to the number of mitigating factors; rather there must be “a thoughtful, deliberate proportionality review to consider the totality of the circumstances in a case, and to compare it with other capital cases.” When compared to other decisions of this Court, the death sentence entered in this case is proportionate.

Questions for Discussion

1. What is the legal standard for determining whether a killing was committed in a “heinous, atrocious, or cruel” fashion?
2. Summarize the facts that support the court’s conclusion that this standard was satisfied.
3. Do you believe that a murder committed in a “heinous, atrocious, or cruel” fashion merits a harsher penalty than other murders?
4. What facts support the allegation that the defendant killed in a “cold, calculated, and premeditated” fashion?

CASES AND COMMENTS

Torture Murder. Gary Heidnik was convicted of murder, kidnapping, rape, aggravated assault, and involuntary deviate intercourse in Pennsylvania. He was sentenced to death based on a number of aggravating circumstances, including “the torture aggravator.” The torture aggravator requires an intent to cause pain and suffering in addition to the intent to kill. There must be suffering beyond that associated with murder. This involves an examination of the manner in which the murder is committed, including the number and type of wounds, whether the wounds were inflicted in areas of the body that indicate an intent to cause pain rather than to kill, whether the victim was conscious during the killing, and the duration of the episode.

The police found three females in Heidnik’s basement, shackled at the ankles. Two of his female captives, Sandra Lindsay and Debra Dudley, had been killed. Heidnik chained, beat, and continually raped the captive women. Women who screamed for help or attempted to escape were suspended by their handcuffed wrists from a hook. Lindsay was subjected to this punishment for three or four days and was fed only bread and water. After three or four days of this abuse, Lindsay collapsed. Heidnik kicked her body into a hole he had constructed in the basement floor. After determining that Lindsay was dead, he decapitated her body and boiled her head in a large pot on the stove. Other body parts were shredded in a food processor and mixed with dog food, which he fed to the other women or sealed in plastic bags and placed in the freezer.

Heidnik placed Lindsay’s head in a pot, which he displayed to Dudley, another of his captives. He told Dudley that unless she changed her attitude, she also would end up with

her head in the pot. A few days later, he placed Dudley in the cement hole, which he filled with water, and attached an electrical wire to Dudley's metal chain and electrocuted her to death. Was the killing of Lindsay as well as Dudley "committed by means of torture"? See *Commonwealth v. Heidnik*, 587 A.2d 687 (Pa. 1991).

SECOND-DEGREE MURDER

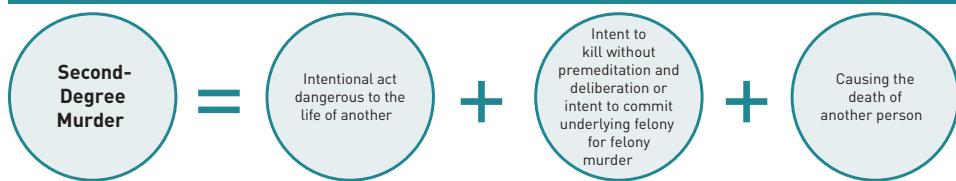
State second-degree murder statutes typically punish intentional killings that are committed with malice aforethought that are not premeditated, justified, or excused. Most statutes go beyond this simple statement and provide that killings committed with malice aforethought that are not specifically listed as first-degree murder are considered second-degree murder. For instance, several states include felony murder as second- rather than first-degree murder.

Washington State provides that a person is guilty of murder in the second degree when with "the intent to cause the death of another person but without premeditation he causes the death of such person." The statute also includes as second-degree murder a killing committed in furtherance of or in flight from a felony.²⁷ Idaho merely provides that all killings that are not explicitly included in the first-degree statute "are of the second degree." This means that an Idaho prosecutor is authorized to charge second-degree murder in all instances in which a murder does not fall within the state's first-degree murder statute.²⁸

The Louisiana statute states that second-degree murder is the killing of a human being when the "offender has a specific intent to kill or to inflict great bodily harm." The law also provides that second-degree murder includes

- a killing that occurs during the perpetration or attempted perpetration of aggravated rape, arson, burglary, kidnapping, escape, a drive-by shooting, armed robbery, or robbery, despite the fact that the individual possesses no intent to kill or to inflict great bodily harm;
- a killing that occurs in the perpetration of cruelty to juveniles, despite the fact that an individual has no intent to kill or to inflict great bodily harm; and
- a killing that directly results from the unlawful distribution of an illegal narcotic.²⁹

The next case, *Midgett v. State*, is based on an Arkansas second-degree murder statute that punishes an individual who "knowingly causes the death of another person under circumstances manifesting extreme indifference to the value of human life." The statute also punishes a killing that is committed when, with the "purpose of causing serious physical injury to another person, he [the perpetrator] causes the death of another person."³⁰ In reading *Midgett*, remember that malice may be express or implied. Express malice is the deliberate intent to unlawfully take the life of another individual. Implied malice involves a killing that results from an intentional act, the natural consequences of which are dangerous to life.

FIGURE 10.3 ■ The Legal Equation: Second-Degree Murder

IS MIDGETT GUILTY OF FIRST- OR SECOND-DEGREE MURDER?

MIDGETT V. STATE, 729 S.W.2D 410 (ARK. 1987)

Opinion by Newbern, J.

Issue

This child abuse case resulted in the appellant's conviction of first degree murder. The sole issue on appeal is whether the state's evidence was sufficient to sustain the conviction. We hold there was no evidence of the "... premeditated and deliberated purpose of causing the death of another person ..." required for conviction of first degree murder. However, we find the evidence was sufficient to sustain a conviction of second degree murder ... as the appellant was shown to have caused his son's death by delivering a blow to his abdomen or chest "... with the purpose of causing serious physical injury." The conviction is thus modified from one of first degree murder to one of second degree murder and affirmed.

Facts

The facts of this case are as heart-rending as any we are likely to see. The appellant is six feet two inches tall and weighs 300 pounds. His son, Ronnie Midgett, Jr., was eight years old and weighed between thirty-eight and forty-five pounds. The evidence showed that Ronnie Jr. had been abused by brutal beating over a substantial period of time. Typically, as in other child abuse cases, the bruises had been noticed by school personnel, and a school counselor . . . had gone to the Midgett home to inquire. Ronnie Jr. would not say how he had obtained the bruises or why he was so lethargic at school except to blame it all, vaguely, on a rough playing little brother. He did not even complain to his siblings about the treatment he was receiving from the appellant. His mother, the wife of the appellant, was not living in the home. The other children apparently were not being physically abused by the appellant.

Ronnie Jr.'s sister, Sherry, aged ten, testified that on the Saturday preceding the Wednesday of Ronnie Jr.'s death, their father, the appellant, was drinking whiskey (two to three quarts that day) and beating on Ronnie Jr. She testified that the appellant would "bundle up his fist" and hit Ronnie Jr. in the stomach and in the back. On direct examination she said that she had not previously seen the appellant beat Ronnie Jr., but she had seen the appellant choke him for no particular reason on Sunday nights after she and Ronnie Jr. returned from church. On cross-examination, Sherry testified that Ronnie Jr. had lied and

her father was, on that Saturday, trying to get him to tell the truth. She said the bruises on Ronnie Jr.'s body noticed over the preceding six months had been caused by the appellant. She said the beating administered on the Saturday in question consisted of four blows, two to the stomach and two to the back.

On the Wednesday Ronnie Jr. died, the appellant appeared at a hospital carrying the body. He told hospital personnel something was wrong with the child. An autopsy was performed, and it showed Ronnie Jr. was a very poorly nourished and underdeveloped eight-year-old. There were recently caused bruises on the lips, center of the chest plate, and forehead as well as on the back part of the lateral chest wall, the soft tissue near the spine, and the buttocks. There was discoloration of the abdominal wall and prominent bruising on the palms of the hands. Older bruises were found on the right temple, under the chin, and on the left mandible. Recent as well as older, healed, rib fractures were found.

The conclusion of the medical examiner who performed the autopsy was that Ronnie Jr. died as the result of intra-abdominal hemorrhage caused by a blunt force trauma consistent with having been delivered by a human fist. The appellant argues that in spite of all this evidence of child abuse, there is no evidence that he killed Ronnie Jr. having premeditated and deliberated causing his death. We must agree. . . .

The evidence in this case supports only the conclusion that the appellant intended not to kill his son but to further abuse him or that his intent, if it was to kill the child, was developed in a drunken, heated, rage while disciplining the child. Neither of those supports a finding of premeditation or deliberation.

Perhaps because they wish to punish more severely child abusers who kill their children, other states' legislatures have created laws permitting them to go beyond second-degree murder. . . . Idaho has made murder by torture a first degree offense, regardless of intent of the perpetrator to kill the victim, and the offense is punishable by the death penalty. . . .

Holding

All of this goes to show that there remains a difference between first and second degree murder, not only under our statute, but generally. Unless our law is changed to permit conviction of first degree murder for something like child abuse or torture resulting in death, our duty is to give those accused of first degree murder the benefit of the requirement that they be shown by substantial evidence to have premeditated and deliberated the killing, no matter how heinous the facts may otherwise be. . . .

The dissenting opinion begins by stating the majority concludes that one who starves and beats a child to death cannot be convicted of murder. That is not so, as we are affirming the conviction of murder; we are, however, reducing it to second degree murder. The dissenting opinion's conclusion that the appellant starved Ronnie Jr. must be based solely on the child's underdeveloped condition which could, presumably, have been caused by any number of physical malfunctions. There is no evidence the appellant starved the child. The dissenting opinion says it is for the jury to determine the degree of murder of which the appellant is guilty. That is true so long as there is substantial evidence to support the jury's choice. The point of this opinion is to note that there was no evidence of premeditation or deliberation, which are required elements of the crime of first degree murder. . . .

In this case we have no difficulty with reducing the sentence to the maximum for second-degree murder. The jury gave the appellant a sentence of forty years imprisonment which was the maximum for first degree murder, and we reduce that. . . . [T]he obvious effect the beatings were having on Ronnie Jr. and his emaciated condition when the final beating

occurred are circumstances constituting substantial evidence that the appellant's purpose was to cause serious physical injury, and that he caused his death in the process. That is second degree murder, . . . [and t]herefore, we reduce the appellant's sentence to imprisonment for twenty years.

Dissenting, Hickman, J.

Simply put, if a parent deliberately starves and beats a child to death, he cannot be convicted of the child's murder. In reaching this decision, the majority . . . substitutes its judgment for that of the jury. The majority has decided it cannot come to grips with the question of the battered child who dies as a result of deliberate, methodical, intentional and severe abuse. A death caused by such acts is murder by any legal standard, and that fact cannot be changed—not even by the majority. The degree of murder committed is for the jury to decide—not us. . . .

In this case the majority, with clairvoyance, decides that this parent did not intend to kill his child, but rather to keep him alive for further abuse. This is not a child neglect case. The state proved Midgett starved the boy, choked him, and struck him several times in the stomach and back. The jury could easily conclude that such repeated treatment was intended to kill the child. . . .

The facts in this case are substantial to support a first degree murder conviction. The defendant was in charge of three small children. The victim was eight years old and had been starved; he weighed only 38 pounds at the time of his death. He had multiple bruises and abrasions. The cause of death was an internal hemorrhage due to blunt force trauma. His body was black and blue from repeated blows. The victim's sister testified she saw the defendant, a 30 year old man, 6'2" tall, weighing 300 pounds, repeatedly strike the victim in the stomach and back with his fist. One time he choked the child.

The majority is saying that as a matter of law a parent cannot be guilty of intentionally killing a child by such deliberate acts. Why not? Is it because it is inconceivable to rational people that a parent would intend to kill his own child? Evidently, this is the majority's conclusion, because they hold the intention of Midgett was to keep him alive for further abuse, not kill him. How does the majority know that? How do we ever know the actual or subliminal intent of a defendant? . . . This parent killed his own child, and the majority cannot accept the fact that he intended to do just that.

Undoubtedly, the majority could accept it if the child were murdered with a bullet or a knife; but they cannot accept the fact, and it is a fact, that this defendant beat and starved his own child to death. His course of conduct could not have been negligent or unintentional. . . . He is guilty of first degree murder in the eyes of the law. His moral crime as a father is another matter, and it is not for us to speculate why he did it.

Questions for Discussion

1. Why did the Arkansas Supreme Court rule that Midgett is guilty of second- rather than first-degree murder? Summarize the dissenting view that Midgett killed his son in a premeditated and deliberate manner.
2. Midgett was charged and convicted of the death of his son inflicted with the purpose of causing serious physical injury. Why was Midgett not charged with knowingly causing the death of another person under circumstances manifesting extreme indifference to the value of human life? For a case involving death resulting from a severe beating of a

19-year-old mentally challenged man by an instructor at a “practical training school,” see *People v. Thomas*, 272 N.W.2d 157 (Mich. Ct. App. 1978).

3. Are you confident that judges and juries are able to clearly determine a defendant’s intent from the nature of his criminal acts? Do you agree with the majority or with the dissent?
4. Based on this case, do you question whether first-degree murder is always a more serious offense than second-degree murder?
5. One month following the decision in *Midgett*, the Arkansas legislature amended the state’s criminal code to authorize a verdict of first-degree criminal homicide when an individual under “circumstances manifesting extreme indifference to the value of human life . . . knowingly causes the death of a person fourteen years of age or younger at the time the murder was committed.” See Ark. Code Ann. § 5-10-101(a)(9). Would Midgett be found guilty of first-degree murder under this statute?

YOU DECIDE 10.2

Jerry Chambers was the babysitter for Tiffany Bennett’s four female children: P.B., age 3; P.B.2., age 4; A.B.2., age 6; and A.B., age 10. Chambers shared his apartment with Bennett’s sister, Candice Geiger, and his “godmother.” In the fall of 2002, Bennett agreed to pay Chambers \$80 a week in return for the girls moving in with him. Bennett saw the girls only on holidays and later resisted taking the girls back into her home.

“The children lived in deplorable conditions. . . . [The apartment] was filthy and infested with flies and cockroaches. An overwhelming stench of urine permeated the dwelling. The bedroom had two beds: one, next to the radiator, for the children; the other for Chambers and Geiger. There were urine and feces on the floor. The window was covered with dark plastic, and on the wall were taped a number of rules. Number 7 instructed the girls to “[r]espect [appellant] at all times or every body [sic] gets their ass whooped.”

Chambers “regularly beat the four girls with extension cords, belts, a metal pole, and a broomstick.” The girls were prohibited from leaving the apartment, even to attend school. They were instructed to remain in the bedroom and to cover their faces when visitors came to the apartment. P.B. was punished whenever she wet her bed by being confined in a cold shower. The girls were reprimanded by being locked in the basement with two pit bulls. At times, they were told to eat “dog poop” out of the dogs’ food bowls.

On the night of August 16, 2003, Chambers beat P.B. with an extension cord while she was in the shower. He then locked A.B. in the basement. Chambers and Geiger along with P.B., A.B.2, and P.B.2 went to bed. Sometime after midnight, Chambers and Geiger were having sex when Chambers accused P.B. of staring at them. He directed P.B. to stop watching, and she allegedly kept staring at them. Chambers called P.B. over to the bed, beat her with an extension cord, and struck her in the face several times. Geiger also beat P.B. Chambers “picked her up by her feet and threw her across the room. P.B. struck her head on the cast-iron radiator and ended up lodged between the bed, radiator, and wall. She remained there, slowly suffocating, until the next day. Appellant did nothing to help the child; further, he instructed the other girls not to help her.” Around 1:00 p.m., the police were called.

Chambers relied on *Midgett* and argued that he should not be held liable for first-degree, premeditated murder.

P.B.'s death was due to a combination of factors, including the multiple blunt-force traumas. She also suffered inanition (a condition in which a child literally wastes away due to physical trauma and emotional stress) and asphyxia from lying "crumpled up in a heap" jammed between the bed, the wall, and the radiator. Apply the precedent in *Midgett*. Would you hold Chambers liable for first- or for second-degree murder? See *Commonwealth v. Chambers*, 980 A.2d 35 (Pa. 2009).

DEPRAVED HEART MURDER

Individuals may be held criminally responsible for depraved heart murder in those instances in which they kill another as a result of the "deliberate perpetration of a knowingly dangerous act with reckless and wanton unconcern and indifference as to whether anyone is harmed or not."³¹ A defendant who acts in this fashion is viewed as manifesting an "abandoned and malignant heart" or "depraved indifference to human life."³² Reckless homicide is based on the belief that acts undertaken without an intent to kill that severely and seriously endanger human life are "just as antisocial and . . . just as truly murderous as the specific intent to kill and to harm." A New York court noted that examples of depraved heart murder are firing into a crowd, opening the lion's cage at a zoo, poisoning a well from which people regularly drink, and placing a time bomb in a public place (without the intent to kill).³³ Malice is implied in the case of depraved heart murder, and this is typically punished as second-degree murder. The California Penal Code states that malice is "implied . . . when the circumstances attending the killing show an abandoned and malignant heart."³⁴

Depraved heart murder requires each of the following:

- *Conduct.* The defendant's act must create a very high degree of risk or serious bodily injury. Keep in mind that the act must be highly dangerous.
- *Intent.* Defendants must be aware of the danger created by their conduct. Some courts merely require that a reasonable person would have been aware of the risk.
- *Danger.* The common law appeared to require that a number of individuals were placed in danger; the modern view is that it is sufficient that a single individual is at risk.

There is no mathematical formula for determining whether an act satisfies the highly dangerous standard of depraved heart murder. This is decided based on the facts of each case. Examples of depraved heart murder include the following:

- A defendant plays a game of Russian roulette in which he loads a revolver with one bullet and six dummy bullets and spins the chamber. He places the gun to the victim's head and pulls the trigger three times; the third pull kills the victim.³⁵
- A defendant shoots into a passing train, unintentionally killing a passenger.³⁶
- Two street gangs engage in a lengthy shoot-out on a street in downtown Baltimore, killing an innocent 15-year-old.³⁷

- The defendant pours gasoline through the mail slot of the victim's house and sets the gasoline on fire, killing two children.³⁸

The next case, *State v. Davidson*, involves a conviction for depraved heart murder. Pay attention to the facts that led the Kansas Supreme Court to affirm the defendant's guilt for the killing of a human being "unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life."³⁹

FIGURE 10.4 ■ The Legal Equation: Depraved Heart Murder



DID THE DEFENDANT MANIFEST AN EXTREME INDIFFERENCE TO THE VALUE OF HUMAN LIFE BASED ON HER FAILURE TO CONTROL HER DOGS?

STATE V. DAVIDSON, 987 P.2D 335 (KAN. 1999)

Opinion by Allegrucci, J.

Defendant Sabine Davidson was convicted of reckless second-degree murder and endangering a child. She appeals her conviction of reckless second-degree murder. . . . The question we must resolve is whether . . . the State presented evidence sufficient to sustain a conviction of reckless second-degree murder.

Facts

Davidson's challenge to the law and the evidence rests on the same premise: that the State proved only that she failed to confine her dogs. The statute requires the State to prove that her conduct "manifested extreme indifference to the value of human life." At best, she argues that her conduct constituted a negligent omission to confine the dogs and she should have been charged with involuntary manslaughter. Simply stated, she argues that the crime of second-degree murder does not fit her conduct. . . . The State's evidence established numerous earlier incidents involving defendant's dogs. . . .

Fifteen-year-old Margaret Smith, who lived near the Davidsons, testified that sometime during the 1995–96 school year, two dogs chased her and Jeffrey Wilson away from the school bus stop as they waited there in the morning. She believed that the dogs belonged to the Davidsons. . . . Deputy Shumate had been to the Davidson house in January 1996 when one of the neighbors complained about their dogs running loose. The complainant said that

his wife was afraid of the dogs, a German shepherd and a Rottweiler. When Shumate went to the Davidson house on that occasion, Sabine Davidson told him that she would keep the dogs in the fenced enclosure. The fenced enclosure that Shumate saw in January 1996 was still in use in April 1997.

Learie Thompson, who lives near the Davidsons, complained to the sheriff's office in January 1996 because the Davidsons' dogs were in his yard. He recalled three to five times earlier when the dogs were loose and came into his yard. For the most part, the dogs Thompson saw in his yard were German shepherds. Thompson testified that he was afraid of the Davidsons' dogs because they were big and aggressive toward people. When the dogs were in their fenced enclosure, they would rage and growl and try to get out of the fence. . . . [E]arly on the morning that Chris was killed, as Thompson opened his garage door to leave for work, the Davidsons' three Rottweiler dogs rushed into the garage. Thompson jumped up onto his truck. The dogs stood on their hind legs and growled and bared their teeth at him for several minutes. . . .

One incident occurred at the intersection where Chris was killed. On June 14, 1996, Tony Van Buren, who lives directly across the street from the Davidson house, was out in his front yard in the evening when he heard dogs barking. He saw three Rottweilers forming a semi-circle around two young children, who were approximately 3 to 5 years old. . . .

In addition to keeping and breeding German shepherds, defendant in 1995 began purchasing Rottweilers. Bernardi testified that defendant bought three from her, five from other kennels, and one from a breeder in Germany. Timothy Himelick testified that defendant bought two Rottweilers from him. Himelick's dogs were 2 years old, had been raised together as family dogs, and were very friendly. He sold them because he was moving, but several months later "repossessed" the dogs because defendant could not control the female. . . . When defendant got close to Himelick's female dog, the dog "went ballistic." When two children rode by on bicycles, defendant said, "One of these days I'm going [to] get even with them." And when asked by Himelick about a German shepherd that obviously had had a litter of puppies, defendant said her Rottweilers had eaten the pups. . . .

About 7 a.m. on April 24, 1997, Walls opened his front door to let his dog back into the house. Three Rottweilers had his dog backed into a corner of the porch. Walls' dog acted scared. Walls' dog slipped into the house, and the Rottweilers advanced toward Walls. He went back inside for his gun, and when he returned a few minutes later, they were gone. Walls went outside where he could see that the Rottweilers were back inside the Davidsons' fenced enclosure. . . .

Violet Wilson dropped her two younger sons, Chris, 11, and Tramell, 9, off at the school bus stop shortly after 7:15 a.m. The bus stop was located near the residences of Tony Van Buren and defendant. While waiting for the bus, Tramell noticed that defendant's dogs were digging at the fence like they "really wanted to get out." When the dogs got out of the fence, they ran toward the boys, who climbed up into a tree in Van Buren's yard. The three dogs surrounded the tree and barked at the boys for several minutes before the biggest dog left and the other two followed it.

Chris wanted to get down out of the tree and see where the dogs had gone and what they were doing. Tramell urged him to stay in the tree, but Chris got down and looked around for the dogs.

When the school bus arrived at 7:30, no children were at the stop, but the driver noticed two book bags and a musical instrument had been left there. The driver saw Tramell up in a tree on Van Buren's lot. Tramell got out of the tree, ran to the bus stop, gathered up the bags and instruments, and got on the bus. As he got on, Tramell said something about Chris, which the driver thought sounded like Chris had run the dog home. The driver waited several

minutes before repositioning the bus to let Chris know that he needed to hurry up. After moving the bus, the driver could see in the side mirror that there were three large black dogs down in the ravine. The dogs appeared to be fighting over something; they were jumping back and forth and thrashing their heads from side to side. One of the children on the bus said, "It looks like they have a rag doll." Then the driver realized that the dogs had Chris. The only movement of Chris' body was that caused by the thrashing motion of the dogs.

The driver began honking the bus horn in an effort to distract the dogs, and she radioed the dispatcher. There were approximately 20 children on the bus, and the driver then made an effort to divert their attention away from the ravine and to calm them.

When David Morrison, a sheriff's deputy, arrived, the bus driver told him that the boy and the dogs were in the ravine. As Morrison walked toward them, the dogs noticed him and moved quickly and steadily in his direction. Morrison could see that Chris was not moving. Morrison's shouts and gestures did not divert the dogs, which continued to move straight toward him with a large male in the lead. Morrison could see blood on the lead dog's face and forelegs. When the lead dog was approximately 15 feet away from him, Morrison shot and killed him. One of the children on the bus testified that the lead dog had been the one at Chris' neck.

The other two dogs began to run away. Another officer, Sergeant Mataruso, who had just arrived, fired shots at the fleeing dogs. Morrison ran down into the ravine and found Chris. The boy had no pulse. The grass around his body was torn up, and there was a lot of blood spread around the area. Items of clothing, some ripped up, and shoes were scattered about.

When Deputy Shumate arrived, he saw a dead dog in the road. Mataruso told him that he had shot at, and probably wounded, another dog that had been seen running toward a house. Shumate went to the Davidson house, where he found the wounded dog and killed it. Shumate told Mr. and Mrs. Davidson that a child had been attacked by their dogs; he then arrested them. They asked no questions about the identity or condition of the child. Inside the house, there was a dog confined in a large plastic pet carrier. Shumate testified that "the dog was growling, sort of barking, and moving the pet carrier all over the floor like it was trying to get out of the carrier to get at me." The third dog was shot and killed by a highway patrolman later in the day.

An autopsy revealed that Chris had died as a result of trauma from animal bites. There were many injuries, but those affecting the head and neck were immediately responsible for his death. The boy's esophagus and carotid artery were torn. His neck had been broken, and the bones splintered and crushed. . . . [T]he victim's neck was engulfed by the dog's mouth so that even the dog's back teeth left impressions in the tissue.

. . . The dogs that killed Chris were Rottweilers. The one killed by Morrison was an 80-pound male. The other two were females of 70 pounds and 54 pounds, respectively. . . .

Defendant told police that she let the dogs out about 6:30 a.m. on April 24, 1997. Then she took a sleeping pill and went to sleep on the living room couch. Later, when she was told that her dogs had attacked a boy, she said, "The dead one should be one of the Wilson boys." She said that the Wilson boys teased her dogs whenever they came around her property so that the dogs barked and got aggressive when the boys were in the area. She also said that the boy had been at the bus stop, and that is how she knew who was attacked.

Defendant told police that she and her husband had discussed putting a chain on the gate to the fenced enclosure because the dogs got out of that gate "all the time." There was no chain on the gate, however. At trial, defendant testified that after Bernardi watched one of the Rottweilers open the gate by lifting the latch, she put a padlock through the hole in the latch so that it could not be lifted. Defendant testified that after padlocking the latch, she had no more reports of the dogs getting out.

A videotape made by Deputies Snyder and Popovich shows that the Davidsons' back and side yards are enclosed by a 6-foot-tall chain link fence. The gate fastening device is a typical horseshoe-shaped hinged latch. In a horizontal position the arms of the latch are on either side of an adjacent upright fence post on which the next section of fence is attached. A locked padlock through the hole in the latch on the Davidsons' gate kept the latch in a horizontal position. The fence post along with the latch should have kept the gate closed, but the post was easily moved far enough from the vertical for the latch to slip past. On the videotape, Snyder opened and closed the "padlocked" gate without much effort. . . . The fence was installed in 1993.

Issue

Reckless second-degree murder, also known as depraved heart murder, was defined by the legislature as "the killing of a human being committed . . . unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life."

Here, defendant argues that . . . the State's evidence establishes only that she failed to secure the dogs. She then argues that her conduct, as a matter of law, is not reckless second-degree murder. . . . Defendant's argument . . . is based on the State's failure to establish a "depraved heart scienter." It is difficult at times to follow her arguments, but she seems to imply that the State has failed to prove foreseeability, that she had knowledge the dogs would attack someone, let alone harm or kill someone. Thus, she argues the State failed to prove that her conduct was inherently dangerous to human life and that she was indifferent to that danger. In her view, her conduct did not rise to that level of reckless conduct manifesting an extreme indifference to the value of human life.

Reasoning

Here, defendant argues that all she did was let the dogs into the fenced area, take a pill, and go to sleep. This argument conveniently ignores significant aspects of her conduct that contributed to the tragic death of Chris. The State presented evidence that she selected powerful dogs with a potential for aggressive behavior and that she owned a number of these dogs in which she fostered aggressive behavior by failing to properly train the dogs. She ignored the advice from experts on how to properly train her dogs and their warnings of the dire results which could occur from improper training. She was told to socialize her dogs and chose not to do so. She ignore[d] the evidence of the dogs getting out on numerous occasions and her failure to properly secure the gate. She ignored the aggressive behavior her dogs displayed toward her neighbors and their children. The State presented evidence that she created a profound risk and ignored foreseeable consequences that her dogs could attack or injure someone. The State is not required to prove that defendant knew her dogs would attack and kill someone. It was sufficient to prove that her dogs killed Chris and that she could have reasonably foreseen that the dogs could attack or injure someone as a result of what she did or failed to do.

Davidson was charged with reckless second-degree murder. The jury was instructed that in order to establish the charge, it would have to be proved that defendant killed Christopher Wilson "unintentionally but recklessly under circumstances showing extreme indifference to the value of human life." "Recklessly" was defined as "conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger." The jury also was instructed

that it could consider the lesser included offense of involuntary manslaughter, either an unintentional killing done recklessly or an unintentional killing done in the commission of the offense of permitting a dangerous animal to be at large. The jury found that defendant's conduct involved an extreme degree of recklessness.

Holding

Here, the evidence, viewed in a light most favorable to the State, showed that defendant created an unreasonable risk and then consciously disregarded it in a manner and to the extent that it reasonably could be inferred that she was extremely indifferent to the value of human life. The evidence was sufficient to enable a rational fact finder to find Davidson guilty of reckless second-degree murder. Thus, the district court properly submitted the charge of reckless second-degree murder to the jury, and the evidence was sufficient to support the jury's verdict. The judgment of the district court is affirmed.

Questions for Discussion

1. What facts support Sabine Davidson's "indifference to the value of human life"?
2. Does the decision require her to know that the dogs would kill, or was it sufficient that the killing was foreseeable? Could Davidson know or anticipate that the dogs were capable of killing a human being?
3. Do you believe that the defendant's recklessness created such an extreme threat to human life that the gravity of her crime was equivalent to intentional murder and that she was properly convicted of second-degree murder rather than a less serious category of homicide, such as negligent manslaughter? An interesting California case involving an owner's responsibility for a dog attack to compare with *Davidson* is *People v. Knoller*, 158 P.3d 731 (Cal. 2007).
4. In September 2021, the Minnesota Supreme Court overturned the third-degree murder conviction of former police officer Mohamed Noor for fatally shooting Justine Ruszczyk. The court held that "depraved-mind" murder requires a "generalized indifference to human life" and Noor's conduct was directed at a single individual and the evidence therefore was "insufficient to sustain his conviction." Noor will continue to serve a prison sentence for his conviction of manslaughter. Would Sabine Davidson be guilty of depraved heart murder under the ruling of the Minnesota Supreme Court? See *Court of Appeals State of Minnesota v. Noor*, A19-1089 (Sept. 15, 2021).

CASES AND COMMENTS

1. Following a party for his softball team at a club where he admitted drinking six beers, Doub left the club in his pickup and struck two parked vehicles and fled the scene of the accident because he feared that the police would detect that he had been drinking. Two hours after striking the parked cars, Doub drove his pickup into the rear of a Cadillac in which 9-year-old Jamika Smith was a passenger. The Kansas accident investigator found that the collision occurred as Doub's pickup was "going tremendously fast," drove "up on top of [the Cadillac]," initially "driving it down into the pavement, and ultimately

propelling it off the street and into a tree." Doub did not attempt to assist the victims, left the scene of the accident, and denied any involvement in the collision, suggesting that his pickup had been stolen. Some 15 hours after the collision, Jamika Smith died as a result of blunt traumatic injuries caused by the collision.

Approximately six months after these events, Doub admitted to a former girlfriend that he had a confrontation with his ex-wife the evening of the collision, had been drinking alcohol and smoking crack, and had subsequently caused the collision. Doub appealed and challenged the sufficiency of evidence to support his conviction of second-degree depraved heart murder.

A Kansas appellate court found that the evidence against Doub was particularly damning considering that (a) he admits that his driving was preceded by drinking; (b) he admits that he struck two parked cars and ignored commands to stop because he was concerned that he had been drinking; (c) he then consumed additional alcohol and used crack cocaine; (d) he then resumed driving and caused a fatal collision, due in part to excessive speed; (e) he failed to render aid to the victims; and (f) he fled the scene in order to avoid criminal liability. The court concluded that "these facts clearly demonstrate an extreme indifference to human life." See *State v. Doub*, 95 P.2d 116 (Kan. App. 2004).

2. Maldonado stole a minivan in Brooklyn, New York, ran a red light, sped through intersections, and drove the wrong way down two one-way streets. The police gave chase with lights and sirens activated and pursued Maldonado. He drove at speeds varying from 40 to 50 miles per hour. The defendant ran a second red light and narrowly missed a pedestrian in a crosswalk. He did not brake or slow down, and accelerated and swerved across the double lines into the southbound lanes to avoid slower-moving vehicles. Maldonado did not slow down when he entered the other lane of traffic and had to swerve to avoid a collision. Once clear of congestion, Maldonado returned to the other lane. A driver headed south reported that defendant sped toward him at a rate of about 50 to 70 miles per hour and that he had to swerve into the northbound lane to avoid a head-on collision with defendant.

A block later, defendant ran a third red light and struck a woman in a crosswalk. The victim hit the passenger side of the minivan's windshield with such force that her body landed more than 100 feet down the avenue. She died at the scene. At that point, the police stopped following defendant to render aid to the victim. The chase ended a few blocks away when Maldonado crashed the minivan into a parked car to avoid hitting other vehicles. Was Maldonado guilty of depraved indifference murder?

The New York court explained that "[a] person who is depravedly indifferent is not just willing to take a grossly unreasonable risk to human life—that person does not care how the risk turns out." In this instance, the "defendant sought to mitigate the consequences of his reckless driving because he 'actively attempt[ed] to avoid hitting other vehicles' by swerving, conduct which establishes a lack of depraved indifference. Although defendant drove on the wrong side of the road, this conduct was episodic and part of his effort to avoid other vehicles while evading the police. This conscious avoidance of risk is the antithesis of a complete disregard for the safety of others. Defendant was unquestionably reckless, but he was not depravedly indifferent." Do you agree with the decision? See *People v. Maldonado*, 18 N.E.3d 391 (N.Y. 2014).

YOU DECIDE 10.3

Michael Berry was charged with depraved heart murder. The defendant purchased a pit bull, Willy, from a breeder of fighting dogs. Berry trained Willy and entered the dog in "professional fights" as far away as South Carolina. Willy was described as possessing stamina, courage, and a particularly "hard bite." He was tied to the inside of a 6-foot unenclosed fence so as to discourage access to the 243 marijuana plants that Berry was illegally growing in an area in the back of his house. Berry's next-door neighbor momentarily left her 2-year-old child, James Soto, playing on the patio of her home. James apparently wandered across Berry's yard to the other side of Berry's home, where he encountered Willy and was mauled to death. An animal control officer testified that pit bulls are considered "dangerous unless proved otherwise." Is Berry guilty of killing with an abandoned and malignant heart? See *Berry v. Superior Court*, 256 Cal. Rptr. 344 [Cal. Ct. App. 1989].

FELONY MURDER

A murder that occurs during the course of a felony is punished as murder. In *People v. Stamp*, Koory and Stamp robbed a store while armed with a gun and a blackjack. The defendants ordered the employees along with the owner, Carl Honeyman, to lie down on the floor so that no one "would get hurt" while they removed money from the cash register. Fifteen or 20 minutes following the robbery, Honeyman collapsed on the floor and was pronounced dead on arrival at the hospital. He was found to suffer from advanced and dangerous hardening of the arteries, but doctors concluded that the fright from the robbery had caused the fatal seizure. A California appellate court affirmed the defendants' convictions for felony murder and sentences of life imprisonment.⁴⁰

This use of the felony-murder rule to hold defendants liable for murder was criticized by another California appellate court, which observed that such a "harsh result destroys the symmetry of the law by equating an accidental killing . . . with premeditated murder."⁴¹ Despite this criticism, the fact remains that "but for" the robbery, Honeyman would not have died. Severely punishing Koory and Stamp deters other individuals contemplating thievery and protects society. As you read this section of the textbook, consider whether the felony-murder rule is a fair and just doctrine.

The felony-murder doctrine, as previously noted, provides that any homicide that occurs during the commission of a felony or attempt to commit a felony is murder. This is true regardless of whether the killing is committed with deliberation and premeditation, intentionally, recklessly, or negligently. The intent to commit the felony is considered to provide the malice for the conviction of murder. The doctrine can be traced back to Lord Coke in the early 1600s and is illustrated by Judge Stephens's example that "if a man shot at a fowl with intent to steal it, and accidentally killed a man, he was to be accounted guilty of murder, because the act was done in the commission of a felony."⁴²

This common law rule was not viewed as unduly harsh because all felonies in England were subject to the death penalty, and it made little difference whether an individual was convicted of murder or of the underlying felony. Felony murder, however, came under increasing criticism in England as the number of felonies subject to the death penalty was gradually reduced. English lawmakers came to view felony murder as making little sense and abandoned the doctrine in 1957.

The 1794 Pennsylvania murder statute included, within first-degree murder, killings committed in the perpetration or attempt to perpetrate “any arson, rape, robbery or burglary.” Killings committed in furtherance of other felonies under the Pennsylvania law were considered second-degree murder. The federal government along with virtually every state has continued to apply the felony-murder rule; only Ohio, Hawaii, Michigan, and Kentucky resist the rule. Four reasons are offered for the felony-murder rule:

- *Deterrence.* Individuals are deterred from committing felonies knowing that a killing will result in a murder conviction.
- *Protection of Life.* Individuals are deterred from committing felonies in a violent fashion knowing that a killing will result in a murder conviction.
- *Punishment.* Individuals who commit violent felonies that result in death deserve to be harshly punished.
- *Prosecution.* Prosecutors are relieved of the burden of establishing a criminal intent. The fact that a killing occurred during a felony is sufficient to establish first-degree murder. The imposition of liability on all the felons carrying out the crime provides an efficient method for incarcerating dangerous felons.

There is some question whether the felony-murder rule is an important tool in the fight against crime. The U.S. Supreme Court, for example, cites statistics indicating that only one half of 1% of all robberies result in homicide.⁴³

State felony-murder statutes generally classify killings committed in the perpetration or attempt to commit dangerous felonies, such as arson, rape, robbery, or burglary, as first-degree murder deserving life imprisonment or, in states with the death penalty as a capital felony, punishable with either life imprisonment or the death penalty. Killings committed in furtherance of other less dangerous felonies typically are not explicitly mentioned and are prosecuted under second-degree murder statutes that punish “all other kinds of murder that are not listed as first-degree murder.”⁴⁴ Several states have statutes that punish as second-degree murder a killing that results from the commission or attempt to commit “any felony.”⁴⁵

Statutes that do not list specific felonies present courts with the challenge of determining which felonies are sufficiently serious to provide the foundation for felony murder. This has potentially severe consequences for a defendant. For example, in Pennsylvania, a killing during the “perpetration of a felony” is considered second-degree murder and is punished by life imprisonment. A court, however, may decide that the killing should not be punished as felony murder and that instead the killing should be punished as “other kinds of murder” under the third-degree murder statute, which is punishable by 20 years in prison.⁴⁶

What felonies should serve as the foundation or predicate for felony murder? Judges have generally limited felony murder to “inherently dangerous felonies.” One approach is to ask whether a particular felony can be committed “in the abstract” without creating a substantial risk that an individual will be killed. The other method is to examine whether the manner in which a particular felony was committed in the specific case before the court created a high risk of death.

The approach of the California Supreme Court in the past asked whether the “underlying felony” can be committed without endangering human life. In *People v. Burroughs*, the defendant, a self-proclaimed healer of illness, treated a patient suffering from terminal leukemia with a special blend of lemonade, colored lights, and massage. The California Supreme Court ruled that the defendant’s felonious unlicensed practice of medicine did not constitute an “inherently dangerous felony” because an unlicensed practitioner may be treating a common cold, a sprained finger, or individuals who suffer from the delusion that they are president of the United States. The California Supreme Court accordingly reversed the defendant’s conviction for felony murder.⁴⁷

In 2018, California revised the state’s felony murder law to clearly state that felony murder involves a killing that is committed during the perpetration of or attempt to perpetrate arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or murder that is committed by discharging a firearm from a motor vehicle. Felony murder also applies to murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, or by any other kind of intentional, deliberate, and premeditated killing. First-degree felony murder is punishable by between 25 years’ and life imprisonment. Second-degree felony murder can result in 15 years in prison.

The felony also must have “caused” the victim’s death. An arsonist who sets fire to a hotel should anticipate that a firefighter or guest may die as a consequence of the fire. On the other hand, a Virginia court ruled that a felon was not liable for the death of his accomplice whose plane crashed while transporting a cache of illegal drugs. The crash resulted from bad weather, and there was no indication that the pilot modified his customary flight plan or altitude to avoid detection. In other words, the crash did not result from the fact that the plane was engaged in the felony of narcotics trafficking.⁴⁸ In *Lester v. State*, the court held that although the defendant had stolen a car and “believed the police were following him,” “his reckless driving was too [distant] from the grand theft of the car the previous evening to support a felony murder conviction.” The court distinguished this case from a situation in which a fatal accident occurred during a high-speed chase in which the defendant was fleeing the scene of an accident.⁴⁹ Keep in mind that under the theory of accomplice liability, all the co-felons will be liable for a killing committed in furtherance of the felony that is the natural and probable result of the crime.

Felony murder can become complicated where a nonfelon, such as a police officer or victim, kills one of the felons or a bystander. In *Campbell v. State*, a police officer killed an armed fleeing felon who had robbed a taxicab driver. An unarmed co-felon was later apprehended by another officer and was charged with the first-degree murder of his co-felon. The Maryland Court of Appeals adopted the **agency theory of felony murder** that limits criminal liability to

the acts of felons and co-felons and acquitted the defendant.⁵⁰ This theory was first stated by the Massachusetts Supreme Judicial Court in *Commonwealth v. Campbell*, which held that a felon was criminally responsible only for acts “committed by his own hand or by some one acting in concert with him in furtherance of a common object or purpose” and that a felon is not liable for the acts of a “person who is his direct and immediate adversary . . . [who is] actually engaged in opposing and resisting him and his confederates.”⁵¹

The agency theory can result in seemingly illogical verdicts. In *State v. Myers*, the Louisiana Supreme Court in applying the agency theory held that the defendant could be held liable for the death of a police officer shot by his confederate in a police raid on a drug house, although he could not be held liable for the police killing of his confederate during the same raid.⁵²

Other courts have adopted a **proximate cause theory of felony murder** that holds felons responsible for foreseeable deaths that are caused by the commission of a dangerous felony. In *Kinchion v. State*, the defendant acted as a lookout while his armed accomplice entered a store. The clerk shot and killed Kinchion’s co-conspirator in self-defense, and Kinchion was convicted of first-degree felony murder. The Oklahoma court affirmed the defendant’s conviction, explaining that his planning and carrying out the armed robbery “set in motion ‘a chain of events so perilous to the sanctity of human life’ that the likelihood of death was foreseeable.”⁵³

As you read about felony murder, consider whether this doctrine makes sense. Oliver Wendell Holmes Jr., in his famous book *The Common Law*, argues that if a felon stealing chickens accidentally kills a farmer, the defendant should be punished for reckless homicide rather than felony murder. Why should the prosecutor rely on felony murder rather than establishing the elements of implied malice second-degree murder? Note that Holmes argues that prosecuting the defendant for felony murder serves little purpose because few chicken thieves will be deterred from stealing chickens by a conviction of the thief for felony murder, and it would not occur to most chicken thieves to carry a weapon in any event.⁵⁴

The Model Penal Code shares Holmes’s point of view and limits felony murder to killings that are recklessly committed during the course of certain felonies. Section 210.2 punishes, as a felony of the first degree, killings committed purposely or knowingly as well as killings that result from “circumstances manifesting extreme indifference to the value of human life.” Reckless indifference is presumed when a killing is committed during the commission, attempted commission, or flight from a robbery, sexual attack, arson, burglary, kidnapping, or felonious escape. The jury must find beyond a reasonable doubt that the defendant possessed a reckless indifference to human life.

The strength of the felony-murder doctrine is indicated by the fact that the Model Penal Code is followed by only a single state. Would you recognize felony murder if you were drafting a new state criminal code? The state legislatures in Hawaii and in Kentucky have abolished the felony-murder rule, and the Michigan Supreme Court has held that defendants may not be held liable for murder during the commission of a felony unless they act with the intent to kill or inflict great bodily harm or act with reckless disregard.⁵⁵

California, as noted earlier, is the most recent state to revise its felony-murder law. The state legislature in amending the felony-murder law explained that it is a “bedrock principle . . . that [people] should be punished for [their] actions according to [their] own level of individual

culpability.” The revised felony-murder law restricts felony murder to an individual who was the actual killer, who was not the actual killer but aided and abetted or solicited the felony with an intent to kill, or who was a major participant in the felony and acted with reckless indifference to human life. Felony-murder also applies where the “victim is a peace officer who was killed in the course of [police] duties, [and] where the felon knew or reasonably should have known that the victim was a peace officer engaged in the performance of [police] duties.” Can you explain how the California law limits the scope of the felony-murder rule? Do you agree with California’s approach?

The next case in the textbook, *People v. Lowery*, asks whether a felon should be held criminally liable for the killing of an innocent bystander by a victim.

FIGURE 10.5 ■ The Legal Equation: Felony Murder



SHOULD THE DEFENDANT BE HELD LIABLE FOR A KILLING COMMITTED BY A VICTIM OF HIS FELONY?

PEOPLE V. LOWERY, 687 N.E.2D 973 (ILL. 1997)

Opinion by Freeman, C.J.

Following a jury trial in the circuit court of Cook County, defendant, Antonio Lowery, was convicted of first-degree murder based on the commission of a felony, attempted armed robbery and two counts of armed robbery. The trial court sentenced defendant to 35 years’ imprisonment for first degree murder, 20 years for each of the two armed robberies and 12 years for attempted armed robbery, to be served concurrently. On appeal, the appellate court reversed defendant’s conviction and vacated his sentence for felony murder, holding that there was insufficient evidence to support defendant’s conviction. We . . . now reverse the judgment of the appellate court.

Facts

On March 20, 1993, defendant was arrested and charged with two counts of armed robbery and one count of attempted armed robbery of Maurice Moore, Marlon Moore, and Robert Thomas. Defendant was also charged with the murder of Norma Sargent. In his statement to the police officers, defendant explained that he and his companion, “Capone,” planned to rob Maurice, Marlon, and Robert. As Maurice, Marlon, and Robert walked along Leland Avenue in Chicago, defendant approached them, pulled out a gun, and forced Maurice into an alley. Capone remained on the sidewalk with Robert and Marlon. Once in the alley, defendant demanded Maurice’s money. Maurice grabbed defendant’s gun and a struggle ensued. Meanwhile, Capone fled with Robert in pursuit. Marlon ran into the alley and began hitting

defendant with his fists. As defendant struggled with Maurice and Marlon, the gun discharged. The three continued to struggle onto Leland Avenue. . . . [D]efendant noticed that Maurice now had the gun. Defendant then ran from the place of the struggle to the corner of Leland and Magnolia Avenues, where he saw two women walking. As he ran, he heard gunshots and one of the women scream.

Defendant continued to run, and in an apparent attempt at disguise, he turned the Bulls jacket which he was wearing inside out. He was subsequently apprehended by the police and transported to the scene of the shooting, where Maurice identified him as the man who had tried to rob him.

At the conclusion of testimony and arguments, the jury found defendant guilty of first degree murder under the felony-murder doctrine, two counts of armed robbery, and one count of attempted armed robbery. The appellate court reversed, holding that there was insufficient evidence to sustain a conviction for felony murder and remanded the cause for resentencing on defendant's armed robbery and attempted armed robbery convictions.

Reasoning

At issue in this appeal is whether the felony-murder rule applies where the intended victim of an underlying felony, as opposed to the defendant or his accomplice, fired the fatal shot which killed an innocent bystander. To answer this question, it is necessary to discuss the theories of liability upon which a felony-murder conviction may be based. The two theories of liability are proximate cause and agency.

In considering the applicability of the felony-murder rule where the murder is committed by someone resisting the felony, Illinois follows the "proximate cause theory." Under this theory, liability attaches under the felony-murder rule for any death proximately resulting from the unlawful activity—notwithstanding the fact that the killing was by one resisting the crime. . . .

Alternatively, the majority of jurisdictions employ an agency theory of liability. Under this theory, "the doctrine of felony murder does not extend to a killing, although growing out of the commission of the felony, if directly attributable to the act of one other than the defendant or those associated with him in the unlawful enterprise." . . . Thus, under the agency theory, the felony-murder rule is inapplicable where the killing is done by one resisting the felony.

Defendant offers several arguments in an attempt at avoiding application of the proximate cause theory in this case. Initially, defendant urges this court to . . . adopt an agency theory of felony murder. We decline to do so. . . . Causal relation is the universal factor common to all legal liability. In the law of torts, the individual who unlawfully sets in motion a chain of events that in the natural order of things results in damages to another is held to be responsible for it.

It is equally consistent with reason and sound public policy to hold that when a felon's attempt to commit a forcible felony sets in motion a chain of events that were or should have been within his contemplation when the motion was initiated, he should be held responsible for any death that by direct and almost inevitable sequence results from the initial criminal act. Thus, there is no reason why the principle underlying the doctrine of proximate cause should not apply to criminal cases. Moreover, we believe that the intent behind the felony-murder doctrine would be thwarted if we did not hold felons responsible for the foreseeable consequences of their actions. . . .

Defendant next argues that we should abandon the proximate cause theory because Illinois originally followed the agency theory of felony murder. Notwithstanding what the

law held originally, . . . a felon is liable for the deaths that are a direct and foreseeable consequence of his actions.

Defendant further argues that the plain and clear language of the Illinois Criminal Code of 1961 requires adoption of the agency theory. . . . Defendant refers to section 9-1(a) of the Code, which states:

(a) A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death:

(1) . . .

(2) . . .

(3) he is attempting or committing a forcible felony other than second degree murder.

We fail to see how the plain language of the statute demonstrates legislative intent to follow the agency theory. To the contrary, the intent of the legislature is an adherence to the proximate cause theory. . . . [T]he committee comments to section 9-1(a)(3) state as follows:

It is immaterial whether the killing in such a case is intentional or accidental, or is committed by a confederate without the connivance of the defendant, . . . or even by a third person trying to prevent the commission of the felony. . . .

It is the inherent dangerousness of forcible felonies that differentiates them from non-forcible felonies. . . . As noted in the committee comments of the felony-murder statute, “it is well established in Illinois to the extent of recognizing the forcible felony as so inherently dangerous that a homicide occurring in the course thereof, even though accidentally, should be held without further proof to be within the ‘strong probability’ classification of murder.” This differentiation reflects the legislature’s concern for protecting the general populace and deterring criminals from acts of violence. . . .

Based on the plain language of the felony-murder statute, legislative intent, and public policy, we decline to abandon the proximate cause theory of the felony-murder doctrine. . . .

Because we have decided to adhere to the proximate cause theory of the felony-murder rule, we must now decide whether the victim’s death in this case was a direct and foreseeable consequence of defendant’s armed and attempted armed robberies. The State . . . argues that defendant was liable for decedent’s death because it was reasonably foreseeable that Marlon would retaliate against defendant. We agree. A felon is liable for those deaths which occur during a felony and which are the foreseeable consequence of his initial criminal acts.

In the present case, when defendant dropped the gun and realized that Marlon was then in possession of the weapon, he believed that Marlon would retaliate, and, therefore, he ran. If decedent’s death resulted from Marlon’s firing the gun as defendant attempted to flee, it was, nonetheless, defendant’s action that set in motion the events leading to the victim’s death. It is unimportant that defendant did not anticipate the precise sequence of events that followed his robbery attempt. We conclude that defendant’s unlawful acts precipitated those events, and he is responsible for the consequences. . . . “[T]hose who commit forcible felonies know they may encounter resistance, both to their affirmative actions and to any subsequent escape.” . . .

Defendant . . . argues that Marlon’s act was an intervening cause because it was not foreseeable that Marlon would act as a vigilante and take the law into his own hands. It is true that an intervening cause completely unrelated to the acts of the defendant does relieve

a defendant of criminal liability. However, the converse of this is also true: When criminal acts of the defendant have contributed to a person's death, the defendant may be found guilty of murder. . . .

Marlon's resistance was in direct response to defendant's criminal acts and did not break the causal chain between defendant's acts and decedent's death. It would defeat the purpose of the felony-murder doctrine if such resistance—an inherent danger of the forcible felony—could be considered a sufficient intervening circumstance to terminate the underlying felony or attempted felony. . . .

Furthermore, we do not believe that Marlon acted as a vigilante, or that because of our holding, the citizenry will have license to practice vigilantism. A vigilante is defined as a member of "a group extra-legally assuming authority for summary action professedly to keep order and punish crime because of the alleged lack or failure of the usual law-enforcement agencies." Regardless of how unreasonable Marlon's conduct may, in hindsight, be perceived, his response was not based on a deliberate attempt to take the law into his own hands, but on his natural, human instincts to protect himself.

Defendant next argues that decedent's death falls outside the scope of felony murder because it did not occur during the course of defendant's armed robbery and attempted armed robbery. In support, he relies on section 7-4 of the Code, which states that justifiable use of force is not available to a person who:

(c) . . . provokes the use of force against himself, unless:

. . .

(2) . . . he withdraws from physical contact with the assailant and indicates clearly to the assailant that he desires to withdraw and terminate the use of force, but the assailant continues or resumes the use of force.

Defendant maintains that he had "overtly retreated" from physical contact with Marlon and that Marlon's pursuit of defendant constituted a new conflict. The State, on the other hand, argues that defendant's election to flee fell within the commission of the armed and attempted armed robberies.

We must agree with the State. This court has consistently held that when a murder is committed in the course of an escape from a robbery, each of the conspirators is guilty of murder under the felony-murder statute, inasmuch as the conspirators have not won their way to a place of safety. . . .

Defendant asserts that he had reached a place of "legal safety" when he ran. We disagree. Defendant was attempting to escape when Marlon fired the shots at him. Apparently, defendant also did not believe he had "won a place of safety" as evidenced by his own act of turning his coat inside out to avoid detection before the police arrested him. Therefore, decedent's death falls within the scope of the felony-murder doctrine.

Defendant's final contention that Marlon was not legally justified in firing at defendant is misplaced. There is no claim that Marlon shot at defendant in self-defense or in an attempt to arrest him. Moreover, the proper focus of this inquiry is not whether Marlon was justified in his actions, but whether defendant's actions set in motion a chain of events that ultimately caused the death of decedent. We hold that defendant's actions were the proximate cause of decedent's death and the issue of whether Marlon's conduct was justified is not before this court.

Holding

In conclusion, we hold that the evidence was sufficient to prove defendant guilty beyond a reasonable doubt under the felony-murder rule. . . . We therefore reverse the appellate court. . . . Accordingly, we remand the cause to the appellate court for consideration of defendant's remaining issues.

Questions for Discussion

1. Explain the difference between the agency and proximate cause theories of causality. Which theory favors the prosecutor in *Lowery*? Which theory favors the defense? What theory do you think is best to apply in *Lowery*?
2. Did Marlon fire the pistol in justifiable self-defense? Was Marlon's pistol shot an intervening act that should limit Lowery's criminal liability? Is Lowery correct when he argues that Marlon's act was "not foreseeable" in that he could not anticipate that Marlon would act as a "vigilante and take the law into his own hands"? Did Lowery set the events in motion that led to the victim's death?
3. Lowery argues that he clearly retreated, that the felony had been completed, and that therefore he should not be held liable for felony murder. How does the court respond to this argument?
4. Would it be fair to hold Capone liable for felony murder, particularly given Marlon's inaccurate marksmanship? Would you hold Capone liable in the event that Marlon shot and killed Lowery in self-defense?
5. In 2021, Illinois adopted the agency theory of felony murder. A felon is liable for first-degree murder if "in the course of or in furtherance of such crime or flight therefrom, he or she or another participant causes the death of a person." Would this change to result in *Lowery*? See Punic Act 10-0652.

CASE AND COMMENTS

Sanexay Sophophone and three other individuals broke into a house in Emporia, Kansas. Police officers responded to a call from residents and spotted four individuals leaving the back of the house. They shined a light on the suspects and ordered them to stop. An officer ran down Sophophone, handcuffed him, and placed him in a police car. Another officer chased Somphone Sysoumphone.

Sysoumphone crossed railroad tracks, jumped a fence, and then stopped. The officer approached with his weapon drawn and ordered Sysoumphone to the ground and not to move. Sysoumphone complied with the officer's command but, while lying face down, rose up and fired at the officer, who returned fire and killed him. . . .

Sophophone was charged with conspiracy to commit aggravated burglary, obstruction of official duty, and felony murder. . . . (*State v. Sophophone*, 19 P.3d 70 [Kan. 2001])

The question of law before the Kansas Supreme Court is whether Sophophone can be convicted of felony murder for the "killing of a co-felon not caused by his acts but by the

lawful acts of a police officer acting in self-defense in the course and scope of his duties in apprehending the co-felon fleeing from an aggravated burglary." The Kansas Supreme Court held that the "overriding fact . . . is that neither Sophophone nor any of his accomplices 'killed' anyone. . . . We believe that making one criminally responsible for the lawful acts of a law enforcement officer is not the intent of the felony-murder statute." The dissent pointed out that the rationale for felony murder is that it serves as a general deterrent. Potential felons will be hesitant to engage in criminal activity if they realize that they risk being convicted of first-degree murder in the event that a death occurs during the commission of a felony. "Sophophone set in motion acts which would have resulted in the death or serious injury of a law enforcement officer had it not been for the highly alert law enforcement officer." This "could have very easily resulted in the death of a law enforcement officer . . . [and] is exactly the type of case the legislature had in mind when it adopted the felony-murder rule. . . . It does not take much imagination to see a number of situations where a death is going to result from an inherently dangerous felony and the majority's opinion is going to prevent the accused from being charged with felony murder."

What is your view? Should the Kansas court use the agency or proximate cause theory? See *State v. Sophophone*, 19 P.3d 70 (Kan. 2001).

YOU DECIDE 10.4

Now consider how you would decide *State v. Kalathakis*. The police conducted a raid on the mobile home of Patrick Langley and Anita Kalathakis, who they had probable cause to believe were manufacturing methamphetamine. The police, as they approached the trailer, encountered a heavily armed man later identified as Larry Calhoun fleeing down the driveway. Three officers pursued Calhoun, and approximately one quarter of a mile from the trailer, Calhoun shot and killed one of the officers. The other officers returned fire and killed Calhoun. As the police entered the trailer, Kalathakis assumed a combat stance with her pistol in a firing position. An officer standing outside the trailer broke a window and ordered her to drop the gun. Langley subsequently was arrested in the bathroom pouring chemicals down the drain. Defendant Kalathakis was convicted under the felony murder doctrine of the homicide of Calhoun. The theory was that Calhoun "died as a direct result of defendant's acts of attempting to manufacture drugs. The court reasoned that the drug manufacturers' arming themselves, as part of the overall scheme, set into motion a chain of events which created a great risk of harm and that Calhoun's death was within the ambit of reasonably foreseeable possibilities." The Louisiana Supreme Court relied on the proximate cause theory in reviewing Kalathakis's conviction. As a judge, how would you rule in this case? See *State v. Kalathakis*, 543 So. 2d 1004 (La. 1990).

CORPORATE MURDER

Should a corporation be held liable for murder? In 1980, the Ford Motor Company was prosecuted for reckless homicide stemming from the 1978 death of three Indiana teenagers. The three were burned to death when their 1972 Ford Pinto was hit from behind by a van. Prosecutors charged that Ford was aware that the Pinto's gasoline tanks were in danger of catching fire when

impacted by a rear-end collision. Ford was alleged to have decided that fixing the problem or recalling the Pinto would deeply cut into profits and decided that it would be less expensive to pay any damage awards that might result from civil suits filed by consumers. By 1977, the Pinto no longer was able to meet tough federal safety standards, and in late 1978, Ford recalled 1.5 million 1971–1976 Pinto sedans. Unfortunately, this recall was not issued in time to save the lives of the three victims. Ford was acquitted in a jury trial in March 1980.⁵⁶

In 1999, a Florida jury found airline maintenance company SabreTech guilty of contributing to the 1996 crash of ValuJet Flight 592, an accident that resulted in the death of 110 passengers. The company allegedly had been responsible for placing prohibited hazardous materials on the ValuJet plane that exploded during flight. SabreTech was convicted on eight counts of mishandling hazardous materials and one count of failing to properly train employees.

In 2003, Motiva Enterprises pled “no contest,” or *nolo contendere* (a guilty plea for purposes of a particular prosecution), to one felony count of criminally negligent homicide and six misdemeanor counts of assault in the third degree. This plea arose out of a July 2001 explosion and fire at a company factory that resulted in the death of one employee and injury to six others. Prosecutors alleged that Motiva, a joint venture between Saudi Aramco and Royal Dutch Shell, ignored warnings and continued to operate the plant in order to maximize profits. The company’s conviction resulted in a fine of \$11,500 on the homicide charge and \$5,750 for each of the assault charges for a total of \$46,000, the maximum then permitted under Delaware law.

In 2005, the Texas City Refinery operated by BP exploded, killing 15 people and injuring 170 others. BP pled guilty to violating environmental statutes and was required to pay a \$50 million fine.⁵⁷

In 2020, Pacific Gas & Electric pled guilty to 84 counts of involuntary manslaughter and one count of illegally setting a fire in 2018 that caused the death of 84 persons in a California wildfire. The fire destroyed the town of Paradise and resulted in billions of dollars in property damage and destruction. The company agreed to pay a \$3.5 million fine. In 2016, a federal jury convicted PG&E of safety violations and obstructing an investigation into a gas pipeline explosion in San Bruno, California, that killed eight people in 2010.⁵⁸

These five cases illustrate that a corporation may be held liable for **corporate murder** in those cases in which conduct is performed or approved by corporate managers or officials. Of course, individual managers and executives may also be held criminally responsible. The extension of criminal responsibility to corporations is based on an interpretation of the term *person* in homicide statutes to encompass both natural persons and corporate entities.

A corporation clearly cannot be incarcerated and, instead, is punished by the imposition of a fine. It is reasoned that the threat of a fine will motivate corporate officials and individuals owning stock in the firm to ensure that the corporation follows the law. On the other hand, some would argue that criminal responsibility is properly limited to the individuals who commit the crimes. A fine on a business hurts only the workers and stockholders who depend on strong corporate profits and creates a poor business climate that leads corporations to move their factories to other countries.

In some instances, courts interpret a state criminal statute to include corporate responsibility for homicide. In other instances, state criminal codes have specific provisions that provide

for corporate criminal responsibility for murder. Keep in mind that a corporation, along with individuals within the corporation, may be prosecuted for murder. In reading the next case, consider whether Far West Water & Sewer Inc. should be held liable for negligent homicide. Ask yourself whether it serves any purpose to hold the corporation liable in this case or whether responsibility should be limited to corporate officials.⁵⁹

SHOULD FAR WEST WATER & SEWER INC. BE HELD LIABLE FOR NEGLIGENT HOMICIDE?

STATE V. FAR WEST WATER & SEWER INC., 228 P.3D 909 (ARIZ. CT. APP. 2010)

Opinion by Weisberg, J.

Issue

Far West Water & Sewer, Inc. ("Far West") appeals its convictions and sentences for negligent homicide, aggravated assault, two counts of endangerment and violating a safety standard or regulation which caused the death of an employee.

Facts

The charges arose from an incident that occurred on October 24, 2001 at a sewage collection and treatment facility owned and operated by Far West, an Arizona corporation. At that time, Santec Corporation ("Santec") was a subcontractor of Far West. A Far West employee, James Gamble, and a Santec employee, Gary Lansen, died in an underground tank after they were overcome by hydrogen sulfide gas. Another Far West employee, Nathan Garrett, suffered severe injuries when he attempted to rescue Gamble from the tank. Other Far West and Santec employees were involved in rescue attempts, but none was injured to a significant degree.

Far West was indicted for [various charges]. . . . Far West's president, Brent Weidman, one of its forepersons, Connie Charles, and Santec were also indicted for the same or similar charges.

Santec pled guilty to one count of violating a safety standard or regulation that caused the death of its employee, Lansen. It was placed on probation for two years and fined \$30,000. Foreperson Connie Charles pled guilty to two counts of endangerment as to Gamble and Garrett and was placed on concurrent one-year terms of probation. . . .

The jury acquitted Far West of both counts of manslaughter as to Gamble and Lansen, but found it guilty of one count of the lesser-included offense of negligent homicide for the death of Gamble, one count of aggravated assault as to Garrett, two counts of endangerment as to Gamble and Garrett, and one count of violating a safety standard or regulation that caused the death of Gamble.

The court ordered the sentences suspended and placed Far West on four years' probation for negligent homicide, five years' probation for aggravated assault and three years' probation for each count of endangerment and for violating a safety standard or regulation

that caused the death of an employee. It ordered some terms of probation to run concurrently and others to run consecutively. The court imposed fines and penalties totaling \$1,770,000. . . .

In 1977, the Arizona legislature enacted A.R.S. § 13-305, which permits an enterprise to be held criminally liable. An enterprise includes a corporation. A.R.S. § 13-105(15)(2001). Section 13-305 provides in relevant part:

A. [A]n enterprise commits an offense if:

1. The conduct constituting the offense consists of a failure to discharge a specific duty imposed by law; or
2. The conduct undertaken in behalf of the enterprise and constituting the offense is engaged in, authorized, solicited, commanded or recklessly tolerated by the directors of the enterprise in any manner or by a high managerial agent acting within the scope of employment. . . .

Arizona's criminal code defines "person" as "a human being and, as . . . an enterprise, a public or private corporation, an unincorporated association, a partnership, a firm, a society, a government, a governmental authority or an individual or entity capable of holding a legal or beneficial interest in property." . . . Further, not only did the legislature include corporations in the definition of person, [but] the legislature described how corporations, as enterprises, can commit criminal offenses through the acts or omissions of their directors, high managerial agents and/or agents. A.R.S. § 13-305(A). . . .

On appeal, Far West argues there was insufficient evidence to support its convictions for the charged offenses. . . . Far West owned and operated several wastewater treatment plants in Yuma. Weidman, who has a master's degree in industrial engineering and a Ph.D. in construction engineering, had been Far West's president and chief operating officer for nine years. Rex Noll, who had extensive training and experience in sewage and wastewater treatment plants, was the supervisor for the sewage division of Far West and reported directly to Weidman. Charles was in charge of the sewer crews and was under Noll's supervision.

Prior to the incident, Far West acquired the Mesa Del Oro Plant and hired Santec to renovate equipment in an underground sewage tank called the Mesa Del Oro Tank ("the Tank"). The 3,000 gallon tank was approximately nine feet underground. The interior of the Tank could only be accessed by descending down a ladder into a manhole approximately four feet wide. Two sewer lines fed into the Tank. The gravity line carried sewage downhill by gravitational force. The force main line carried sewage pumped by force main pumps from another tank or lift station, approximately one mile away.

On October 24, 2001, Far West and Santec began work on the Tank. . . . After the force main pumps at the lift station were shut off, Gamble and Garrett pumped out the sewage from the surface and cleaned out the remaining sewage from inside the Tank. As part of this process, Gamble inserted a plug into the gravity line to stop the flow of sewage. After the Santec crew finished upgrading the Tank, it was ready to have sewage pumped into it.

Normally, the crew would pull the gravity line plug and exit the Tank before turning on the force main pump. On this occasion, however, Charles wanted to turn the force main pumps on first because she was concerned that the lift station was overflowing. . . . Charles told Gamble to enter the Tank to pull out the gravity line plug once the Tank was about half-full of sewage. Charles then drove to the lift station, turned on the pumps and sewage began flowing into the Tank. In a radio communication, Charles asked Gamble if the Tank was half-full and inquired, "Is the plug out yet? Is the plug out yet?" As sewage was flowing into the Tank, Gamble climbed inside the Tank to unplug the gravity line. When the lower part of his body was in the Tank, he passed out and fell into the sewage.

Garrett saw Gamble floating facedown in the Tank. In an effort to rescue him, Garrett tied a rope around his waist, told Andre to hold it and climbed down a ladder into almost waist-deep sewage. Not able to get Gamble out of the Tank, Garrett tried to climb up the ladder but passed out before he reached the top. Lansen then climbed down the manhole in an attempt to rescue both Gamble and Garrett, passed out and fell into the Tank. At some point, Hackbath radioed to Charles to turn off the pumps and call 911. Charles rushed back to the Tank and entered it in an effort to rescue Gamble, Garrett and Lansen. She, too, passed out, but eventually regained consciousness. . . .

Dr. Daniel Teitelbaum, a physician specializing in occupational medicine and toxicology, and an OSHA expert and consultant, concluded that Gamble and Lansen died from acute hydrogen sulfide poisoning which occurred in a confined space. . . . Although Garrett survived, he suffered life-threatening respiratory distress syndrome and aspiration pneumonia and sustained injuries to his lungs and eyes.

Reasoning

The State presented substantial evidence that Weidman and Noll were high managerial agents of Far West acting within the scope of their authority under [the statute]. Weidman was President and Chief Operating Officer of Far West and a member of the board of directors. Noll was the supervisor for the sewage division of Far West, answered to Weidman and had considerable authority over Far West's employees. He was in charge of Far West's safety program. He and Weidman together formulated and developed policies and practices of Far West regarding entry into underground sewage tanks. . . . A jury could reasonably conclude that Weidman and Noll were high managerial agents of Far West and were acting within the scope of their authority. . . .

The State presented substantial evidence that Weidman and Noll were aware of the extreme risks to employees working at Far West. Both were industry professionals with extensive training and experience in sewage treatment plants. They knew the dangers associated with confined spaces and sewer environments. They knew about potentially lethal dangers posed by toxic gases found in underground tanks. Weidman posited that the death and injuries occurred due to the toxic gases. Noll admitted that working in underground tanks was unsafe. The State presented substantial evidence that Weidman and Noll knew and understood the OSHA permit-required confined space regulations. [They also knew that OSHA required the company to develop and to issue confined space regulations.] . . .

A jury could reasonably conclude that Noll and Weidman consciously disregarded a substantial and unjustifiable risk of death or physical injury by knowingly violating OSHA regulations and permitting Far West employees to enter dangerous, life-threatening underground tanks without training, equipment, safety measures or rescue capability. A reasonable jury could find from this evidence that Weidman and Noll did more than "fail to perceive a substantial and unjustifiable" risk of death or serious physical injury for purposes of criminal negligence; they acted recklessly by being "aware of" and "consciously disregard[ing] a substantial and unjustifiable risk" of death or serious physical injury. . . . The State also presented substantial evidence that the conduct of Weidman and Noll constituted a gross deviation from the required standard of care and/or conduct.

Holding

Moreover, there was substantial evidence to show that Weidman and Noll engaged in conduct necessary to satisfy not only the elements of the criminal statutes defining the offenses but also the elements necessary to impose enterprise liability on Far West. See A.R.S. §

13-305(A) ("failure to discharge a specific duty imposed by law" and/or conduct undertaken which constitutes offense and "is engaged in, authorized, solicited, commanded or recklessly tolerated" by directors or high managerial agents).

Questions for Discussion

1. State the facts leading to the death of James Gamble.
2. Explain under what circumstances an enterprise may be held criminally liable under Arizona law.
3. What is the legal basis in Arizona law for finding that Far West as an enterprise is liable for negligent homicide?
4. Describe why the court concludes that Weidman and Noll acted in a criminal fashion. Why are the actions of Noll and Weidman attributed to Far West?
5. Does it make sense to hold a corporation criminally liable, as well as individuals within the corporation?

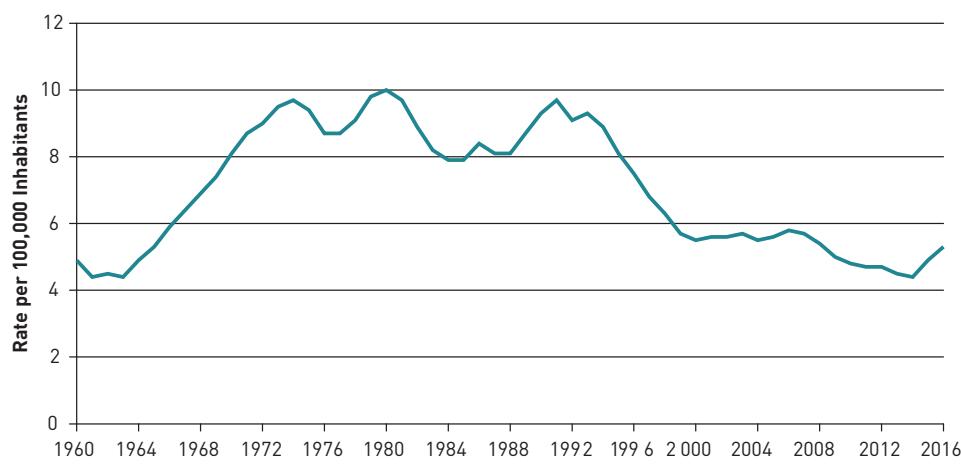
CASES AND COMMENTS

Corporate and Individual Liability. In Illinois, a corporation is criminally responsible for offenses "authorized, requested, commanded, or performed by the board of directors or by a high managerial agent acting within the scope of his employment." A corporation is "responsible whenever any of its high managerial agents possess the requisite mental state and is responsible for a criminal offense while acting within the scope of its employment." Evidence established that Stefan Golab died after ingesting poisonous cyanide fumes while working at a plant operated by Film Recovery and an affiliated corporation, Metallic Marketing. Golab reportedly trembled and foamed at the mouth before losing consciousness. The fumes were created by a process used to remove silver from used X-ray and photographic film. The air inside the plant reportedly was foul, and breathing was difficult and painful. Workers experienced dizziness, nausea, headaches, and vomiting. The plant workers were not informed that they were working with cyanide or of the danger of breathing cyanide gas, nor were they informed that the ventilation was inadequate. Workers were not provided with safety instructions or protective clothing. Steven O'Neil, Charles Kirschbaum, and Daniel Rodriguez were responsible for operating the plant and were convicted of Golab's murder; they were sentenced to imprisonment for 25 years. O'Neil and Kirschbaum were also each fined \$10,000. The defendants were found to have performed an act or acts knowing that the acts create a strong probability of death or great bodily harm.

Film Recovery and Metallic Marketing were convicted of involuntary manslaughter and were each fined \$10,000. Involuntary manslaughter requires the reckless performance of an act or acts that are likely to cause death or great bodily harm.

An Illinois appellate court reversed and remanded the convictions of the individual defendants to the trial court on the grounds that their convictions for murder were inconsistent with the finding that Film Recovery and Metallic Marketing were guilty of involuntary manslaughter. Can you explain why these verdicts are inconsistent? See *People v. O'Neil*, 550 N.E.2d 1090 (Ill. App. Ct. 1990).

FIGURE 10.6 ■ Crime on the Streets: Rate of Homicides in the United States, 1960–2016



Source: Federal Bureau of Investigation, Uniform Crime Reporting Program, 1960–2019.

Notes: Includes murder and non-negligent manslaughter only. The murder and non-negligent homicides that occurred as a result of the events of September 11, 2001, are not included in this table.

MANSLAUGHTER

Manslaughter comprises a second category of homicide and is defined as an unlawful killing of another human being without malice aforethought.

The common law distinction between voluntary manslaughter and the less severe offense of involuntary manslaughter continues to appear in many state statutes. Other statutes distinguish between degrees of manslaughter, and a third approach provides for a single offense of manslaughter. Voluntary manslaughter is the killing of another human being committed in a sudden heat of passion in response to adequate provocation. Adequate provocation is considered a provocation that would cause a reasonable person to lose self-control. Involuntary manslaughter is the killing of another human being as a result of criminal negligence. Criminal negligence involves a gross deviation from the standard of care that a reasonable person would practice under similar circumstances.⁶⁰ An unintentional killing that results from an unlawful act “not amounting to a felony” is termed misdemeanor manslaughter. Remember, as we discussed in Chapter 8, an unreasonable, but good-faith, belief in the necessity of self-defense in many states is recognized as imperfect self-defense and is punished as manslaughter.

VOLUNTARY MANSLAUGHTER

One function of criminal law is to remind us that we will be prosecuted and punished in the event that we allow our anger or frustration to boil over and assault individuals or destroy their property. Voluntary manslaughter seemingly is an exception to the expectation that we control

our emotions. This offense recognizes that a reasonable person, under certain circumstances, will be provoked to lose control and kill. In such situations, it is only fair that an individual should receive a less serious punishment than an individual who kills in a cool and intentional fashion.

Voluntary manslaughter requires that an individual kill in a sudden and intense **heat of passion** in response to adequate provocation. Heat of passion is commonly described as anger but is sufficiently broad to include fear, jealousy, and panic.

The law of provocation is based on the reaction of the **reasonable person**, a fictional balanced, sober, and fair-minded human being with no physical or mental imperfections. **Adequate provocation** is defined as conduct that is sufficient to excite an intense passion that causes a reasonable person to lose control. The common law restricted adequate provocation to a limited number of situations: aggravated assault or battery, mutual combat defined as a fight voluntarily entered into by the participants, a serious crime committed against a close relative of a defendant, and one spouse observing the adultery of the other spouse. An individual who is overwhelmed by jealousy and anger after observing her boyfriend in an act of sexual interaction with another would not have a claim of heat of passion because the victim is not her husband. Keep in mind that the provocation must cause a reasonable person to lose control (objective component) and the defendant, in fact, must have lost control and killed in a heat of passion (subjective component).⁶¹

In some cases, courts have instructed jurors that they possess discretion to determine whether an event provides adequate provocation. This certainly seems preferable to limiting provocation to acts that were viewed as provocative by common law judges in England. On the other hand, this may lead to controversy concerning questions such as whether a nonviolent homosexual advance constitutes adequate provocation.⁶² In a famous English case, the court ruled that an impotent individual was not reasonably provoked when he killed a prostitute who poked fun at his disability. The judges explained that the standard to be used was the hypothetical reasonable person rather than a reasonable person who was impotent.⁶³

Jurists increasingly follow the Model Penal Code and are willing to recognize physical traits such as blindness or disease in determining whether an act constitutes reasonable provocation. However, judges are generally reluctant to broaden the traits of a reasonable person to include a defendant's moral views and attitudes. A Pennsylvania court, for instance, rejected a defendant's plea of voluntary manslaughter when he recounted that he was driven to kill a lesbian whom he witnessed making love as a result of his own mother's lesbianism and his anger at having been molested at a young age by a homosexual male.⁶⁴ This case illustrates the complexity of considering an individual's views and attitudes. Should we recognize the cultural background of an immigrant parent from the Middle East who kills his daughter as a "matter of honor" after he observes her sexually interacting with her boyfriend?⁶⁵

The defense of sudden heat of passion is unavailable if a reasonable person's passion would have experienced a **cooling of blood** between the time of the provocation and the time of killing. Some common law courts followed an ironclad rule that limited the impact of provocation to 24 hours. The modern approach is to view the facts and circumstances of a case and to determine whether a reasonable person's "blood would have cooled" and whether the defendant's "blood had cooled." One court recognized provocation lasting for more than 24 hours in the case of

a defendant who had been informed that his father-in-law had raped the defendant's wife.⁶⁶ In a frequently cited case, the victim was sodomized while unconscious. The perpetrator spread news of the defendant's victimization throughout the community and subjected the victim to what the victim viewed as humiliating comments and embarrassment. The defendant boiled over in rage after two weeks of this harassment and killed the perpetrator. The court ruled that the cumulative impact of the harassment would not be taken into consideration and that too much time had passed to recognize involuntary manslaughter.⁶⁷

Courts confront the challenge of determining whether an individual killed in a heat of passion as a result of the provocation or killed in a calm and intentional fashion. In *People v. Bridgehouse*, Marylou Bridgehouse informed her husband that while he was working two jobs to support his wife and their two sons, she had been having an affair with William Bahr for the past six or seven months. Bridgehouse later learned that Bahr and Marylou had a joint bank account and that Marylou had used his credit card to purchase a gift for Bahr, and Bridgehouse later discovered Bahr's clothes hanging in his closet. On the morning of the killing, Bridgehouse invited his wife to go skiing, but Marylou stated that she planned to go fishing with her mother and Bahr. Bridgehouse, a former sheriff, placed his service revolver in his belt and went over to his mother-in-law's house to allegedly get a pair of socks for his young son. Bridgehouse testified that he did not realize that Bahr was living there and, when encountering Bahr, lost control and only regained consciousness when he realized that his revolver was clicking on empty and Bahr was dead on the ground. A police officer testified that Bridgehouse was emotionally overwhelmed following the killing and told the officer that he wanted to "tell off" Bahr and that he "didn't want him around my children." Did Bridgehouse go to his mother-in-law's house with the intent to kill Bahr, or was he taken by surprise and driven by emotion to kill? Could he have intended to kill Bahr and then found himself overwhelmed by emotion at the time that he arrived at his mother-in-law's home? Is there always a clear line behind intentional and premeditated killing and murder in the heat of passion?⁶⁸

Voluntary Manslaughter Reconsidered

Voluntary manslaughter involves several "hurdles"⁶⁹:

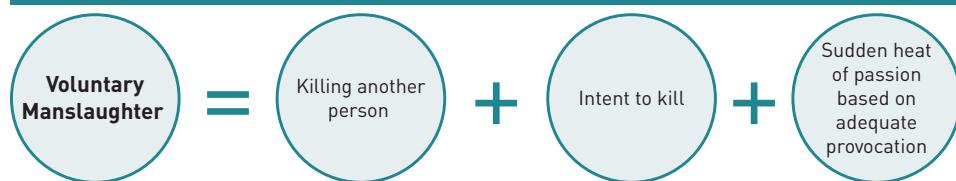
- *Provocation.* An individual must be reasonably and actually provoked and must kill in a heat of passion.
- *Cooling of Blood.* An individual must have reasonably and actually not "cooled off."

The question remains whether the law should recognize voluntary manslaughter. An individual who loses control and impulsively kills clearly poses a threat to society and might be viewed to be as dangerous as an individual who intentionally and calmly kills. Should we accept that a "reasonable person" can be driven to kill in the heat of passion and therefore should be subject to less severe punishment than other categories of killers?

In the next case, *Girouard v. State*, the court considers whether "words" may be sufficiently provocative to drive a reasonable person to kill. Courts generally have refused to recognize

insulting and racist language as adequate provocation. However, there are decisions recognizing that “informational” words may constitute adequate provocation. For instance, in *State v. Flory*, the Wyoming Supreme Court recognized that a husband had been reasonably provoked by his wife’s informing him that she had been raped by her father. The thinking is that these facts would constitute adequate provocation had the defendant directly observed the behavior.⁷⁰

FIGURE 10.7 ■ The Legal Equation: Voluntary Manslaughter



CAN WORDS CONSTITUTE PROVOCATION?

GIROUARD V. STATE, 583 A.2d 718 (MD. 1991)

Opinion by Cole, J.

In this case we are asked to . . . determine whether words alone are provocation adequate to justify a conviction of manslaughter rather than one of second degree murder.

Facts

Steven S. Girouard and the deceased, Joyce M. Girouard, had been married for about two months on October 28, 1987, the night of Joyce’s death. Both parties, who met while working in the same building, were in the army. They married after having known each other for approximately three months. The evidence at trial indicated that the marriage was often tense and strained, and there was some evidence that after marrying Steven, Joyce had resumed a relationship with her old boyfriend, Wayne.

On the night of Joyce’s death, Steven overheard her talking on the telephone to her friend, whereupon she told the friend that she had asked her first sergeant for a hardship discharge because her husband did not love her anymore. Steven went into the living room where Joyce was on the phone and asked her what she meant by her comments; she responded, “[N]othing.” Angered by her lack of response, Steven kicked away the plate of food Joyce had in front of her. He then went to lie down in the bedroom.

Joyce followed him into the bedroom, stepped up onto the bed and onto Steven’s back, pulled his hair, and said, “What are you going to do, hit me?” She continued to taunt him by saying, “I never did want to marry you and you are a lousy f— and you remind me of my dad.” The barrage of insults continued with her telling Steven that she wanted a divorce, that the marriage had been a mistake, and that she had never wanted to marry him. She also told him she had seen his commanding officer and filed charges against him for abuse. She then asked Steven, “What are you going to do?” Receiving no response, she continued her verbal

attack. She added that she had filed charges against him in the Judge Advocate General's Office (JAG) and that he would probably be court martialed.

There was some testimony presented at trial to the effect that Joyce had never gotten along with her father, at least in part because he had impregnated her when she was fourteen, the result of which was an abortion. Joyce's aunt, however, denied that Joyce's father was the father of Joyce's child. In addition, Joyce lied about filing the charges against her husband.

When she was through, Steven asked her if she had really done all those things, and she responded in the affirmative. He left the bedroom with his pillow in his arms and proceeded to the kitchen where he procured a long handled kitchen knife. He returned to Joyce in the bedroom with the knife behind the pillow. He testified that he was enraged and that he kept waiting for Joyce to say she was kidding, but Joyce continued talking. She said she had learned a lot from the marriage and that it had been a mistake. She also told him she would remain in their apartment after he moved out. When he questioned how she would afford it, she told him she would claim her brain-damaged sister as a dependent and have the sister move in. Joyce reiterated that the marriage was a big mistake, that she did not love him, and that the divorce would be better for her.

After pausing for a moment, Joyce asked what Steven was going to do. What he did was lunge at her with the kitchen knife he had hidden behind the pillow and stab her 19 times. Realizing what he had done, he dropped the knife and went to the bathroom to shower off Joyce's blood. Feeling like he wanted to die, Steven went back to the kitchen and found two steak knives with which he slit his own wrists. He lay down on the bed waiting to die, but when he realized that he would not die from his self-inflicted wounds, he got up and called the police, telling the dispatcher that he had just murdered his wife.

When the police arrived they found Steven wandering around outside his apartment building. Steven was despondent and tearful and seemed detached, according to police officers who had been at the scene. He was unconcerned about his own wounds, talking only about how much he loved his wife and how he could not believe what he had done. Joyce Girouard was pronounced dead at the scene.

At trial, defense witness, psychologist Dr. William Stejskal, testified that Steven was out of touch with his own capacity to experience anger or express hostility. He stated that the events of October 28, 1987, were entirely consistent with Steven's personality, that Steven had "basically reach[ed] the limit of his ability to swallow his anger, to rationalize his wife's behavior, to tolerate, or actually to remain in a passive mode with that. He essentially went over the limit of his ability to bottle up those strong emotions. What ensued was a very extreme explosion of rage that was intermingled with a great deal of panic." Another defense witness, psychiatrist Thomas Goldman, testified that Joyce had a "compulsive need to provoke jealousy so that she's always asking for love and at the same time destroying and undermining any chance that she really might have to establish any kind of mature love with anybody."

Steven Girouard was convicted, at a court trial in the Circuit Court for Montgomery County, of second degree murder and was sentenced to 22 years incarceration, 10 of which were suspended. Upon his release, Petitioner is to be on probation for five years, two years supervised and three years unsupervised. . . . We granted certiorari to determine whether the circumstances of the case presented provocation adequate to mitigate the second degree murder charge to manslaughter.

Issue

Petitioner [Steven Girouard] relies primarily on out-of-state cases to provide support for his argument that the provocation to mitigate murder to manslaughter should not be limited only to the traditional circumstances. . . . Steven argues that the trial judge did find

provocation (although he held it inadequate to mitigate murder) and that the categories of provocation adequate to mitigate should be broadened to include factual situations such as this one.

The State counters by stating that although there is no finite list of legally adequate provocations, the common law has developed to a point at which it may be said there are some concededly provocative acts that society is not prepared to recognize as reasonable. Words spoken by the victim, no matter how abusive or taunting, fall into a category society should not accept as adequate provocation. According to the State, if abusive words alone could mitigate murder to manslaughter, nearly every domestic argument ending in the death of one party could be mitigated to manslaughter. This, the State avers, is not an acceptable outcome. Thus, the State argues that the courts below were correct in holding that the taunting words by Joyce Girouard were not provocation adequate to reduce Steven's second-degree murder charge to voluntary manslaughter.

Reasoning

Initially, we note that the difference between murder and manslaughter is the presence or absence of malice. Voluntary manslaughter has been defined as "an *intentional* homicide, done in a sudden heat of passion, caused by adequate provocation, before there has been a reasonable opportunity for the passion to cool."

There are certain facts that may mitigate what would normally be murder to manslaughter. For example, we have recognized as falling into that group: (1) discovering one's spouse in the act of sexual intercourse with another; (2) mutual combat; (3) assault and battery. There is also authority recognizing injury to one of the defendant's relatives or to a third party, and death resulting from resistance of an illegal arrest as adequate provocation for mitigation to manslaughter. . . . Those acts mitigate homicide to manslaughter because they create passion in the defendant and are not considered the product of free will.

In order to determine whether murder should be mitigated to manslaughter we look to the circumstances surrounding the homicide and try to discover if it was provoked by the victim. Over the facts of the case, we lay the template of the so-called "Rule of Provocation." The courts of this State have repeatedly set forth the requirements of the Rule of Provocation:

1. There must have been adequate provocation;
2. The killing must have been in the heat of passion;
3. It must have been a sudden heat of passion—that is, the killing must have followed the provocation before there had been a reasonable opportunity for the passion to cool; and
4. There must have been a causal connection between the provocation, the passion, and the fatal act.

We shall assume without deciding that the second, third, and fourth of the criteria listed above were met in this case. We focus our attention on an examination of the ultimate issue in this case, that is, whether the provocation of Steven by Joyce was enough in the eyes of the law so that the murder charge against Steven should have been mitigated to voluntary manslaughter. For provocation to be "adequate," it must be "calculated to inflame the passion of a reasonable man and tend to cause him to act for the moment from passion rather than reason." . . . The issue we must resolve, then, is whether the taunting words uttered by Joyce were enough to inflame the passion of a reasonable man so that that man would be sufficiently infuriated so as to strike out in hot-blooded blind passion to kill her. Although we agree with the trial judge that there was needless provocation by Joyce, we also agree with him that the provocation was not adequate to mitigate second-degree murder to voluntary manslaughter. . . .

Before the shooting, the victim had called the appellant "a chump" and "a chicken," dared the appellant to fight, shouted obscenities at him, and shook her fist at him. . . .

[W]ords can constitute adequate provocation if they are accompanied by conduct indicating a present intention and ability to cause the defendant bodily harm. Clearly, no such conduct was exhibited by Joyce in this case. While Joyce did step on Steven's back and pull his hair, he could not reasonably have feared bodily harm at her hands. This, to us, is certain based on Steven's testimony at trial that Joyce was about 5'1" tall and weighed 115 pounds, while he was 6'2" tall, weighing over 200 pounds. Joyce simply did not have the size or strength to cause Steven to fear for his bodily safety. Thus, since there was no ability on the part of Joyce to cause Steven harm, the words she hurled at him could not . . . constitute legally sufficient provocation. . . .

Holding

Thus, with no reservation, we hold that the provocation in this case was not enough to cause a reasonable man to stab his provoker 19 times. Although a psychologist testified to Steven's mental problems and his need for acceptance and love, we agree with the Court of Special Appeals speaking through Judge Moylan that "there must be not simply provocation in psychological fact, but one of certain fairly well-defined classes of provocation recognized as being adequate as a matter of law." The standard is one of reasonableness; it does not and should not focus on the peculiar frailties of mind of the Petitioner. That standard of reasonableness has not been met here. We cannot in good conscience countenance holding that a verbal domestic argument ending in the death of one spouse can result in a conviction of manslaughter. We agree with the trial judge that social necessity dictates our holding. Domestic arguments easily escalate into furious fights. We perceive no reason for a holding in favor of those who find the easiest way to end a domestic dispute is by killing the offending spouse.

Questions for Discussion

1. Did Joyce's behavior constitute provocation that would cause a reasonable person to lose control or to kill? Was Steven provoked?
2. Do you believe that Steven killed in the "heat of passion" or in a cool and deliberate fashion?
3. Should the jury be permitted to freely determine whether Joyce's words and conduct constituted provocation that should reduce second-degree murder to voluntary manslaughter?
4. Some courts have recognized that "information" may constitute adequate provocation. Would Joyce's alleged filing of abuse charges against Steven qualify as "information" constituting adequate provocation?

CASES AND COMMENTS

1. **Racial Speech and Heat of Passion.** Rufus Watson, a 20-year-old Black American, was incarcerated for second-degree murder. He was involved in a homosexual relationship for several months with the decedent, Samples, a heavily muscled white inmate. The

two became embroiled in a disagreement in front of a third inmate, Johnny Lee Wilson, shortly before the lights were to be dimmed for the night. Samples was verbally abusing Watson, calling him “N—” and alleging that he was too scared to fight. Samples then made derogatory and obscene comments about Watson’s mother. Watson warned Samples, and Samples replied, “Why don’t you f— me up if that’s what you want to do. All you’re gonna do is tremble, N—.” Samples continued to verbally insult Watson, when Watson ran toward Samples’s bunk and violently and repeatedly stabbed him with a kitchen paring knife.

The North Carolina Supreme Court ruled that words do not constitute adequate provocation sufficient to reduce the charge to voluntary manslaughter, but noted that a minority of states recognized that an individual who kills in response to a verbal assault might be considered to lack premeditation and be held criminally responsible for second- rather than first-degree murder. The jury seemingly followed this approach on its own accord and convicted Watson of second-degree murder. The Supreme Court affirmed the trial court’s refusal to instruct the jury that the informal code of conduct among inmates required Watson to stand up for himself or risk being viewed as weak and easily abused and raped. The Supreme Court pointed out that Watson could have demonstrated his toughness by fighting with his fists rather than with a knife. Is the inmate code of conduct important in determining whether Watson acted in the “heat of passion”? See *State v. Watson*, 214 S.E.2d 85 (N.C. 1975).

2. **Model Penal Code.** The Model Penal Code in section 210.3(1)(b) provides that in reducing murder to manslaughter, the question is whether (1) the defendant acted under “extreme mental or emotional disturbance” and (2) the defendant’s reaction was reasonable based on the defendant’s background, experience, and characteristics. The Model Penal Code provision allows the jury to decide for itself whether there is adequate provocation to reduce a defendant’s guilt from murder to manslaughter. See *State v. Casassa*, 404 N.E.2d 1219 (N.Y. 1980).

Six states have adopted the Model Penal Code or **extreme emotional disturbance (EED)** approach to provocation, and several other states have incorporated an aspect of the Model Penal Code provision into their law.

Vidado Dumla was convicted of killing his mother-in-law, Pacita M. Reyes. He appealed on the grounds that the judge refused to issue an instruction to the jury to consider whether the killing was committed “under the influence of extreme mental or emotional disturbance for which there [was] a reasonable explanation.” An expert witness testified that Dumla suffered from a “paranoid personality disorder” and harbored the belief that other males were involved with his wife throughout his 10-year marriage. He also was easily insulted and reacted with extreme emotion to the smallest slight that other individuals would overlook. He believed that everyone was plotting against him, and he required his wife’s family members to speak to her at a distance so that he could monitor what was being said.

Dumla testified that “because of the way [his brother-in-law] looked at him,” he concluded that his wife and brother-in-law were having an affair. He thought that the family was talking about him behind his back, and when his brother-in-law allegedly rushed at him with a knife, he tried to scare him by brandishing his gun, which accidentally fired and killed his mother-in-law. See *State v. Dumla*, 715 P.2d 822 (Haw. Ct. App. 1986).

The Hawaii appellate court found that Dumla was entitled to have the jury consider his extreme emotional disturbance defense, for which there was a reasonable explanation.

The court clarified that the emotional disturbance defense differs from the defense of voluntary manslaughter: (1) the defense focuses on the defendant's specific background, emotional state, and physical characteristics; (2) there are no limitations on what constitutes adequate provocation; (3) there is no "cooling-off period"; and (4) the jury decides whether the defendant's extreme emotional reaction was reasonable based on the particular characteristics. See also *State v. Elliot*, 411 A.2d 3 (Conn. 1979).

Should states replace their statutes on voluntary manslaughter with statutes based on the Model Penal Code?

3. **Gender Identity or Sexual Orientation.** Trial court judges in some instances have allowed defendants to raise "gay panic" or "trans panic" to reduce murder to voluntary manslaughter. Appellate courts have uniformly held that this defense is not objectively reasonable and thus is not legally recognized. See *Patrick v. State*, 104 So. 3d 1046 (Fla. 2012). California in 2014 and Illinois in 2017 passed legislation prohibiting defendants from arguing that their murder charge should be reduced to voluntary manslaughter because the killing was provoked by the victim's gender orientation or identity. The California law amended Penal Code section 192, and it provides, in part, that for purposes of determining sudden quarrel or heat of passion for voluntary manslaughter, the provocation was not objectively reasonable if it resulted from "the discovery of, knowledge about, or potential disclosure of the victim's actual or perceived gender, gender identity, gender expression, or sexual orientation, including under circumstances in which the victim made an unwanted nonforcible romantic or sexual advance towards the defendant, or if the defendant and victim dated or had a romantic or sexual relationship." Between 2018 and 2020, Rhode Island and six other states barred defendants from raising the "gay panic defense."

YOU DECIDE 10.5

A number of courts no longer require a spouse to actually witness adultery. Merely being informed about a spouse's adultery may constitute adequate provocation. George Schnopps shot his wife after 14 years of marriage. During the previous six months, the two had argued over Schnopps's allegation that his wife was involved with another man who was a "bum," and he threatened her with scissors, a knife, a shotgun, and a plastic pistol. In September 1979, Schnopps's wife informed him that she was moving to her mother's house with the three children. At one point, Schnopps became aware that his wife's alleged boyfriend employed a signal when he telephoned. Schnopps used the signal, and his wife answered the phone, "Hello, lover." Schnopps's son shortly thereafter told Schnopps that his wife would not return home.

A few days prior to the killing, Schnopps threatened to make his wife suffer "as she had never suffered before." On October 12, 1979, a coworker helped Schnopps purchase a gun and ammunition. Schnopps stated that he was "mad enough to kill" and that a "bullet was too good for her, he would choke her to death." On October 13, Schnopps called his wife. For the first time, he stated that he would consider leaving their apartment and arranged for his wife to meet him at the unit. A neighbor agreed to care for the couple's youngest child while the two met. Schnopps's wife refused to reconcile with him and stated that she was going to court and that Schnopps would be left with nothing and pointed to her crotch and said that "[y]ou will never touch this again, because I have got something bigger and better for it."

Schnopps stated that these words "cracked" him and he wept that he had "nothing to live for" and that he would never love anyone else. His wife responded that she was "never coming back to you." He then shot her as she began to leave. The evidence indicated that Schnopps fired an additional bullet at his wife while she was on the floor. Schnopps allegedly stated that he wanted to "go with her" and shot himself. Schnopps made a number of statements on his way to the hospital including that he had shot his wife because she was cheating on him and that the "devil made me do it." Marylou died of three gunshot wounds to the heart and lungs fired from within 2 to 4 feet. The forensic evidence indicated that the killing occurred within a few minutes of her arrival at the apartment.

Friends and coworkers testified that Schnopps's physical and emotional health deteriorated during the separation from his wife. He began drinking, wept at work, was twice sent home early, and was diagnosed as suffering from a "severe anxiety state."

The jury was instructed that it could convict on manslaughter based on adultery, but returned a verdict of intentional and premeditated murder. The Massachusetts Supreme Judicial Court affirmed the verdict. Evidence indicated that following the killing, Schnopps suffered from a major depression in reaction to his wife's death. Can you clearly distinguish between deliberate and premeditated murder and murder in the heat of passion in this case? What verdict would you return? See *Commonwealth v. Schnopps*, 459 N.E.2d 98 (Mass. 1984).

We now have reviewed voluntary manslaughter. Involuntary manslaughter is the second branch of manslaughter. Involuntary manslaughter involves the unintentional killing of another without malice and typically includes **negligent manslaughter**, the negligent creation of a risk of serious injury or death of another, as well as **misdemeanor manslaughter** (also referred to as unlawful-act manslaughter), the killing of another during the commission of a criminal act that does not amount to a felony. Some states, such as California, also provide for **vehicular manslaughter**, or the killing of another that results from the grossly negligent operation of an automobile or from driving under the influence of intoxicants.

Negligent Manslaughter

Negligent manslaughter arises when individuals commit an act that they are unaware creates a high degree of risk of human injury or death under circumstances in which a reasonable person would have been aware of the threat. Some courts require **recklessness**, meaning that defendants must have been personally aware that their conduct creates a substantial risk of death or serious bodily harm. Other courts do not clearly state whether they require negligence or recklessness.

The Alabama Criminal Code section 13AA-6-4 provides that a person "commits the crime of criminally negligent homicide if he causes the death of another person by criminal negligence." The Missouri Criminal Code section 565.024 provides that the crime of involuntary manslaughter involves "recklessly" causing the death of another person. The Model Penal Code uses a negligence standard and holds individuals criminally responsible where they are "grossly insensitive to the interests and claims of other persons in society" and their conduct constitutes a "gross deviation from ordinary standards of conduct."

In *People v. Ogg*, Irene Phyllis Ogg was convicted of involuntary manslaughter after her two young children died of carbon dioxide poisoning from a fire. Ogg had left the children locked in a bedroom while she left the home to attend a business meeting. A Michigan appellate court held that the “acts of defendant in placing her children, or allowing them with her knowledge, to be locked in a small windowless upstairs room, without proper heat, light food, clothing or bedding, and without means of escape, and in...disregard of the consequences of such action, absenting herself from the home in pursuit of her own business, constitutes...culpable negligence.”⁷¹ At this point, it’s likely you have correctly concluded that there is not always a clear line separating involuntary manslaughter from depraved heart murder. Depraved heart murder requires recklessness, and involuntary manslaughter in most states requires negligence. Depraved heart murder, as we have seen, involves the commission of an act that exhibits such a gross and obvious indifference to human life that the law implies malice aforethought. This type of recklessness may involve intentionally driving at an excessive and dangerous speed down a crowded street and indifferently killing a pedestrian. Involuntary manslaughter, in contrast, might involve a driver who confidently and negligently takes the wheel without adequate sleep and then falls asleep and kills a pedestrian. Can you explain the difference between recklessness and negligence? In the next case, *People v. Mehsere*, the defendant contended he meant to pull his Taser and shock a suspect, but mistakenly drew his handgun and fired and killed the suspect. In evaluating the evidence, do you believe the officer was properly convicted of involuntary manslaughter?

WAS THE DEFENDANT GUILTY OF INVOLUNTARY MANSLAUGHTER?

PEOPLE V. MEHSERLE, 206, CAL. APP. 4TH 1125 (2012)

Opinion by Marchiano, P.J.

Issue

Defendant Johannes Mehserle served as a police officer for the Bay Area Rapid Transit District (BART). Shortly after 2:00 a.m. on January 1, 2009, while responding to a report of a fight on a BART train, he shot and killed BART passenger Oscar Grant during a tense confrontation. Defendant was attempting to arrest and handcuff Grant for misdemeanor obstructing a police officer while Grant was lying face down on the BART platform. Defendant shot Grant, who was unarmed, in the back. Defendant contended he meant to pull his [T]aser and shock Grant to subdue him, but accidentally drew his handgun by mistake and fired the fatal shot.

After a trial involving many witnesses, the jury found defendant not guilty of murder or voluntary manslaughter. The jury convicted defendant of involuntary manslaughter, thus necessarily finding the shooting was not accidental, but criminally negligent. The trial court sentenced him to two years in prison....

Defendant contends: (1) there is insufficient evidence to support the jury's finding of criminal negligence necessary for a conviction for involuntary manslaughter....

Facts

Defendant carried two weapons: a black model 226 40-caliber Sig Sauer handgun and a bright yellow Taser International X26 [T]aser. The handgun weighed more than three times as much as the [T]aser. The handgun had no manual safety switch, while the [T]aser had a safety switch that also functioned as an on/off switch. The [T]aser had a red laser sight; the handgun did not.

Defendant's handgun was holstered on his right side, called the dominant side—presumably because defendant is right-handed. The [T]aser was holstered on defendant's left, or nondominant, side, in a cross-draw configuration for use with the dominant (right) hand. The handgun holster had an automatic locking system, requiring a two-step process to remove the weapon: first, a rotating hood must be pressed down and rotated forward; second, a safety latch must be pushed back to release the weapon from its holster. The [T]aser holster had a safety strap and a safety hood....

In the small hours of the early morning of New Year's Day 2009, Grant boarded a BART train in San Francisco with his fiancée, Sophina Mesa, and several other friends. The group was bound for the Fruitvale BART station. The train was very crowded with New Year's Eve celebrants, and people were standing in the aisles.

As the train approached the Fruitvale BART station in Oakland, Grant began to argue with a fellow passenger and the two men started "tussling around." They attempted to strike each other, but the train was so crowded they were reduced to pushing and shoving. The aggression spread into a large fist fight, involving at least 10 men.

Passengers used the train intercom to report the fight to the operator, who in turn contacted BART central control. Central control apparently contacted BART police, whose dispatcher contacted officers in the field with a report of a fight at the Fruitvale BART station in the train's "lead car, no weapons, all black clothing, large group of B[lack] M[ales]."

The train reached the Fruitvale station and stopped at the platform. The train doors opened. The fight stopped. BART Police officers Anthony Pirone and Marysol Domenici were on the street level of the station. Pirone went up to the platform and saw five African-American men, including Grant and Michael Greer, and one woman standing on the platform by the lead car and talking. As Pirone approached, Grant and Greer got back on the train. According to a bystander, Pirone appeared to be agitated and said, "This train isn't f— going anywhere, I'm not stupid, I see you guys."

Pirone ordered the three men who remained on the platform, who apparently were Jackie Bryson, Nigel Bryson and Carlos Reyes, to stand against the platform wall and keep their hands visible. He pulled his [T]aser and pointed it at the men as he ordered them to the wall. Pirone called Domenici and told her to come up to the platform, where he instructed her to watch the detained men against the wall.

Pirone ordered Grant off the train. By one account he said, "Get off the f— train, otherwise I'm going to pull you out." By another account he said, "Get off the train m—." By his own account, Pirone said, "Get the f— off the train." Grant got off the train. Pirone took Grant over to the three detainees and shoved him against the wall. The men sat down after being ordered to do so by Domenici.

Pirone went back to the train for Greer and ordered him out, saying "Get the f— off my train." Pirone denied using profanity when he ordered Greer off the train, because of the

presence of female passengers. Greer did not comply. Pirone said, "I've asked you politely. I'm going to have to remove you in front of all these people now." Pirone grabbed Greer by his hair and the scruff of his neck and forced him off the train. Train passengers described Pirone as hostile, angry, mean, and aggressive. One passenger said Pirone acted "like a punk." Defendant concedes Pirone was "verbally and physically abusive in his attempt to remove both Greer and Grant from the train."

According to Pirone, Greer struggled to break free once the two were on the platform. Pirone, therefore, pushed Greer and knocked him off balance. Pirone said Greer spun around and raised his fists, so Pirone used a takedown maneuver and swept Greer's legs out from under him, knocking him to the ground. Pirone handcuffed Greer. Several passengers testified that in their opinion Pirone used excessive or unnecessary force, or that his behavior was excessive.

Grant, Jackie Bryson, and Reyes jumped to their feet and shouted, "This is f— up, this is f— up." Domenici told them to "stay out of it." The three continued to yell at Pirone to stop what he was doing. Pirone approached Reyes and told him to "shut the f— up." A cell phone video taken by a passenger shows Pirone striking Grant with his fist. There was testimony that Pirone shoved Grant against the wall. Pirone forced Grant to his knees. A passenger's video shows Pirone drawing his [T]aser and pointing it at the detainees. Grant pleaded with Pirone not to tase him because "I have a daughter." Domenici drew her [T]aser and pointed it at the seated detainees, who kept their hands up and kept saying "don't tase me."

According to a BART surveillance video, defendant and his partner, Officer Woffinden, arrived on the platform at 2:08:27 a.m. Defendant ordered the men who were approaching Domenici to "get back." Defendant drew his [T]aser and pointed it at the detainees, including Grant. The [T]aser's red laser sight was trained on Grant's chest and groin. Woffinden drew his baton and ordered four or five people away from the detention area. At 2:09:24, Officer Guerra joined defendant to help guard the detainees.

Grant answered a call from his fiancée Mesa, who was on the street level, and said, "They're beating us up for no reason. I'm going to call you back." Mesa thought he sounded scared.

Referring to Grant, Pirone said, "that m— is going to jail" for "148," a reference to Penal Code section 148, resisting a police officer. Pirone testified he gave the order to arrest Grant and Greer. Defendant thought Pirone told him to arrest Grant and Jackie Bryson. Pursuant to BART policy, Officers Pirone and Domenici were the officers in charge because they had been the first on the scene.

When he heard he was going to be arrested, Grant stood up and asked, "Who can we talk to?" A cell phone video shows Pirone grabbing Grant and forcing him back down. Defendant admitted he put his hand on Grant's head to help force him back down.

Jackie Bryson stood up. Defendant pushed Bryson back down into a seated position. He then pointed his [T]aser at Bryson and told him he needed to start listening or he was going to get tased. Bryson replied there wouldn't be any problems. Defendant handcuffed Bryson without incident.

At this point, three officers—defendant, Pirone, and Guerra—were dealing with the five detainees and two officers—Domenici and Woffinden—were keeping the crowd of bystanders away from the detention area.

Grant was kneeling on the ground. Pirone was yelling in Grant's face, "Bitch-ass n—, right. Bitch-ass n—, right. Yeah." Defendant stepped behind Grant and grabbed his hands. Grant fell forward onto the ground. Pirone thought defendant had forced Grant to the platform, but defendant denied this.

Pirone and defendant placed Grant on his stomach. Pirone used his knees to pin Grant's neck to the ground. Grant protested, "I can't breathe. Just get off of me. I can't breathe. I quit. I surrender. I quit." Defendant ordered Grant to give up his arms, presumably so he could handcuff him. Grant responded that he couldn't move. Defendant repeatedly pulled at Grant's right arm, which apparently was under Grant's body.

At 2:10:49, two more BART officers, Knudtson and Flores, arrived on the platform and ran to the detention area. Knudtson tackled one of the bystanders after he (or the person next to him) threw a cell phone at Domenici and Woffinden, who were still keeping the crowd at bay. Flores took up position next to Domenici and Woffinden to help them keep the crowd back. Woffinden testified the officers succeeded in keeping the crowd out of the detention area. He never drew his firearm because the crowd's behavior did not warrant such a response.

Meanwhile, defendant was heard to exclaim, "f— this." He told Pirone, "I can't get his hands, his hands are in his waistband, I'm going to tase him, . . . get back."

A cell phone video shows defendant tugging three separate times on his handgun, unsuccessfully trying to remove it from his holster. On the fourth try, defendant was able to remove his handgun. He stood up, held the weapon apparently with both hands, and fired a bullet into Grant's back. The time was 2:11:04.

Several witnesses said that defendant appeared surprised and dumbfounded after the shooting. One witness heard defendant say, "Oh, s—!" or "Oh, my God." Another heard defendant say, "Oh, s—, I shot him," or, "Oh God, oh s—, I shot him." Defendant holstered his handgun and put his hands to his head, then bent over and put his hands on his knees. Grant was still conscious and exclaimed, "Oh, you shot me, you shot me." Defendant handcuffed Grant and searched him for weapons. Grant was unarmed.

Shortly after the shooting, defendant talked to Pirone on the platform and said, "I thought he was going for a gun." In the minutes after the shooting he had several conversations on the platform with Pirone and three other officers, and said nothing about mistaking his handgun for his [T]aser. Later, at the station, he cried and told a support person, Officer Foreman, that he thought Grant was going for a gun. He did not say he mistook his handgun for his [T]aser.

Grant was taken to Highland Hospital. He had a single gunshot wound that penetrated his right lung and caused excessive blood loss. He died about three or four hours after having surgery.

Defendant testified as follows:

He did not intend to shoot Grant, but only to tase him. He mistakenly drew and fired his handgun. As defendant approached Grant to arrest him, Grant was on his knees with both hands behind his back. Grant fell to the ground; defendant did not push him. Grant ended up on his stomach with his right hand underneath his body. Defendant focused on getting control of Grant's right arm, which was tense. Defendant could not free it by pulling it out or by ordering Grant to give up his arm. Defendant did not hear Grant complain that he could not breathe. Defendant did not notice that Pirone had restrained Grant by placing his knee on Grant's neck.

Defendant saw Grant's right hand go into his pocket as if he were grabbing for something. Although he did not see a weapon, he thought Grant might be reaching for one. He decided to tase Grant. He stood up to get sufficient distance to properly deploy the [T]aser, and announced, "I'm going to tase him. I'm going to tase him."

Defendant was not aware he had mistakenly drawn his handgun until he heard the shot. He looked down and saw he was holding his handgun. He testified, "There were no flags that

popped up, there were no red flags." He was unaware he had to tug at his handgun three times before freeing it from its holster, and did not notice the lack of a red laser sight which would have emanated from his [T]aser.

Defendant denied losing control of his emotions and judgment during the attempt to arrest Grant, and believed tasing Grant would have been consistent with BART policy. Defendant voluntarily resigned from the BART police force on January 7, 2009.

BART Police Sergeant Stewart Lehman testified that he trained defendant on the use of the [T]aser. The training was the minimum six and one-half hours. Lehman believed the training period was "a minimum," but admitted the training was up to industry standards and the standards set by POST [Police Officers' Standards and Training] and the [T]aser manufacturer. He testified that defendant did not have his own [T]aser and holster issued to him, which would have enabled him to practice at home.

Greg Meyer, a consultant in police tactics, testified as an expert in the "use and deployment of tasers, taser training methods and procedures, laws of arrest, arrest procedures, and the use of lethal and non-lethal force." In his opinion, Grant's re-entering the BART train upon seeing Pirone and his standing up after being told to sit against the wall were sufficient to violate section 148—and thus, Grant was being lawfully arrested for resisting a police officer.

It was also Meyer's opinion defendant was entitled to rely, without question, on Pirone's order to arrest Grant. Meyer did acknowledge that Pirone's conduct was "loud and aggressive," and his calling Grant a "bitch-ass n—" was aggressive behavior. He did opine, however, the use of a [T]aser on Grant would have been appropriate because Grant was physically, as opposed to passively, resisting arrest.

Meyer testified regarding six documented instances of handgun/[T]aser confusion in the United States and Canada between 2001 and 2006. In each of those six instances, the [T]aser was holstered on the dominant side of the officer's body, close to the officer's handgun, for a strong-hand draw. Meyer was unaware of the color of the [T]aser in each incident.

Meyer testified about defendant's [T]aser training. In his opinion, the training "could have been better" and "had some deficiencies." Meyer believed defendant's 10 practice draws during training were inadequate for defendant to develop "muscle memory" with the [T]aser, and that defendant should have had access to a [T]aser and holster after training so he could practice draws. (The record shows that BART did not issue individual officers their own [T]asers.) In Meyer's opinion, defendant's training was insufficient to prevent handgun/ [T]aser confusion and to alert defendant when he had drawn his handgun instead of his [T]aser.

William Lewinski, a retired university professor, testified as an expert about human performance in high-stress situations. He testified people in high-stress situations can become singularly focused on one thing, resulting in "inattentional blindness" whereby the mind blocks out competing stimuli. This condition, common with police officers under stress, can result in an officer resorting to automatic responses.

Lewinski described "muscle memory" as a motor function that becomes automatic with repetition. He believed it would take 500 to 3,000 repetitions of a particular movement to create muscle memory. In Lewinski's opinion, a police officer may, under stress, fail to notice the distinguishing features between his handgun and his [T]aser and confuse the two. Lewinski acknowledged that an officer angry at a suspect could deviate from his training.

Several BART officers testified that defendant was dependable and even-tempered, and did not show a tendency to use inappropriate aggression toward suspects.

As noted, the People had charged defendant with murder. The jury found defendant not guilty of murder or voluntary manslaughter and convicted defendant of the lesser-included offense of involuntary manslaughter (§ 192, subd. (b)), and found true the enhancement that he personally used a firearm. . . . The court denied probation. . . .

Reasoning

Defendant contends there is insufficient evidence of the requisite criminal negligence to sustain his conviction of involuntary manslaughter. Specifically, he contends he “accidentally fired his gun” and Grant’s death was “a tragic error.” . . .

The trial court expressed support for the verdict of involuntary manslaughter, which is of course an unintentional killing. On one occasion, the court stated: “But because the jury accepted the defense of weapons confusion, and that’s the finding that the court believes was made here, the issue on the involuntary manslaughter charge was whether or not in mistakenly drawing his firearm and shooting Mr. Grant [defendant] acted in a grossly negligent manner. The jury found that he did.” . . .

We find sufficient evidence that his conduct of mistakenly drawing and firing his handgun instead of his [T]aser constitutes criminal negligence. . . .

The definition of criminal negligence in California has been settled since 1955, when the California Supreme Court adopted the definition set forth in American Jurisprudence: “. . . The negligence must be aggravated, culpable, gross, or reckless, that is, the conduct of the accused must be such a departure from what would be the conduct of an ordinary prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to the consequences.” . . .

CALCRIM No. 580 defines criminal negligence as follows. Defendant’s jury was so instructed with CALCRIM No. 580, but with additional language we will discuss below.

A person acts with criminal negligence when:

1. He or she acts in a reckless way that creates a high risk of death or great bodily injury;

AND

2. A reasonable person would have known that acting in that way would create such a risk.

In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act.

It is important to distinguish between the mental states for involuntary manslaughter on the one hand, and implied-malice murder, on which the jury found defendant not guilty, on the other. . . . A finding of gross negligence is made by applying an *objective* test: if a *reasonable person* in defendant’s position would have been aware of the risk involved, then defendant is presumed to have had such an awareness. However, a finding of implied malice depends upon a determination that the defendant *actually appreciated* the risk involved, i.e., a *subjective* standard. . . .

At least two reported California involuntary manslaughter cases involve police officers. In *People v. Sidwell* (1915) 29 Cal.App. 12 (*Sidwell*), . . . [T]he court upheld defendant’s involuntary manslaughter conviction, noting that handling a loaded firearm in a public place was always fraught with danger, and that danger was increased when defendant was focused on something other than the weapon—i.e., the forcing of the door. The court held it was “gross

or culpable negligence" to force the door, "with his mind centered upon getting into the room," while holding a loaded weapon.

In *People v. Velez* (1983) 144 Cal.App.3d 558 (*Velez*), the defendant failed to perceive the risk of pointing a potentially hazardous weapon at the victim. Pointing the gun at the victim . . . evidenced a "disregard for human life or an indifference to consequences" to warrant the jury's finding of involuntary manslaughter.

We know of no California case in which a police officer was convicted of involuntary manslaughter due to handgun/[T]aser confusion. But we believe this record demonstrates substantial evidence that defendant's conduct was criminally negligent due to the following evidence.

First, the jury could have reasonably found defendant did not need to use a [T]aser at all. Regardless of the question whether Grant initially resisted arrest, at the time defendant decided to use his [T]aser, the jury could have reasonably found that Grant was immobilized—being pinned by Pirone—and compliant. Grant said, "I can't breathe," "I quit," and "I surrender." Although defendant was having difficulty obtaining control of Grant's hand, the jury could have found in view of Grant's position and demeanor that this did not present a proper situation for the use of a [T]aser.

Second, the jury could have reasonably found that when defendant did decide to use his [T]aser he was criminally negligent in mistaking his handgun for his [T]aser. Defendant's handgun was peculiarly distinguishable from his [T]aser for a number of reasons. Defendant had drawn his [T]aser earlier. The handgun weighed more than three times as much as the [T]aser. The [T]aser was bright yellow. The handgun was black. The [T]aser had an on/off safety switch. The handgun did not. The [T]aser had a red laser sight. The handgun did not. The handgun was holstered on defendant's right, or dominant side, with a two-step release mechanism requiring defendant to push down and forward and then back on a separate safety switch. The [T]aser, in contrast, was holstered on defendant's left, or nondominant side, for a cross-draw by defendant's right hand and had only a safety strap and safety hood.

After some of the handgun/[T]aser confusion incidents referred to above, three police agencies changed their [T]aser policies to require nondominant-side holstering and the [T]aser's bright yellow color as measures to prevent handgun/[T]aser confusion. A reasonable jury could conclude that a reasonably prudent person could distinguish between the two weapons, and drawing the deadly weapon—heavier, of a different color, and on the dominant side of the body with a complicated release mechanism under the circumstances—amounted to criminal negligence. Thus, the jury could have reasonably found defendant's conduct rose to the level of conscious indifference to the consequences of his acts, and was not a mere mistake.

This conclusion is supported by two additional facts. First, defendant twice drew his [T]aser on the platform shortly before the shooting, strongly suggesting he was familiar with the weapon and its location on his body. Second, a cell phone video shows him struggling to remove his handgun from his holster three times immediately prior to freeing the weapon and shooting Grant. A reasonable jury could conclude a reasonably prudent person would have known he was holding his deadly handgun and not his nonlethal [T]aser.

Defendant asserts he was "badly trained" on the use of the [T]aser. He presented evidence that his training was inadequate. But the record shows defendant had six and one-half hours of [T]aser training, which included 10 to 15 practice draws and three scenario trainings. During the training, defendant practiced drawing the [T]aser from a holster on the nondominant side with his dominant hand. The training's content and length complied with industry standards as set forth by the [T]aser manufacturer and POST. A defendant's lack

of awareness of the risk of his conduct—e.g., by allegedly inadequate training—“would not preclude a finding of gross negligence if a reasonable person would have been so aware.” Thus, if a reasonable person would not have confused his handgun with his [T]aser, the state of training is marginally pertinent to the determination of criminal negligence.

Defendant presented expert testimony from William Lewinski that people in high-stress situations can become singularly focused on one thing, resulting in “inattentional blindness” whereby the mind blocks out competing stimuli. In Lewinski’s opinion, a police officer under stress, with muscle memory with his handgun, may fail to notice the distinguishing features between his handgun and his [T]aser and confuse the two.

There are several reasons the jury was unpersuaded by this evidence. The jury may have concluded the evidence showed that defendant was simply criminally negligent for all the reasons discussed above, for failing to notice his difficulty in drawing his weapon, and seemingly being unaware of much of his surroundings—for instance, Grant’s protests that he could not breathe and the fact Pirone had Grant pinned down. Defendant also admitted, “[T]here were no flags that popped up, there were no red flags” as he drew and fired his gun.

The jury also heard evidence that in the past 10 or 11 years, several hundred thousand, if not a million, [T]asers had been deployed by 13,000 police agencies across the United States. In all that time, with all those deployments, the jury was told there were only six documented instances of [T]aser/handgun confusion in the United States and Canada. The jury could reasonably have concluded “inattentional blindness” is uncommon and is not something suffered by a reasonably prudent person.

Finally, the jury could reasonably have concluded the situation on the platform was not an extreme high-stress situation at the time of the shooting itself. There were seven officers on the platform, the detainees were under control, and the crowd from the train was being held back. Apparently, no other officer drew a firearm. The officers were shocked when defendant fired on Grant. Also, defendant’s use of the phrase “f—this” just before he shot Grant could, in the minds of the jury, bespeak a tone of recklessness about subduing the suspect.

Holding

We conclude there is sufficient evidence from which the jury could legitimately have found that defendant acted with the requisite criminal negligence to support his conviction for involuntary manslaughter.

Questions for Discussion

1. What was the jury required to find to convict defendant Johannes Mehserle of involuntary manslaughter?
2. Summarize the facts that support Mehserle’s involuntary manslaughter conviction.
3. Why does Mehserle contend that the evidence does not support the jury verdict of involuntary manslaughter?
4. Is Mehserle’s conviction for involuntary manslaughter consistent with the precedents discussed in the court’s decision?
5. Would you have convicted Mehserle of implied malice murder (depraved heart murder) or of voluntary manslaughter? What about second-degree murder?
6. Mehserle argued there should be a “higher standard for involuntary manslaughter” for police officers because of the stress of their job. Police officers would be held liable

for an on-duty shooting only if their conduct was “such a departure from the norm of reasonable police conduct that it may fairly be characterized as ‘extraordinary and outrageous’ . . . [and] qualifies as ‘wanton and abandoned disregard of human life.’” Do you agree with Mehserle that there should be a higher standard for involuntary manslaughter for law enforcement officers?

CASES AND COMMENTS

In 2020, four Minneapolis police officers were fired and later criminally indicted for the May 25 death of 46-year-old George Floyd. A video recorded by a bystander showed that Floyd was handcuffed and moved behind a police car outside the store where he was pinned face down on the ground. Officer Derek Chauvin pressed his knee into the area between Floyd’s head and neck for over nine minutes and maintained pressure for almost three minutes after Floyd had been rendered unconscious. Officer J. Alexander Kueng held Floyd’s back while Officer Thomas Lane held his legs. Floyd during the assault continued to protest “I can’t breathe” and called out for his deceased mother. At one point, Floyd cried out that he was “about to die.” Before his final breaths, Floyd gasped: “They’ll kill me. They’ll kill me.” As Floyd shouted for his life, an officer reportedly yelled back at him to “stop talking, stop yelling, it takes a heck of a lot of oxygen to talk.” Chauvin was convicted in April 2021 second-degree murder, which in Minnesota may entail the killing of an individual during a felony assault, and the lesser offense of second-degree manslaughter, which involves creating “an unreasonable risk, and consciously taking the chance of causing death or great bodily harm to another,” as well as of third-degree manslaughter, which is unintentionally causing death by committing an act that is imminently dangerous to another while exhibiting a depraved mind with reckless disregard for life. He was sentenced to 270 months in prison. The three other officers were charged with aiding and abetting second-degree murder during the course of a felony and with aiding and abetting second-degree manslaughter with culpable negligence. The three officers if convicted of the second-degree murder charges confront 40 years in prison. All four officers also face federal civil rights charges.

YOU DECIDE 10.6

On November 9, 1998, Latrece Jones, age 18, was riding in the front passenger seat of a rented Chevrolet Cavalier in Chattanooga, Tennessee. Her 2-year-old son, Carlon Bowens Jr., was asleep in her lap. Carlon’s aunt, Letitia Abernathy, had rented and was driving the rental car; five children and one adult sat in the back seat. A car failed to yield the right of way, causing an accident. The accident was not severe, but it caused the passenger-side airbag to deploy. The airbag struck Ms. Jones’s son and broke his neck, killing him. No one else in the car was seriously injured.

The five children in the back seat were aged 7 years, 6 years, 5 years, 4 years, and 9 months. Ms. Abernathy, who operated a day care center, testified that she had rented the

Chevrolet because her car was being repaired. She stated that she normally had car seats for the children but that she did not use them that day because there was no room in the Chevrolet.

Jones was charged with criminally negligent homicide. The driver, Ms. Abernathy, pled guilty to reckless endangerment and violation of the child restraint law. At the time of the accident, Tennessee's child restraint law required children under 4 years old to be in a "child passenger restraint system meeting federal motor vehicle standards." The statute applies only to drivers, providing that "[a]ny person transporting a child . . . is responsible for . . . properly using a child passenger restraint." A warning on the visor on the passenger's side of the front seat warned that children under 12 can be killed by airbags and should ride in the back seat. A warning label affixed to the seatbelt stated that one should "never put a child in a rear-facing child restraint in the front seat of this vehicle. Secure a rear-facing child restraint in the rear seat." There was evidence that on giving birth, a mother in Tennessee was given a pamphlet that warned, "Never hold a child in your lap while riding in either the front or back seat" and "Be consistent! Always buckle your child in the safety seat." There also was evidence that a widespread media campaign in the past year had been directed at the need to use child restraints and on the danger posed by airbags. This campaign, in part, was a recognition that it was only in 1999, a year after this accident, that all automobiles were required to have airbags and that parents were not aware of the danger posed by airbags. A newspaper study 12 days prior to the accident indicated that only 60% of children observed in motor vehicles were restrained and that a number of children were sitting in the front seat. The Tennessee Supreme Court stated that the prosecution was required to establish the following: (1) whether a substantial and unjustifiable risk existed at the time of the conduct or resulting from the conduct; (2) whether, using a subjective standard, the defendant failed at the time of the conduct to perceive the risk; and (3) whether that failure was a gross deviation from the standard of care of an ordinary person under the circumstances. Was Jones guilty of negligent homicide?

See *State v. Jones*, 151 S.W.3d 494 (Tenn. 2004).

Misdemeanor Manslaughter

An unintentional killing that results from an "unlawful act not amounting to a felony" is termed misdemeanor manslaughter. It may be more accurate to term this *unlawful-act manslaughter* because some states extend this to nonviolent felonies that do not trigger the felony-murder rule, as well as to acts that are not criminal but are considered "unlawful." Unlawful is broadly interpreted to include "bad" or "immoral conduct." An individual, for instance, was convicted of manslaughter when he accidentally killed his girlfriend while attempting suicide, which is not a crime.⁷²

The commission of the unlawful act provides a predicate that the defendant acted in a grossly negligent fashion and is properly held criminally liable for manslaughter. The California Penal Code defines involuntary manslaughter as an unlawful killing of a human being without malice "in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."⁷³

In *People v. Datema*, Pam and Greg Datema were drinking and smoking marijuana with friends. Pam and Greg started arguing about their previous romantic relationships. Pam at one point told Greg that she had sexual relations with other men in front of their sons. Greg responded by slapping Pam on the face. Pam lost consciousness and subsequently died as a result of a tear in an artery in her head. The medical examiner believed that her reflexes, which may have prevented the injury, slowed as a result of her intoxication and smoking marijuana. The Michigan Supreme Court nonetheless held that “if an assault and battery is committed with a specific intent to inflict injury and causes unintended death, the actor may be found guilty of . . . involuntary manslaughter.”⁷⁴

A majority of states retain this rule. Some courts have limited the harshness of the doctrine by requiring a showing of proximate cause. For example, an individual who stole \$10 from a church collection plate was not held criminally responsible for the death of a congregant who suffered a heart attack while chasing the thief. The Florida court reasoned that this was not the “kind of direct, foreseeable risk of physical harm that would support a conviction of manslaughter.”⁷⁵ Other courts limit misdemeanor manslaughter to dangerous offenses.

A third approach is to distinguish between a *malum in se* offense, a crime that is “wrong in itself,” as opposed to a *malum prohibitum* offense, a social welfare offense regulating areas such as professional licenses, motor vehicles, food service, and housing quality. A *malum prohibitum* offense provides the foundation for manslaughter only in those instances in which a defendant acted negligently. A cosmetologist who had not obtained a professional license was not held criminally liable for death caused by a poisoned facial treatment. The court reasoned that the facial treatment, rather than the failure to possess a license, caused the victim’s death.⁷⁶

Various states also provide for the offense of vehicular homicide. California punishes vehicular homicide that results in the death of another stemming from the grossly negligent operation of a motor vehicle, as well as vehicular homicide that results from the operation of a motor vehicle while intoxicated.⁷⁷ The Florida vehicular homicide provision encompasses killing caused by the reckless operation of a motor vehicle in a manner “likely to cause the death of, or great bodily harm to, another.”⁷⁸

The Model Penal Code rejects the misdemeanor manslaughter rule and merely punishes the reckless killing of another, an approach adopted by various states.

FIGURE 10.8 ■ The Legal Equation: Misdemeanor Manslaughter



YOU DECIDE 10.7

In November 2004, Rachelle Waterman's mother was murdered by two young men—Brian Radel and Jason Arrant, both of whom had recently dated Waterman. Waterman, age 16, told the young men that her mother had beaten her, thrown her down the stairs, intimidated her with a knife, and threatened to sell her into slavery. Waterman indicated that she wanted her mother dead. An ambush murder scheme concocted by Radel and Arrant failed when Radel realized that he had neglected to bring a bolt that connected the shotgun's barrel to its stock.

Arrant informed Waterman about the failed attempted murder, which he referred to as a "hunting trip." Waterman did not warn her mother, nor did she alert the police. Instead, Waterman wrote Arrant that she was tempted to take a "hunting trip" herself.

Several weeks later Waterman again reported that her mother had beaten her. Radel and Arrant broke into the Waterman residence, kidnapped Waterman's mother, drove her out of town in the family van, beat her to death, let the van go over the edge of the road, and set the van on fire with gasoline.

Waterman was prosecuted as an adult and convicted of criminally negligent homicide based on her having placed her mother in peril and failing to take "reasonable steps to warn her mother, or to alert the authorities, that Radel and Arrant were plotting to kill her mother."

As a defense, Waterman presented expert testimony on adolescent brain development. According to this testimony, "the prefrontal cortex—the portion of the human brain responsible for planning, the ability to think in the long-term, and the ability to control impulsive behavior and risk-taking—does not become fully developed until a person is around 25 years old. Thus, even though adolescents and young adults are just as capable as more mature adults when it comes to perceiving or understanding the risks that accompany certain behavior, they have a lesser ability to 'appreciate' these risks—*i.e.*, a lesser ability to weigh those risks, assess the likely consequences, and stop themselves from engaging in the risky behavior."

Waterman argued that the judge was in error in instructing the jury that the standard for culpable negligence is a gross deviation from the standard of care that "a reasonable person" would observe in a similar situation. Instead, she contended that the judge should have instructed jurors that they should decide whether Waterman's conduct constituted a gross deviation from the standard of care to be expected of "a person of similar age, intelligence, and experience." The court in rejecting Waterman's claim noted that scientists do not claim that all people younger than 25 have a reduced capacity to "appreciate risks and control themselves. The research has given us only generalized descriptions of human brain development, not reliable predictions about any particular individual's mental abilities."

The court concluded that the standard of care that a reasonable person is to observe in a situation does not vary by age. Do you agree with the decision in *Waterman*? See *Waterman v. State*, 342 P.3d 1261 (Alaska Ct. App. 2015).

CRIME IN THE NEWS

On August 5, 2019, the United States experienced two mass shootings. In El Paso, Texas, 21-year-old Patrick Crusius shot and killed 23 individuals and wounded 26 others at a Walmart store. Several hours later, 26-year-old Connor W. Betts, wearing a mask, body armor, and hearing protection and armed with a high-capacity magazine holding 100 rounds

of ammunition, shot and killed 9 men and women and wounded as many as 27 outside a bar in an entertainment district in Dayton, Ohio. The police responded within a minute and killed Betts. The victims included Betts's 22-year-old sister and a number of African Americans although Betts's motive remains unknown.

The individuals killed in El Paso included one German citizen and eight Mexican citizens from border towns adjacent to El Paso. American Jordan Anchondo was killed while shielding her two-month-old son with her body. Jordan's husband Andre also was shot and killed in the attack. The couple had just celebrated their wedding anniversary and had two other young children. Luis Juarez was another victim. At 90 years old, Juarez had lived the "American Dream." He emigrated to the United States, received his citizenship, purchased a home, and retired from a career as an iron worker. He and his wife of 70 years, Martha, raised a family that included 7 children, 20 grandchildren, 35 great-grandchildren, and 8 great-great-grandchildren.

Nine months following the attack, soccer coach Guillermo Garcia, 36, was the last victim shot in the attack to pass away. Garcia underwent 50 operations in an effort to save his life. Garcia had come to the Walmart to raise money for a soccer team for young girls he coached. Garcia was shot while shielding his wife and son. Another coach and four parents of players on the team were injured. Ten young girls affiliated with the team emerged uninjured.

Crusius in the attack used a WASR-10, a semi-automatic Romanian version of the Russian AK-47 military assault weapon, which he lawfully purchased from a gun dealer. This weapon is attractive because it is less expensive than the American AR-15 assault rifle. Roughly a thousand WASR-10s are imported and sold in the United States for "sporting purposes" each year. Roughly seven states and the District of Columbia prohibit ownership of assault rifles, and nine states and the District of Columbia restrict ownership of high-capacity magazines holding more than 10 rounds of ammunition.

Crusius drove on the day of the killing from his family home in the Dallas suburb of Allen, Texas, to El Paso. He selected the Walmart because it was located nearby to the United States–Mexico border in a city that is 80% Hispanic. The store was frequented by individuals from both countries and attracted 65,000 customers a week, nearly four times the number of customers at a typical Walmart.

Crusius testified that he entered the Walmart and returned to his car to complete and to post his manifesto and then reentered the store and launched his attack. Under Texas law, a license is not required to openly carry a rifle in public. After the shooting, Crusius drove away in his car and called 911, although he stated that he attempted to contact a dispatcher. Crusius stated that he was returning to the store to surrender when he encountered and was arrested by Texas Rangers.

Crusius in a 2,300-word manifesto echoed broad themes articulated by other white supremacist attackers. He warned of a Hispanic "invasion" of Texas that would "replace" whites. He attacked Hispanics for taking jobs away from whites, wrote that the country was "rotting from the inside," and urged other like-minded individuals to attack "low hanging fruit."

Several weeks before the El Paso killings, Crusius's mother had called the police in Allen to express her concern that her son lacked the maturity and experience to handle the powerful weapon that he had purchased. The police appear to have responded that Crusius had a legal right to possess the firearm and subsequently explained their inaction by noting that Crusius's mother did not indicate that her son posed a danger to others and did not leave her name.

Crusius, according to the family's lawyer, was not "erratic" or "isolated." He was raised with a twin sister and older brother. His father, a therapist who specialized in addiction therapy, was divorced from his mother, a nurse. He moved to his grandparents' home in Allen six weeks before the shooting and was attending a local college.

Crusius in his social media posts stated that he did not have interest in anything beyond what was required to “get by” and that working “sucks.” He noted that a career in software development would appear to suit him because he believed the 8 hours a day he spent on the computer constituted the required “technological experience.”

Crusius’s family issued a statement that his actions were “apparently influenced” by individuals whom they did not know and by ideas that the family does not “accept or condone, in any way.” The statement went on to stress that the family remained concerned with “each and every victim of this senseless tragedy.”

Neighbors and classmates viewed Crusius as “strange” and “off” and withdrawn and awkward. He had expressed extreme conservative views and indicated an intense interest in gun rights, white supremacy, and police use of deadly force. Crusius spent a great deal of time on his computer, and his manifesto appeared on 8chan, a popular site for extremist right-wing views.

There nonetheless is little that is remarkable about Crusius that would lead to a prediction that he would violently act on his reactionary political views. In October 2019, Crusius pled not guilty to capital murder charges and may be charged with a hate crime. Roughly a month later, a gunman who was mentally disturbed killed seven and injured two dozen others in a mass shooting in Midland-Odessa, Texas.

Seventeen states have so-called red flag laws or extreme risk protection orders that authorize law enforcement authorities or relatives to request that a judge temporarily remove firearms from individuals determined to be a threat to themselves or to others. Most of these laws were passed following the February 2018 killings at Marjory Stoneman Douglas High School in Parkland, Florida, in which a 19-year-old former student used a semiautomatic assault rifle to kill 17 students and school personnel and to wound 17 other individuals. In 2019–2020, the U.S. Senate failed to consider a federal red flag law passed by the House of Representatives. Although FBI studies indicate that most active shooters exhibit behavior that indicates that they pose a threat, other studies question whether this type of lethal conduct can be predicted and assert that less than 5% of shooters are mentally disturbed. Proposals to adopt a law that would specifically punish domestic terrorism have been rejected because these acts can be punished under existing criminal statutes.

The El Paso killings were the most lethal attack on Latinx individuals in modern American history. A database compiled by the Associated Press, *USA Today*, and Northeastern University recorded 41 incidents of mass killings in the United States in 2019 that resulted in 211 deaths. Mass killings are defined as four or more people being killed in the same incident, excluding the perpetrator. In prior incidents of mass killings, gun attacks specifically targeted African Americans, Asians, immigrants, LGBT groups, Sikhs, Jews, Christians, members of the military, and students.

CHAPTER SUMMARY

The killing of another human being violates the fundamental right to life and is considered the most serious criminal offense. The common law gradually distinguished between murder (killings committed with malice aforethought) and the less serious crime of manslaughter (killings committed without malice aforethought).

We generally measure the beginning of human life from viability, the point at which a fetus is able to live independently from the mother. Death is measured by the brain death test, or the failure of the brain function.

Malice is an intent to kill with ill will or hatred. Aforethought means a design to kill. Malice aforethought is expressed when there is a deliberate intent to kill or implied where an individual possesses an intent to cause great bodily harm or an intent to commit an act that may lead to death or great bodily harm. Judges gradually expanded the concept of malice aforethought to include various forms of criminal intent.

There is no single approach to defining the law of murder or manslaughter in state statutes. The division of homicide into degrees is intended to divide killings by the “moral blameworthiness of the individual.” This division is typically based on factors such as the perpetrator’s intent, the nature of the killing, and the surrounding circumstances of the killing.

First-degree murder is the deliberate and premeditated killing of another with malice aforethought. An individual who is capable of devising a plan to take the life of another is considered a serious threat to society. Premeditation may be formed instantaneously and does not require a lengthy period of reflection. Twenty-seven states, the federal government, and the U.S. military recognize the death penalty. Killings viewed as deserving of capital punishment are categorized as capital first-degree murder or aggravated first-degree murder. Conviction results in the death penalty or life imprisonment. In non-death penalty states, aggravated murder carries life imprisonment. Twenty-three states and Washington, D.C., reject capital punishment. A homicide qualifies as aggravated or capital murder when it is found to have been committed in a heinous or atrocious fashion.

Second-degree murder comprises intentional killings with malice aforethought that are not committed in a premeditated and deliberate fashion. Depraved heart murder includes killings resulting from a knowingly dangerous act committed with reckless and wanton disregard as to whether others are harmed. Felony murder entails the death of an individual during the commission of or attempt to commit a felony. This tends to be limited to dangerous felonies, and in various states, felony murders are categorized as first-degree murder rather than second-degree murder.

Some state statutes explicitly provide for the criminal liability of corporations for unlawful killings. Absent an explicit provision for corporate liability, the term *person* in criminal statutes generally is interpreted to include corporations, which are legally considered to be “non-natural persons.” A corporation is held liable for homicide where the offense is authorized, requested, commanded, or performed by the board of directors or by high managerial agents acting within the scope of their employment. Corporate officers and employees may also be held individually liable.

Manslaughter comprises voluntary and involuntary manslaughter. Voluntary manslaughter is the killing of another in a sudden and intense heat of passion in response to an adequate

provocation. Adequate provocation is defined as conduct that is sufficient to excite an intense passion that would cause a reasonable person to lose control. Only a limited number of acts are considered to constitute adequate provocation, but some judges have vested the discretion to determine provocation in jurors. The heat of passion is considered to have “cooled” after a reasonable period of time.

Involuntary manslaughter includes negligent manslaughter and misdemeanor manslaughter, also termed unlawful-act manslaughter. Negligent manslaughter involves the creation of a risk of the serious injury or death of another. Courts, in practice, do not clearly distinguish between a negligence and recklessness standard. Misdemeanor manslaughter involves a killing committed during the commission of a misdemeanor. Some states expand misdemeanor manslaughter to include nonviolent felonies and, for this reason, term this offense unlawful-act manslaughter.

CHAPTER REVIEW QUESTIONS

1. Discuss the historical origins and development of criminal homicide into murder and manslaughter. Can you distinguish between murder and manslaughter?
2. Differentiate first-degree murder from first-degree capital or aggravated homicide.
3. What is the difference between first- and second-degree murder?
4. Define depraved heart murder.
5. Why does the law provide for the offense of felony murder? What are the arguments for and against the felony-murder rule?
6. Discuss the legal standards for holding a corporation liable for first-degree murder and for involuntary manslaughter. Is there a social benefit in holding corporations liable for homicide?
7. Define voluntary manslaughter.
8. What acts constitute adequate provocation? What must the defendant prove to establish heat of passion? At what point does a defendant’s blood “cool”?
9. Should the law recognize the defense of voluntary manslaughter? Why not?
10. Discuss the difference between negligent homicide and misdemeanor manslaughter. Why is misdemeanor manslaughter termed unlawful-act manslaughter in some states?
11. Discuss the purpose of the various grades of murder and dividing homicide into murder and manslaughter. Why do we make all these technical distinctions between types of homicide?

LEGAL TERMINOLOGY

adequate provocation	implied malice
agency theory of felony murder	<i>in utero</i>
aggravated murder	involuntary manslaughter
aggravating factors	justifiable homicide
benefit of clergy	malice aforethought
brain death test	manslaughter
capital murder	misdemeanor manslaughter
cooling of blood	mitigating circumstances
corporate murder	murder
criminal homicide	negligent manslaughter
depraved heart murder	<i>nolo contendere</i>
excusable homicide	premeditation and deliberation
express malice	proximate cause theory of felony murder
extreme emotional disturbance (EED)	reasonable person
felony murder	recklessness
first-degree murder	second-degree murder
grading	vehicular manslaughter
heat of passion	voluntary manslaughter

TEST YOUR KNOWLEDGE ANSWERS

1. False.
2. False.
3. True.
4. False.
5. False.
6. False.
7. False.
8. True.
9. False.

11

CRIMINAL SEXUAL CONDUCT, ASSAULT AND BATTERY, KIDNAPPING, AND FALSE IMPRISONMENT

TEST YOUR KNOWLEDGE: TRUE/FALSE

1. Common law rape historically involved procedural rules that made it one of the easiest crimes for which to convict a defendant.
2. A man may be held criminally liable in several states for raping his wife.
3. A male would be guilty of rape in virtually every state in those instances in which a female fails to affirmatively and freely consent to sexual intercourse.
4. An individual who offers a job to another individual in return for sexual intercourse would be guilty of rape in virtually every state if the individual never intended to offer the job to the “victim.”
5. In every state it is a defense to rape that an individual reasonably and mistakenly believed that the “victim” consented to sex.
6. It is a defense to statutory rape in most states that the underage “victim” was sexually experienced.
7. It is not recognized as a rape in any state when an individual consents to sexual intercourse and then withdraws consent and the aggressor continues to engage in sex.
8. Individuals who are charged with rape under rape shield laws are legally required to take the stand at trial and to testify in their own defense.
9. There is no difference between an assault and a battery.
10. An individual can be convicted of stalking who makes no effort to inflict physical injury on the person who is being stalked.

11. The slight and nonconsensual movement of an individual under certain circumstances may constitute kidnapping.
12. False imprisonment may occur in public or in private and may be for a brief or for a lengthy period.

Check your answers at the end of the chapter on page 623.

Was the Defendant Guilty of Rape?

[The victim] agreed that Appellee's hands were not restraining her in any manner during the actual penetration, and that the weight of his body on top of her was the only force applied. She testified that at no time did Appellee verbally threaten her. The complainant did testify that she sought to leave the room, and said "no" throughout the encounter. As to the complainant's desire to leave the room, the record clearly demonstrates that the door could be unlocked easily from the inside, that she was aware of this fact, but that she never attempted to go to the door or unlock it. (*Commonwealth v. Berkowitz*, 641 A.2d 1161 [Pa. 1994])

INTRODUCTION

This chapter discusses three categories of crimes against the person. The first is freedom from sexual violations (rape and sexual assault), and the second is protection against the threat and infliction of bodily harm (assault and battery). A third category is freedom of movement (kidnapping and false imprisonment).

Next to homicide, sexual offenses are considered the most serious offenses against the person and are punished as felonies, even when the victim is not physically injured. This harsh punishment reflects the fact that nonconsensual acts of sexual intimacy can cause severe physical injury as well as psychological trauma. Assaults and batteries and false imprisonment are typically misdemeanors (other than when committed in an aggravated fashion) that risk or result in physical injury. Kidnapping is considered a serious offense that places people in danger and was subject to the death penalty under the common law.

There clearly is no more fundamental or important interest than protecting the life and bodily integrity of the individual. This is the basic and essential expectation of all members of a community. Imagine a society in which each of us was constantly fearful of an attack on our bodily integrity. Are there geographic areas of American society and the world that come close to this type of "lawlessness"?

THE COMMON LAW OF RAPE

The common law treated rape as a capital crime punishable by death.¹ In the United States, only homicide has been historically considered more serious than rape. In 1925, 19 states and the District of Columbia, as well as the federal government, punished rape with capital punishment. This was particularly controversial because the penalty of death for rape was almost exclusively employed against Black Americans, particularly when accused of raping white women. By 1977, only Georgia provided capital punishment for rape. In that same year, the U.S. Supreme Court declared the death penalty for rape unconstitutional on the grounds that it was disproportionate to the harm caused by the rape.² Today, most states divide rape into degrees of seriousness that reflect the circumstances of the offense. Aggravated rape may result in incarceration for a significant period of time and, in some jurisdictions, for life.

The law of rape was rooted in the notion that a man's daughters and wife were his property, and that rape involved a trespass on a male's property rights. In fact, for a brief period of time the common law categorized rape as a trespass subject to imprisonment and fine. William Blackstone recounts that under ancient Hebraic law, the rape of an unmarried woman was punishable by a fine of 50 shekels paid to the woman's father and by forced marriage without the privilege of divorce. The commentary to the Model Penal Code observes that the notion of "the wife as chattel" is illustrated by the fact that as late as 1984, 40 states recognized a "[marital exemption](#)" that provided that a husband could not be held liable for the rape of his wife.³ Seventeenth-century English jurist Sir Matthew Hale explained that this exemption was based on the fact that a wife by "matrimonial consent and contract" had forfeited the privilege of refusing sexual favors to her husband.⁴

The law of rape is no longer an expression of property rights and today is designed to punish individuals who violate a victim's bodily integrity, psychological health and welfare, and sexual independence. The stigma and trauma that result from rape contribute to the reluctance of rape victims to report the crime to law enforcement authorities. Another factor contributing to the hesitancy of victims to report a rape is a lack of confidence that the criminal justice system will seriously pursue the prosecution and conviction of offenders.⁵

The criminal justice system is fairly effective in prosecuting what Professor Susan Estrich calls "real rape," or cases in which the victim is attacked by an unknown male. In such instances, the prosecution has little difficulty in demonstrating that the victim was forcibly subjected to sexual molestation. A greater challenge is presented in the area of so-called [acquaintance rape](#) or date rape. In these cases, although no less serious, the perpetrator typically admits that sexual intercourse occurred and claims that it was consensual, while the victim characterizes the interaction as rape.⁶ The reluctance to report rape may be most prevalent in the largely undocumented area of same-sex rape, which is a particularly serious problem in correctional institutions.⁷

Rape has profound, powerful, and long-lasting destructive physical and emotional consequences that often can be overcome only by years of therapy and treatment. The symptoms of [rape trauma syndrome](#) include the following:

- *Remembering the Event.* Victims have nightmares and replay the event in their minds.
- *Strong Emotions.* Victims may feel anger, guilt, and depression and may be drawn to suicide.
- *Psychological Impact.* Victims can lose self-confidence and develop an apprehension that they will be attacked once again. They often fear trusting others and withdraw from friends and relationships.
- *Physical Symptoms.* In addition to physical injury, victims suffer headaches and stress leading to physical illness. There also is the threat of HIV/AIDS.
- *Self-Medication.* Victims may attempt to find comfort in drug or alcohol abuse.

In reading about rape, keep in mind that jurors and judges are likely to bring a host of prejudices and preconceptions regarding the proper behavior of men and women to their consideration of the facts. What types of issues do you anticipate may arise in rape prosecutions?⁸

The Elements of the Common Law of Rape

The common law defined rape as the forcible carnal knowledge of a woman against her will. Carnal knowledge for purposes of rape is defined as vaginal intercourse by a man with a woman who is not his wife. The vaginal intercourse is required to be carried out by force or threat of severe bodily harm ("by force or fear") without the victim's consent.⁹

The common law of rape reflects a distrust of women, and various requirements were imposed to ensure that the **prosecutrix** (victim) was not engaged in blackmail or in an attempt to conceal a consensual affair or was not suffering from a psychological illness. The fear of an unjust conviction was reflected in Sir Hale's comment that rape "is an accusation easy to be made, hard to be proved, but harder to be defended by the party accused though innocent." Sir Hale stressed that there was a danger that a judge and jury would be emotionally carried away by the seriousness of the charge and convict a defendant based on false testimony.¹⁰

The prosecution in a rape prosecution under the common law, as noted, was required to overcome a number of hurdles under the common law in order to convict the defendant¹¹:

- *Immediate Complaint.* The absence of a **prompt complaint** by the victim to authorities was evidence that the complaint was not genuine.
- *Corroboration Rule.* The victim's allegation of rape required **corroboration**, evidence such as physical injury or witnesses.
- *Sexual Activity.* The victim's past sexual conduct or reputation for chastity was admissible as evidence of consent or on cross-examination to attack her credibility.
- *Judicial Instruction.* The judge was required to issue a cautionary instruction to the jury that the victim's testimony should be subject to strict scrutiny because rape is a crime easily charged and difficult to prove.
- *Marital Exemption.* A husband could not be held guilty of raping his wife.

The crucial evidence in a prosecution for rape under the common law was a demonstration that the female “victim” did not consent to the sexual intercourse. Blackstone writes that a “necessary ingredient” in the crime of rape is that it is against the woman’s will. He notes that it is a felony to forcibly ravish “even a concubine or harlot because the woman may have forsaken that unlawful course of life.”¹²

The victim’s lack of consent was demonstrated through outward resistance. In reference to sexual advances, a victim was required to **resist to the utmost** in order to establish a lack of consent. This expectation of combat against an attacker was viewed as reflecting “the natural instinct of every proud female to resist.”¹³ In *Brown v. State*, a 16-year-old woman recovering from the measles was attacked on a path near her family farm. The young woman was a virgin and testified that she tried as “hard as I could to get away” and “screamed as hard as I could . . . until I was almost strangled.” The Wisconsin Supreme Court ruled that the prosecutrix failed to demonstrate that “she did her utmost” to resist. This not only requires “escape or withdrawal,” but involves resistance “by means of hands and limbs and pelvic muscles.” The alleged victim also failed to corroborate her complaint by “bruises, scratches and ripped clothing.”¹⁴ Courts did rule that resistance to the “utmost” was not required when the woman reasonably believed that she confronted a threat of “great and immediate bodily harm that would impair a reasonable person’s will to resist.”¹⁵

In the mid-20th century, judges began to relax this harsh resistance requirement. A few courts continued to require a fairly heavy burden of **earnest resistance**. Most, however, adopted the position that a victim was required to engage in **reasonable resistance** under the circumstances. Some judges argued that a more sensible approach would be to require that a female victim engage in the degree of resistance that is necessary to communicate her lack of consent to a reasonable person. This might be satisfied by a verbal protest. After all, it was pointed out that “no means no.” Critics of those demanding a resistance standard also pointed out that the victims of robbery or burglary are not required to demonstrate resistance. What is the thinking behind the resistance requirement? Which is the best test? How will perpetrators react to “earnest” or “reasonable” resistance?¹⁶

Resistance is not required under the common law standard when a victim is incapable of understanding the nature of intercourse as a result of intoxication, sleep, or a lack of consciousness.¹⁷ Another exception is so-called **fraud in the factum** or “fraud in the nature of the act.” In *People v. Minkowski*, a woman consented to treatment for menstrual cramps by a doctor who proceeded to insert a metal instrument. During the procedure he withdrew the metal object and without the consent of the patient inserted his sexual organ. The California court ruled that this was rape because the victim consented to a medical procedure and did not consent to intercourse.¹⁸ This is distinguished from **fraud in inducement** or consent to intercourse that results from a misrepresentation as to the purpose or benefits of the sexual act. In one well-known case, a female consented to intercourse with a donor after being tricked into believing that the donor had been injected with a serum that would cure her alleged disease. The California appellate court ruled that this was not rape because the victim consented to the “thing done” and the fraud related to the underlying purpose rather than to the fact of the sexual interaction.¹⁹ Another form of fraud that traditionally has not been held to constitute rape is **fraudulent representation of identity**. In *People v. Morales*, Morales entered a darkened bedroom and engaged

in sexual intercourse with the victim although he was aware that she believed that he was her boyfriend. Morales's conviction was reversed on the grounds that "a person who accomplishes sexual intercourse by impersonating someone other than a married victim's spouse is not guilty of the crime of rape."²⁰ The California legislature passed laws providing that fraud in the inducement along with fraudulent representation of identity constitutes rape.²¹

Rape Reform

During the 1970s and 1980s, a number of states abolished the special procedures surrounding the common law of rape. This included the corroboration and prompt reporting provisions and the judge's cautionary instructions to the jury. Another important development that we will discuss later in the chapter is the adoption of **rape shield laws** prohibiting the introduction of evidence concerning a victim's past sexual activity.

The commentary to the Model Penal Code justifies these reforms on the grounds that rape trials had become focused on the sexual background and resistance of victims rather than on the conduct of defendants. The extraordinary resistance standard placed women in a "no win" situation. Resistance might lead to violent retaliation; a failure to resist might result in the defendant's acquittal.²²

A number of states adopted new sexual assault statutes that fundamentally changed the law of rape. The statutes treated rape as an assault against the person rather than as an offense against sexual morality. These statutes refer to "criminal sexual conduct" or "sexual assault" rather than rape. The modified statutes widely differ from one another and typically incorporate one or more of the following provisions²³

- *Gender Neutral.* A male or a female may be the perpetrator or the victim of rape.
- *Degrees of Rape.* Several degrees of rape are defined that are distinguished from one another based on the seriousness of the offense. These statutes provide that involuntary sexual penetration is more serious than involuntary contact and that the use of force results in a more serious offense than an involuntary contact or penetration that is accomplished without the use of force.
- *Sexual Intercourse.* "Sexual intercourse" is expanded to include a range of forced sexual activity or forced intrusions into a person's body, including oral and anal intercourse and the insertion of an object into the genital or anal opening of another. Some statutes also prohibit "sexual contact" or the intentional and nonconsensual touching of an intimate portion of another individual's body for purposes of sexual gratification.
- *Consent.* Some statutes provide that consent requires free, affirmative, and voluntary cooperation or that resistance may be established by either words or actions. Other statutes provide that physical resistance is not required. Several continue to maintain the traditional standard that rape requires force along with an absence of consent.
- *Coercion.* There is explicit recognition that coercion may be achieved through fraud or psychological pressure as well as through physical force.

- *Marital Exemption.* A husband or wife may be charged with the rape of a spouse. More than half of the states continue to recognize the marital exemption where there is no force or threat of force, and some require a prompt reporting requirement. Others only recognize the marital exemption where the spouses are not legally separated or living separate and apart.²⁴
- *Statute of Limitations.* California and nine other states have eliminated the statute of limitations for various forms of rape and serious sexual offenses, and other states have extended their statute of limitations for as long as 20 years.

The important point to keep in mind is that these statutes have removed the barriers that have made rape convictions so difficult to obtain. States such as Michigan have adopted far-reaching reforms, whereas states such as Georgia have introduced only modest changes.

The Impact of Rape Reform

Have these statutes fundamentally changed the prosecution of rape? Despite rape reform, prosecutions for “acquaintance rape” inevitably seem to return to considerations of force, resistance, and consent.²⁵ In the trial of basketball star Kobe Bryant, the public dialogue centered on why the alleged victim accompanied Kobe Bryant to his hotel room and whether there were any indications of resistance. This discussion was complicated by the accusation that the alleged victim had engaged in sexual contact with other men immediately following her encounter with Kobe Bryant.

We should mention one additional modern innovation in the law of rape. Some courts permit victims to present expert witnesses on the issue of rape trauma syndrome. This expert evidence is intended to support the victim’s contention of rape by pointing out that the victim’s psychological and medical condition is characteristic of rape victims. In other instances, experts are employed to educate the jurors that rape victims often have a delayed reaction and that the jurors should not conclude that an individual was not raped because the complainant did not immediately bring charges of rape or was seemingly calm and collected following the alleged attack.²⁶

Punishment and Sexual Assault

Sexual assault typically is divided into **aggravated rape** (or first-degree rape) and simple (or second-degree) rape. Aggravated rape in Vermont is punishable by not less than 10 years in prison but a maximum of life imprisonment, by a fine of not more than \$50,000, or both. This requires the infliction or threat of serious bodily injury or death, the use of or threat to use a deadly weapon, repeated rape, rape accompanied by kidnapping, the perpetration of rape by more than one individual, or a victim younger than the age of 13 and a perpetrator who is at least 18 years of age. The **aggravated sexual assault** of a child is punishable by not less than 25 years in prison with a maximum term of life, and an offender also may be fined not more than \$50,000. In contrast, **sexual assault** in Vermont is punishable by a minimum of 3 years and a maximum of life in prison, in addition to a fine of not more than \$25,000. Sexual assault involves the compulsion

of another to participate in a sexual act without consent, or through threat or coercion, or by placing the other person in fear of imminent bodily injury, or by the administration of drugs or intoxicants, as well as the sexual molestation of a juvenile younger than 16 by a parent or grandparent or guardian or by an individual who serves in the parental role with respect to the victim. A sexual act with a victim who is under 16 is punishable by imprisonment for not more than 20 years and by a fine of not more than \$10,000 other than when the perpetrator is under 19 years old and the child is at least 15 years old and the sexual act is consensual or where the two individuals are married. The statute of limitations for bringing a charge of sexual assault is 6 years, although there is no statute of limitations for aggravated sexual assault.²⁷

In Indiana, an individual commits the crime of rape by engaging in the sexual penetration of a person by force or threat of force, when the victim is unaware that sexual intercourse is occurring, or when the victim is unable to consent because of mental disability. Rape is punishable by 6 to 20 years in prison and by a fine of up to \$10,000. Aggravated rape involves sexual intercourse when the perpetrator uses or threatens to use deadly force, severely injures an individual other than the victim, is armed with a deadly weapon, gives the victim drugs, or is aware that the victim has been given drugs without the victim's knowledge. Aggravated rape is punishable by 20 to 50 years in prison and by a fine of up to \$10,000. Indiana extends the 5-year statute of limitations an additional 5 years if DNA evidence is discovered or in the event that the perpetrator later confesses or new evidence implicating the perpetrator is discovered.²⁸

The issue of sentencing for individuals convicted of rape became an issue of national debate following the conviction in 2015 of Stanford swimmer Brock Turner. Turner was convicted of three counts of felony sexual assault for the assault of a 22-year-old intoxicated and unconscious woman. Santa Clara County Superior Court judge Aaron Persky followed the recommendation of the probation department and sentenced Turner to 6 months in jail and 3 years of probation. Judge Persky agreed that Turner's inebriated condition and remorse were mitigating factors. Turner as a result of his conviction was obligated to register as a sex offender and to enter a rehabilitation program for sex offenders. He subsequently served half of the sentence before being released from prison. In June 2018, Santa Clara County citizens, angered by what they viewed as Turner's "unreasonably lenient" sentence, voted to remove Persky from office. The California state legislature responded by changing the law of rape to require a mandatory minimum term of 3 years in prison for the rape of an unconscious or intoxicated individual to broaden the forms of nonsensual sexual penetration that are considered rape.

THE ACTUS REUS OF MODERN RAPE

The *actus reus* of rape requires the sexual penetration of the body of a rape victim by force. There are three approaches to defining the *actus reus*. Most states adhere to the common law and punish genital copulation. A second group of states that has followed the Model Penal Code expands this to include anal and oral copulation. A third group of states, in general, use the term *criminal sexual conduct* or *sexual assault* and include digital penetration and penetration with an instrument as well as genital, anal, and oral sex. The Model Penal Code and states such as Utah punish this last form of penetration as a less serious form of sexual assault.²⁹

The Federal Bureau of Investigation defines rape as the “penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sexual organ of another person, without consent of the victim.”³⁰

Most states prohibit nonforcible forms of nonconsensual sexual intercourse. An example is sexual intercourse with an unconscious or inebriated victim or intercourse resulting from fraud in the factum.³¹

Virtually all jurisdictions have adopted gender-neutral statutes that provide that women as well as men may be the perpetrators or victims of rape. A woman, for instance, may be an accomplice to the rape of a male by restraining a male victim while he is being subjected to homosexual rape. As for sexual penetration, California’s statute reflects the majority rule by providing that “sexual penetration, however slight, is sufficient to complete the crime.” An emission is not required.³² An Arizona appellate court noted that it was following the majority rule in affirming the rape conviction of an impotent defendant who was unable to attain an erection and only achieved a penetration of roughly one inch.³³

The essence of the *actus reus* of the common law crime of rape remains the employment of force to cause another individual to submit to sexual penetration without consent. How much force is required? Professor Wayne LaFave observes that courts have followed two distinct approaches. The first is the **extrinsic force** approach that requires an act of force beyond the physical effort required to accomplish penetration. This ensures that the penetration is without the victim’s consent. The **intrinsic force** standard requires only the amount of force required to achieve penetration. The intrinsic force standard is based on the insight that there may be a lack of consent despite the fact that the perpetrator employed little or no force to achieve penetration.

The next cases represent these two approaches to force. *Commonwealth v. Berkowitz* represents the extrinsic force standard. You should contrast this with *In the Interest of M.T.S.*, which illustrates the intrinsic force standard.

WAS BERKOWITZ GUILTY OF RAPE?

COMMONWEALTH V. BERKOWITZ, 609 A.2d 1338 (PA. SUPER. CT. 1992)

Per curiam.

Facts

[Robert Berkowitz was convicted in the Court of Common Pleas, Monroe County, of rape and indecent assault, and he appealed. The Superior Court, Philadelphia, reversed the rape conviction. The Commonwealth appealed to the Pennsylvania Supreme Court.]

In the spring of 1988, appellant and the victim were both college sophomores at East Stroudsburg State University, ages twenty and nineteen years old, respectively. They had mutual friends and acquaintances. On April 19 of that year, the victim went to appellant’s

dormitory room. What transpired in that dorm room between appellant and the victim thereafter is the subject of the instant appeal.

During a one day jury trial held on September 14, 1988, the victim gave the following account during direct examination by the Commonwealth. At roughly 2:00 on the afternoon of April 19, 1988, after attending two morning classes, the victim returned to her dormitory room. There, she drank a martini to "loosen up a little bit" before going to meet her boyfriend, with whom she had argued the night before. Roughly ten minutes later she walked to her boyfriend's dormitory lounge to meet him. He had not yet arrived.

Having nothing else to do while she waited for her boyfriend, the victim walked up to appellant's room to look for Earl Hassel, appellant's roommate. She knocked on the door several times but received no answer. She therefore wrote a note to Mr. Hassel, which read, "Hi Earl, I'm drunk. That's not why I came to see you. I haven't seen you in a while. I'll talk to you later, [victim's name]." She did so, although she had not felt any intoxicating effects from the martini, "for a laugh."

After the victim had knocked again, she tried the knob on the appellant's door. Finding it open, she walked in. She saw someone lying on the bed with a pillow over his head, whom she thought to be Earl Hassel. After lifting the pillow from his head, she realized it was appellant. She asked appellant which dresser was his roommate's. He told her, and the victim left the note.

Before the victim could leave appellant's room, however, appellant asked her to stay and "hang out for a while." She complied because she "had time to kill" and because she didn't really know appellant and wanted to give him "a fair chance." Appellant asked her to give him a back rub but she declined, explaining that she did not "trust" him. Appellant then asked her to have a seat on his bed. Instead, she found a seat on the floor, and conversed for a while about a mutual friend. No physical contact between the two had, to this point, taken place. [The victim testified on cross-examination that she explained that she was having problems with her boyfriend.]

Thereafter, however, appellant moved off the bed and down on the floor, and "kind of pushed [the victim] back with his body. It wasn't a shove, it was just kind of a leaning-type of thing." Next appellant "straddled" and started kissing the victim. The victim responded by saying, "Look, I gotta go. I'm going to meet [my boyfriend]." Then appellant lifted up her shirt and bra and began fondling her. The victim then said "no."

After roughly thirty seconds of kissing and fondling, appellant "undid his pants and he kind of moved his body up a little bit." The victim was still saying "no" but "really couldn't move because [appellant] was shifting at [her] body so he was over [her]." . . . Appellant then tried to put his penis in her mouth. The victim did not physically resist, but rather continued to verbally protest, saying "No, I gotta go, let me go," in a "scolding" manner.

Ten or fifteen more seconds passed before the two rose to their feet. Appellant disregarded the victim's continual complaints that she "had to go," and instead walked two feet away to the door and locked it so that no one from the outside could enter. The victim testified that she realized at the time that the lock was not of a type that could lock people inside the room.

Then, in the victim's words, "[appellant] put me down on the bed. It was kind of like—he didn't throw me on the bed. It's hard to explain. It was kind of like a push but no. . ." She did not bounce off the bed. "It wasn't slow like a romantic kind of thing, but it wasn't a fast shove either. It was kind of in the middle."

Once the victim was on the bed, appellant began "straddling" her again while he undid the knot in her sweatpants. . . . He then removed her sweatpants and underwear from one of her legs. The victim did not physically resist in any way while on the bed because appellant

was on top of her, and she "couldn't like go anywhere." She did not scream out at anytime because, "[I]t was like a dream was happening or something."

Appellant then used one of his hands to "guide" his penis into her vagina. At that point, after appellant was inside her, the victim began saying "no, no to him softly in a moaning kind of way . . . because it was just so scary." After about thirty seconds, appellant pulled out his penis and ejaculated onto the victim's stomach.

Immediately thereafter, appellant got off the victim and said, "Wow, I guess we just got carried away." To this the victim retorted, "No, we didn't get carried away, you got carried away." The victim then quickly dressed, grabbed her school books and raced downstairs to her boyfriend who was by then waiting for her in the lounge. . . .

Defense counsel's cross-examination elicited more details regarding the contact between appellant and the victim before the incident in question. The victim testified that roughly two weeks prior to the incident, she had attended a school seminar entitled, "Does 'no' sometimes mean 'yes'?" Among other things, the lecturer at this seminar had discussed the average length and circumference of human penises. After the seminar, the victim and several of her friends had discussed the subject matter of the seminar over a speaker-telephone with appellant and his roommate Earl Hassel. The victim testified that during that telephone conversation, she had asked appellant the size of his penis. According to the victim, appellant responded by suggesting that the victim "come over and find out." She declined. . . .

Appellant took the stand in his own defense and offered an account of the incident and the events leading up to it that differed only as to the consent involved. According to appellant, the victim had begun communication with him after the school seminar by asking him of the size of his penis and of whether he would show it to her. Appellant had suspected that the victim wanted to pursue a sexual relationship with him because she had stopped by his room twice after the phone call while intoxicated, lying down on his bed with her legs spread and again asking to see his penis. He believed that his suspicions were confirmed when she initiated the April 19, 1988, encounter by stopping by his room (again after drinking) and waking him up.

Appellant testified that, on the day in question, he did initiate the first physical contact, but added that the victim warmly responded to his advances by passionately returning his kisses. He conceded that she was continually "whispering . . . no's," but claimed that she did so while "amorously . . . passionately" moaning. In effect, he took such protests to be thinly veiled acts of encouragement. When asked why he locked the door, he explained that "that's not something you want somebody to just walk in on you [doing]."

According to appellant, the two then lay down on the bed, the victim helped him take her clothing off, and he entered her. He agreed that the victim continued to say "no" while on the bed, but carefully qualified his agreement, explaining that the statements were "moaned passionately." According to appellant, when he saw a "blank look on her face," he immediately withdrew and asked "[I]s anything wrong, is something the matter, is anything wrong[?]" He ejaculated on her stomach thereafter because he could no longer "control" himself. Appellant testified that after this, the victim "saw that it was over and then she made her move. She gets right off the bed . . . she just swings her legs over and then she puts her clothes back on." Then, in wholly corroborating an aspect of the victim's account, he testified that he remarked, "Well, I guess we got carried away," to which she rebuked, "No, we didn't get carried [away], you got carried away."

After hearing both accounts, the jury convicted appellant of rape and indecent assault. . . . Appellant was then sentenced to serve a term of imprisonment of one to four years for rape and a concurrent term of six to twelve months for indecent assault.

WAS BERKOWITZ PROPERLY CONVICTED OF RAPE?

COMMONWEALTH V. BERKOWITZ, 641 A.2D 1161 (PA. 1994)

Opinion by Cappy, J.

The Commonwealth appeals from an order of the Superior Court which overturned the conviction by a jury of Appellee, Robert A. Berkowitz, of one count of rape and one count of indecent assault. The judgment of the Superior Court discharged Appellee as to the charge of rape. . . . For the reasons that follow, we affirm the Superior Court's reversal of the conviction for rape. . . .

Issue

The crime of rape is defined as follows:

[18 Pennsylvania Consolidated Statutes Annotated] § 3121. Rape[.] A person commits a felony of the first degree when he engages in sexual intercourse with another person not one's spouse: (1) by forcible compulsion; (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; (3) who is unconscious; or (4) who is so mentally deranged or deficient that such person is incapable of consent.

18 Pa.C.S.A. § 3121. The victim of a rape need not resist. 18 Pa.C.S.A. § 3107. "The force necessary to support a conviction of rape . . . need only be such as to establish lack of consent and to induce the [victim] to submit without additional resistance. . . . The degree of force required to constitute rape is relative and depends on the facts and particular circumstance of the case." . . .

[Was Berkowitz guilty of sexual intercourse with the victim by "forcible compulsion"?]

Reasoning

In regard to the critical issue of forcible compulsion, the complainant's testimony is devoid of any statement that clearly or adequately describes the use of force or the threat of force against her. In response to defense counsel's question, "Is it possible that [when Appellee lifted your bra and shirt] you took no physical action to discourage him," the complainant replied, "It's possible." When asked, "Is it possible that [Appellee] was not making any physical contact with you . . . aside from attempting to untie the knot [in the drawstrings of complainant's sweatpants]," she answered, "It's possible." She testified, "He put me down on the bed. It was kind of like—He didn't throw me on the bed. It's hard to explain. It was kind of like a push but not—I can't explain what I'm trying to say." She concluded that "it wasn't much" in reference to whether she bounced on the bed, and further detailed that their movement to the bed "wasn't slow like a romantic kind of thing, but it wasn't a fast shove either. It was kind of in the middle." She agreed that Appellee's hands were not restraining her in any manner during the actual penetration, and that the weight of his body on top of her was the only force applied. She testified that at no time did Appellee verbally threaten her. The complainant did testify that she sought to leave the room, and said "no" throughout the encounter. As to the complainant's desire to leave the room, the record clearly demonstrates that the door could

be unlocked easily from the inside, [and] that she was aware of this fact, but that she never attempted to go to the door or unlock it.

As to the complainant's testimony that she stated "no" throughout the encounter with Appellee, we point out that, while such an allegation of fact would be relevant to the issue of consent, it is not relevant to the issue of force. . . . [W]here there is a lack of consent, but no showing of either physical force, a threat of physical force, or psychological coercion, the "forcible compulsion" requirement . . . is not met. . . .

[If the legislature had intended to define rape, a felony of the first degree, as non-consensual intercourse, it could have done so. It did not do this. It defined rape as sexual intercourse by "forcible compulsion." . . . If the legislature means what it said, then where, as here, no evidence was adduced by the Commonwealth that established either that mental coercion, or a threat, or force inherently inconsistent with consensual intercourse was used to complete the act of intercourse, the evidence is insufficient to support a rape conviction. Accordingly, we hold that the trial court erred in determining that the evidence adduced by the Commonwealth was sufficient to convict appellant of rape. (*Commonwealth v. Berkowitz*, 609 A.2d 1338 [Pa. Super. Ct. 1992])]

Holding

Reviewed in light of the above described standard, the complainant's testimony simply fails to establish that the Appellee forcibly compelled her to engage in sexual intercourse as required under 18 Pa.C.S.[A.] § 3121. Thus, even if all of the complainant's testimony was believed, the jury, as a matter of law, could not have found Appellee guilty of rape. . . .

[T]he crime of indecent assault does not include the element of "forcible compulsion" as does the crime of rape. The evidence described above is clearly sufficient to support the jury's conviction of indecent assault. "Indecent contact" is defined as "[a]ny touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person." 18 Pa.C.S.[A.] § 3101. Appellee himself testified to the "indecent contact." The victim testified that she repeatedly said "no" throughout the encounter. Viewing that testimony in the light most favorable to the Commonwealth as verdict winner, the jury reasonably could have inferred that the victim did not consent to the indecent contact. Thus, the evidence was sufficient to support the jury's verdict finding Appellee guilty of indecent assault.

Questions for Discussion

1. Why does the Pennsylvania Supreme Court rule that the evidence was insufficient to hold Berkowitz legally liable for rape? Can you explain why the court rules that Berkowitz was properly convicted of indecent assault?
2. What facts support the court's finding that Berkowitz did not use "forcible compulsion" in his sexual intercourse with the victim? Are there facts supporting the contention that Berkowitz did rely on "forcible compulsion"?
3. Why did the Pennsylvania Supreme Court opinion fail to highlight that in the past, the victim had made sexually provocative remarks to Berkowitz and had visited his dorm room? Is it significant that the victim's boyfriend reported the rape immediately after the victim informed him that she had sexual intercourse with Berkowitz?

WAS M.T.S. GUILTY OF RAPE?

IN THE INTEREST OF M.T.S., 609 A.2D 1266 (N.J. 1992)

Opinion by Handler, J.

Issue

Under New Jersey law a person who commits an act of sexual penetration using physical force or coercion is guilty of second-degree sexual assault. The sexual assault statute does not define the words "physical force." The question posed by this appeal is whether the element of "physical force" is met simply by an act of nonconsensual penetration involving no more force than necessary to accomplish that result. . . . The factual circumstances of this case expose the complexity and sensitivity of those issues and underscore the analytic difficulty of those seemingly straightforward legal questions.

Facts

On Monday, May 21, 1990, fifteen-year-old C.G. was living with her mother, her three siblings, and several other people, including M.T.S. and his girlfriend. A total of ten people resided in the three-bedroom town-home at the time of the incident. M.T.S., then age seventeen, was temporarily residing at the home with the permission of C.G.'s mother; he slept downstairs on a couch. C.G. had her own room on the second floor. At approximately 11:30 p.m. on May 21, C.G. went upstairs to sleep after having watched television with her mother, M.T.S., and his girlfriend. When C.G. went to bed, she was wearing underpants, a bra, shorts, and a shirt. At trial, C.G. and M.T.S. offered very different accounts concerning the nature of their relationship and the events that occurred after C.G. had gone upstairs. The trial court did not credit fully either teenager's testimony.

C.G. stated that earlier in the day, M.T.S. had told her three or four times that he "was going to make a surprise visit up in [her] bedroom." She said that she had not taken M.T.S. seriously and considered his comments a joke because he frequently teased her. She testified that M.T.S. had attempted to kiss her on numerous other occasions and at least once had attempted to put his hands inside of her pants, but that she had rejected all of his previous advances.

C.G. testified that on May 22, at approximately 1:30 a.m., she awoke to use the bathroom. As she was getting out of bed, she said, she saw M.T.S., fully clothed, standing in her doorway. According to C.G., M.T.S. then said that "he was going to tease [her] a little bit." C.G. testified that she "didn't think anything of it"; she walked past him, used the bathroom, and then returned to bed, falling into a "heavy" sleep within fifteen minutes. The next event C.G. claimed to recall of that morning was waking up with M.T.S. on top of her, her underpants and shorts removed. She said "his penis was into [her] vagina." As soon as C.G. realized what had happened, she said, she immediately slapped M.T.S. once in the face, then "told him to get off [her], and get out." She did not scream or cry out. She testified that M.T.S. complied in less than one minute after being struck; according to C.G., "he jumped right off of [her]." She said she did not know how long M.T.S. had been inside of her before she awoke.

C.G. said that after M.T.S. left the room, she "fell asleep crying" because "[she] couldn't believe that he did what he did to [her]." She explained that she did not immediately tell her mother or anyone else in the house of the events of that morning because she was "scared

and in shock." According to C.G., M.T.S. engaged in intercourse with her "without [her] wanting it or telling him to come up [to her bedroom]." By her own account, C.G. was not otherwise harmed by M.T.S.

At about 7:00 a.m., C.G. went downstairs and told her mother about her encounter with M.T.S. earlier in the morning and said that they would have to "get [him] out of the house." While M.T.S. was out on an errand, C.G.'s mother gathered his clothes and put them outside in his car; when he returned, he was told that "[he] better not even get near the house." C.G. and her mother then filed a complaint with the police.

According to M.T.S., he and C.G. had been good friends for a long time, and their relationship "kept leading on to more and more." He had been living at C.G.'s home for about five days before the incident occurred; he testified that during the three days preceding the incident they had been "kissing and necking" and had discussed having sexual intercourse. The first time M.T.S. kissed C.G., he said, she "didn't want him to, but she did after that." He said C.G. repeatedly had encouraged him to "make a surprise visit up in her room."

M.T.S. testified that at exactly 1:15 a.m. on May 22, he entered C.G.'s bedroom as she was walking to the bathroom. He said C.G. soon returned from the bathroom, and the two began "kissing and all," eventually moving to the bed. Once they were in bed, he said, they undressed each other and continued to kiss and touch for about five minutes. M.T.S. and C.G. proceeded to engage in sexual intercourse. According to M.T.S., who was on top of C.G., he "stuck it in" and "did it [thrust] three times, and then the fourth time [he] stuck it in, that's when [she] pulled [him] off of her." M.T.S. said that as C.G. pushed him off, she said "stop, get off," and he "hopped off right away."

According to M.T.S., after about one minute, he asked C.G. what was wrong; she replied with a back-hand to his face. He recalled asking C.G. what was wrong a second time, and her replying, "[H]ow can you take advantage of me or something like that." M.T.S. said that he proceeded to get dressed and told C.G. to calm down, but that she then told him to get away from her and began to cry. Before leaving the room, he told C.G., "I'm leaving . . . I'm going with my real girlfriend, don't talk to me . . . I don't want nothing to do with you or anything, stay out of my life . . . don't tell anybody about this . . . it would just screw everything up." He then walked downstairs and went to sleep.

On May 23, 1990, M.T.S. was charged with conduct that if engaged in by an adult would constitute second-degree sexual assault of the victim, contrary to [New Jersey Statutes Annotated §] 2C:14–2c(1). . . .

Following a two-day trial on the sexual assault charge, M.T.S. was adjudicated delinquent. After reviewing the testimony, the court concluded that the victim had consented to a session of kissing and heavy petting with M.T.S. The trial court did not find that C.G. had been sleeping at the time of penetration, but nevertheless found that she had not consented to the actual sexual act. Accordingly, the court concluded that the State had proven second-degree sexual assault beyond a reasonable doubt. On appeal, following the imposition of suspended sentences on the sexual assault and the other remaining charges, the Appellate Division determined that the absence of force beyond that involved in the act of sexual penetration precluded a finding of second-degree sexual assault. It therefore reversed the juvenile's adjudication of delinquency for that offense.

Reasoning

The New Jersey Code of Criminal Justice defines "sexual assault" as the commission "of sexual penetration . . . with another person" with the use of "physical force or coercion." An unconstrained reading of the statutory language indicates that both the act of "sexual

penetration" and the use of "physical force or coercion" are separate and distinct elements of the offense....

The parties offer two alternative understandings of the concept of "physical force" as it is used in the statute. The State would read "physical force" to entail any amount of sexual touching brought about involuntarily. A showing of sexual penetration coupled with a lack of consent would satisfy the elements of the statute. The Public Defender urges an interpretation of "physical force" to mean force "used to overcome lack of consent." That definition equates force with violence and leads to the conclusion that sexual assault requires the application of some amount of force in addition to the act of penetration....

The new statutory provisions covering rape were formulated by a coalition of feminist groups assisted by the National Organization [for] Women (NOW) National Task Force on Rape. Both houses of the Legislature adopted the NOW bill, as it was called, without major changes, and [the Governor] signed it into law on August 10, 1978.

Since the 1978 reform, the Code has referred to the crime that was once known as "rape" as "sexual assault." The crime now requires "penetration," not "sexual intercourse." It requires "force" or "coercion," not "submission" or "resistance." It makes no reference to the victim's state of mind or attitude, or conduct in response to the assault. It eliminates the spousal exception based on implied consent. It emphasizes the assaultive character of the offense by defining sexual penetration to encompass a wide range of sexual contacts, going well beyond traditional "carnal knowledge." Consistent with the assaultive character, as opposed to the traditional sexual character, of the offense, the statute also renders the crime gender-neutral: both males and females can be actors or victims.

The reform statute defines sexual assault as penetration accomplished by the use of "physical force" or "coercion," but it does not define either "physical force" or "coercion" or enumerate examples of evidence that would establish those elements. Some reformers had argued that defining "physical force" too specifically in the sexual offense statute might have the effect of limiting force to the enumerated examples. The task of defining "physical force" therefore was left to the courts....

[T]he New Jersey Code of Criminal Justice does not refer to force in relation to "overcoming the will" of the victim, or to the "physical overpowering" of the victim, or the "submission" of the victim. It does not require the demonstrated nonconsent of the victim. As we have noted, in reforming the rape laws, the Legislature placed primary emphasis on the assaultive nature of the crime, altering its constituent elements so that they focus exclusively on the forceful or assaultive conduct of the defendant.

The Legislature's concept of sexual assault and the role of force were significantly colored by its understanding of the law of assault and battery. As a general matter, criminal battery is defined as "the unlawful application of force to the person of another." The application of force is criminal when it results in either (a) a physical injury or (b) an offensive touching. Thus, by eliminating all references to the victim's state of mind and conduct, and by broadening the definition of penetration to cover not only sexual intercourse between a man and a woman but a range of acts that invade another's body or compel intimate contact, the Legislature emphasized the affinity between sexual assault and other forms of assault and battery....

The understanding of sexual assault as a criminal battery, albeit one with especially serious consequences, follows necessarily from the Legislature's decision to eliminate non-consent and resistance from the substantive definition of the offense. Under the new law, the victim no longer is required to resist and therefore need not have said or done anything in order for the sexual penetration to be unlawful. The alleged victim is not put on trial,

and his or her responsive or defensive behavior is rendered immaterial. We are thus satisfied that an interpretation of the statutory crime of sexual assault to require physical force in addition to that entailed in an act of involuntary or unwanted sexual penetration would be fundamentally inconsistent with the legislative purpose to eliminate any consideration of whether the victim resisted or expressed non-consent.

We note that the contrary interpretation of force—that the element of force need be extrinsic to the sexual act—would not only reintroduce a resistance requirement into the sexual assault law, but also would immunize many acts of criminal sexual contact short of penetration. The characteristics that make a sexual contact unlawful are the same as those that make a sexual penetration unlawful. An actor is guilty of criminal sexual contact if he or she commits an act of sexual contact with another using “physical force” or “coercion.” N.J.S.A. [§] 2C:14–3(b). That the Legislature would have wanted to decriminalize unauthorized sexual intrusions on the bodily integrity of a victim by requiring a showing of force in addition to that entailed in the sexual contact itself is hardly possible.

Because the statute eschews any reference to the victim’s will or resistance, the standard defining the role of force in sexual penetration must prevent the possibility that the establishment of the crime will turn on the alleged victim’s state of mind or responsive behavior. We conclude, therefore, that any act of sexual penetration engaged in by the defendant without the affirmative and freely given permission of the victim to the specific act of penetration constitutes the offense of sexual assault. Therefore, physical force in excess of that inherent in the act of sexual penetration is not required for such penetration to be unlawful. The definition of “physical force” is satisfied under N.J.S.A. [§] 2C:14–2c(1) if the defendant applies any amount of force against another person in the absence of what a reasonable person would believe to be affirmative and freely given permission to the act of sexual penetration.

Under the reformed statute, permission to engage in sexual penetration must be affirmative and it must be given freely, but that permission may be inferred either from acts or statements reasonably viewed in light of the surrounding circumstances. Persons need not, of course, expressly announce their consent to engage in intercourse for there to be affirmative permission. Permission to engage in an act of sexual penetration can be and indeed often is indicated through physical actions rather than words. Permission is demonstrated when the evidence, in whatever form, is sufficient to demonstrate that a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act.

Our understanding of the meaning and application of “physical force” under the sexual assault statute indicates that the term’s inclusion was neither inadvertent nor redundant. The term “physical force,” like its companion term “coercion,” acts to qualify the nature and character of the “sexual penetration.” Sexual penetration accomplished through the use of force is unauthorized sexual penetration. That functional understanding of “physical force” encompasses the notion of “unpermitted touching” derived from the Legislature’s decision to redefine rape as a sexual assault. As already noted, under assault and battery doctrine, any amount of force that results in either physical injury or offensive touching is sufficient to establish a battery. Hence, as a description of the method of achieving “sexual penetration,” the term “physical force” serves to define and explain the acts that are offensive, unauthorized, and unlawful.

Today the law of sexual assault is indispensable to the system of legal rules that assures each of us the right to decide who may touch our bodies, when, and under what circumstances. The decision to engage in sexual relations with another person is one of

the most private and intimate decisions a person can make. Each person has the right not only to decide whether to engage in sexual contact with another, but also to control the circumstances and character of that contact. No one, neither a spouse, nor a friend, nor an acquaintance, nor a stranger, has the right or the privilege to force sexual contact.

We emphasize as well that what is now referred to as "acquaintance rape" is not a new phenomenon. Nor was it a "futuristic" concept in 1978 when the sexual assault law was enacted. Current concern over the prevalence of forced sexual intercourse between persons who know one another reflects both greater awareness of the extent of such behavior and a growing appreciation of its gravity. Notwithstanding the stereotype of rape as a violent attack by a stranger, the vast majority of sexual assaults are perpetrated by someone known to the victim. One respected study indicates that more than half of all rapes are committed by male relatives, current or former husbands, boyfriends, or lovers. Similarly, contrary to common myths, perpetrators generally do not use guns or knives and victims generally do not suffer external bruises or cuts. Although this more realistic and accurate view of rape only recently has achieved widespread public circulation, it was a central concern of the proponents of reform in the 1970s.

The insight into rape as an assaultive crime is consistent with our evolving understanding of the wrong inherent in forced sexual intimacy. It is one that was appreciated by the Legislature when it reformed the rape laws, reflecting an emerging awareness that the definition of rape should correspond fully with the experiences and perspectives of rape victims. Although reformers focused primarily on the problems associated with convicting defendants accused of violent rape, the recognition that forced sexual intercourse often takes place between persons who know each other and often involves little or no violence comports with the understanding of the sexual assault law that was embraced by the Legislature. Any other interpretation of the law, particularly one that defined force in relation to the resistance or protest of the victim, would directly undermine the goals sought to be achieved by its reform.

Holding

In short, in order to convict under the sexual assault statute in cases such as these, the State must prove beyond a reasonable doubt that there was sexual penetration and that it was accomplished without the affirmative and freely given permission of the alleged victim. As we have indicated, such proof can be based on evidence of conduct or words in light of surrounding circumstances and must demonstrate beyond a reasonable doubt that a reasonable person would not have believed that there was affirmative and freely-given permission. If there is evidence to suggest that the defendant reasonably believed that such permission had been given, the State must demonstrate either that defendant did not actually believe that affirmative permission had been freely-given or that such a belief was unreasonable under all of the circumstances. Thus, the State bears the burden of proof throughout the case. . . .

We acknowledge that cases such as this are inherently fact sensitive and depend on the reasoned judgment and common sense of judges and juries. The trial court concluded that the victim had not expressed consent to the act of intercourse, either through her words or actions. We conclude that the record provides reasonable support for the trial court's disposition.

Accordingly, we reverse the judgment of the Appellate Division and reinstate the disposition of juvenile delinquency for the commission of second-degree sexual assault.

Questions for Discussion

1. Explain why the New Jersey Supreme Court ruled that the definition of "physical force" is satisfied if the defendant applies any amount of force against another person in the absence of what a reasonable person would believe to be the affirmative and freely given permission to the act of sexual penetration.
2. What are the facts the prosecution is required to prove beyond a reasonable doubt to convict a defendant under the legal test established by the New Jersey Supreme Court? List the facts that are relied on by the New Jersey Supreme Court in concluding that the sexual penetration was without the affirmative and freely given permission of the victim.
3. Is there difficulty determining precisely what occurred in this case? As a defense attorney, what questions would you ask the victim on cross-examination in order to undermine her direct testimony? What questions would you ask your client, the accused, on direct examination in the event that he testified?
4. As a juror, would you convict the defendant?
5. Do you believe that it is difficult to apply the legal test established by the New Jersey Supreme Court? What problems do you anticipate would confront a defendant in establishing that the alleged victim, in fact, affirmatively and freely engaged in sexual contact?
6. As a lawyer working for a New Jersey university, what points would you include in a guide to sexual conduct to be distributed to students in light of *M.T.S.*?
7. Do you favor the standard in *Berkowitz* or in *M.T.S.*? In reaching your conclusion, consider *State v. Jones*. Jones "proceeded to pull down A.S.'s pants and underwear, and 'pushed [her] legs apart and started having sex with [her].'" In response, A.S. 'just froze,' and testified that she was 'paralyzed' with fear." The Idaho Supreme Court held that "Idaho's forcible rape statute expressly requires resistance.... [S]tudies have shown that 'freezing up' is indeed a legitimate, understandable reaction of victims of sexual assault.... [A] lack of physical resistance may reflect a 'profound primal terror' rather than consent." The Idaho Supreme Court held that although these "findings belie the traditional notion that a woman who does not resist has consented," there was "insufficient evidence on the element of resistance to support [a] conviction of forcible rape." See *State v. Jones*, 299 P.3d 219 (Idaho 2013).

CASES AND COMMENTS

An April 2014 report of the White House Task Force to Protect Students From Sexual Assault reported that "one in five women is sexually assaulted in college" and that only roughly 5% of campus rapes are reported to the police. In September 2014, California implemented a fundamental reform in the law on campus sexual abuse when Governor Jerry Brown signed legislation requiring all institutions of higher education receiving state funds or whose students receive state funds to strengthen their policies on sexual assault by requiring students to give "active consent" to one another before all sexual activity. This will require students either to say "yes" or to give nonverbal consent. "Affirmative consent" means a conscious, and voluntary, agreement to engage in sexual activity. It is the responsibility of each person

involved in the sexual activity to ensure that they have the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact that they had sexual relations in the past, should never by itself be assumed to indicate consent.

Other Approaches to the *Actus Reus* of Modern Rape

The force requirement may also be satisfied by a threat of force. Statutes make this clear by stating that penetration may be accomplished by “force or threat of force” or by “force or coercion” or by “force or fear.” In other words, actual force is not required.

There are two requirements that must be satisfied. First, there must be a threat of death or serious personal injury. Second, the victim’s fear that the assailant will carry out the threat must be reasonable. The California statute provides that sexual intercourse constitutes rape where accomplished by “threatening to retaliate in the future . . . and there is a reasonable possibility that the perpetrator will execute the threat. . . . Threatening to retaliate means a threat to kidnap or falsely imprison or to inflict extreme pain, serious bodily injury, or death.” The California statute also states that the threat requirement is satisfied where a public official threatens to “incarcerate, arrest, or deport the victim or another.”³⁴ Michigan provides that a person is guilty of criminal sexual conduct where an individual engages in sexual penetration with another under circumstances in which the “actor is armed with a weapon or any article . . . fashioned . . . to lead the victim to reasonably believe it to be a weapon.”³⁵

Several states have extended the *actus reus* for rape and declare that it is criminal to use a position of trust to cause another person to submit to sexual penetration. Texas, for instance, has provisions covering public servants, therapists, and nurses. Clergy are held liable for causing another person to submit or participate in a sexual act by “exploiting the other person’s emotional dependency.”³⁶ Pennsylvania defines “forcible compulsion” to mean “physical, intellectual, moral, emotional or psychological force either express or implied.”³⁷ This was narrowly interpreted by the Pennsylvania Supreme Court in ruling that it was not forcible compulsion for an adult guardian to threaten to send a 14-year-old girl back to a juvenile detention home unless she submitted to vaginal intercourse and various deviate sexual acts. The court ruled that although the acts of the 63-year-old guardian were despicable, the young woman was not coerced into the sexual activity, because she voluntarily made a deliberate choice to undertake a course of conduct that enabled her to avoid return to the juvenile home.³⁸

We have already mentioned that force is not required where penetration is achieved through fraud or when the victim is unconscious, asleep, or insane and is unaware of the nature of the sexual penetration. The California statute provides for rape when the victim is “prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance” or where an individual is “unconscious of the nature of the act.”³⁹

In these situations, a victim clearly is incapable of consent, and the law finds rape. We shall see when we consider **statutory rape** that force is also not required where the victim is a juvenile.

YOU DECIDE 11.1

George James Brooks and J.P. married in 1996 and divorced roughly 10 years later. Following their divorce, Brooks accessed J.P.'s e-mail and forwarded copies of J.P.'s e-mails to his own account. The e-mails revealed that J.P. and a married coworker had been involved in an extramarital affair for the past two months.

Brooks visited J.P. and told J.P. that he planned to give copies of the e-mails to J.P.'s employer and her coworker's wife if she "didn't have sex with him." J.P. told Brooks she did not want to "have sex . . . and it would be against her will." Brooks directed J.P. to remove her underwear. Brooks reportedly became agitated when J.P. hesitated and proceeded to remove his pants and put on a condom. "J.P. sat in a chair, and Brooks had intercourse with her. . . . J.P. said she had her hands over her face and her eyes closed so she would not have to look at Brooks." Brooks refused to turn over the e-mails following intercourse and stated that this had been a "test" and that he would be back in several days for "more sex."

Brooks reported that she did not fear that J.P. would physically harm her if she refused to have sex, although she believed he would disclose the affair. J.P. told the jury she did not want her extramarital relationship publicized because this would strain her relationships with her coworkers, many of whom knew her coworker's wife. J.P. testified that she had no reason to think she would have been fired or would have suffered any adverse change in the terms or conditions of her employment were the affair to come to light. J.P. told the jury she and Brooks had sex "only because he had the e-mails and threatened to expose her workplace affair if she did not submit." Was J.P. raped by Brooks? See *State v. Brooks*, 317 P.3d 54 (Kan. 2014).

THE MENS REA OF RAPE

Rape at common law required that the male defendant intended to engage in vaginal intercourse with a woman who he knew was not his wife through force or the threat of force. There was no clear guidance as to whether a defendant was required to be aware that the intercourse was without the female's consent. This issue remained unsettled for a number of years and has been resolved only in the last several decades.

The majority of states accept an "objective test" that recognizes it is a defense to rape that a defendant honestly and reasonably believed that the rape victim consented. This doctrine was first recognized by the California Supreme Court in *People v. Mayberry*. The prosecutrix claimed that she had been kidnapped while shopping and had involuntarily accompanied the kidnapper to an apartment where she was raped by the defendant and another male. The defendant denied the accusations and characterized the victim's story as "inherently improbable."

The California Supreme Court ruled that the defendant was entitled to have the jury receive a mistake of fact instruction, reasoning that the state legislature must have intended that such a defense be available given the seriousness of the charge. The court accordingly held that a defendant who "entertains a reasonable and bona fide belief that a prosecutrix voluntarily consented

to accompany him and to engage in sexual intercourse . . . does not possess the wrongful intent that is a prerequisite . . . to a conviction of rape by means of force or threat.⁴⁰

Some commentators argue that given the seriousness of the crime of rape, a defendant who genuinely believes that an individual has consented should be entitled to a mistake of fact defense, no matter how unreasonable the belief. The English House of Lords adopted a subjective approach in *Director of Public Prosecutions v. Morgan*. A married man invited three of his drinking companions over to his house to have intercourse with his wife. He assured his fellow military men that although she might protest, his wife enjoyed “kinky sex” and this was the only way she was able to get “turned on.” The three held down the woman while they took turns having sexual intercourse with her.

The House of Lords ruled that rape requires a specific intent to have vaginal intercourse with a woman without her consent and acquitted the defendants based on their honest belief that the officer’s wife consented to the sexual intercourse. As Lord Hailsham noted, “[E]ither the prosecution proves that the accused had the requisite intent or it does not.⁴¹

The English test is based on the premise that it is unfair to hold an individual liable who actually believes that another individual has consented. This approach, however, opens the door to defendants claiming this defense in virtually every acquaintance rape case. The subjective approach has been adopted with qualifications by the English Parliament and has been followed by only a small number of American courts.

Several states do not recognize the mistake of fact defense and continue to adhere to the view that a defendant’s belief as to a victim’s consent should not be considered in determining guilt. In *State v. Plunkett*, a physically imposing 29-year-old defendant intimidated and forced a 17-year-old woman who was a virgin into his house where, in response to his aggressive refusal to let her leave, she fearfully cooperated in oral, anal, and vaginal intercourse. The Kansas Supreme Court ruled that “[w]hether Plunkett thought his victim consented is irrelevant if the State proved that she did not consent and was overcome by fear. . . . Plunkett’s argument that there was insufficient evidence to show that he knew his sexual activity was nonconsensual is irrelevant.”

In *State v. Williams*, the victim, a college student, accepted a ride from the defendant to the bus station. The defendant instead drove to a dark area and threatened to kill her unless she had sex with him. The frightened victim told him to “go ahead.” The trial court refused to instruct the jury that the defendant should be acquitted if he reasonably believed that the victim consented to have sexual relations. A Pennsylvania court affirmed and held that if an individual “uses force or the threat of force to have sexual relations with a person . . . without consent he has committed the crime of rape. . . . We refuse to create such a defense.”⁴²

The difficulty with this approach is that rape is converted into a strict liability defense and that a defendant is liable regardless of the reasonableness of the belief concerning the victim’s consent.⁴³

A majority of states, as noted, have adopted the objective test. This requires **equivocal conduct**, meaning that the victim’s nonconsensual reactions were capable of being reasonably, but mistakenly, interpreted by the assailant as indicating consent. In the prosecution of heavyweight boxing champion Mike Tyson for the rape of a contestant in a beauty pageant that he was judging, an Indiana Court of Appeals held that Tyson was not entitled to a reasonable mistake of fact defense. Tyson’s testimony indicated that the victim freely and fully participated in their sexual relationship. The victim, on the other hand, testified that Tyson forcibly imposed himself on

her. The appellate court ruled that “there is no recitation of equivocal conduct by D.W. [the victim] that reasonably could have led Tyson to believe that D.W. . . . appeared to consent, . . . [N]o gray area existed from which Tyson can logically argue that he misunderstood D.W.’s actions.”⁴⁴

Statutory Rape

Having sexual relations with a juvenile was not a crime under early English law so long as there was consent. This was modified by a statute that declared that it was a felony to engage in vaginal intercourse with a child younger than the age of 10, regardless of whether there was consent. This so-called statutory rape was incorporated into the common law of the United States. American legislatures gradually raised the age at which a child was protected against sexual intercourse to between 11 and 14. Statutory rape is based on several considerations⁴⁵:

- *Understanding.* Minors are considered incapable of understanding the nature and consequences of their act.
- *Harmful.* Sexual relations are psychologically damaging to minors and may lead to pregnancy.
- *Social Values.* This type of conduct is immoral and is contrary to social values.
- *Vulnerability.* The protection of females is based on the fact that males are typically the aggressors and take advantage of the vulnerability of immature females.

The general rule is that statutory rape is a strict liability offense in which a male is guilty of rape by engaging in intercourse with an “underage” female. This rule is intended to ensure that males will take extraordinary steps to ensure that females are of the age of consent.

Most commentators reason that the “overwhelming interest in protecting children” outweighs the interest in protecting individuals from criminal liability who engage in sexual relations with a child who they mistakenly believe is at or over the age of consent. There also is the concern that the mistake of age defense may “place the victim on trial” by shifting the focus from the defendant to the victim’s appearance and maturity.⁴⁶

Commentators have viewed strict liability for statutory rape as unjust in the case of a young woman who is physically mature and misrepresents her age. One reform is to provide that defendants can offer a “promiscuity defense” and document that the victim has had multiple sex partners and can be presumed to have possessed the capacity to appreciate the nature of her act and to have knowingly consented to a sexual relationship. A second approach is to divide the offense into various categories and to provide for more severe penalties for sexual relationships involving younger females. A third approach recognizes that young people will engage in sexual experimentation and that statutory rape should not be a crime where the parties are roughly the same age or should be punished less severely. Forty-five states now recognize statutory rape as a gender-neutral offense; only five states still restrict guilt to males.⁴⁷

The major issue that arises in regard to statutory rape is whether this should remain a strict liability offense in which the mere act of penetration results in criminal liability.⁴⁸ Should a reasonable mistake of fact regarding an individual’s age constitute a defense? The Model Penal

Code limits strict liability to sexual relations with a female younger than 10 years of age. In such cases, the commentary explains that there is little likelihood of a reasonable mistake regarding the victim's age. The code punishes sexual intercourse with a woman 16 years of age or younger by a male at least 4 years older as the less serious offense of corruption of a minor. A defendant charged with corruption of a minor is authorized under the code to offer a reasonable mistake of fact defense as to the age of the victim.⁴⁹

Consider whether you favor imposing strict liability for statutory rape after reading *Garnett v. State*.

DID GARNETT KNOW THAT HE WAS COMMITTING STATUTORY RAPE?

GARNETT V. STATE, 632 A.2d 797 (MD. 1993)

Opinion by Murphy, J.

Facts

Maryland's "statutory rape" law prohibiting sexual intercourse with an underage person is codified in Maryland Code Art. 27, § 463, which reads in full:

Second-degree rape. . . . A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person . . . [w]ho is under 14 years of age and the person performing the act is at least four years older than the victim. . . . Any person violating the provisions of this section is guilty of a felony and upon conviction is subject to imprisonment for a period of not more than 20 years.

. . . Now we consider whether under the present statute, the State must prove that a defendant knew the complaining witness was younger than 14 and, in a related question, whether it was error at trial to exclude evidence that he had been told, and believed, that she was 16 years old.

Raymond Lennard Garnett is a young [man with intellectual disabilities]. At the time of the incident in question he was 20 years old. He has an I.Q. of 52. His guidance counselor from the Montgomery County public school system, Cynthia Parker, described him as a [person with mild intellectual disabilities] who read on the third-grade level, did arithmetic on the fifth-grade level, and interacted with others socially at school at the level of someone 11 or 12 years of age. Ms. Parker added that Raymond attended special education classes and for at least one period of time was educated at home when he was afraid to return to school due to his classmates' taunting. Because he could not understand the duties of the jobs given him, he failed to complete vocational assignments; he sometimes lost his way to work. As Raymond was unable to pass any of the State's functional tests required for graduation, he received only a certificate of attendance rather than a high-school diploma.

In November or December 1990, a friend introduced Raymond to Erica Frazier, then aged 13; the two subsequently talked occasionally by telephone. On February 28, 1991, Raymond, apparently wishing to call for a ride home, approached the girl's house at about nine o'clock

in the evening. Erica opened her bedroom window, through which Raymond entered; he testified that "she just told me to get a ladder and climb up her window." The two talked, and later engaged in sexual intercourse. Raymond left at about 4:30 a.m. the following morning. On November 19, 1991, Erica gave birth to a baby, of whom Raymond is the biological father.

Raymond was tried before the Circuit Court for Montgomery County on one count of second degree rape under § 463(a)(3) proscribing sexual intercourse between a person under 14 and another at least four years older than the complainant. . . .

The court found Raymond guilty. It sentenced him to a term of five years in prison, suspended the sentence and imposed five years of probation, and ordered that he pay restitution to Erica and the Frazier family.

Issue

Raymond asserts that the events of this case were inconsistent with the criminal sexual exploitation of a minor by an adult. As earlier observed, Raymond entered Erica's bedroom at the girl's invitation; she directed him to use a ladder to reach her window. They engaged voluntarily in sexual intercourse. They remained together in the room for more than seven hours before Raymond departed at dawn. With an I.Q. of 52, Raymond functioned at approximately the same level as the 13-year-old Erica; he was mentally an adolescent in an adult's body. Arguably, had Raymond's chronological age, 20, matched his socio-intellectual age, about 12, he and Erica would have fallen well within the four-year age difference obviating a violation of the statute, and Raymond would not have been charged with any crime at all.

The precise legal issue here rests on Raymond's unsuccessful efforts to introduce into evidence testimony that Erica and her friends had told him she was 16 years old, the age of consent to sexual relations, and that he believed them. Thus the trial court did not permit him to raise a defense of reasonable mistake of Erica's age, by which defense Raymond would have asserted that he acted innocently without a criminal design.

Reasoning

At common law, a crime occurred only upon the concurrence of an individual's act and his guilty state of mind. In this regard, it is well understood that generally there are two components of every crime, the *actus reus* or guilty act and the *mens rea* or the guilty mind or mental state accompanying a forbidden act. The requirement that an accused acted with a culpable mental state is an axiom of criminal jurisprudence. . . .

To be sure, legislative bodies since the mid-19th century have created strict liability criminal offenses requiring no *mens rea*. Almost all such statutes responded to the demands of public health and welfare arising from the complexities of society after the Industrial Revolution. Typically misdemeanors involving only fines or other light penalties, these strict liability laws regulated food, milk, liquor, medicines and drugs, securities, motor vehicles and traffic, the labeling of goods for sale, and the like. Statutory rape, carrying the stigma of felony as well as a potential sentence of 20 years in prison, contrasts markedly with the other strict liability regulatory offenses and their light penalties.

Modern scholars generally reject the concept of strict criminal liability. . . .

[T]he consensus [is] that punishing conduct without reference to an actor's state of mind . . . is unjust . . . "because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy." . . . [An individual who acts without a criminal intent needs to be neither punished in order to be deterred from future criminal activity nor incapacitated or reformed in order to remove a threat to society.]

Conscious of the disfavor in which strict criminal liability resides, the Model Penal Code states generally as a minimum requirement of culpability that a person is not guilty of a criminal offense unless he acts purposely, knowingly, recklessly, or negligently. The Code allows generally for a defense of ignorance or mistake of fact negating *mens rea* [criminal intent]. . . .

The commentators similarly disapprove of statutory rape as a strict liability crime. In addition to the arguments discussed above, they observe that statutory rape prosecutions often proceed even when the defendant's judgment as to the age of the complainant is warranted by her appearance, her sexual sophistication, her verbal misrepresentations, and the defendant's careful attempts to ascertain her true age. Voluntary intercourse with a sexually mature teenager lacks the features of psychic abnormality, exploitation, or physical danger that accompanies such conduct with children. . . .

Statutory rape laws are often justified on the "lesser legal wrong" theory or the "moral wrong" theory; by such reasoning, the defendant acting without *mens rea* nonetheless deserves punishment for having committed a lesser crime, fornication, or for having violated moral teachings that prohibit sex outside of marriage. We acknowledge here that it is uncertain to what extent Raymond's intellectual and social [disability] may have impaired his ability to comprehend imperatives of sexual morality in any case.

The legislatures of 17 states have enacted laws permitting a mistake of age defense in some form in cases of sexual offenses with underage persons. In addition, the highest appellate courts of four states have determined that statutory rape laws by implication required an element of *mens rea* as to the complainant's age. In the landmark case of *People v. Hernandez*, 393 P.2d 673 (Cal. 1964), the California Supreme Court held that, absent a legislative directive to the contrary, a charge of statutory rape was defensible wherein a criminal intent was lacking; it reversed the trial court's refusal to permit the defendant to present evidence of his good faith, reasonable belief that the complaining witness had reached the age of consent. In so doing, the court first questioned the assumption that age alone confers a sophistication sufficient to create legitimate consent to sexual relations: "the sexually experienced 15-year-old may be far more acutely aware of the implications of sexual intercourse than her sheltered cousin who is beyond the age of consent." The court then [asked whether it could be considered fair to punish an individual who participates in a mutual act of sexual intercourse while reasonably believing his partner to be beyond the age of consent.] . . .

We think it sufficiently clear, however, that Maryland's second degree rape statute defines a strict liability offense that does not require the State to prove *mens rea*; it makes no allowance for a mistake-of-age defense. The plain language of [Annotated Code of Maryland] § 463, viewed in its entirety, and the legislative history of its creation lead to this conclusion. . . .

Section 463(a)(3) prohibiting sexual intercourse with underage persons makes no reference to the actor's knowledge, belief, or other state of mind. As we see it, this silence as to *mens rea* results from legislative design. . . .

Second, an examination of the drafting history of § 463 during the 1976 revision of Maryland's sexual offense laws reveals that the statute was viewed as one of strict liability from its inception and throughout the amendment process. . . .

[T]he Legislature explicitly raised, considered, and then explicitly jettisoned any notion of a *mens rea* element with respect to the complainant's age in enacting the law that formed the basis of current § 463(a)(3).

Holding

In the light of such legislative action, we must inevitably conclude that the current law imposes strict liability on its violators. This interpretation is consistent with the traditional view of statutory rape as a strict liability crime designed to protect young persons from the dangers of sexual exploitation by adults, loss of chastity, physical injury, and, in the case of girls, pregnancy. The majority of states retain statutes which impose strict liability for sexual acts with underage complainants. We observe again, as earlier, that even among those states providing for a mistake-of-age defense in some instances, the defense often is not available where the sex partner is 14 years old or less; the complaining witness in the instant case was only 13. . . .

Maryland's second degree rape statute is by nature a creature of legislation. Any new provision introducing an element of *mens rea*, or permitting a defense of reasonable mistake of age, with respect to the offense of sexual intercourse with a person less than 14, should properly result from an act of the Legislature itself, rather than judicial fiat. Until then, defendants in extraordinary cases, like Raymond, will rely upon the tempering discretion of the trial court at sentencing.

Dissenting, *Bell, J.*

To hold, as a matter of law, that section 463(a)(3) does not require the State to prove that a defendant possessed the necessary mental state to commit the crime, i.e. knowingly engaged in sexual relations with a female under 14, or that the defendant may not litigate that issue in defense, "offends a principle of justice so rooted in the traditions of conscience of our people as to be ranked as fundamental" and is, therefore, inconsistent with due process.

In this case, according to the defendant, he intended to have sex with a 16, not a 13, year old girl. This mistake of fact was prompted, he said, by the prosecutrix herself; she and her friends told him that she was 16 years old. Because he was mistaken as to the prosecutrix's age, he submits, he is certainly less culpable than the person who knows that the minor is 13 years old, but nonetheless engages in sexual relations with her. Notwithstanding, the majority has construed section 463(a)(3) to exclude any proof of knowledge or intent. But for that construction, the proffered defense would be viable. I would hold that the State is not relieved of its burden to prove the defendant's intent or knowledge in a statutory rape case and, therefore, that the defendant may defend on the basis that he was mistaken as to the age of the prosecutrix.

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the eighteenth century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will." . . .

[G]iven the tremendous difference between individuals, both in appearance and in mental capacity, there can be no . . . rational relationship between the proof of the victim's age and the defendant's knowledge of that fact.

Questions for Discussion

1. Summarize the argument of the majority and of the dissenting opinion.
2. Should vaginal intercourse with an individual younger than the age of 14 be a strict liability offense? Would you provide for the defense of a reasonable mistake of fact as to the age of the victim?
3. Why did Raymond receive a “suspended sentence” rather than being sentenced to prison? In answering this question, discuss justifications for punishment.
4. Consider this quote from a judgment of the California Supreme Court recognizing a mistake of age defense: “The sexually experienced 15-year-old may be far more acutely aware of the implications of sexual intercourse than her sheltered cousin who is beyond the age of consent. . . . [T]he [older] male is deemed criminally responsible for the act, although himself young and naïve and responding to advances which may have been made to him.” Would you modify or abolish the crime of statutory rape? See *People v. Hernandez*, 293 P.2d 673 [Cal. 1964].

Withdrawal of Consent

In 2003, Illinois became the first state to pass a law on the **withdrawal of consent**. This legislation provides that a person “who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or conduct” (720 Illinois Compiled Statutes (ILCS) 5/12-14 (a)(2)).

The Illinois law was passed in reaction to disagreement among courts in California as to whether an individual who continues sexual intercourse following the other party’s withdrawal of consent is guilty of rape. The California Supreme Court resolved this conflict by ruling in the next case in the text, *People v. John Z.* The decision in *John Z.* has been followed by courts in most jurisdictions. Do you believe that a male who continues sexual relations under such circumstances is guilty of rape?

SHOULD THE LAW RECOGNIZE LAURA'S WITHDRAWAL OF CONSENT TO SEXUAL INTERCOURSE?

PEOPLE V. JOHN Z., 60 P.3D 183 (CAL. 2003)

Opinion by Chin, J.

The juvenile court . . . found that [John Z.] committed forcible rape . . . [and] committed [him] to Crystal Creek Boys Ranch. On appeal, defendant contends the evidence is insufficient to sustain the finding that he committed forcible rape. We disagree.

Facts

During the afternoon of March 23, 2000, 17-year-old Laura T. was working at Safeway when she received a call from Juan G., whom she had met about two weeks earlier. Juan wanted Laura to take him to a party at defendant's home and then return about 8:30 p.m. to pick him up. Laura agreed to take Juan to the party, but since she planned to attend a church group meeting that evening she told him she would be unable to pick him up.

Sometime after 6:00 p.m., Laura drove Juan to defendant's residence. Defendant and Justin L. were present. After arranging to have Justin L.'s stepbrother, P. W., buy them alcohol, Laura picked up P. W. and drove him to the store where he bought beer. Laura told Juan she would stay until 8:00 or 8:30 p.m. Although defendant and Juan drank the beer, Laura did not.

During the evening, Laura and Juan went into defendant's parents' bedroom. Juan indicated he wanted to have sex but Laura told him she was not ready for that kind of activity. Juan became upset and went into the bathroom. Laura left the bedroom and both defendant and Justin asked her why she "wouldn't do stuff." Laura told them that she was not ready.

About 8:10 p.m., Laura was ready to leave when defendant asked her to come into his bedroom to talk. She complied. Defendant told her that Juan had said he (Juan) did not care for her; defendant then suggested that Laura become his girlfriend. Juan entered the bedroom and defendant left to take a phone call.

When defendant returned to the bedroom, he and Juan asked Laura if it was her fantasy to have two guys, and Laura said it was not. Juan and defendant began kissing Laura and removing her clothes, although she kept telling them not to. At some point, the boys removed Laura's pants and underwear and began "fingering" her, "playing with [her] boobs" and continued to kiss her. Laura enjoyed this activity in the beginning, but objected when Juan removed his pants and told defendant to keep fingering her while he put on a condom. Once the condom was in place, defendant left the room and Juan got on top of Laura. She tried to resist and told him she did not want to have intercourse, but he was too strong and forced his penis into her vagina. The rape terminated when, due to Laura's struggling, the condom fell off. Laura told Juan that "maybe it's a sign we shouldn't be doing this," and he said "fine" and left the room. (Although Juan G. was originally a codefendant, at the close of the victim's testimony he [pled guilty to] charges of sexual battery and unlawful sexual intercourse, a misdemeanor.)

Laura rolled over on the bed and began trying to find her clothes; however, because the room was dark she was unable to do so. Defendant, who had removed his clothing, then entered the bedroom and walked to where Laura was sitting on the bed and "he like rolled over [her] so [she] was pushed back down to the bed." Laura did not say anything and defendant began kissing her and telling her that she had "a really beautiful body." Defendant got on top of Laura, put his penis into her vagina "and rolled [her] over so [she] was sitting on top of him." Laura testified she "kept . . . pulling up, trying to sit up to get it out . . . [a]nd he grabbed my hips and pushed me back down and then he rolled me back over so I was on my back . . . and . . . kept saying, will you be my girlfriend." Laura "kept like trying to pull away" and told him that "if he really did care about me, he wouldn't be doing this to me and if he did want a relationship, he should wait and respect that I don't want to do this." After about 10 minutes, defendant got off Laura, and helped her dress and find her keys. She then drove home.

On cross-examination, Laura testified that when defendant entered the room unclothed, he lay down on the bed behind her and touched her shoulder with just enough pressure to

make her move, a nudge. He asked her to lie down and she did. He began kissing her and she kissed him back. He rolled on top of her, inserted his penis in her and, although she resisted, he rolled her back over, pulling her on top of him. She was on top of him for four or five minutes, during which time she tried to get off, but he grabbed her waist and pulled her back down. He rolled her over and continued the sexual intercourse. Laura told him that she needed to go home, but he would not stop. He said, “[J]ust give me a minute,” and she said, “[N]o, I need to get home.” He replied, “[G]ive me some time” and she repeated, “[N]o, I have to go home.” Defendant did not stop, “[h]e just stayed inside of me and kept like basically forcing it on me.” After about a “minute, minute and [a] half,” defendant got off Laura.

Defendant testified, admitting that he and Juan were kissing and fondling Laura in the bedroom, but claimed it was with her consent. He also admitted having sexual intercourse with Laura, again claiming it was consensual. He claimed he discontinued the act as soon as Laura told him that she had to go home.

Reasoning

Although the evidence of Laura’s initial consent to intercourse with John Z. was hardly conclusive, we will assume for purposes of argument that Laura impliedly consented to the act, or at least tacitly refrained from objecting to it, until defendant had achieved penetration. As will appear, we conclude that the offense of forcible rape occurs when, during apparently consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection. . . .

[*People v. Vela*, 218 Cal. Rptr. 161 [Cal. Ct. App. 1985], reasoned] that “the essence of the crime of rape is the outrage to the person and feelings of the female resulting from the nonconsensual violation of her womanhood. When a female willingly consents to an act of sexual intercourse, the penetration by the male cannot constitute a violation of her womanhood nor [can it] cause outrage to her person and feelings. If she withdraws consent during the act of sexual intercourse and the male forcibly continues the act without interruption, the female may certainly feel outrage because of the force applied or because the male ignores her wishes, but the sense of outrage to her person and feelings could hardly be of the same magnitude as that resulting from an initial nonconsensual violation of her womanhood. It would seem, therefore, that the essential guilt of rape as stated in . . . section 263 is lacking in the withdrawn consent scenario.” . . .

As the Court of Appeal in this case stated, “while outrage of the victim may be the cause for criminalizing and severely punishing forcible rape, outrage by the victim is not an element of forcible rape. . . . [F]orcible rape occurs when the act of sexual intercourse is accomplished against the will of the victim by force or threat of bodily injury and it is immaterial at what point the victim withdraws her consent, so long as that withdrawal is communicated to the male and he thereafter ignores it.”

In the present case, assuming arguendo that Laura initially consented to, or appeared to consent to, intercourse with defendant, substantial evidence shows that she withdrew her consent and, through her actions and words, communicated that fact to defendant. Despite the dissent’s doubt in the matter, no reasonable person in defendant’s position would have believed that Laura continued to consent to the act. As the Court of Appeal below observed, “Given [Laura’s testimony], credited by the court, there was nothing equivocal about her withdrawal of any initially assumed consent.”

Vela appears to assume that, to constitute rape, the victim’s objections must be raised, or a defendant’s use of force must be applied, before intercourse commences, but that

argument is clearly flawed. One can readily imagine situations in which the defendant is able to obtain penetration before the victim can express an objection or attempt to resist. Surely, if the defendant thereafter ignores the victim's objections and forcibly continues the act, he has committed "an act of sexual intercourse accomplished . . . against a person's will by means of force."

Issue

Defendant, candidly acknowledging *Vela*'s flawed reasoning, contends that, in cases involving an initial consent to intercourse, the male should be permitted a "reasonable amount of time" in which to withdraw, once the female raises an objection to further intercourse. As defendant argues, "By essence of the act of sexual intercourse, a male's primal urge to reproduce is aroused. It is therefore unreasonable for a female and the law to expect a male to cease having sexual intercourse immediately upon her withdrawal of consent. It is only natural, fair and just that a male be given a reasonable amount of time in which to quell his primal urge. . . ."

Holding

We disagree with defendant's argument. Aside from the apparent lack of supporting authority for defendant's "primal urge" theory, the principal problem with his argument is that . . . there is no support for the proposition that the defendant is entitled to persist in intercourse once his victim withdraws her consent.

In any event, even were we to accept defendant's "reasonable time" argument, in the present case he clearly was given ample time to withdraw but refused to do so despite Laura's resistance and objections. Although defendant testified he withdrew as soon as Laura objected, for purposes of appeal we need not accept this testimony as true in light of Laura's contrary testimony. As noted above, Laura testified that she struggled to get away when she was on top of defendant, but that he grabbed her waist and pushed her down onto him. At this point, Laura told defendant that if he really cared about her, he would respect her wishes and stop. Thereafter, she told defendant three times that she needed to go home and that she did not accept his protestations he just needed a "minute." Defendant continued the sex act for at least four or five minutes after Laura *first* told him she had to go home. According to Laura, after the third time she asked to leave, defendant continued to insist that he needed more time and "just stayed inside of me and kept like basically forcing it on me," for about a "minute, minute and [a] half." . . .

The judgment of the Court of Appeal is affirmed.

Dissenting, Brown, J.

The majority finds Laura's "actions and words" clearly communicated withdrawal of consent in a fashion "no reasonable person in defendant's position" could have mistaken. But, Laura's silent and ineffectual movements could easily be misinterpreted. . . . When asked if she had made it clear to John that she didn't want to have sex, Laura says "I thought I had," but she acknowledges she "never officially told him" she did not want to have sexual intercourse. When asked by the prosecutor on redirect why she told John "I got to go home," Laura answers: "Because I had to get home so my mom wouldn't suspect anything."

Furthermore, even if we assume that Laura's statements evidenced a clear intent to withdraw consent, sexual intercourse is not transformed into rape merely because a woman

changes her mind. . . . Under the facts of this case, however, it is not clear that Laura was forcibly compelled to continue. All we know is that John Z. did not instantly respond to her statement that she needed to go home. He requested additional time. He did not demand it. Nor did he threaten any consequences if Laura did not comply.

The majority relies heavily on John Z.'s failure to desist immediately. But, it does not tell us how soon would have been soon enough. Ten seconds? Thirty? A minute? Is persistence the same thing as force? And even if we conclude persistence should be criminalized in this situation, should the penalty be the same as for forcible rape? Such questions seem inextricably tied to the question of whether a reasonable person would know that the statement "I need to go home" should be interpreted as a demand to stop. Under these circumstances, can the withdrawal of consent serve as a proxy for both compulsion and wrongful intent?

Questions for Discussion

1. What facts support the conclusion that Laura clearly withdrew her consent? Could John Z. have reasonably believed that Laura desired to continue to engage in sexual intercourse?
2. Did the majority apply the extrinsic or intrinsic force test? Consider California Penal Code section 261.6, which defines consent to "mean positive cooperation in act or attitude pursuant to and exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved."
3. How did the court distinguish *Vela* from *John Z.*?
4. Do you agree with dissenting Judge Brown that Laura was not forcibly compelled to continue the intercourse with John Z.? What of Judge Brown's argument that the majority of the California Supreme Court is equating "persistence" with "force"? Should a male be provided a "reasonable amount of time" to respond to a withdrawal of consent?

Would you hold John Z. guilty of rape? Is the continuation of sexual intercourse despite a withdrawal of consent the same crime as the forcible attack on an individual? The North Carolina Supreme Court held that once a female consents to sexual intercourse, it is not considered rape if an individual continues sexual relations following the withdrawal of consent. The court noted that the male under these circumstances may be held liable for a crime such as a battery where supported by the facts. "If the actual penetration is accomplished with the woman's consent, the accused is not guilty of rape, although he may be guilty of another crime because of his subsequent actions." The state legislature is considering legislation to change North Carolina rape law. See *State v. Way*, 254 S.E.2d 760 (N.C. 1979).

YOU DECIDE 11.2

Cottie Brown had been involved with the defendant Edward Alston for roughly six months. They shared an apartment, and when they fought, she would live with her mother until he called to ask her to return. Brown testified that at times she had sex with the defendant to "accommodate him." On these occasions, Brown would "stand still and remain entirely passive while the defendant undressed and had sexual intercourse with her." She testified that

Alston beat her on occasion and that she left the apartment and ended the relationship after he struck her when she refused to give him money.

Alston appeared at Brown's technical school a month later and prevented her from entering the building and grabbed her arm, saying that she was going with him. Brown agreed to walk with Alston, and he let go of her arm. Alston stated that Brown was going to miss class that day and threatened to "fix her face" to keep Brown's mother from continuing to interfere in their relations. Brown told him that their relationship was over, and Alston replied that he had a right to make love to her again since "everyone could see her but him." Brown agreed to give Alston her address in an unsuccessful effort to persuade him to permit her to return to school. They passed a group of Alston's friends and finally arrived at the home of Lawrence Taylor. Alston briefly went to the back of the house and, when he returned, asked whether Brown was "ready," and she replied that she "wasn't going to bed with him." Brown complied with Alston's order to lie down on the bed, and the defendant pushed apart Brown's legs and had sexual intercourse with her. Brown testified that she cried, but did not attempt to push Alston off her. They then talked. At some point following this incident, Brown let Alston into her apartment after he threatened to kick down the door. He spent the night, and the two made love several times. The defendant testified that she did not resist because she "enjoyed it." Was Alston guilty of the rape of Brown? See *State v. Alston*, 312 S.E.2d 470 (N.C. 1984).

RAPE SHIELD LAWS

The common law permitted the defense to introduce evidence concerning a victim's prior sexual relations with the accused, prior sexual relations with individuals other than the accused, and evidence concerning the alleged victim's reputation for chastity. Would you find this type of evidence valuable in determining a defendant's guilt or innocence?

The law continues to permit the introduction of evidence relating to sexual activity between the accused and victim. The assumption is that an individual who voluntarily entered into a relationship with a defendant in the past is more than likely to have again consented to enter into a relationship with the accused. The thinking is that the defendant is entitled to have the jury consider and determine the weight (importance) to attach to this evidence in determining guilt.

Rape shield laws prohibit the defense from asking the victim about or introducing evidence concerning sexual relations with individuals other than the accused or introducing evidence concerning the victim's reputation for chastity. The common law assumed that such evidence was relevant in that an individual who has "already started on the road of [sexual unchastity] would be less reluctant to pursue her way, than another who yet remains at her home of innocence and looks upon such a [pursuit] with horror."

The other reason for this evidence was the belief that the jury should be fully informed concerning the background of the alleged victim in order to determine whether her testimony was truthful or was the product of perjury or of a desire for revenge.⁵⁰

Rape shield laws prohibiting evidence relating to a victim's general sexual activity are based on several reasons:

- *Harassment.* They prevent the defense attorney from harassing the victim.
- *Relevance.* The evidence has no relationship to whether the victim consented to sexual relations with the defendant and diverts the attention of the jury from the facts of the case.
- *Prejudice.* The evidence biases the jury against the accused.
- *Complaints.* Victims are not likely to report rapes if they are confronted at trial with evidence of their prior sexual activity.

Rape shield laws do not prohibit the introduction of an accused's past sexual activity in every instance. The Sixth Amendment to the U.S. Constitution guarantees individuals a fair trial and provides that individuals have the right to confront the witnesses against them. Courts have permitted the introduction of a victim's past activity with others in those instances when it is relevant to the source of injury or semen or reveals a pattern of activity or a motive to fabricate. For instance, the fact that a victim had a sexual relationship with a man other than the accused before going to the hospital may be relevant for the source of injury or semen.

A good example of the application of a rape shield statute is the Kobe Bryant case. The now deceased Los Angeles Lakers superstar was charged with sexual assault in Colorado. There was evidence that the young female victim had sexual intercourse with at least one other individual after she left Bryant and before she contacted the police. The trial court judge ruled that the defense was entitled to introduce evidence of the woman's sexual activity during the three days prior to her hospital examination on the grounds that this was relevant to the cause of her injuries, the source of DNA, and her credibility. This ruling along with other information that was prejudicial to the prosecution case led to the dismissal of the charges against Bryant.

Consider the issue that confronted the trial court in *State v. Colbath*. The defendant and victim were in a bar. The victim made sexually provocative remarks to the defendant and permitted him to feel her breast and buttocks and rubbed his sexual organ. The two went to the defendant's trailer where they had sexual intercourse. The defendant's significant other arrived and assaulted the woman, who defended her behavior by contending that she had been raped by the defendant. The trial judge rejected the defendant's effort to introduce evidence of the alleged victim's public sexual displays with other men in the bar and evidence that the victim had left the bar with other men prior to her approaching the defendant. The New Hampshire Supreme Court, however, held that despite the rape shield law, the defendant's Sixth Amendment right to confront witnesses against him required admission of evidence of the victim's conduct in the bar because it might indicate that at the time that the victim met the defendant, she possessed a "receptiveness to sexual advances."⁵¹

In *State v. DeJesus*, the Connecticut Supreme Court held that the trial court was in error in excluding the victim's history of prostitution, which the defendant argued was relevant to

establish the victim's motive to fabricate. "If the jury had been allowed to consider the excluded evidence, it reasonably could have found, contrary to the implication that she simply needed money, that the victim demanded a fee for her services as she had done in the past. Further, it could have found that, when the defendant paid only part of the fee, the victim insisted that he pay the balance, and that, when he refused to do so and indicated that he would not do so in the future, she decided to fabricate a charge of sexual assault."⁵²

In *Neeley v. Commonwealth*, a 14-year-old white female alleged that Neeley, a young Black American male, entered her bedroom and raped her. Neeley denied the charge. The prosecution case primarily was based on expert testimony that hair on the alleged victim's cervix was "characteristic" of hair from a Black person. A Virginia court of appeals held that the trial court had improperly denied the defendant the opportunity to introduce evidence that the young woman earlier had sexual relations with her Black boyfriend, which accounted for the presence of the hair fragment. Any embarrassment resulting from introduction of the evidence was ruled to be outweighed by the evidentiary value of the improperly excluded evidence. Do you agree?⁵³

On the other hand, in *People v. Wilhelm*, a Michigan appellate court upheld a ruling excluding evidence that the victim had exposed her breasts to two men who were sitting at her table in a bar and that she permitted one of them to fondle her breasts. The court ruled that the victim's conduct in the bar did not indicate that she would voluntarily engage in sexual intercourse with the defendant.⁵⁴

In *Luckett v. Commonwealth*, the Kentucky Court of Appeals held that the fact the victim had engaged in oral sex with the defendant was inadmissible in evidence at the defendant's rape trial. The court reasoned that the fact the victim had consented to oral sex with the defendant did not mean that she consented to fornicate with the defendant and had not been raped.⁵⁵

In *Fells v. State*, the defendant argued that the victim's HIV status was admissible to demonstrate a motive to fabricate rape because it was illegal for individuals with HIV to engage in sexual interaction without disclosing this status to their partners. The Arkansas Supreme Court rejected the defendant's argument and held that "the HIV status of a rape victim is protected under Arkansas's rape-shield statute. The statute prohibits the use of past sexual behavior to embarrass and degrade victims; its purpose is to shield rape victims from public humiliation. While it is possible to contract HIV through blood transfusions or other means, the public generally views it as a sexually transmitted disease. In the minds of the jurors, evidence that S.H. was HIV-positive would be tantamount to evidence of her prior sexual behavior."⁵⁶ How would you have decided the above rape shield cases?

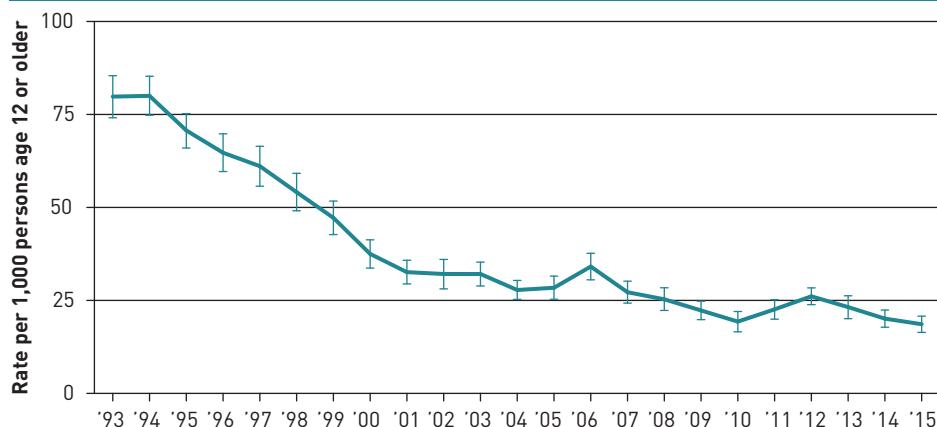
YOU DECIDE 11.3

Stephen F. [Child] appeals his convictions for two counts of criminal sexual penetration and argues that the trial court improperly excluded evidence of the alleged victim's past sexual activities. Child claimed that this evidence would have demonstrated the alleged victim's

motive to fabricate. Under sections 30-9-11 through 30-9-15 of New Mexico Statutes, evidence of the victim's past sexual conduct and opinion evidence of the victim's past sexual conduct or of reputation for past sexual conduct shall not be admitted unless, and only to the extent, the court finds that the evidence is material to the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

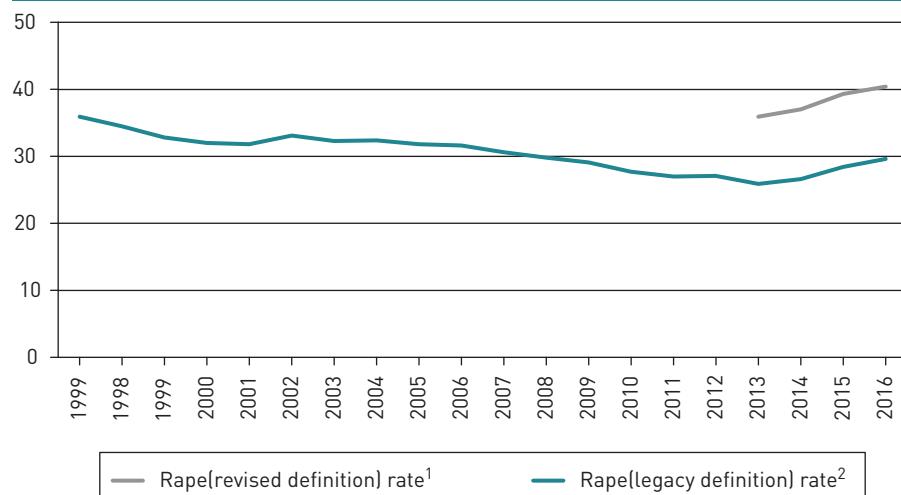
Child (age 15) and the alleged victim (B.G., age 16) engaged in sexual intercourse. Child, B.G., and B.G.'s brother had been watching movies in B.G.'s bedroom. Child had been a friend of B.G.'s brother and family for nine years and usually slept on the couch in the living room when he spent the night. B.G. testified that after Child had headed for bed in the living room, he returned to her room and forced her to engage in sexual conduct, including oral, vaginal, and anal intercourse. The morning after the incident, B.G. told her mother that Child had raped her. Child was convicted of two counts of criminal sexual penetration. Child contended that the intercourse was consensual and claimed that B.G. lied because she feared that she would be punished by her religious parents. B.G. previously had been punished by her parents after having had consensual sexual relations with her then boyfriend. B.G. reportedly had told Child that her mother "was really upset . . . [about my having engaged in sex with my boyfriend;] she said that it was going to take her a long time to trust me again, . . . about three or four months[,] . . . and I wasn't allowed to go out on dates with guys." Child's theory was that B.G. was motivated to fabricate the claim of rape because she feared the punishment and disapproval of her parents, devout Christians who "don't believe in sex before marriage." The State of New Mexico opposed Child's motion to permit the cross-examination of the complaining witness in regard to her prior sexual conduct with her boyfriend on the grounds that this was intended to portray the complaining witness as an individual who is likely to engage in sexual activity outside of marriage. As a judge, would you permit Child to cross-examine the complaining witness in regard to her sexual conduct with her boyfriend? See *State v. Stephen F.*, 152 P.3d 842 (N.M. Ct. App. 2007).

FIGURE 11.1 ■ Crime on the Streets: Violent Victimization, 1993–2015



Source: Bureau of Justice Statistics, National Crime Victimization Survey (NCVS), 1993–2019.

FIGURE 11.2 ■ Crime on the Streets: Rate of Rapes in the United States, 1999–2016



Source: Federal Bureau of Investigation: Uniform Crime Reporting, Criminal Justice Information Services Division. <https://ucr.fbi.gov/crime-in-the-u-s/2016/crime-in-the-u-s-2016/tables/table-1/table-1.xls>

Notes: Includes both revised definition and legacy definition of rape. The murders and non-negligent homicides that occurred as a result of the events of September 11, 2001, are not included.

¹ The figures shown in this column for the offense of rape were estimated using the revised Uniform Crime Reporting Program's (UCR) definition of rape.

² The figures shown in this column for the offense of rape were estimated using the legacy UCR definition of rape.

ASSAULT AND BATTERY

Assault and battery, though often referred to as a single crime, in fact are separate offenses. A battery is the application of force to another person. An assault may be committed either by attempting to commit a battery or by intentionally placing another in fear of a battery. Notice that an assault does not involve physical contact. An assault is the first step toward a battery, and the law takes the position that it would be unfair to hold an individual liable for both an assault and a battery. As a result, the assault “merges” into the battery, and an individual only is held responsible for the battery. A Georgia statute provides that an individual “may not be convicted of both the assault and completed crime.”⁵⁷

State statutes typically include assault and battery under a single “assault statute.” Both offenses are considered misdemeanors. Serious assaults and batteries are punished as aggravated misdemeanors and aggravated batteries that are categorized as felonies.

The Elements of Battery

Modern battery statutes require physical contact that results in bodily injury or offensive touching, a contact that is likely to be regarded as offensive by a reasonable person. Assault and battery are satisfied under the Model Penal Code by an intentional, purposeful, reckless, or negligent intent. The code punishes an individual who “purposely, knowingly or recklessly causes bodily injury to another or negligently causes bodily injury to another with a deadly weapon.”⁵⁸ The Texas Penal Code follows the MPC and declares that it is a battery to “intentionally, knowingly, or recklessly [cause] bodily injury to another.”⁵⁹ Most state statutes narrowly limit the required intent. Illinois punishes the intentional or knowing causing of bodily harm to an individual or physical contact with an individual of an insulting or provoking nature.⁶⁰ Georgia limits battery to the intentional causing of “substantial physical harm or visible bodily harm to another.” This includes, but is not limited to, substantially blackened eyes, substantially swollen lips, and substantial bruises to other body parts.⁶¹

In thinking about battery, you should be aware that a battery is not confined to the direct application of force by an individual. It can include causing substantial bodily harm by poisoning, bombing, a motor vehicle, illegal narcotics, or an animal. Minnesota, for instance, punishes causing “great or substantial harm” by intentionally or negligently failing to keep a dog properly confined.⁶² In *State v. Sherer*, the defendant placed over 30 random phone calls to women in which he impersonated a doctor treating urinary tract infections. He directed the women to engage in self-examinations over the phone involving a knife, a razor blade, or fingernail polish remover. The Montana Supreme Court held that aggravated assault does not require that the defendant personally direct force toward a victim, and that the resulting injury was precisely what Sherer intended to accomplish. Sherer’s communications were held to be the cause of the victims’ physical abuse.⁶³ In states with statutes punishing offensive physical contact, an uninvited kiss or sexual fondling may be considered a battery. A Washington court held that assault and battery include spitting.⁶⁴

You should also keep in mind that not every physical contact is a battery. We impliedly consent to physical contact in sports, in medical operations, while walking in a crowd, or when a friend greets us with a hug or kiss. The law accepts that police officers and parents are justified in employing reasonable force. Reasonable force may also be used in self-defense or in defense of others.

Simple and Aggravated Battery

We earlier mentioned that a battery is a misdemeanor. Aggravated batteries are felonies and typically require

- serious injury,
- the use of a dangerous or deadly weapon, or
- the intent to kill, rape, or seriously harm.

The Georgia battery statute punishes a second conviction for a simple battery with imprisonment of between 10 days and 12 months with the possibility of a fine of not more than \$1,000.⁶⁵ An aggravated battery in Georgia requires an attack that renders a “member” of the victim’s body “useless” or “seriously disfigured” and is punishable by between 1 and 20 years in prison. The penalty is enhanced to between 10 and 20 years when knowingly directed at a police or correctional officer and is punished by between 5 and 20 years when directed at an individual over 65, committed in a public transit vehicle or station, or directed at a student or teacher. An aggravated battery is punished by between 3 and 20 years in prison when directed at a family member.⁶⁶

California considers a battery as aggravated when committed with a deadly weapon, a caustic or flammable chemical, or a Taser or stun gun, or when the battery results in grievous bodily harm.⁶⁷ Illinois lists as an aggravated battery inserting a substance that may cause death or serious bodily harm in food, drugs, or cosmetics and a battery committed by an individual who is “hooded, robed or masked in such manner as to conceal his identity.”⁶⁸ South Dakota considers the serious physical injury on an unborn child to be an aggravated assault.⁶⁹ Florida punishes as aggravated a battery that intentionally or knowingly is committed against a woman who is pregnant and who the offender knows is pregnant.⁷⁰ A Minnesota statute punishes as battery the selling or provision of illegal narcotics that “causes great bodily harm” by imprisonment for not more than 10 years and by payment of a fine of not more than \$20,000.⁷¹

In Massachusetts, a battery through the use of a dangerous weapon may result in imprisonment for 10 years.⁷² A dangerous weapon is an instrumentality that may be used to inflict serious bodily harm. This may be an object like a gun, knife, or hatchet designed to inflict substantial bodily harm or an object that may be used to inflict substantial harm. Ordinary objects may be transformed into dangerous weapons based on how they are used. This includes beer bottles, wooden boards, pool cues, and boots. A defendant’s hands or feet have been determined to constitute a dangerous weapon when a “brutal and prolonged attack” is directed against a “vulnerable” and “defenseless” victim. In *State v. Davis*, the victim was seven months pregnant at the time the defendant attacked her. When she tried to run from the defendant, he grabbed her, and she fell to the ground on her hands and knees. The defendant slapped her and repeatedly kicked her as if he were “jump-starting a Harley and the defendant punched the victim five to ten times in her face, torso and chest.”⁷³ The firing of a paintball gun at a young woman was not determined to be a battery through the use of a dangerous weapon because a paintball gun is not “by design or intent calculated or likely to produce death or great bodily harm.”⁷⁴

The federal government and 16 states provide criminal penalties for female genital mutilation, a practice in which the sexual organs of young women are bound to prevent premarital sexual relations. The federal statute punishes “whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person.” This procedure is punished with a fine and imprisonment of not more than five years when applied against a person younger than 18.⁷⁵

The common law crime of **mayhem** is included in the criminal codes of several states, including California. California defines mayhem as occurring when one deprives a human being of a “member of his or her body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip.”⁷⁶ A well-known case of “malicious wounding” involved Lorena Bobbitt who, while her husband John was asleep, dismembered his sexual organ and then left the house and tossed it out the car window onto the highway. Lorena claimed that John had raped her, and she was subsequently found not guilty by reason of insanity and was committed to a mental institution for observation.

California Penal Code section 206 punishes **torture** with life imprisonment. “Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury . . . upon the person of another is guilty of torture.”⁷⁷

States also have adopted statutes punishing caregivers who cause injury to a “vulnerable elderly person,” endanger the health of a “vulnerable elderly individual,” or subject an elderly individual to sexual abuse.⁷⁸

In summary, a battery involves each of the following:

- *Act.* The application of force that results in bodily injury or offensive contact. Aggravated battery statutes require a serious bodily injury. The contact must be regarded as offensive by a reasonable person.
- *Intent.* The intentional, knowing, reckless, or negligent application of force.
- *Consent.* An implied or explicit consent may constitute a defense under certain circumstances.

Domestic Battery

Domestic battery statutes enhance the punishment for assaults and batteries committed against family members. The thinking is that individuals are particularly vulnerable because they often are victimized behind closed doors and may lack the economic resources and psychological capacity to protect themselves by moving out of the home. Family relationships can be full of emotion and passion and result in significant injury and harm. Punishing domestic violence more severely than other assaults and batteries is intended to provide protection for family members by deterring and punishing domestic violence. Most statutes extend coverage under domestic violence statutes to protect spouses who are living separate and apart, unmarried individuals who are living together, and individuals with whom an individual has a child. Some state statutes also punish batteries against individuals who an offender is “dating,” despite the fact that the couple is not living together.

Indiana defines the crime of domestic battery, in part, as an attempt to cause, a threat to cause, or causing physical harm to another family or household member. A court may impose a civil order of protection against an individual who is demonstrated by a preponderance of the evidence to pose a credible threat to an individual protected under the domestic violence statute. The order of protection may require that the assailant vacate the home, pay child support,

remain at a distance from the victim, and turn over all firearms to the police. Domestic battery is punishable by up to one year in jail and a \$5,000 fine. If the defendant commits the domestic battery in the physical presence of a child under the age of 16, or if the defendant has a prior unrelated domestic battery conviction, the new conviction for domestic battery is a felony, which may be punished by up to three years in prison and a \$10,000 fine. These penalties may be enhanced by punishment of other crimes involved in the same transaction such as kidnapping.⁷⁹

Every state allows parents to administer reasonable force to discipline a child, and 19 states allow corporal punishment in school.

One of the more interesting cases is a 2008 decision by an Illinois appellate court in *People v. Irvine*. Irvine was charged with domestic battery against Niya White. The two confronted one another on the street. White confronted Irvine, who “grabbed [her], choked [her] on the neck, and he shoved [her] into a glass window.” White also testified that the defendant slapped her in the face with an open hand and grabbed her by the hair and threw her against a parked car. An Illinois appellate court found that Irvine and White had a “family relationship” for purposes of the domestic battery statute because they dated for six weeks and continued to have sexual intercourse up to and including the date of their altercation.⁸⁰

The U.S. Congress established the offense of “interstate domestic violence” in 18 U.S.C. § 261. The statute establishes criminal penalties for any “person who travels in interstate or foreign commerce . . . with the intent to kill, injure, harass, or intimidate a spouse, intimate partner or dating partner, and . . . in the course or as a result of such travel, commits or attempts to commit a crime of violence against the spouse or intimate partner.” A violation of this statute is punishable by a minimum penalty of five years in prison.

Assault

An assault may be committed by an attempt to commit a battery or by placing an individual in fear of a battery. Georgia defines an assault as an attempt to “commit a violent injury to the person of another; or . . . an act which places another in reasonable apprehension of immediately receiving a violent injury.”⁸¹

California limits assault to an “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.”⁸² Illinois, on the other hand, provides that a person commits an assault when, “without lawful authority, he engages in conduct that places another in reasonable apprehension of receiving a battery.”⁸³ An assault is a misdemeanor, punishable in California by imprisonment of up to six months in the county jail and by a possible fine of \$2,000.⁸⁴ Ohio is among the states whose criminal code uses the term *menacing* rather than assault.⁸⁵

A small number of states, including New York, recognize the offense of an attempted assault. The overwhelming majority of jurisdictions reject that an individual may be prosecuted for an attempt to commit a battery on the grounds that this risks the conviction of individuals who have yet to take clear steps toward an assault.⁸⁶ A Georgia court in the 19th century also pointed out that prosecuting an individual for an attempt to commit a battery “is simply absurd. As soon as any act is done towards committing a violent injury on the person of another, the party doing the

act is guilty of an assault, and he is not guilty until he has done the act. . . . An attempt to act is too [confused] for practical use." Do you agree that an attempt to commit an assault is "absurd"?⁸⁷

Aggravated Assault

Aggravated assault is a felony and is generally based on factors similar to those constituting an aggravated battery.

Georgia provides three forms of aggravated assault that are punishable by between 5 and 25 years in prison: assault with intent to murder, rape, or rob; assault with a deadly weapon; and discharge of a firearm from within an automobile. The statute also punishes as an aggravated assault an assault on a police or correctional officer, a teacher, or an individual 65 years of age or older, or an assault committed during the theft of a vehicle engaged in public or commercial transport.⁸⁸

Illinois lists as an aggravated assault an assault committed while "hooded, robed or masked," and an assault committed with "a deadly weapon or any device manufactured and designed to be substantially similar in appearance to a firearm." Individuals also commit an aggravated assault in Illinois when they knowingly and without lawful justification "shine[] or flash[] a laser gunsight or other laser device that is attached or affixed to a firearm . . . so that the laser beam strikes near or in the immediate vicinity of any person."⁸⁹ Illinois also punishes under a separate statute "vehicular endangerment," the dropping of an item off a bridge with the intent to strike a motor vehicle.⁹⁰

The crime of **stalking** is recognized in every state. Some of you may recall the stalking and killing of both young television actress Rebecca Schaeffer and rock star and former member of the Beatles John Lennon, and the attack on tennis star Monica Seles. A recent study indicates that of the 3.4 million Americans who have been a victim of stalking, 11% have been stalked for five years or more. The Illinois statute provides that individuals commit stalking when they "on at least 2 separate occasions" follow another person or place the person under surveillance or any combination of these two acts. This must be combined with the transmittal of a threat of immediate or future bodily harm or the placing of a person in reasonable apprehension of immediate or future bodily harm or the creation of a reasonable apprehension that a family member will be placed in immediate or future bodily harm.⁹¹ These acts, when combined with the causing of bodily harm, restraining the victim, or the violation of a judicial order prohibiting such conduct, constitute aggravated stalking.⁹² Illinois, along with a number of other states and the federal government, has also passed laws to combat the new crime of **cyberstalking**. This involves transmitting a threat through an electronic device of immediate or future bodily harm, sexual assault, confinement, or restraint against an individual or family member of that person. The threat must create a "reasonable apprehension of immediate or future bodily harm, sexual assault, confinement, or restraint."⁹³

In *State v. Hoying*, Hoying met Kelly Criswell when they both worked a local restaurant. Hoying became angry when Kelly declined to go out with him. He persisted in trying to contact her after she left the restaurant, and she obtained a civil protection order prohibiting him from contacting her. Hoying disregarded the order and sent 105 emails to Kelly within a three-week period threatening to visit her place of employment and threatening her physical safety. An Ohio appellate court in affirming Hoying's six-and-a-half-year prison term expressed the "greatest fear" for Kelly, whose mental distress led to her moving from the immediate area.⁹⁴

The next case, *Carter v. Commonwealth*, discusses some interesting issues involved in the legal standard for a threatened battery assault.

The Elements of Assault

In considering an attempted-battery assault, keep the following in mind:

- *Intent.* An attempt in most states to commit a battery requires an intent (purpose) to commit a battery.
- *Act.* An individual is required to take significant steps toward the commission of the battery.
- *Present Ability.* Some states require the present ability to commit the battery. In these jurisdictions, an individual would not be held liable for an assault where the assailant is unaware that a gun is unloaded. South Dakota, on the other hand, provides for a battery “with or without the actual ability to seriously harm the other person.”⁹⁵
- *Victim.* The victim need not be aware of the attempted battery.

The crime of assault of placing another in fear of a battery requires the following:

- *Intent.* There must be intent (or purpose) to cause a fear of immediate bodily harm.
- *Act.* The act would cause a reasonable person to fear immediate bodily harm. Words ordinarily are not sufficient and typically must be accompanied by a physical gesture that, in combination with the words, creates a reasonable fear of imminent bodily harm.
- *Victim.* The victim must be aware of the assailant’s act and possess a reasonable fear of imminent bodily harm. A threat may be conditioned on the victim’s meeting the demands of the assailant.

MODEL PENAL CODE

Section 211.1. Assault

1. Simple Assault. A person is guilty of assault if he:
 - a. attempts to cause or purposely, knowingly, or recklessly causes bodily injury to another; or
 - b. negligently causes bodily injury to another with a deadly weapon; or
 - c. attempts by physical menace to put another in fear of imminent serious bodily injury.

Simple assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent in which case it is a petty misdemeanor.

2. Aggravated Assault. A person is guilty of aggravated assault if he:
 - a. attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life; or
 - b. attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.

Aggravated assault under paragraph (a) is a felony of the second degree; aggravated assault under paragraph (b) is a felony of the third degree.

Analysis

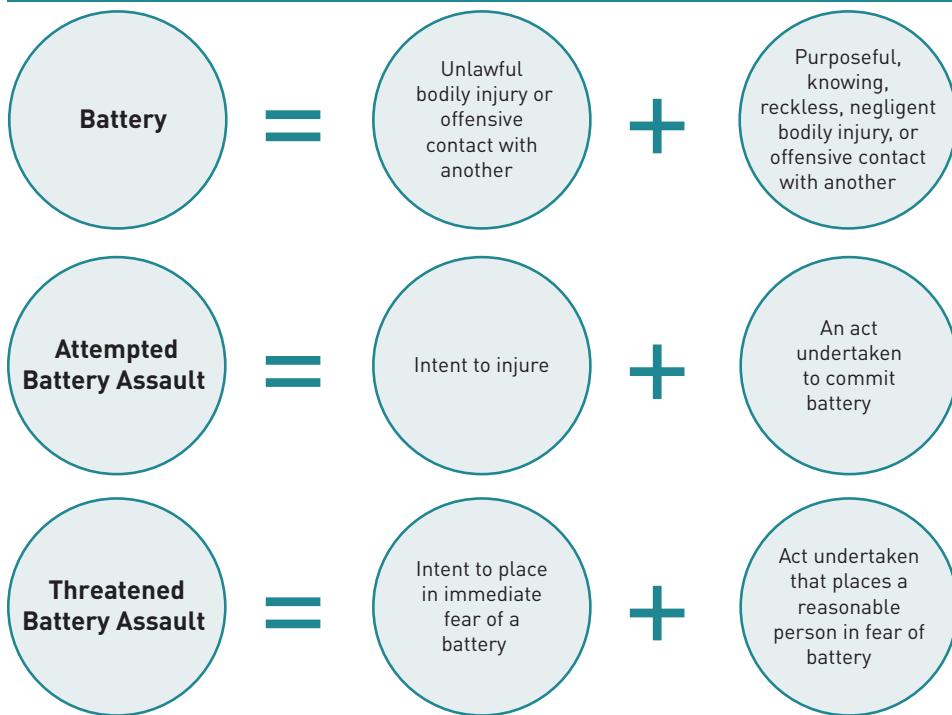
1. The Model Penal Code eliminates the common law categories and integrates assaults and batteries into a single assault statute.
2. Assists are graded into categories based on the gravity of the harm intended or actually caused.
3. Grading is not based on the identity of the victim.
4. Actual or threatened bodily injury or serious bodily injury is required. Offensive contact is excluded.
5. A deadly weapon includes poisons, explosives, caustic chemicals, handguns, knives, and automobiles.

YOU DECIDE 11.4

Sheriff deputies arrived at Kenneth Chance's home to arrest him. Chance apparently saw the deputies approach and ran from his house. Sergeant Murdoch pursued him on foot and twice shouted, "Sheriff's Department, stop." Murdoch from a distance of 30 to 35 feet saw that Chance was armed with a handgun. The defendant ran around the front end of a trailer.

Murdoch advanced to his left, around the back of the trailer, which was roughly 20 feet long. Carefully peering around the corner, he saw Chance pressed against the trailer, facing the front end. He was holding the gun in his right hand, extended forward and supported by his left hand. Chance looked back over his right shoulder at Murdoch, who had his own gun trained on the defendant. Murdoch repeatedly told Chance to drop his weapon. The officer testified, "I was in fear of my life. I was afraid . . . he was going to try to shoot me any second." After some hesitation, defendant brought the gun toward the center of his body, then flipped the firearm behind him. Chance began to run again, but fell after only a few steps and was arrested. The gun was fully loaded with 15 rounds in the magazine. There was no round in the firing chamber, although the defendant could have chambered a bullet by pulling back a slide mechanism.

A jury convicted Chance of assault with a firearm on a peace officer. The California Penal Code since 1872 has defined assault as "an unlawful attempt, coupled with a present ability to commit a violent injury on the person of another." As a judge, would you affirm or reverse the trial court judgment? See *People v. Chance*, 44 Cal. 4th 1167 (Cal. 2008).

FIGURE 11.3 ■ The Legal Equation: Battery

DID CARTER PLACE OFFICER O'DONNELL IN IMMINENT FEAR OF A BATTERY?

CARTER V. COMMONWEALTH, 594 S.E.2D 284 (VA. CT. APP. 2004)

Opinion by Clements, J.

Michael Anthony Carter was convicted in a bench trial of assaulting a police officer. . . . On appeal, he contends the evidence presented at trial was insufficient to support his conviction because the Commonwealth did not prove he had the present ability to inflict actual violence upon the officer. . . . [W]e affirm Carter's conviction.

Facts

The evidence presented to the trial court established that, on December 29, 1998, around 11:00 p.m., Officer B.N. O'Donnell of the City of Charlottesville Police Department observed a speeding car and, activating his vehicle's overhead flashing blue emergency lights, initiated a traffic stop. O'Donnell, who was on routine patrol at the time in a high crime area of

the city, was driving a marked police vehicle and wearing his police uniform and badge. After the car pulled over, O'Donnell shone his vehicle's "take down" lights and spotlight onto the car and approached it on foot.

Two people were inside the car, the driver and Carter, who was seated in the front passenger seat. O'Donnell initiated a conversation with the driver, asking for his driver's license and registration and informing him why he had been stopped. The driver responded to O'Donnell in a "hostile" tone of voice. While conversing with the driver, O'Donnell used his flashlight to conduct a "plain view search" of the car to make sure there were no visible weapons or drugs in it. O'Donnell noticed that Carter had his right hand out of sight "down by his right leg." Carter then suddenly brought his right hand up and across his body. Extending the index finger on his right hand straight out and the thumb straight up, he pointed his index finger at the officer and said, "Pow." Thinking Carter "had a weapon and was going to shoot" him, O'Donnell "began to move backwards" and went for his weapon. A "split second" later, O'Donnell realized "it was only [Carter's] finger." O'Donnell testified: "The first thing I thought was that I was going to get shot. I—it's a terrifying experience, and if I could have gotten my weapon, I would have shot him." Immediately after the incident, O'Donnell, who was "visibly shaken," asked Carter "if he thought it was funny," and Carter responded, "Yes, I think it is funny." . . .

Carter moved to strike the evidence, arguing the Commonwealth's evidence was insufficient to prove assault because it failed to prove Carter had the present ability to inflict actual violence upon the officer. The Commonwealth responded that proof of such ability was unnecessary as long as the evidence proved the officer reasonably believed Carter had the present ability to inflict actual bodily harm upon him.

The trial court agreed with the Commonwealth. Finding Carter's "act of pointing what the officer believed at the time to be a weapon at him" did, "in fact, place Officer O'Donnell in reasonable apprehension or fear," the trial court found the evidence sufficient to prove beyond a reasonable doubt that Carter was guilty of assault. Thus, the trial court denied Carter's motion to strike the evidence and subsequently convicted him of assaulting a police officer. . . . At sentencing, the court imposed a sentence of three years, suspending two years and six months.

Issue

[Virginia Code Annotated] § 18.2-57(C) provides, in pertinent part, that "any person [who] commits an assault . . . against . . . a law-enforcement officer . . . engaged in the performance of his public duties as such . . . shall be guilty of a . . . felony."

On appeal, Carter asserts the Commonwealth failed to prove his conduct constituted an assault of a law enforcement officer because, in pointing his finger at the officer and saying "pow," he did not have the present ability to inflict harm upon the officer, as required under the common law definition of assault. Thus, he contends, the trial court erred, as a matter of law, in finding the evidence sufficient to sustain a conviction for assault.

In response, the Commonwealth contends that, under long-established Virginia case law, a defendant need not have had the present ability to inflict harm at the time of the offense to be guilty of assault. It is enough, the Commonwealth argues, that, as in this case, the defendant's conduct created in the mind of the victim a reasonable fear or apprehension

of bodily harm. Accordingly, the Commonwealth concludes, the trial court properly found the evidence sufficient to convict Carter of assaulting a police officer.

Reasoning

While statutorily proscribed and regulated, the offense of assault is defined by common law in Virginia. (“In this jurisdiction, we adhere to the common law definition of assault, there having been no statutory change to the crime.”) . . .

Assault has . . . long been defined at common law “as being (1) an attempt to commit a battery or (2) an intentional placing of another in [reasonable] apprehension of receiving an immediate battery.” Today, most jurisdictions include both of these separate types of assault, attempted battery and putting the victim in reasonable apprehension, within the scope of criminal assault.

In Virginia, our Supreme Court has long recognized the existence of both concepts of assault in the criminal-law context. . . .

The instruction under consideration . . . presents the question on which there is a sharp and irreconcilable conflict in the authorities on the subject; diametrically opposed positions being taken by the authorities. . . .

We think that, both in reason and in accordance with the great weight of modern authority, . . . a present ability to inflict bodily harm upon the victim is not an essential element of criminal assault in all cases. Indeed, under those cases, to be guilty of . . . criminal assault, a defendant need have only an apparent present ability to inflict harm.

Holding

As previously discussed, the two types of criminal assault recognized at common law—attempted assault and putting the victim in reasonable apprehension of bodily harm—are separate and distinct forms of the same offense. They have different elements and are, thus, defined differently and applied under different circumstances. . . .

For these reasons, we hold that, under the common law definition of assault, one need not, in cases such as this, have a present ability to inflict imminent bodily harm at the time of the alleged offense to be guilty of assault. It is enough that one’s conduct created at the time of the alleged offense a reasonable apprehension of bodily harm in the mind of the victim. Thus, an apparent present ability to inflict imminent bodily harm is sufficient to support a conviction for assault.

In this case, the trial court found that Carter’s “act of pointing what the officer believed at the time to be a weapon at him” did, “in fact, place Officer O’Donnell in reasonable apprehension or fear.” The evidence in the record abundantly supports this finding, and the finding is not plainly wrong. . . .

O’Donnell testified that he thought he was “going to get shot.” It was, he said, “a terrifying experience, and if I could have gotten my weapon, I would have shot him.”

The trial court could reasonably conclude from these facts that the officer was terrified and thought he was about to be shot. That the officer’s terror was brief does not alter the fact, as found by the trial court, that the officer believed for a moment that Carter had the intention and present ability to kill him. Moreover, under the circumstances surrounding

the incident, we cannot say, as a matter of law, that such a belief was unreasonable. Thus, although Carter did not have a weapon, the trial court could properly conclude from the evidence presented that Carter had an apparent present ability to inflict imminent bodily harm and that his conduct placed Officer O'Donnell in reasonable apprehension of such harm.

Hence, the trial court did not err, as a matter of law, in finding the evidence sufficient to convict Carter of assault. . . . Accordingly, we affirm Carter's conviction for assault. . . .

Dissenting, Benton, J., with whom Fitzpatrick, C.J., joins.

The police officer testified that . . . the "first thing I thought was that I was going to get shot. I—it's a terrifying experience, and if I could have gotten my weapon, I would have shot him. But it's—it happens . . . [in] a split second."

The officer testified that Carter then "started laughing."

The common law definition of "assault" . . . does not encompass this type of intentional conduct, which is intended to startle but is performed without a present ability to produce the end if carried out. . . .

I disagree with the majority opinion's holding that a conviction for criminal assault can be sustained in Virginia even though the evidence failed to prove the accused had a present ability to harm the officer. I would hold that Carter committed an "act accompanied with circumstances denoting an intention" to menace but it was not "coupled with a present ability . . . to use actual violence" or "calculated to produce the end if carried into execution."

Because Virginia continues to be guided by the common law rule concerning assault, I would hold that the conviction is not supported because the evidence failed to prove Carter acted "by means calculated to produce the end if carried into execution." Accordingly, I would reverse the conviction for assault.

Questions for Discussion

1. Explain the distinction between attempted battery and the assault of placing a victim in reasonable apprehension of bodily harm.
2. Compare and contrast the majority and dissenting opinions. Which is more persuasive?
3. Did Officer O'Donnell reasonably believe that he would be subjected to an immediate battery? Would Carter be criminally liable in the event that he pointed a pistol at O'Donnell that Carter knew was unloaded?
4. Would you convict Carter of assault? Consider whether you would convict Carter under a statute that requires that a criminal threat be made verbally, in writing, or by means of electronic communication? See *People v. Gonzalez*, 394 P.3d 1074 (Cal. 2017).

STALKING

In *State v. Craig*, the New Hampshire Supreme Court addressed whether posting messages on social media constitutes stalking. Do you agree with the court's decision? (Note this is part of the text introducing the case).

DOES POSTING MESSAGES ON FACEBOOK CONSTITUTE STALKING?

STATE V. CRAIG, 112 A.3D 559 (N.H. 2015)

Opinion by Bassett, J.

Issue

The defendant, Brian Craig, was convicted on one count . . . of stalking. . . . On appeal, the defendant argues that the trial court erred in denying his motion to dismiss the witness tampering and stalking charges for insufficient evidence.

Facts

In late 2011, the defendant met the victim at a restaurant in Exeter where she worked as a bartender and waitress. The defendant initially came to the victim's workplace with his brother or with friends. The victim interacted with the defendant only at work, and, according to her, their relationship consisted only of "very casual, very simple" customer-server communications. In time, the defendant began coming to the restaurant by himself, and the victim noticed that he stared at her. On one occasion, he came in alone, and told the victim that he came in just to see her.

In April 2012, the defendant mailed a letter to the victim at her workplace. The letter addressed the victim by name, and began: "So, you must've heard I was speaking highly of you on my Facebook page. I can tell, because you are trying to hurt me." Alarmed by the letter, the victim contacted the Exeter Police Department. Shortly thereafter, the victim received a second letter at work, in which the defendant stated that he "had to get a few things off of [his] chest" about their relationship before he could "say good bye properly."

On April 22, Officer Chadwick of the Exeter Police Department served the defendant with a stalking warning letter. Chadwick explained to the defendant that the victim had complained about his behavior, and that the letter was a warning from the Exeter Police Department that "future stalking behavior" would result in prosecution for stalking. Chadwick confirmed that the defendant understood the warning letter and the consequences of violating it. On the same day, the Exeter police served the defendant with a no-trespass notice from the victim's employer, informing him that he was forbidden from entering the victim's workplace, and that if he did so, he could be arrested for criminal trespass.

The next day, the victim received a third letter at her workplace. The defendant wrote, "[I can] never give you another shot again, since you chose not to repair the damage you caused in having me banned from [the restaurant] for having spoken of it on the internet." Although the victim had been told by the police that the defendant had mailed another letter prior to being served with the stalking warning letter, she was nevertheless distressed when she received it. The victim was so troubled that, later that day, she filed a petition for a temporary restraining order.

On April 24, the Superior Court issued a temporary restraining order against the defendant which was served on the defendant the same day. The restraining order required the

"[s]toppage of the mail letters and no contact whatsoever, phone, email, et cetera." The order also notified the defendant that a final hearing on the restraining order was scheduled for May 4, 2012.

Subsequent to service of the restraining order, the defendant continued to post statements directed to the victim on his public Facebook page. On April 27, the defendant posted:

Dear Kitty Kat:

I just wanted to remind you that since you would have to choose to look at the things I say to you on Facebook, that it means my butt is covered. Also, you are not allowed to do anything back to me all week, as it would constitute a breach in your end of the whole Restraining order thing. So technically, you are the one in cuffs. HA HA!

...

[Y]ou need to stop trying to beat me and start helping save people from death.

...

I think by the day in court you will have come around.

...

Now you see, [victim's name], why it has to be you. Only you can wake up and say "Oh, there's no beating him, I better help him or we're all dead."

The next day, April 28, the defendant posted:

Dear Babe

...

[Y]ou are the one person I could never walk away from, unless I was made to. I am just asking you not to make me. . . . [Y]ou made it so I could not come back. You did so to see if I would care. . . . Well, damnit, I care! . . . This is not goodbye.

Despite acknowledging that, "I know you want me to slow down a bit on here," the defendant continued to post statements directed to the victim on his Facebook page:

So you want to push with this restraining order eh? Ha Ha, okay! Here's what we will do. Since it won't be resolved this Friday, and you intend to use my facebook posts against me, even though they are not a crime, I can retaliate with law too. . . . I can represent myself and beat you. . . .

...

Just tell the judge you are all set, and I will never speak your name again. Don't forget to bring this post in with you.

...

You'll have to lie under an oath of God to tell them you first became aware of my words on Facebook via my letter.

...

You don't want to go to jail for perjury do you?

...

The document I have here does not mention my Facebook wall. You lose again[.]

...

HA HA. I mentioned Facebook in a letter, you mentioned your knowledge of it in your complaint, yet did not say not to talk about you on here.

Later on April 28, the defendant posted four more messages, instructing the victim as to what he wanted her to do and say at the hearing scheduled for Friday, May 4, and threatening her if she did not comply:

[H]ere's my proposal. On Friday, you can either tell the judge you are all set with me . . . [o]r, you can drop all [the] charges and become an honest woman.

...

[G]oing to trial means the entire staff at [your workplace] gets put on the stand to answer the question "Did she view [the defendant's] Facebook wall, prior to the letter in which he mentions it was received?["] Since I know you have been viewing my wall for quite some time, I win.

...

Oh Schnookums! I forgot to mention . . . if you get me convicted of anything, I go to jail for a year, and everyone dies in the Apocalypse, and it will be all your fault. So, your options are to be all mine as of this Friday, or f**k off forever.

...

No, I want the order removed before Friday now. Or I will have you held accountable. . . . You go tell the judge that you were mistaken, and you'd like it removed. . . . You're a s**t! [S]o shut up and do as I say.

...

Well folks, I am going to go silent for the week, and let [the victim] eat s**t and rot in Hell.

...

[G]o tell them you were lying and you want to face the music for it.

...

You can tell the police the truth and drop the charges on [M]onday[.] No, right now, go there now. [I]f and when I receive documentation that you have dropped the charges we can start all over. . . .

Several days after the court's entry of the restraining order against the defendant, the victim, for the first time, decided to read the defendant's Facebook page. She did so because

the defendant's first letter referenced his posts about her on Facebook, and because her mother, who had read the posts, warned the victim of "the extent and the severity" of the language in them.

Although the victim had a Facebook page at the time, she was not a "Facebook friend" of the defendant. However, because the defendant's page was public, the victim found the defendant's Facebook page simply by entering his name into the Facebook search tool. The defendant's posts were contained in his Facebook "Notes," which the victim could read by opening the "Notes" section of the defendant's Facebook profile page.

The victim spent "about three hours" reading the defendant's posts about her. She was "appalled" and "scared" by the language he used in reference to her, and by reading her name in one of his posts. Consequently, she contacted the Exeter Police Department and reported the content of the Facebook page. In response, Officer Chadwick logged onto Facebook, found the defendant's Facebook page, and read the multiple posts directed to the victim, many of which were written after the defendant had been served with the restraining order. On April 28, Chadwick went to the defendant's home and confronted him with printed copies of the Facebook posts. The defendant admitted that he wrote them, but said that he was "expressing his feelings." Chadwick then arrested the defendant.

A grand jury indicted the defendant for witness tampering, stalking, and criminal threatening. A jury trial was held . . . [and t]he jury convicted the defendant on all three charges. This appeal followed.

Reasoning

In order to convict the defendant of stalking . . . , the State had to prove that the defendant, after being served with a protective order issued pursuant to that prohibited contact with the victim, "purposely, knowingly, or recklessly engage[d] in a single act of conduct that *both* violates the provisions of the order *and* is listed in paragraph II(a)." Here, the State charged that the defendant: (1) engaged in an "act of communication . . . , and (2) that this act of communication violated the provision of the restraining order that required "no contact whatsoever, phone, email, et cetera." [New Hampshire Revised Statutes Annotated (RSA)] 644:4, II defines "communicates," in relevant part, as "impart[ing] a message by any method of transmission, including . . . electronic transmission." RSA 173-B: 1, IV defines "contact" as "any action to communicate with another either directly or indirectly, including, but not limited to, using any form of electronic communication, leaving items, or causing another to communicate in such fashion." . . .

The defendant does not dispute that he was served with the domestic violence restraining order . . . or that he subsequently posted the statements at issue on his Facebook page. Thus, the State had to prove that the defendant, by posting on his own public Facebook page after he had received the restraining order, engaged in a single act of conduct that constitutes: (1) an "act of communication"; and (2) "contact" . . . pursuant to RSA 173-B:1, IV that violates the April 24 restraining order.

The trial court concluded that "the nature of what [was] written and how [it was] written . . . suggest[ed] that [the defendant's posts were] a communication directed at [the victim] in a public forum," and that "the definition of communication is broad enough, certainly, to cover . . . these posts on Facebook." . . .

The defendant's argument that he did not "contact" the victim in violation of the restraining order has two main components. First, he asserts that his conduct is insufficient, standing alone, to constitute an "action to communicate." . . . Second, he argues that the victim's

affirmative act of searching for and reading his Facebook posts precludes his conduct from constituting “contact” as defined above.

We first consider the defendant’s argument regarding his own conduct. The defendant contends that, in order for his conduct to constitute “contact” he must “be the actor not only in the creation of the message, but in the conveyance of it to the protected person.” The defendant argues that his Facebook posts cannot constitute contact because he merely posted publicly online without sending the posts directly to the victim, and, therefore, did not take an “action to communicate.” . . . We disagree.

In essence, the defendant asks us to rewrite the statute. The defendant’s argument that “contact” requires that the defendant “be the actor not only in the creation of the message, but in the conveyance of it to the protected person,” is fatally undermined by the legislature’s definition of the term “contact.” . . . The statute provides that “any action to communicate with another either directly or indirectly” constitutes contact.

Additionally, the defendant incorporates a narrow “conveyance” requirement in his preferred interpretation of “contact,” that would require that the defendant deliver the message directly to “the protected person.” Although we agree with the defendant that “contact” requires more than merely creating a message, his limitations do not find support in the actual language chosen by the legislature, which requires only that a person act “either directly or *indirectly*” to “communicate with another.” Further, in this case, the defendant did more than merely create a message. By posting messages addressing the victim on his public Facebook page, and directing the victim’s attention to his page, the defendant both created a message and took steps to convey it to the victim. To construe the statute as not encompassing the defendant’s conduct—writing a message addressing the victim and posting it in a public forum, but not personally conveying the message to the victim—would add limiting language that the legislature did not include. . . .

Moreover, it is significant that RSA 193-B:1, IV lists “any form of electronic communication” in its nonexhaustive list of “action[s] to communicate.” This reflects the legislature’s awareness that technological advances in communication—including e-mail and social media websites such as Facebook—provide a fertile environment for criminal behavior and that “[s]ometimes, particularly in stalking and harassment cases, social media facilitates the crime.” . . .

“It is the public policy of this state to prevent and deter domestic violence through equal enforcement of the criminal laws and the provision of judicial relief for domestic violence victims.” A broad interpretation of the statute comports with the legislative purpose to “preserve and protect the safety of the family unit for all family or household members by entitling victims of domestic violence to immediate and effective police protection and judicial relief.”

Therefore, a broad interpretation of “any action to communicate” comports with the legislative purpose to provide those who seek protective orders pursuant to the statute with “immediate and effective police protection and judicial relief.”

Our interpretation finds support in cases from other jurisdictions in which defendants have been held accountable for posting messages on the internet. For example, in *O’Leary v. State*, 109 So.3d 874 (Fla. Dist. Ct. App. 213), the District Court of Appeal for the First District of Florida upheld a trial court’s finding that a defendant “sent” a threatening statement to one of his relatives and her romantic partner by posting it on his own Facebook page. The defendant in *O’Leary* identified his victims by name, and his Facebook page was “accessible by any member of the public who wanted to view [it].” A Facebook friend of

the defendant read the post and informed the victims about it. Although the defendant in *O'Leary* claimed that "he 'sent' nothing because he neither asked anyone to view the posting on his personal Facebook page, nor addressed the posting to anyone," the Court of Appeal . . . ruled that "by the affirmative act of posting the threats on Facebook, even though it was on his own personal page, [the defendant] 'sent' the threatening statements to all of his Facebook friends. . . ." . . .

We recognize that, unlike the victim in this case, the recipient of the threat in *O'Leary* was a Facebook friend of the defendant, and he received the post by way of his Facebook News Feed. However, we find that, given the circumstances in this case—that the defendant directed the victim to his Facebook page—the *O'Leary* court's rationale applies with equal force here: there is "no logical reason" for the defendant to post statements directed to the victim on Facebook other than "to communicate them." Had the defendant desired merely "to put his thoughts into writing for his own personal contemplation," and not wished them to be communicated to the victim, he could have written his thoughts in "any other medium that is not accessible by other people."

Similarly, in *Rios v. Fergusan*, 978 A.2d 592 (Conn. Super. Ct. 2008), a Connecticut court upheld a restraining order against a defendant after he "posted a video on YouTube in which [the defendant] brandished a firearm in a rap song in which he states that he wants to hurt the applicant, to shoot her and to 'put her face on the dirt until she can't breathe no more.'" The court observed that "[the defendant's] YouTube video [was] more than the mere posting of a message on an open Internet forum . . . [because] he specifically targeted his message at [the victim] by threatening her life and safety." Further, the court explained, the defendant "posted the video on an Internet medium that can be disseminated world-wide, but the content of the video establishes that he was purposefully directing it to [the victim]. . . ."

We find these cases to be instructive. In this case, as in *O'Leary*, the defendant chose to make his page "public," meaning his page was "available to anyone, even to people without an account on [Facebook]." If, as he asserted to Officer Chadwick at the time of his arrest, the defendant was only "expressing his feelings," he could have chosen to make his page private, or recorded his thoughts in "any other medium that is not accessible by other people." Further, in several posts that the defendant wrote after he received the restraining order, he stated that he was aware the victim was reading his Facebook page. . . .

These posts demonstrate that the defendant, like the defendant in *O'Leary*, had "no logical reason to post comments other than to communicate them" to the victim.

In addition, we note that most of the defendant's posts would have been meaningless to any reader other than the victim. For example, the defendant instructed the victim to take certain actions and say specific things "on Friday," referring to the final restraining order hearing, and referenced specific details of the victim's complaint. The content of these posts shows that the defendant, like the defendant in *Rios*, "specifically targeted his message at [the victim]," and "purposefully direct[ed]" his posts to her (discussing case in which court held that content of MySpace posts revealed that defendant intentionally communicated a public message on MySpace to specific victim).

Finally, the defendant himself acknowledged in his motion to dismiss that "it would violate the [stalking] statute if . . . he had the intent [to make contact] and was in a place where he knew [the victim] might be." Although during oral argument the defendant attempted to distinguish his Facebook posts from "standing out on the street corner where [he] might know [the victim] is going to be present and shouting out" to the victim—an act that he concedes would constitute an "action to communicate" and, thus, contact—we find the defendant's posited scenario to be materially equivalent to the situation in this case. In both circumstances, the defendant's contact with the victim is calculated, not fortuitous. The

defendant's posts reveal that he was aware that the victim had been reading his posts on Facebook. We discern no meaningful difference between the defendant posting messages on Facebook with both the purpose and effect of communicating a message to her, and the defendant positioning himself on a street corner with the knowledge and expectation that the victim would pass by, and then shouting to her. For all of these reasons, we conclude that the defendant's conduct was sufficient to constitute an "action to communicate" pursuant to RSA 173-B:1, IV.

We next address the defendant's argument that, because the victim "voluntarily retrieved" rather than "merely received" the defendant's messages when she searched for his Facebook page, he did not "contact" her in violation of the restraining order. We disagree.

First, nothing in the language of [the statutes involved] addresses the actions of a victim or the recipient of a message, nor states that they have a bearing on the issue of "contact." "We will not consider what the legislature might have said or add language that the legislature did not see fit to include." Although we can envision circumstances in which a protected person's conduct could impact the "contact" analysis—for example, if the protected person, without enticement, sought out the restrained person—this case does not present such a circumstance.

Moreover, to deny the victim in this case protection under the stalking statute would frustrate the statute's purpose and thwart the intent of the legislature. The legislature passed restraining orders with a focus upon protecting individuals from "domestic violence and problems of like gravity, such as threatening strangers and obsessive former lovers," and in recognition of the fact that "[h]arassing and threatening behaviors toward innocent people is a serious problem." Acknowledging that "[s]talking is a part of [domestic violence]," the legislature enacted RSA chapter 633:3-a in response to the "wide spread need in New Hampshire for legislation to allow the police to interfere before a domestic violence situation escalates into violence." We conclude, therefore, that interpreting RSA chapter 633:3-a to deny protection to a victim who has viewed publicly available Facebook posts and alerted the police to the threatening messages would frustrate the purpose of the stalking statute. Were we to conclude otherwise, the incongruous and potentially dangerous result would be—as the defendant himself observed in his Facebook posts directed to the victim—that the restraining order, rather than restraining the threatening behavior of the defendant, would make the victim "the one in cuffs."

Notably, the defendant does not cite, and we are unable to find, any case law supporting his assertion that the victim's affirmative act of finding and reading his Facebook posts operates to bar his conduct from constituting "contact" pursuant to RSA 173-B:1, IV. In *Commonwealth v. Butler*, 661 N.E.2d 666 (Mass. App. Ct. 1996), the court concluded that an indirect communication can constitute contact by the defendant, despite a victim's affirmative act. Although the case did not involve online conduct, the court held that the defendant had violated a restraining order by anonymously sending flowers to the victim. In that case, the restraining order provided that the defendant was "not to contact [the victim] either in person, by telephone, in writing, or otherwise, either directly or through someone else." The victim then received flowers at her home, with a card that gave the sender's name as "requested withheld." Suspecting that the defendant was the sender, the victim called the florist and confirmed that the defendant had sent them. The defendant had not given the florist his name, address, or telephone number, and wanted no name on the card. Nonetheless, the court concluded that the defendant violated the "no contact" order, because he "achieved a communication with [the victim] amounting to 'contact.'" The court noted that "[the defendant's] profession of anonymity merely invited inquiry" by the victim into the identity of the person who sent the flowers.

Like the defendant in *Butler*, the defendant here “achieved a communication” with the victim indirectly. As in *Butler*, the defendant took deliberate steps to communicate with the victim while attempting to avoid culpability for violating the terms of the restraining order. As the victim testified, she would have had no “reason or desire to go look up [the defendant’s] Facebook page” if she had not received the defendant’s letter in which he told her that he was “speaking highly of [her] on [his] Facebook page,” or if her mother had not read the defendant’s posts and urged her to read them. Although the letter was sent prior to the issuance of the restraining order, and, therefore, its mailing did not, standing alone, violate the restraining order, it is critical in that it invited the victim’s later inquiry as to the nature of the defendant’s Facebook posts. . . . The victim was “alarmed” by the defendant’s letter referencing his Facebook posts, and was urged by her mother to read the posts; it strains credulity to expect that the victim—or any person in her position—would refrain from ensuring her own safety by searching for and reading the defendant’s public Facebook page. Thus, just as the defendant in *Butler* “invited inquiry” into who had anonymously sent the flowers, the defendant here, by referring to Facebook posts in his letter, “invited inquiry” by the victim into what his posts said. The reasoning of *Butler* is equally applicable in the context of the internet. We conclude that the victim’s affirmative act of viewing the defendant’s Facebook page does not preclude the defendant’s conduct from constituting “contact” as used in RSA 173-B:1, IV.

The legislature expansively defined “contact” in RSA 173-B:1, IV to include “any action to communicate with another either directly or indirectly.” Here, the defendant, having alerted the victim to his Facebook posts in his earlier correspondence, and believing that the victim was reading his posts, continued to post messages directed to her on his public profile page after he had been served with the restraining order. The victim’s mother urged her to read the posts due to “the extent and the severity and the vulgar use of words” about her daughter.

Holding

In sum, examining the defendant’s conduct “in the context of all the evidence, not in isolation,” and “considering all the evidence and all reasonable inferences therefrom in the light most favorable to the State,” we conclude that the defendant has not met his burden to demonstrate that no rational trier of fact could have found beyond a reasonable doubt that the defendant’s posts on his public Facebook page constitute “contact” in violation of the protective order. Accordingly, we conclude that the trial court properly denied the defendant’s motion to dismiss the stalking charge.

In so ruling, we need not decide whether a public Facebook post, standing alone, is sufficient to constitute “contact” pursuant to RSA 173-B:1, IV.

Questions for Discussion

1. Why did the judge issue a temporary restraining order against the defendant on April 24, 2012, and what actions by the defendant were prohibited by the order?
2. What is the legal requirement to convict Craig of stalking? Why does the court conclude that Craig is guilty of stalking?
3. Explain why the court found *O’Leary v. State* and *Rios v. Fergusen* “instructive” in reaching a decision in this case.

4. How does the court respond to the defendant's argument that the victim "voluntarily retrieved" rather than "merely received" the defendant's messages when she searched for his Facebook page?
5. Was the defendant adequately informed by the restraining order and/or statute that he was in violation of the order of protection by posting messages on Facebook?
6. Does the decision in *Craig* unreasonably interfere with an individual's ability to post messages on social media?

CASES AND COMMENTS

In April of 1993, Randall Waldon married Val Majors, and they had a son. During the marriage, Majors worked as a nurse and taught classes at a dance studio. In November of 1994, Waldon and Majors divorced, stipulating to a mutual restraining order.

On the morning of December 5, 1994, Majors was driving home from the dance studio when she encountered Waldon. Waldon was walking down the street about two blocks away from the studio. Majors was fearful and alarmed to find Waldon so close to the studio.

On the morning of August 16, 1995, Majors again saw Waldon as she was leaving the parking lot of the studio. Waldon was walking at a "hurried" rate toward the entrance of the parking lot. Majors was intimidated and threatened by Waldon's actions.

On evening of August 20, 1995, Majors was leaving work from the hospital when she saw Waldon standing near the parking lot. He stood about twenty-five feet away from Majors and stared at her. Although Waldon did not approach her, Majors was frightened by him.

A few days later, Majors again saw Waldon near her studio. As Majors was getting into her car, Waldon walked slowly by her. Majors grew more fearful of her encounters with Waldon.

On the morning of November 1, 1995, Majors was getting into her car in the studio parking lot when she noticed Waldon staring at her through a fence about four feet away. Majors became very frightened and ran back to the studio. She then called the police and filed a report.

On the evening of November 7, 1995, Majors was teaching a dance class when she saw Waldon outside of the studio. Waldon was riding his bike around a dumpster in the parking lot. When the class ended, Majors was afraid to walk alone to her car, so she had a friend escort her. As Majors was leaving the parking lot, Waldon rode his bike in front of her car. Majors felt threatened by Waldon's actions.

On December 14, 1995, the State charged Waldon with stalking. After a trial on March 7, 1996, the jury found Waldon guilty as charged. The trial court later sentenced Waldon to six months....

Waldon was convicted under Ind. Code § 35-45-10-5(a), which provides that a "person who stalks another person commits stalking, a . . . misdemeanor." Stalking is defined as:

"[A] knowing or an intentional course of conduct involving repeated or continuing harassment of another person that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened and that actually causes the victim to feel terrorized, frightened, intimidated, or threatened." (*Waldon v. State*, 684 N.E.2d 206 [Ind. App. Ct. 1997])

Did Waldon engage in a course of conduct that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened and that actually causes the victim to feel terrorized, frightened, intimidated, or threatened?

YOU DECIDE 11.5

Defendant Kevin Ellis and Sarah S., both 17, attended the same high school and met while they both were sophomores. They shared a table at lunchtime, and Sarah allegedly felt sorry for Kevin because he did not have a lot of friends. During the spring of their junior year, Kevin sent Sarah an email revealing that he had a crush on her. Sarah responded that she had a boyfriend and that there was "no chance" they could ever be anything other than friends. Kevin waited outside Sarah's classes to talk to her and bought her a number of small gifts and continued to send her emails. Sarah occasionally included the defendant on emails that she sent to a large group.

During the summer break, Kevin called Sarah twice at home and sent her several emails. Sarah responded that she wanted to be friends, but "you need to back off a little bit." Kevin responded with an expletive-filled, angry email that he followed with another email asking for another chance to be Sarah's friend. Kevin approached Sarah asking if they could do something together. Sarah responded, "Perhaps." He then emailed Sarah, who stated she was unavailable. At some point over the summer, Sarah requested that Kevin never call her at home again. In the fall, following an after-school sporting event, Kevin approached Sarah and her brother and asked for a ride to his car in an adjacent parking lot, which they refused. Shortly thereafter, Kevin spotted Sarah along with her brother and mother at a shopping mall and attempted to engage her brother in conversation.

Sarah's father, the local police chief, happened to encounter Kevin and told him to leave Sarah alone. Kevin approached Sarah the next day at school and Sarah told him she had been trying to tell him to leave her alone for months. Defendant sent an email stating he "just needed a friend" and that he only was "asking for some closure." Kevin later approached Sarah between classes, and her boyfriend stepped between them. He later attempted to talk to Sarah between classes. Did Kevin engage in a course of conduct that "would cause a reasonable person to fear for his or her physical safety or would cause a reasonable person substantial emotional distress"? See *State v. Ellis*, 979 A.2d 1023 (Vt. 2009).

KIDNAPPING

Kidnapping at common law was the forcible abduction or stealing away of individuals from their own country and sending them into another country.⁹⁶

This misdemeanor was intended to punish the taking of an individual to an isolated location where the victim was outside of the protection law. Imagine the fear you would experience in the event that you were locked in a basement under the complete control of an abusive individual.

Kidnapping became of concern in 1932 with the kidnapping of the 20-month-old son of Charles Lindbergh, the aviation hero who piloted the *Spirit of St. Louis* in the first solo flight across the Atlantic. Lindbergh paid the \$50,000 ransom demanded for the return of Charles Jr., who later was found dead in the woods five miles from the Lindbergh home. A German immigrant, Bruno Hauptmann, was prosecuted for felony murder and executed. The question of whether Hauptmann was the perpetrator continues to be a topic of intense debate.

The Lindbergh kidnapping resulted in the adoption of the Federal Kidnapping Act, known as the Lindbergh Law. This law prohibits the kidnapping and carrying of an individual across state lines for the purpose of obtaining a ransom or reward. Six states shortly thereafter adopted new statutes significantly increasing the penalty for kidnapping. This trend continued, and by 1952, all but four states punished kidnapping by death or life imprisonment.

The Lindbergh Law excluded parents from coverage. In 1981, Congress addressed the 150,000 abductions of children by a parent involved in a custody dispute in the Parental Kidnapping Prevention Act. The statute provides for FBI jurisdiction when a kidnapped child is transported across state lines. The abduction of children by a parent or relative involved in a custody dispute is also the subject of specific state statutes punishing a “relative of a child” who “takes or entices” a child younger than 18 from his or her “lawful custodian.”⁹⁷

The last decades have been marked by a string of high-profile kidnappings of wealthy corporate executives and members of their families. In 1974, Patricia Hearst, heiress to the Hearst newspaper fortune, was kidnapped from her campus apartment at the University of California, Berkeley. The abduction was carried out by the Symbionese Liberation Army (SLA), a self-proclaimed revolutionary group. The case took on a bizarre character when Hearst participated in bank robberies intended to finance the activities of the group. Hearst was later apprehended and convicted at trial despite her claim of “brainwashing.” The major figures in the SLA were subsequently killed in a shoot-out with the Los Angeles police.

More recently we have seen the 1991 kidnapping of 11-year-old Jaycee Dugard, the 1993 abduction and killing of 12-year-old Polly Klaas, and the kidnapping, in 2002, of 12-year-old Elizabeth Smart. Elizabeth was later found to have been forced into a “marriage” with her abductor, a handyman in the Smart home. In 2013, Ariel Castro pled guilty to 937 counts of kidnapping, rape, and murder stemming from his abduction and confinement of three young women for roughly a decade.

The AMBER Alert System was established in 1996 when Dallas-Fort Worth broadcasters teamed with local police to develop an early warning system to help find abducted children. AMBER stands for America’s Missing: Broadcast Emergency Response. The system is named after 9-year-old Amber Hagerman, who was kidnapped while riding her bicycle in Arlington, Texas, and murdered. Other states and communities across the country have established

AMBER Alert systems. The federal government in 2003 passed legislation to support and to coordinate these various state systems.

Following American intervention into Iraq, foreigners were regularly kidnapped by criminal gangs who “sold” the victims to political groups opposed to the presence of the United States. The terrorists typically threatened to kill the hostage unless the company for which the prisoner worked or the prisoner’s country of nationality agreed to withdraw from Iraq. In a related incident, *Wall Street Journal* reporter Daniel Pearl was kidnapped and beheaded by an extremist group in Pakistan. The terrorist group’s British-born leader, Ahmed Omar Saeed Sheikh, was later prosecuted and sentenced to death in Pakistan. The Islamic State, a terrorist group also known as the Islamic State of Iraq and Syria or the Levant, is responsible for taking and beheading foreign journalists and humanitarian workers. The taking of hostages is recognized as a crime under the International Convention Against the Taking of Hostages, which requires countries signing the treaty either to prosecute offenders or to send them to a nation claiming the right to prosecute the offenders.

The U.S. Congress has also enacted the Victims of Trafficking and Violence Protection Act of 2000 and the PROTECT Act of 2003 that together combat the international sex trafficking industry. Roughly 1 million children, most of whom are girls, have been persuaded to leave or have been forcibly abducted from their mostly rural villages in poor countries and forced into sex slavery or low-wage industrial labor.

Criminal Intent

Kidnapping statutes vary widely in their requirements. The California Penal Code section 202 provides that

[e]very person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping.

The *mens rea* of kidnapping, although subject to dispute, is commonly thought to be an intent to move or to confine victims without their consent. The Wisconsin statute section 940.31 provides that kidnapping is the carrying of another from one place to another without consent and with the “intent to cause [the person] to be secretly confined or imprisoned or to be carried out of this state or to be held to service against [the person’s] will.” Some statutes require holding an individual for a specific purpose such as detaining a person for ransom or as a hostage. Florida requires a specific intent, whether to hold an individual for ransom or reward, to serve as a shield or hostage, to inflict bodily harm, to terrorize the victim, or to interfere with the performance of any governmental or political function.⁹⁸ Texas considers the intentional or knowing abduction of another person with the intent to commit these acts as “aggravated kidnapping.”⁹⁹

Criminal Act

The essence of kidnapping is the *actus reus* of the forcible movement of a person as provided under the North Carolina statute “from one place to another.”¹⁰⁰ The central issue is the extent of the movement required. The traditional rule in American law is that any movement, no

matter how limited, is sufficient. In the well-known California case of *People v. Chessman*, Caryl Chessman was convicted of kidnapping when he forced a rape victim to move 22 feet into his car. The California Supreme Court noted that it is “the fact, not the distance of forcible removal which constitutes kidnapping in this State.”¹⁰¹

Most courts abandoned this approach after realizing that almost any rape, battery, or robbery involves some movement of a victim. This led to prosecutors charging defendants with the primary crime as well as kidnapping and resulted in life imprisonment for crimes that otherwise did not merit this harsh penalty. In 1969, the California Supreme Court rejected the *Chessman* standard in *People v. Daniels*. The defendants entered the victims’ apartments and forced them at knifepoint to move a few feet into another room where they were robbed and raped. The court reversed the kidnapping convictions on the grounds that the victims’ movements were a central step in the rape or robbery and should not be considered as constituting the independent offense of kidnapping.¹⁰² Courts now generally limit the application of kidnapping statutes to “true kidnapping situations and [do] not . . . apply it to crimes which are essentially robbery, rape or assault . . . in which some confinement or asportation occurs as a subsidiary incident.”¹⁰³ In other words, kidnapping statutes are no longer thought to include unlawful confinements or movements incidental to the commission of other felonies. Under this standard, courts require that for a movement to be considered kidnapping, it “must be more than slight, inconsequential, or an incident inherent in the crime.” Judges have ruled that for the movement to constitute kidnapping, it must meaningfully contribute to the commission of the primary crime by preventing the victim from calling for help, reducing the defendant’s risk of detection, facilitating escape, or increasing the danger to the victim.¹⁰⁴

The movement or detention of the victim must be unlawful, meaning without the victim’s consent by force or threat of force. The Wisconsin statute requires that the movement of an individual must be undertaken “without [the individual’s] consent” and by “force or threat of imminent force.”¹⁰⁵ This excludes movements undertaken as a result of a lawful arrest, court order, or consent. An Arkansas court held that where the victim voluntarily accepted the defendant’s offer of a ride to a friend’s house, the victim revoked her consent when the perpetrator prevented her from leaving the automobile by displaying and threatening her with a firearm, ordering her to place her hands under her thighs, and taking her to his home where she was raped.¹⁰⁶

Consider *People v. Dominguez*. Dominguez forced the victim against her will in the middle of the night from the side of the road to a spot in an orchard 25 feet away and down a steep hill that was 10 to 12 feet below the surface of the road. The California Supreme Court noted that although the distance was not great, the victim was moved from a “relatively open area” to a wooded location “substantially decreasing the possibility of detection, escape or rescue.” The movement of the victim substantially increased the risk of “harm to the victim over and above that necessarily present in the commission of the rape.” In reaching this conclusion, the court stressed that there is no “minimum number of feet a defendant must move a victim to constitute kidnapping.”¹⁰⁷

Courts are divided over whether an individual is “forcibly” moved where defendants fraudulently misrepresents their intended destination. The California Supreme Court held that a victim’s movement was “accomplished by force or any other means of instilling fear” where a

rapist falsely represented that he was a police officer and informed the 18-year-old victim that she faced arrest unless she accompanied him to a store from which she was suspected of having stolen merchandise. The court concluded that this “kind of compulsion is qualitatively different than if defendant had offered to give Alesandria [the victim] a ride, or sought her assistance in locating a lost puppy, or any other circumstance suggesting voluntariness on the part of the victim.”¹⁰⁸ Some states follow the Model Penal Code in reducing the seriousness of the kidnapping where the victim was “voluntarily released . . . in a safe place.” This provides an incentive for a defendant to limit the harm inflicted on victims.¹⁰⁹

In the next case, *People v. Aguilar*, the California court must decide whether the defendant’s movement of the victim was sufficient to constitute kidnapping.¹¹⁰

MODEL PENAL CODE

Section 212.1. Kidnapping

A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following purposes:

1. to hold for ransom or reward, or as a shield or hostage; or
2. to facilitate commission of any felony or flight thereafter; or
3. to inflict bodily injury on or to terrorize the victim or another; or
4. to interfere with the performance of any governmental or political function.

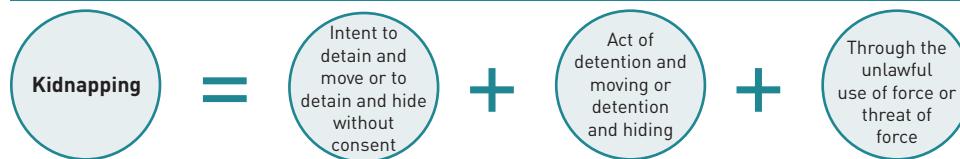
Kidnapping is a felony of the first degree unless the actor voluntarily releases the victim alive and in a safe place prior to the trial, in which case it is a felony of the second degree (ten years). A removal or confinement is unlawful . . . if it is accomplished by force, threat, or deception, or, in the case of a person who is under the age of 14 or incompetent, if it is accomplished without the consent of a parent, guardian, or other person responsible for general supervision of his welfare.

Analysis

1. Kidnapping is defined to include any of three acts. First, removing a victim from the protection of the home or business is intended to punish the taking of individuals from the safety and security of a home or business and placing them in danger. Second, removing individuals “a substantial distance from the vicinity” from where they are located is intended to ensure that punishment is not imposed for “trivial changes of location.” Third, confining an individual for a substantial period of time in an isolated location with a specified intent is intended to punish the “frightening and dangerous” removal of a victim from a safe environment to an “isolated” location where the victim is outside the protection of the law. No movement or asportation is required in regard to confining an individual. The requirement that the detention is for a “substantial period of time” in a “place of isolation” is intended to avoid punishing a defendant for a detention that is merely incidental to a rape or other crime of violence.

2. Kidnapping is defined to require one of four specified purposes that commonly appear in kidnapping statutes.
3. An unlawful removal must be accomplished through force, threat, or deception or in the case of an “incompetent” juvenile under the age of 14, without the consent of a parent or guardian.
4. The reduction in punishment for kidnapping to a second-degree felony where the perpetrator releases the victim “alive and in a safe place” provides an incentive for the kidnapper to abandon the criminal enterprise. The defendant would remain liable for any battery or sexual assault.

FIGURE 11.4 ■ The Legal Equation: Kidnapping



WAS THE DEFENDANT GUILTY OF AGGRAVATED KIDNAPPING?

PEOPLE V. AGUILAR, 16 CAL. Rptr. 3d 231 (CAL. 2004)

Opinion by Gilbert, P.J.

Issue

Aguilar contends the evidence is insufficient to support the aggravated kidnapping conviction.

Facts

Aguilar followed Nancy C., age 16, as she walked her dog down a residential street at night. He grabbed her and said “he was going to take [her] somewhere and rape [her].” He inserted his fingers in her vagina and she screamed. He then removed his hands from her vagina and pulled her 133 feet down the sidewalk past a house with a lit porch light to an area in front of a house with no light. He pushed her facedown onto the hood of a car, “put his hands down [her] pants” and inserted his fingers in her vagina.

Police Officer James Ella testified that the area to which Nancy C. was moved was “extremely dark.” Trees blocked “most of the illumination” coming from the light down the street. In a videotaped confession, Aguilar admitted he had grabbed Nancy C., was aroused, and put his fingers in her vagina. He said he moved “to a place where nobody could see [them]” to have intercourse with her. He admitted that what he did was “wrong” and that

Nancy C. did not consent to have sex with him. He said he had a knife with him, but he "didn't pull the knife out."

Martin Molina, a nearby resident, testified that his porch light was the "only light on the street" between the area where Aguilar first grabbed Nancy C. and the location to which she was ultimately dragged. He said the first area was lighter because trees and bushes "[funnel] the light" from his porch light to that area. They deflect light away from the area where the attack ended.

Anthony Ventura Castillo was at home when he heard a woman screaming "help, help" and "save me." He testified it was so dark he had to turn on the porch light to see what was happening. He saw Aguilar throw Nancy C. to the ground and grab her by the neck. Aguilar was holding a knife "12 or 13 inches from her neck." Castillo told him to release her. Aguilar "got up and ran." Castillo and his brother chased Aguilar and apprehended him.

Reasoning

"Kidnapping to commit rape involves two prongs. First, the defendant must move the victim and this asportation must not be merely incidental to the [rape]. Second, the movement must increase 'the risk of harm to the victim over and above that necessarily present in the [rape].'"

For aggravated kidnapping "... there is no minimum number of feet a defendant must move a victim in order to satisfy the first prong." "Where movement changes the victim's environment, it does not have to be great in distance to be substantial."

"[W]here a defendant moves a victim from a public area to a place out of public view, the risk of harm is increased even if the distance is short." ... Aguilar contends that ... he did not move Nancy C. into "a hidden location" such as a bathroom or a back room of a store. He says, "[t]he movement was down the sidewalk," an open area. But this distinction is not dispositive. Courts have held that moving a victim to a more isolated open area which is less visible to public view is sufficient....

In *People v. Rayford*, 884 P.2d 1369 (Cal. 1994), the defendant forcibly moved the victim 105 feet at night from the parking lot of a closed store "to the other side of a wall located at the edge of the lot." *Rayford* affirmed the kidnapping conviction noting that "a slender tree," 34 feet from the street, and bushes at the end of the wall "limited detection" of the victim. Under these circumstances there was sufficient evidence that the forcible movement of the victim was not merely incidental to the attempted rape, but substantially increased the victim's risk of harm.

Holding

Here Aguilar forcibly moved Nancy C. 133 feet down a sidewalk at night, from an area illuminated by a porch light to an "extremely dark" area. The "risk to [Nancy C.] in the dark . . . increased significantly. . . ." Aguilar admitted his goal was to move her "to a place where nobody could see [them]." The movement "decreased [Aguilar's] likelihood of detection. . . ."

A reasonable trier of fact could infer this increased her risk by making it harder for her to escape and "enhanced [Aguilar's] opportunity to commit additional crimes." Moreover, "[a]n increased risk of harm was manifested by appellant's demonstrated willingness to be violent. . . ." He pulled Nancy C. down the sidewalk, threw her to the ground, grabbed her neck, choked her, bit her, slammed her onto a car hood, held her facedown and held a knife near her neck. He told Nancy C. that he was moving her to rape her which, when coupled with his violent acts, "pose[d] a substantial increase in the risk of psychological trauma . . . beyond that to be expected from a stationary" sexual attack.

Aguilar contends that he did not complete his goal because Castillo rescued Nancy C. But that “does not . . . mean that the risk of harm was not increased [by the movement].” We conclude the evidence was sufficient.

Questions for Discussion

1. Discuss the legal test for aggravated kidnapping relied on by the court.
2. Why does Aguilar contend that this was not aggravated kidnapping? Is it significant that the victim was moved only a short distance? What does the court conclude?
3. Do you agree with the court’s decision? Why not charge and convict Aguilar of a sexual offense rather than aggravated kidnapping?
4. In *People v. Perkins*, 5 Cal.App.5th 454 (Cal. Ct. App. 2016), the movement of an 11-year-old victim by her mother’s physically imposing significant other a short distance from the bathroom to the bedroom where she was raped and sodomized did not substantially increase her danger where neither bathroom nor bedroom was visible to her 8-year-old sister and the defendant could have sodomized the victim in the bathroom. Indeed it was less risk of harm in the bedroom given the presence of her 3-week-old sister. In any event, the defendant could have committed “whatever crime he wanted in both rooms.” The defendant was improperly convicted and sentenced for aggravated kidnapping.

YOU DECIDE 11.6

[Reno Keith] Shadden entered a video store shortly after 9:00 p.m., and punched store owner Christa M. who was at the front counter. As she stumbled, he grabbed her by the shoulders and dragged her nine feet into a small twelve-by-eight-foot back room.

Shadden punched her again, knocking her to the floor and then pushed the door closed with his foot. He continued to hit her, tore her panties off and “straddled” her with his knees on each side of her. He removed his belt buckle and opened his zipper half-way. But Shadden stopped the attack when he heard a customer calling Christa M.’s name.

Shadden took four videotapes from a table in the room while he was still on top of her, and then left. Christa M. testified she was afraid for her life. As a result of the attack, she suffered bruises, abrasions, and compression fractures in her back.

Shadden testified that because he was high on alcohol and “meth” he tripped and fell into Christa M. She panicked and began hitting him. He stated, “I guess I hit back and then I finally got up and I left the store.” Shadden testified, “I don’t believe I took any videos.” He had problems remembering the events because of his drug use. (*People v. Shadden*, 93 Cal. App.4th 166 [Cal. App. 2001])

Was Shadden guilty of kidnapping?

FALSE IMPRISONMENT

Within the common law and in state statutes, **false imprisonment** is defined as the intentional and unlawful confinement or restraint of another person. The Idaho statute simply states that false imprisonment is the “unlawful violation of the personal liberty of another.”¹¹¹

False imprisonment is generally considered a misdemeanor, punishable in Idaho by a fine not exceeding \$5,000 or by imprisonment in the county jail for no more than one year or both.¹¹²

As with kidnapping, false imprisonment is a crime that punishes interference with the freedom and liberty of the individual.

False imprisonment requires an intent to restrain the victim. Arkansas and other states follow the Model Penal Code and provide that false imprisonment may be committed by an individual who “without consent and without lawful authority . . . knowingly restrains another person so as to interfere with [the person’s] liberty.”¹¹³ The detention must be unlawful and without the victim’s consent. A restraint by an officer acting in accordance with the law or by a parent disciplining a child does not constitute false imprisonment. The consent of the victim constitutes a defense to false imprisonment. A farmer who secured his wife with a chain while he went to town was not held liable for false imprisonment where the evidence indicated that she requested him to manacle her to the bed.¹¹⁴

The *actus reus* is typically described as compelling the victim to “remain where he did not want to remain or go where he did not want to go.”¹¹⁵ The confinement may be accomplished by physical restraint or by a threat of force of which the victim is aware. Confinement may also be achieved without force or the threat of force when, for instance, the perpetrator locks a door. Professors Perkins and Boyce point out that an individual is not confined because he is prevented from moving in one or in several directions so long as he may proceed in another direction. An individual may also be confined in a moving bus or in a hijacked airplane.¹¹⁶

False imprisonment may overlap with kidnapping or with assault and battery or robbery, and several states have eliminated the crime. In these states, people who are unlawfully detained are able to seek damages in civil court. The major difference between the crimes of kidnapping and false imprisonment is that false imprisonment does not require an asportation (movement). In addition, kidnapping statutes that punish the confinement as well as the movement of a victim often provide that the victim must be “secretly confined” or “held in isolation” for a specific purpose (e.g., to obtain a ransom). The Model Penal Code provides that the confinement for kidnapping must be for a “substantial period.”¹¹⁷ False imprisonment, in contrast, requires a detention that may take place in public or in the privacy of a home and may be for a brief or lengthy period. States such as Alabama provide for the punishment of aggravated false imprisonment where an individual “restrains another person under circumstances which expose the latter to a risk of serious physical injury.”¹¹⁸

Juries, at times, are asked to determine whether a defendant should be convicted of false imprisonment or kidnapping. In the Georgia case of *Shue v. State*, James Shue attacked and threatened to kill Michelle Guthrie unless she got into her car. Guthrie testified that as Shue pushed her into the car, she tightly grabbed the steering wheel and honked the horn. Shue cursed and walked away. The police report indicated that Guthrie voluntarily entered her car after Shue fled. Shue subsequently was acquitted of kidnapping, but convicted of false imprisonment.

The Georgia statute states that false imprisonment is committed by an “arrest, confinement or detention of the person, without legal authority, which violates the person’s

personal liberty.” A kidnapping occurs when an individual “abducts or steals away any person[s] without lawful authority or warrant and holds such person[s] against [their] will.” The Georgia appellate court noted that the “only difference between false imprisonment and kidnapping is that kidnapping requires asportation.” The court ruled that the “jury could have believed Guthrie’s testimony that Shue held her against her will but discounted her testimony that he pushed her into the car. Thus, the jury could have found that Guthrie was detained without having been carried away and therefore falsely imprisoned but not kidnapped.”¹¹⁹

In another example, a North Carolina appellate court affirmed the conviction of Richard Overton for second-degree kidnapping of Elsie Fennell for the purpose of terrorizing her, a purpose that is prohibited under the North Carolina kidnapping statute. Overton beat and punched Fennell, with whom he was living, after she told him that he would have to move out if he did not start paying the bills. Overton “caught and restrained” Fennell from leaving the house and gave her the keys to the car only after she persuaded him that she would not call the police. Overton appealed on the grounds that he should have been convicted of false imprisonment rather than for kidnapping because he had confined and restrained Fennell for the purpose of avoiding detection by the police rather than for the purpose of terrorizing her. The North Carolina court recognized that “if the purpose of the restraint was to accomplish one of the purposes . . . in the kidnapping statute[,] . . . the offense is kidnapping. In the absence of one of the statutorily specified purposes, the unlawful restraint is false imprisonment.” The court affirmed Overton’s conviction based on the fact that “it is immaterial that defendant’s purpose may have changed during the course of the restraint.”¹²⁰

In *People v. Islas*, Islas and Giron and other gang members congregated in front of an apartment building known as a “gang stronghold.” The police arrived, and Islas and Giron climbed up a ventilation shaft and entered the bathroom of the studio apartment of Teresa Salado and her four daughters. The two bare-chested and heavily tattooed intruders told Salado to be quiet, to conceal their presence from the police, and to pretend she was Giron’s aunt. Despite the fact that the two burglars stated to Salado that she had nothing to fear, she later testified that she was terrified that they would hurt her daughters. Two police officers entered the apartment and discovered Islas hiding under a pile of clothes. A California appellate court held that the evidence permitted the jury to find that Islas and Giron created a climate of fear and intimidation and coerced the victims into remaining in the apartment and cooperating with their demands through an implied threat of harm. “Given the gang evidence, the jury could conclude Islas and Giron would take whatever action was necessary to avoid capture. Thus, the evidence supports the reasonable conclusion Islas and Giron falsely imprisoned the victims by menace, i.e., an express or implied threat of harm.”¹²¹

A contemporary application of false imprisonment is the U.S. Victims of Trafficking and Violence Protection Act of 2000 (discussed earlier) that punishes acts of slavery and forced labor. In *United States v. Bradley*, two New Hampshire defendants were convicted of misrepresenting the working conditions of their tree removal company to workers recruited from Jamaica who were threatened, forcibly detained, and abused when they attempted to return home.¹²²

MODEL PENAL CODE

Section 212.3. False Imprisonment

A person commits a misdemeanor if he knowingly restrains another unlawfully so as to interfere substantially with his liberty.

Section 212.2. Felonious Restraint

A person commits a felony of the third degree if he knowingly:

1. restrains another unlawfully in circumstances exposing him to risk of serious bodily injury; or
2. holds another in a condition of involuntary servitude.

Analysis

1. The Model Penal Code requires a substantial interference with an individual's liberty. This eliminates prosecutions for relatively modest interference with an individual's liberty.
2. An individual must knowingly restrain another person. As a result, it is sufficient that defendants are aware that their conduct will result in the detention of another individual.
3. Felonious restraint is intended to punish as felonies restraints that create a risk of serious bodily injury or involuntary servitude.

FIGURE 11.5 ■ The Legal Equation: False Imprisonment



CRIME IN THE NEWS

Harvey Weinstein was known as a powerful Hollywood producer who had been the recipient of an Oscar for *Shakespeare in Love* in 1999 along with seven Tony Awards for plays and musicals. Weinstein had progressed from a modest personal background to a prominent and powerful career in Hollywood film distribution and production and was responsible for promoting the careers of a long list of recognizable Hollywood stars. He was an intimate of former president Bill Clinton and regularly talked to the former president on the phone.

In October 2017, a number of newspaper stories appeared reporting Weinstein's sexual misconduct, which led to a flood of accusations by 90 women who claimed to have been sexually harassed, molested, attacked, or raped by Weinstein. Prosecution for virtually all of these allegations was either barred by the statute of limitations or unavailable because the women involved were unwilling to testify.

In the aftermath of these allegations, Weinstein's production company went into bankruptcy, and he sold six properties for roughly \$60 million, money that he used, in part, to protect himself by retaining a crisis manager, a media consultant, a personal assistant, legal consultants, and lawyers. Weinstein also allegedly hired a private intelligence firm to investigate "red flags," people whom he suspected of talking to the media.

In January 2020, Weinstein, age 67, pled not guilty to five felony charges including rape, criminal sexual act, and two counts of predatory sexual assault, the latter charge carrying a possible life sentence. He subsequently was convicted of two felony sex crimes. Cyrus R. Vance, the Manhattan prosecutor who brought the charges, had been criticized for failing to indict Weinstein for sexual "touching" charges in 2015 when a woman reported that Weinstein had groped her breasts at a business meeting and subsequently recorded Weinstein apologizing to her. Vance allegedly was concerned that he could not prove the charge and that the victim had made inconsistent remarks. This was alleged to be part of a pattern of reluctance by Vance's office to bring charges against men represented by powerful lawyers accused of criminal sexual conduct. Vance found himself under political pressure to bring new charges against Weinstein based on accusations by two women that they had been sexually attacked by Weinstein. Charges against Weinstein relating to a third woman were dropped because prosecutors concluded that the lead detective had withheld evidence that could have discredited the woman's account.

Weinstein's case was tried before a jury of seven men and five women who had been selected from an original pool of between 600 and 700 potential jurors. A motion to relocate the trial based on the difficulty of finding a fair and impartial jury was rejected by Justice James M. Burke.

Prosecutor Meghan Hast in her opening remarks at the three-week trial charged that Weinstein was a sexual predator who had used "his power and prestige in the entertainment industry" to ensure the "silence" of his victims. Weinstein's defense attorneys responded that the sexual encounters with the two victims were consensual and that the women had intentionally entered into "transactional" relationships with Weinstein to advance their Hollywood careers. Defense attorneys pointed to friendly email communications that the women had sent to Weinstein following the alleged sexual assaults. Prosecutor Hast, in anticipating this argument, in her opening statement argued that an extreme imbalance in influence and finances can lead victims to behave in "ways that a layperson may not generally expect."

The felony charges were based on the testimony of two women, Mimi Haleyi and Jessica Mann. Weinstein was charged with one count of a criminal sexual act and predatory sexual assault involving Haleyi. Haleyi, age 42 at the time of the trial, was born in England and raised in Sweden. She first met Weinstein in 2004. Two years later, she approached him for employment, and when they met in a hotel, he asked her for a massage, which she refused. Weinstein subsequently arranged for her to work as a production assistant on the cable television show *Project Runway*. Haleyi later accepted an invitation to attend a film premiere with Weinstein in Los Angeles. The day he paid for the ticket in July 2006, she visited him at his apartment in New York City, and during the meeting he forcibly pulled a tampon from Haleyi's vagina and performed oral sex on her. Two weeks later, Haleyi testified that she

visited him in a New York City hotel, and he forced her to have a sexual interaction with him. She did not resist, and he was not charged with this rape by prosecutors. Haleyi continued to communicate with Weinstein and to send him friendly emails, share scripts, pitch projects, seek work, and accept tickets to premiers. The defense attorneys noted that three days following her second sexual encounter with Weinstein, Haleyi had written "hearts" in her day planner, and when asked whether this reflected her mood, she replied that "it might have been." The defense attorneys noted that Haleyi had signed an email "Lots of love." The prosecution argued in response to this evidence that Haleyi was trying to normalize the situation so as not to make it "so disgusting." Haleyi, when asked by the prosecution why she continued to communicate with Weinstein after he forced her to engage in oral sex, responded that she was taking advantage of him.

Weinstein also was charged with raping Jessica Mann in 2013. Mann, who was 34 at the time of the trial, was raised on a dairy farm and as a young woman attended an evangelical church in Washington State. She fled an abusive home at 16 and at age 25 moved to Los Angeles to pursue a career in the entertainment industry. She met Weinstein at a party, and he took an interest in helping her launch her career. Mann later met with him at a hotel room, and a conversation about business ended with her giving him a massage. He invited her to several parties at his production studio, and he subsequently met with Mann and her friend at a hotel about acting in a movie. He separated the women in different rooms and forcibly performed oral sex on Mann. She decided to be in a "relationship" with Weinstein although she found their sexual interactions "degrading." "It would be him wanting to see me and just needing a fix like a drug addict." Eight months later, a meeting in a New York City hotel in March 2013 ended with Weinstein attacking her, throwing her onto a bed, and ripping off her clothing and penetrating her. She testified that that he been furious after being told that she had a boyfriend.

Defense attorneys on cross-examination pointed out that Mann had a sexual relationship with Weinstein that lasted for three years and pointed to several emails in which she expressed affection and love for Weinstein. There was an email inviting him to meet her mother, and an email to a boyfriend stated that Weinstein had given her all of the "validation she had ever wanted." In another email she thanked him for his "unfailing support and kindness."

In 2015, Mann asked Weinstein to sponsor her application for membership in an exclusive club and continued to accept tickets to the Oscars and Golden Globes. In a blog post, Mann described an older man as her "casual boyfriend." She stated on cross-examination that their relationship was "complicated" and "different" and alternated between consensual and nonconsensual sexual relationships although it does not change "the fact he raped me."

Mann explained that she continued the relationship because of fear for herself and for her family. She also stated that terminating her relationship with Weinstein could have been "death to any attempt of a career." When confronted with an allegation that she bragged about her relationship with Weinstein, Mann noted that if people are aware that you know him, it can "open doors."

Annabella Sciorra, 58, known for her role in *The Sopranos* and *Jungle Fever*, testified in support of two predatory sexual assault charges, each of which requires at least two sexual offenses. Sciorra testified that Weinstein had raped her in late 1993 and early 1994, both of which were barred by the statute of limitations. She testified that Weinstein after dropping her off at home had returned, and had barged into her apartment and raped her. She could not recall the precise dates of the sexual attacks and did not report the incident to the police although she testified that he continued to harass her.

Three additional witnesses whose allegations were barred by the statute of limitations testified to demonstrate that Weinstein engaged in a pattern of similar conduct. Dawn Dunning, an aspiring actress, testified that Weinstein had inserted his fingers into her vagina; Lauren Young testified that Weinstein had agreed to review a script that she had written and when she met with him he pushed her into a bathroom, pulled down her dress, groped her breasts, masturbated, and ejaculated onto the floor. Tarale Wulff, an aspiring actress, alleged that Weinstein had masturbated in front of her and that she later met with Weinstein in his New York City apartment where she was raped.

Weinstein had been in an auto accident before the trial and used a "walker" and did not appear to be a physically imposing figure. At the same time, he was seemingly humiliated after the prosecution introduced a photo of his genitalia to substantiate testimony that his genitalia was abnormal in appearance.

In the closing argument, prosecutor Joan Illuzzi argued that Weinstein was an "abusive rapist" and a "predator" who believed that because of his power in Hollywood he would never be called to account for his behavior. Illuzzi argued that the fact that the victims communicated with Weinstein following his attacks did not mean that he was "allowed" to sexually assault them. Both Haleyi and Mann were younger women who were looking to establish careers in the entertainment industry and were in no position to accuse Weinstein of sexually attacking them. The defense, on the other hand, argued that Haleyi and Mann were not passive victims and continued their relationships with Weinstein and never approached the police at the time of the assaults. Several witnesses testified that neither Haleyi, Mann, nor Sciorra mentioned the attacks at the time that they were alleged to have occurred. Absent forensic evidence, the question was whom the jury should believe.

In the past, the prosecution of individuals for rape in cases in which the victims remained in contact with their assailant generally have proven unsuccessful. An expert prosecution witness, forensic psychiatrist Barbara Ziv, explained that it is common for rape victims who feel humiliated to avoid reporting the attack to the police. They often remain in contact with their assailant because they want to ensure that the assailant does not damage their career and reputation and want to put the event behind them. Victims of sexual assault often think about leaving a relationship although it takes a lengthy period of time to take this step.

A central defense witness was Elizabeth Loftus, an academic expert on false memory. She pointed to the lengthy period of time that had passed between the alleged sexual attacks and the witnesses' testimony. Loftus testified that victims can unconsciously create false stories to complete the gaps in their memory.

The jury after deliberating for 26 hours returned guilty verdicts on the first-degree criminal sexual act against Mimi Haleyi and the third-degree rape ("forcible compulsion") of Jessica Mann but did not find beyond a reasonable doubt that Weinstein had raped Annabella Sciorra and as a result acquitted him of two counts of predatory sexual assault (which requires serious sexual assault against at least two women). He also was acquitted of first-degree rape in the attack on Jessica Mann, which required the state to establish the use of force during the attack.

At sentencing, both Haleyi and Mann made emotional victim impact statements to the court. Haleyi stated that Weinstein had "violated my trust, my body, and my basic right to reject his sexual advances. . . . When he attacked me that evening, it scarred me emotionally and physically."

Harvey Weinstein in addressing the court at sentencing expressed "remorse" although he believed his relationships with the women had been consensual and compared the #MeToo movement to the attacks on suspected communist screenwriters in Hollywood in

the 1950s. Weinstein called the judge's attention to his work for charities and achievements in the film industry and stated that his empathy toward others had improved as a result of his experiences. He expressed remorse for the victims but added that he was "totally confused" about the basis of his conviction and expressed concern for the future of due process of law in the United States.

Weinstein was sentenced to 23 years in prison and likely will spend the remainder of his life in prison. Judge Burke explained that although this was Weinstein's first criminal conviction, there was evidence that he had committed other sexual assaults.

District Attorney Vance thanked the women who "refused to be silent" and noted that their "words took down a predator and put him behind bars, and gave hope to survivors of sexual violence all across the world." The defense attorneys later complained that some murderers receive less time than Weinstein and that the sentence he received was not supported by the evidence.

In January 2020, the Los Angeles County prosecutor announced that Weinstein would be charged with two additional rape charges along with forcible rape, forcible oral copulation, sexual penetration by force, and sexual battery by means of restraint.

A complicated multimillion-dollar financial settlement with the victims of sexual assault by Weinstein was reached in December 2020.

CHAPTER SUMMARY

There are four categories of offenses against the person: sexual offenses, bodily injury and interference, freedom of movement, and homicide.

The most serious sexual offense is rape. Rape at common law was punishable by death, and only homicide was historically considered a more severe crime. Common law rape required the intentional vaginal intercourse by a man of a woman who was not his wife by force or threat of serious bodily injury against her will. The fear of false conviction led to the imposition of various barriers that the victim was required to overcome. This included immediate complaint, corroboration, the admissibility of evidence pertaining to a victim's past sexual activity, and a cautionary judicial instruction. The focus was on the victim, who was expected to demonstrate her lack of consent by the utmost resistance.

The law of sexual offenses was substantially modified by the legal reforms of the 1970s and 1980s that treated rape as an assault against the person rather than as an offense against sexual morality. Sexual intercourse was expanded to include the forced intrusion into any part of another person's body, including the insertion of an object into the genital or anal opening. Rape was defined in gender-neutral terms, the marital exemption was abolished, and rape was divided into simple and aggravated rape based on the type of penetration, use of force, or resulting physical injury. Various statutes no longer employ the term *rape* and consider vaginal intercourse merely to be another form of sexual assault.

The intent of rape reform is to shift attention from resistance by the victim to the force exerted by the perpetrator. There are two approaches to analyzing force. The extrinsic force standard requires an act of force beyond the physical effort required to achieve sexual penetration. The intrinsic force standard requires only that amount of force required to achieve penetration. Rape may also be accomplished by threat of force, through penetration obtained by fraud, or when the victim is incapable of consent stemming from unconsciousness, sleep, or insanity.

The *mens rea* of rape at common law was the intent to engage in vaginal intercourse with a woman who the defendant knew was not his wife through force or the threat of force against her will. There was no clear guidance as to whether a defendant was required to know that the intercourse was without the female's consent. A majority of states now accept an objective test that recognizes the defense that a defendant honestly and reasonably believed that the victim consented. This requires equivocal conduct by the victim that is capable of being reasonably, but mistakenly, interpreted by the assailant as indicating consent. The English House of Lords rule, in contrast, adopts a subjective approach and examines whether a defendant "knows" whether the victim consented. The third approach is the imposition of strict liability that holds defendants guilty whatever their personal belief or the objective reasonableness of their belief.

Recent legal and statutory developments recognize that individuals may withdraw their consent. The continuation of sexual relations under such circumstances constitutes rape.

Statutory rape is a strict liability offense that holds a defendant guilty of rape based on the defendant's intercourse with an "underage" victim. Several states permit the defense of a reasonable mistake of age. Rape shield laws prohibit the prosecution from asking the victim about or introducing evidence concerning sexual relations with individuals other than the accused or introducing evidence relevant to the victim's reputation for chastity.

Assault and battery, although often referred to as a single crime, are separate offenses. A battery is the application of force to another person. An assault may be committed by attempting to commit a battery or by intentionally placing another in imminent fear of a battery. Aggravated assaults and batteries are felonies. Domestic violence is severely punished because of the vulnerability of individuals in the home.

Kidnapping is the unlawful and forcible seizure and asportation (carrying away) of another without consent. This requires the specific intent to move the victim without consent. The *actus reus* is the moving or detention of the victim. Courts differ on the extent of this movement, variously requiring slight or, under the Model Penal Code standard, substantial movement. The majority rule is that the movement must not be incidental to the commission of another felony and must contribute to the primary crime by preventing the victim from calling for help, reducing the defendant's risk of detection, facilitating escape, or increasing the danger to the accused.

False imprisonment is the intentional and unlawful confinement or restraint of another person. The restraint may be achieved by force, by threat of force, or by other means and does not

require the victim's asportation or secret confinement. False imprisonment is a misdemeanor other than when committed in an aggravated fashion.

CHAPTER REVIEW QUESTIONS

1. What was the original justification for the crime of rape?
2. Why does "date rape" present a challenge to prosecutors?
3. How did the common law define rape? List some of the barriers to establishing rape under the common law.
4. Describe the changes in the law of rape introduced by the reform statutes of the 1970s and 1980s.
5. What elements distinguish a simple or second-degree rape from an aggravated or first-degree rape?
6. Distinguish the standard of extrinsic force from the intrinsic force standard in the law of rape.
7. How do states differ in their definition of the *actus reus* of rape?
8. What are the three approaches to the defense of mistake of fact in the *mens rea* of rape?
9. Is a defendant's belief that another individual is above the age of lawful consent a defense to statutory rape? What of the victim's past sexual experience? As a state legislator drafting a statutory rape law, what would be important to include in the statute?
10. May an individual who withdraws consent claim to be the victim of rape?
11. What is the purpose of rape shield laws? Are there exceptions to rape shield laws?
12. Distinguish an assault from a battery.
13. What are the requirements of a battery? Describe the difference between a simple and an aggravated battery.
14. Discuss the two ways to commit an assault.
15. What is the relationship between the crime of stalking and a criminal assault?
16. What is the definition of kidnapping? How do courts approach the issue of determining whether a kidnapping has occurred when a victim is moved in the course of committing a crime?
17. Distinguish between false imprisonment and kidnapping.

LEGAL TERMINOLOGY

acquaintance rape	kidnapping
aggravated rape	marital exemption
aggravated sexual assault	mayhem
assault and battery	prompt complaint
corroboration	prosecutrix
cyberstalking	rape shield laws
domestic battery	rape trauma syndrome
earnest resistance	reasonable resistance
equivocal conduct	resist to the utmost
extrinsic force	sexual assault
false imprisonment	stalking
fraud in inducement	statutory rape
fraud in the factum	torture
fraudulent representation of identity	withdrawal of consent
intrinsic force	

TEST YOUR KNOWLEDGE ANSWERS

1. False.
2. True.
3. False.
4. False.
5. False.
6. False.
7. False.
8. False.
9. False.
10. True.
11. True.
12. True.

12

BURGLARY, TRESPASS, ARSON, AND MISCHIEF

TEST YOUR KNOWLEDGE: TRUE/FALSE

1. An individual who pushes open a half-closed door to a house and reaches inside and grabs a wallet on a table is guilty of common law burglary.
2. An individual who is the owner of a home in which the individual does not live is not criminally liable for common law burglary if the individual breaks into the home with the intent to commit a felony.
3. A conviction for the crime of trespass requires an unauthorized entry onto property and an intent to commit a crime on the property.
4. The common law crime of arson requires an actual burning, and smoke damage is not sufficient to constitute arson.
5. Criminal mischief requires substantial damage to property.

Check your answers at the end of the chapter on page 658.

Was Fitch Guilty of Vandalism?

Police Officer Michael O'Malley parked his patrol car near the entrance to South Kitsap High School. Outside the school, he saw a group of students walking toward him. Watching from a distance of about 20 feet, he saw 16-year-old Randy Fitch turn and spit onto the windshield of the patrol car. When Fitch tried to walk past O'Malley and into the building, O'Malley grabbed his shoulder. . . . O'Malley grasped him harder and told him he was under arrest for malicious mischief. (*State v. Fitch*, Washington Appeal No. 18258-I-II [1996])

INTRODUCTION

The notion that the home is an individual's castle is deeply ingrained in the American character. After all, the United States is an immigrant society to which people flocked in order to seek a better life. A fundamental aspect of this dream was the ownership of a home.

The importance of the home was apparent from the early days of the country. The warrantless intrusion and quartering of British soldiers in the homes of the colonists was a central cause of the American Revolution. The Fourth Amendment to the Constitution was specifically adopted to ensure that individuals were free from arbitrary searches of their homes and seizures of their property. This amendment reminds us that a home is more than bricks and mortar and is valued as more than an economic investment. It is a safe and secure shelter where we are free to express our personalities and interests without fear of uninvited intrusions. What are your feelings when you think about your home?

In this chapter, we look at the common law offenses developed to protect an individual's dwelling and at the incorporation of these common law crimes in state statutes that cover a broad range of structures and vehicles. The criminal offenses covered in the chapter are as follows:

- *Burglary*. Breaking and entering into a dwelling or other structure.
- *Trespass*. An uninvited intrusion onto an individual's property and dwelling.
- *Arson*. The burning of a dwelling.
- *Malicious Mischief*. The destruction of property or the home.

You should pay particular attention to how statutes have changed the common law of burglary and arson.

BURGLARY

Burglary at common law was defined as the breaking and entering of the dwelling house of another at night with the intention to commit a felony. Burglary was punished by the death penalty, reflecting the fact that a nighttime invasion of a dwelling poses a threat to the home, which is "each man's castle . . . and the place of security for his family, as well as his most cherished possessions."¹ Sir William Blackstone observed that burglary is a "heinous offense" that causes "abundant terror," which constitutes a violation of the "right of habitation" and provides the inhabitant of a dwelling with the "natural right of killing the aggressor."² The law prohibiting and punishing the crime of burglary protects several interests:

- *Home*. The right to peaceful enjoyment of the home.
- *Safety*. The protection of individuals against violent attack and fright within the home.
- *Escalation*. The prevention of a dangerous confrontation that may escalate into a fatal conflict.

In 1990, the U.S. Supreme Court noted that state statutes no longer closely followed common law burglary and that these statutes, in turn, did not agree on a common definition of burglary. This means that in thinking about burglary, you should pay particular attention to the definition of burglary in the relevant state statute. As you read this section, analyze how burglary has been modified by state statutes. In addition, consider whether we continue to need the crime of burglary. What does burglary contribute that is not provided by other offenses?³

Breaking

Common law burglary requires a “breaking” to enter the home by a trespasser, an individual who enters without the consent of the owner. A breaking requires an act that penetrates the structure, such as breaking a window or pushing open an unlocked door. Permanent damage is not required; the slightest amount of force is sufficient. Why did the common law require a breaking? Most commentators conclude that this requirement was intended to encourage homeowners to take precautions against intruders by closing doors and windows. In addition, an individual who resorts to breaking also typically lacks permission to enter, and the breaking is evidence of an “unlawful” or “uninvited” entry. A breaking may also occur through constructive force. This entails entry by fraud, misrepresentation, or threat of force; entry by an accomplice; or entry through a chimney.

Most statutes no longer require a breaking. Burglary is typically defined as an unlawful or uninvited entry (e.g., lacking permission to enter). Note that it is not burglary under this definition for an individual to enter a store that is open to the general public. Some courts have interpreted statutes to cover the entry into a store by arguing that individuals who enter a store while concealing that they plan to commit a crime have committed a fraud and therefore have entered unlawfully. Courts have ruled that an ATM or other structure “too small for a human being to live in or do business in is not a ‘building’ or ‘structure’ for the purpose of burglary.”⁴

In other words, keep in mind that as the U.S. Supreme Court noted, state statutes have substantially changed the common law requirements for burglary:

[T]he contemporary understanding of “burglary” has diverged a long way from its common-law roots. Only a few States retain the common-law definition, or something closely resembling it. Most other States have expanded this definition to include entry without a “breaking,” structures other than dwellings, offenses committed in the daytime, entry with intent to commit a crime other than a felony, etc. This statutory development, “when viewed in totality, has resulted in a modern crime which has little in common with its common-law ancestor except for the title of burglary.”⁵

Entry

The next step after the breaking is “entry.” This requires only that a portion of an individual’s body enters the dwelling; a hand, foot, or finger is sufficient. Courts also find burglary when there is entry by an instrument that is used to carry out the burglary. This might involve reaching into a window with a straightened coat hanger to pull out a wallet or reaching an arm through a window to pour inflammable liquid into a home. In a recent case, an individual

launched an aggressive verbal attack on his lover's husband while reaching his arm threateningly through the open door of the husband's motor home. A Washington appellate court determined that this was sufficient to constitute an intent to assault and a conviction for burglary.⁶ Note the general rule is that it is not a burglary when an instrument is used solely to break the structure, such as tossing a brick through a window.⁷

Another point to keep in mind is that the breaking must be the means of entering the dwelling. You might break a window and then realize that the front door is open and walk in and steal a television. There is no burglary because the breaking is not connected to the entry. A burglary may also be accomplished constructively by helping a small, thin co-conspirator enter a home through a narrow basement window.

Some statutes provide that a burglary may be committed by "knowingly . . . remaining unlawfully in a building" with the required intent or "surreptitiously (secretly) remaining on the premises with the intent to commit a crime." In *Dixon v. State*, for example, the defendant entered a church during Sunday services, wandered into the church sanctuary, and stole money from the collection plate in the pastor's office. A Florida appellate court ruled that the defendant illegally entered the sanctuary and surreptitiously remained in the structure when he closed the door to the pastor's office during the theft.⁸ The important point to keep in mind is that the entry for a burglary must be trespassory, meaning without consent. Note that if you steal someone else's computer from your own dorm room, it is not a burglary. The essence of burglary is the unlawful interference with the right to habitation of another. In *Stowell v. People*, the Colorado Supreme Court observed that there is no burglary "if the person entering has a right to do so, although he may intend to commit and may actually commit a felony." Otherwise, a schoolteacher "using the key furnished to her . . . to re-open the schoolhouse door immediately after locking it in the evening, for the purpose of taking (but not finding) a pencil belonging to one of her pupils, could be sent to the penitentiary."⁹

Dwelling House

The common law limited burglary to a "dwelling house," a structure regularly used as a place to sleep. A structure may be used for other purposes and still constitute a dwelling so long as the building is used for sleep. The fact that the residents are temporarily absent from a summer cottage does not result in the building's losing its status as a dwelling. However, a structure that is under construction and not yet occupied or a dwelling that has been permanently abandoned is not considered a dwelling. The Illinois burglary statute provides that a dwelling is a "house, apartment, mobile home, trailer, or other living quarters in which at the time of the alleged offense the owners or occupants actually reside or in their absence intend within a reasonable period of time to reside."¹⁰

A dwelling at common law included the **curtilage**, or the land and buildings surrounding the dwelling, including the garage, tool shed, and barn. A recently decided Washington case held a defendant liable for a burglary when, with the intent to assault his former wife, he jumped over a 6-foot wooden fence in the backyard of the house she shared with her current lover.¹¹

Most statutes no longer limit burglaries to dwelling houses and typically categorize the burglary of a dwelling as an aggravated burglary. The California statute extends protection to “any house, room, apartment, . . . shop, warehouse, store, mill, barn, stable, outhouse, . . . tent, vessel, . . . floating home, railroad car, . . . inhabited camper, . . . aircraft, . . . or mine.”¹² Other statutes are less precise and provide that a burglary involves a “building or occupied structure, or separately secure or occupied portion thereof.”¹³

Dwelling of Another

The essence of burglary under the common law is interference with an individual’s sense of safety and security within the home. In determining whether the home is “of another,” you need to examine who resides in the dwelling rather than who owns the dwelling. For example, a husband who separates from his wife and moves out of the home that he owns with his spouse may be liable for the burglary of his former home. In *Ellyson v. State*, the defendant was convicted of burglary for breaking into the house that he and his estranged wife owned together with the intent of raping his wife.¹⁴ The couple was undergoing a divorce, and the court found that his “wife alone controlled access to the home.” Also, individuals generally cannot burglarize a dwelling that they share with another. A burglary of this dwelling is possible only when an individual enters into portions of the home under the exclusive control of the individual’s roommate with the requisite criminal intent.

The requirement that an entry be of the dwelling of another is not explicitly stated in most statutes. Despite the failure to include this language, you still cannot burglarize your own home because an entry must be unlawful, meaning without a legal right, and you clearly are entitled to enter your own home.

Nighttime

A central requirement of burglary at common law is that the crime be committed at night. The nighttime hours are the time when a dwelling is likely to be occupied and when individuals are most apt to be resting or asleep and vulnerable to fright and to attack. Perpetrators are also less likely to be easily identified during the nighttime hours. The common law determined whether it was nighttime by asking whether the identity of an individual could be identified in “natural light.”

State statutes no longer require that a burglary be committed at night. However, a breaking and entering during the evening is considered an aggravated form of burglary and is punished more severely. States typically follow the rule that night extends between sunset and sunrise or from 30 minutes past sunset to 30 minutes before sunrise. English law defines nighttime as extending from 6 at night until 9 in the morning.¹⁵

Intent

The common law required that individuals possess an intent to commit a felony within the dwelling at the time that they enter the building. Individuals are guilty of a burglary when they enter the dwelling, regardless of whether they actually commit the crime or abandon their

criminal purpose. The intent must be concurrent with the entry; it is not a burglary when the felonious intent is formed following entry.

Some judges recognize that individuals who enter a building are guilty of a burglary in the event that they develop a felonious intent after entering into a building and unlawfully break into a secured space, such as an office or dorm room.

States have adopted various approaches to modifying the common law intent standard. Pennsylvania requires an intent to commit a crime.¹⁶ California broadens the intent to include any felony or any misdemeanor theft.¹⁷ The expansion of the intent standard is justified on the grounds that an intrusion into the home is threatening to the occupants regardless of whether the intruder's intent is to commit a felony or misdemeanor.

Aggravated Burglary

Burglary is typically divided into degrees. Aggravated first-degree burglary statutes generally list various circumstances as deserving enhanced punishment, including the nighttime burglary of a dwelling, the possession of a dangerous weapon, or the infliction of injury to others. Second-degree burglary may include the burglary of a dwelling, store, automobile, truck, or railroad car. The least serious grade of burglary typically involves entry with the intent to commit a misdemeanor or nonviolent felony.

Arizona punishes as first-degree burglary the entering of or remaining in a residential or nonresidential structure with the intent to commit a felony or theft while knowingly possessing explosives or a deadly weapon or dangerous instrument. The burglary of a residential structure is a second-degree burglary, and the least serious form of burglary involves a nonresidential structure or fenced-in commercial or residential yard.¹⁸

Most states also prohibit possession of burglar tools. Idaho considers guilty of a misdemeanor anyone in possession of a "picklock, crow, key, bit, or other instrument or tool with intent feloniously to break or enter into any building or who shall . . . knowingly make or alter any key . . . [to] fit or open the lock of a building, without being requested so to do by some person having the right to open the same."¹⁹

Burglary is a distinct offense and does not merge into the underlying offense. An individual, as a result, may be sentenced for both a burglary and assault and battery or for both a burglary and larceny. Pennsylvania, however, provides that a burglary merges into the offense "which it was his intent to commit after the burglarious entry" unless the additional offense was a serious felony.²⁰

YOU DECIDE 12.1

Defendant John Martin Sandoval is an alcoholic. He started drinking while watching a football game, and after a 12-pack of beer, he walked to a bar and drank an additional beer. He does not remember leaving the bar or any other location until he awoke in jail later in the day for first-degree burglary. Sandoval was found to have walked to a stranger's home at 3:20 a.m. and kicked in the front door of the home of Mike Christensen, a reserve deputy with the police for 12 years. Christensen demanded to know what Sandoval was "doing in my house." Sandoval responded, "Who are you?" and shoved Christensen in the chest, knocking

him back a few feet. Christensen then punched Sandoval in the head, wrestled him to the floor, and held him down until the police arrived. The Washington burglary statute declares that it is burglary in the first degree if, “with the intent to commit a crime against a person or property therein,” an individual “enters or remains unlawfully in a building” and if, while entering, “[t]he actor . . . assaults any person.” Sandoval and Christensen had never met. Sandoval did not have burglary tools or take any of Christensen’s property. A Washington appellate court reversed Sandoval’s conviction. How would you rule? See *State v. Sandoval*, 94 P.3d 323 (Wash. Ct. App. 2004).

Do We Need the Crime of Burglary?

Do we really need burglary statutes? Why not just severely punish a crime committed inside a dwelling or another building?

The commentary to the Model Penal Code points out that punishment for burglary can lead to illogical results. An individual entering a store with the intent to steal an inexpensive item under some statutes would be liable for both burglary and shoplifting. On the other hand, an individual who developed an intent to steal only after having entered the store would be liable only for shoplifting. Does this make sense?

In *State v. Stinton*, Stinton violated an order of protection issued by a judge that prohibited Stinton from harassing his former lover, Tyna McNeill. Stinton nevertheless entered and attempted to remove his personal property from the home the two formerly shared. He was held liable for the misdemeanor of violating the order of protection in addition to the felony of burglary for entering a dwelling with the intent to commit a crime. Stinton unsuccessfully argued that this unfairly transformed his violation of an order of protection into a burglary. Had he confronted McNeill on the street, Stinton would be held liable only for a misdemeanor. Do you agree with Stinton’s contention?²¹

On the other hand, burglary statutes recognize that there clearly is a difference in the degree of fear, terror, and potential for violence resulting from an assault or theft in the home as opposed to an assault and theft on the street. Do burglary statutes require reform? Should we return to the common law definition of burglary? The Model Penal Code provides a reformed version of the law of burglary.

The next case, *Bruce v. Commonwealth*, challenges you to creatively apply the breaking and entering requirement to an unusual set of circumstances.

MODEL PENAL CODE

Section 221.1. Burglary

1. A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portions thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter.

It is an affirmative defense to prosecution for burglary that the building or structure was abandoned.

2. Burglary is a felony of the second degree (maximum sentence of ten years) if it is perpetrated in the dwelling of another at night, or if, in the course of committing the offense, the actor:
 - a. purposely, knowingly or recklessly inflicts or attempts to inflict bodily injury on anyone; or
 - b. is armed with explosives or a deadly weapon.
 Otherwise, burglary is a felony of the third degree (a maximum sentence of five years). An act shall be deemed "in the course of committing" an offense if it occurs in an attempt to commit the offense or in flight after the attempt or commission.
3. A person may not be convicted both for burglary and for the offense which it was his purpose to commit after the burglarious entry or for an attempt to commit that offense, unless the additional offense constitutes a felony of the first or second degree.

Analysis

1. A burglary is limited to an occupied building or structure. The building or structure need not be occupied at the precise moment of the burglary; the important point is that the structure is "normally occupied." There is no breaking and entering requirement. The Model Penal Code does not punish remaining unlawfully on the premises as burglary.
2. The Model Penal Code does not include stores open to the public or motor vehicles or railcars.
3. A burglary may be committed in a separate portion or unit of a building.
4. A burglary involves an intent to commit a "crime" and is not limited to a felony. The burglary is aggravated when perpetrated at night or when it involves the infliction or attempted infliction of bodily harm or in those instances in which the perpetrator is armed with explosives or a deadly weapon.
5. Most burglaries are punished as felonies in the third degree. The burglary merges into the completed crime unless the underlying offense is a felony in the second degree (maximum sentence of 10 years) or serious felony such as rape, violent robbery, or murder (maximum imprisonment for life).

FIGURE 12.1 ■ The Legal Equation: Burglary



TWO CASES ON BURGLARY

DID THE APPELLANT BREAK INTO THE TRAILER?

BRUCE V. COMMONWEALTH, 469 S.E.2D 64 (VA. CT. APP. 1996)

Opinion by Elder, J.

Facts

Appellant and Deborah Bruce (Deborah), although married, lived in separate residences during late 1993. Deborah lived with the couple's son, Donnie Bruce, Jr. (Donnie), and Donnie's girlfriend at Greenfield Trailer Park in Albemarle County, Virginia. Although appellant stayed with Deborah at the residence during a period of time in September or October of 1993, his name was not on the lease, he was not given a key to the residence, and he did not have permission to enter the residence at the time of the alleged offense.

On December 5, 1993, at approximately 2:00 p.m., Deborah, Donnie, and Donnie's girlfriend left their residence. Earlier that morning, Donnie told appellant that Deborah would not be home that afternoon. Upon departing, Donnie and Deborah left the front door and front screen door closed but unlocked. The front door lacked a knob but had a handle, which allowed the door to be pulled shut or pushed open.

After Deborah, Donnie, and Donnie's girlfriend left their residence, a witness observed appellant drive his truck into the front yard of the residence and enter through the front door without knocking. Appellant testified, however, that he parked his truck in the lot of a nearby supermarket and never parked in front of the residence. Appellant stated that the front screen door was open and that the front door was open three to four inches when he arrived. Appellant testified that he gently pushed the front door open to gain access and entered the residence to look for Donnie.

While preparing to leave the residence, appellant answered a telephone call from a man with whom Deborah was having an affair. The conversation angered appellant, and he threw Deborah's telephone to the floor, breaking it. Appellant stated that he then exited through the residence's back door, leaving the door "standing open," and retrieved a .32 automatic gun from his truck, which was parked in the nearby supermarket parking lot. Appellant returned to the residence through the open back door. Appellant, who testified that he intended to shoot himself with the gun, went to Deborah's bedroom, lay on her bed, and drank liquor.

When Deborah, Donnie, and Donnie's girlfriend returned to their residence, appellant's truck was not parked in the front yard. Upon entering the residence, Donnie saw that someone was in the bathroom, with the door closed and the light on. When police arrived soon thereafter, they found appellant passed out on Deborah's bed and arrested him.

On May 24, 1994, a jury in the Circuit Court of Albemarle County convicted appellant of breaking and entering a residence, while armed with a deadly weapon, with the intent to commit assault. Appellant appealed to this court.

Issue

In order to convict appellant of the crime charged, the Commonwealth had to prove that appellant broke and entered into his wife's residence with the intent to assault her with a deadly weapon. Under the facts of this case, the Commonwealth satisfied this burden.

Reasoning

Breaking, as an element of the crime of burglary, may be either actual or constructive. . . . Actual breaking involves the application of some force, slight though it may be, whereby the entrance is effected. Merely pushing open a door, turning the key, lifting the latch, or resorting to other slight physical force is sufficient to constitute this element of the crime.

"Where entry is gained by threats, fraud or conspiracy, a *constructive breaking* is deemed to have occurred." . . . "[A] breaking, either actual or constructive, to support a conviction of burglary, must have resulted in an *entrance* contrary to the will of the occupier of the house."

Appellant's *initial entry* into Deborah's residence constituted an actual breaking and entering. Sufficient credible evidence proved that appellant applied at least slight force to push open the front door and that he did so contrary to his wife's will. However, as the Commonwealth concedes on brief, appellant did *not* possess the intent to assault his wife with a deadly weapon at this time. . . . The Commonwealth therefore had to prove appellant intended to assault his wife when he reentered the residence with his gun.

We hold that the Commonwealth presented sufficient credible evidence to prove the crime charged. On the issue of intent, the jury reasonably could have inferred that the phone call from Deborah's boyfriend angered appellant, resulting in his destruction of the telephone and the formation of an intent to commit an assault with a deadly weapon upon Deborah. Viewed in the light most favorable to the Commonwealth, credible evidence proved that appellant exited the back door of the residence, leaving the door open, moved his truck to a nearby parking lot, and reentered the residence carrying a gun with the intent to assault Deborah.

Well-established principles guide our analysis of whether appellant's exit and reentry into the residence constituted an actual or constructive breaking. As we stated above, an "actual breaking involves the application of some force, slight though it may be, *whereby the entrance is effected*." . . . "In the criminal law as to housebreaking and burglary, [breaking] means the tearing away or removal of any part of a house or of the locks, latches, or other fastenings intended to secure it, or otherwise exerting force to gain an entrance, with criminal intent. . . ." Virginia, like most of our sister states, follows the view that "breaking out of a building after the commission of a crime therein is not burglary in the absence of a statute so declaring." . . . In this case, appellant *exited* the back door of the residence on his way to retrieve the gun from his truck. In doing so, the appellant did not break for the purpose of escaping or leaving. Rather, by opening the closed door, he broke in order to facilitate his reentry. At the time he committed the breaking, he did so with the intention of reentering after retrieving his firearm. Although appellant used no force to effect his reentry into the residence, he used the force necessary to constitute a breaking by opening the closed door on his way out. . . .

Holding

Sound reasoning supports the conclusion that a breaking from within in order to facilitate an entry for the purpose of committing a crime is sufficient to prove the breaking element of burglary. The gravamen of the offense is breaking the close or the sanctity of the residence, which can be accomplished from within or without. A breaking occurs when an accomplice opens a locked door from within to enable his cohorts to enter to commit a theft or by leaving a door or window open from within to facilitate a later entry to commit a crime. . . .

Accordingly, a breaking occurred when appellant opened the back door of the victim's residence, even though the breaking was accomplished from within. Thus, because the evidence was sufficient to prove an intent to commit assault at the time of the breaking and the entering, the Commonwealth proved the elements of the offense. Thus, we affirm appellant's conviction.

Questions for Discussion

1. The Virginia burglary statute, section 18.2-91, punishes any person who, in the daytime, breaks and enters a dwelling house with the intent to commit larceny or assault and battery, or enters with the intent to commit any felony other than murder, rape, or robbery. Is the decision of the Virginia appellate court clearly dictated by the language of this statute? Is the court's judgment consistent with the public policy underlying the crime of burglary?
2. Why did the appellant's initial entry not constitute a burglary?
3. Would the case have turned out differently in the event that the back door was wide open when Bruce left and reentered the trailer?
4. How would you decide this case?

Lacey v. Commonwealth raises the issue of what constitutes the breaking and entering of a dwelling house.

DID LACEY'S ENTRY INTO THE GARAGE AND A UTILITY ROOM CONSTITUTE A BURGLARY?

LACEY V. COMMONWEALTH, 675 S.E.2D 846 (VA. CT. APP. 2009)

Opinion by Haley, Jr., J.

Issue

Michael Eugene Lacey appeals his convictions for statutory burglary. . . . Lacey maintains the evidence of statutory burglary was insufficient since it showed he entered a dwelling house through an open garage door. [The issue also arises whether the breaking and entry into a room in a dwelling house constitutes burglary.] . . .

Facts

On the afternoon of May 5, 2007, H.F. was trimming a tree at his house in Virginia Beach. One of his two garage doors was open. H.F. noticed his trimmer blade failed to work as well as desired, so he decided to sharpen it in the garage. H.F. also stored the trimmer in the garage. As H.F. disassembled the trimmer, he saw Lacey emerge from a “utility room” connecting the house to the interior of the garage. A door must be opened to enter the utility room from the garage. H.F. asked Lacey why he was in the house. When Lacey failed to respond, H.F. inquired again and Lacey stated he had to use the restroom. Believing Lacey lacking in truthfulness, H.F. accused him of burglarizing the house. Lacey then ran from the scene. H.F. attempted to pursue him, but could not keep pace. When H.F. returned to his home, he discovered \$152 in cash missing from his wallet in his bedroom. H.F. contacted the police, and two officers came to his house. He provided a description of the intruder to them.

Police apprehended Lacey shortly after speaking with H.F. Police Officer W.R. Chisholm recovered exactly \$152 from Lacey’s person. H.F. identified Lacey as the person who burglarized his house.

Photos of H.F.’s residence later introduced by Lacey at trial show the house to have two stories, with an attached two-door garage extending to the side. The garage shares a roof with the first floor of the house so that the roof over the main portion of the dwelling and the roof over the garage form one single roof. The brickwork on the first floor of the house also extends to the garage so that one wall covers both.

A grand jury indicted Lacey for third or subsequent offense petit larceny and statutory burglary. Lacey was tried by a jury on February 13, 2008. . . . The trial court entered an order finding Lacey guilty of statutory burglary and a subsequent offense of petit larceny. The appeal followed.

Reasoning

Lacey maintains he entered the dwelling home when he entered the attached garage through an open door and his subsequent breaking into the utility room constituted a breaking within a dwelling house, not a breaking into a dwelling house. We agree. . . .

Lacey was convicted of statutory burglary under Code § 18.2-91. In relevant part, that section provides that “[i]f any person commits any of the acts mentioned in § 18.2-90 with intent to commit larceny . . . he shall be guilty of statutory burglary.” In turn, Code § 28.2-90 in relevant part states that “[i]f any person . . . in the daytime breaks and enters . . . a dwelling house . . . he shall be deemed guilty of statutory burglary.” Thus, conviction under Code § 18.2-91 required the Commonwealth to prove (1) a breaking and entering in the daytime of (2) a dwelling house and (3) with intent to commit larceny. The presence of an intent to commit larceny is not at issue. We consider the first two elements in turn.

“A breaking for purposes of statutory burglary may be either actual or constructive.” An actual breaking merely requires “the application of some force, slight though it may be, whereby the entrance is effected. Merely pushing open a door, turning the key, lifting the latch, or resort[ing] to other slight physical force is sufficient to constitute this element of the crime.”

It is undisputed for purposes of this appeal that Lacey entered H.F.’s open garage in the daytime without any physical force, but employed force to enter the utility room. This force constituted a breaking. The question of whether Lacey broke into a dwelling home upon

entering the utility room, or whether he had entered the dwelling house in the attached garage, requires greater consideration.

The Virginia Supreme Court has stated that “[b]urglary was, at common law, primarily an offense against the security of the habitation, and that is still the general conception of it. A difference is recognized between the crime of wrongfully entering . . . a house where people live and the crime of entering a house where chickens roost.” The burglary statutes exist to protect against “the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence.”

Recognizing these concerns, our Supreme Court recently defined the meaning of a “dwelling house” in the burglary statutes in *Giles v. Commonwealth*, 672 S.E.2d 879 (Va. 2009). The Court held “a dwelling house is a house that one uses for habitation, as opposed to another purpose.”

In *Hitt v. Commonwealth*, 598 S.E.2d 783 (Va. Ct. App. 2004), this Court held the breaking of a room within a dwelling house does not constitute the breaking of a dwelling as required by the burglary statutes; rather, only the breaking and entering from outside the dwelling into the dwelling suffices. In *Hitt*, the defendant spent the night in a home with the occupants’ permission. After the occupants departed, the defendant broke into a locked bedroom and stole money from within it. Like Lacey, the defendant in *Hitt* was convicted of statutory burglary. In considering whether the defendant’s actions constituted burglary, we stated that a “dwelling house” “contemplates a residence within which human beings sleep or habitate. It does not contemplate individual rooms or compartments within such a ‘residence,’ that are not dwelling houses in and of themselves. . . .” The Court further quoted *Lockhart v. State*, 60 S.E. 215 (Ga. Ct. App. 1908), for the notion that where a case involves a private home, “breaking into the house is necessary to be shown, in order to constitute a burglary. The breaking and entering of one of the rooms of such private dwelling-house, where the entrance into the house is accomplished without breaking, is not burglary.” Since the defendant in *Hitt* had not broken into a dwelling, but only into a room within one, we reversed the conviction.

Although Virginia courts have not previously considered whether a garage attached to a house represents part of the dwelling, courts in other jurisdictions have found such an attached garage constitutes a portion of the dwelling, akin to a room. As one court held: “In the situation where the garage is an attached and integral part of the house, it is simply one room of several which together compose the dwelling. This is especially true where . . . the garage can be reached through an inside door connecting it to the rest of the residence.” . . . “[T]he record reveals the [attached] garage . . . [was] separated from the living quarters by a door. The same roof covered the garage as the rest of the residence. The living quarters surrounded the garage on two sides. It was structurally no different from any other room in the residence.” . . . “[T]he garage was attached to the house, contained an interior connecting door and was used for household storage—a purpose connected with family living. That the breaking into the garage did not afford the Defendant immediate access to the actual living quarters is immaterial.” Even where a garage did not have interior access to the house, it has been held a portion of the dwelling where it was attached to the house. Thus, it was held that “given the fact that the garage was under the same roof, functionally interconnected with, and immediately contiguous to other portions of the house, simple logic would suffer if we were to . . . [hold] a garage is not part of a dwelling because no inside entrance connects the two.” . . .

Some courts holding an attached garage to be part of a dwelling have also noted the normal functions of daily living for which residents use the garage. One court remarked that “at

least some of the usual uses of a residential garage, including storage of household items, are incidental to and part of the habitation uses of the residence itself." An Indiana court found important that a "freezer full of food for use by the family was situated in the garage, as well as a pool table for the family's recreation."

Another court well synthesized the above law: "The proper focus is whether the attached structure is an integral part of a dwelling, that is, functionally interconnected with and immediately contiguous to other portions of the house."

We find this reasoning persuasive and, applying it here, conclude the attached garage was part of the dwelling house for purposes of the burglary statute. Photos of the house introduced at trial plainly show the garage is an integrated part of the whole house. The garage shares a roof and wall with the other portions of the house. The garage also connects interiorly with other portions of the house. Lacey took advantage of this to enter the open garage, pass into the utility room, steal money from H.F.'s bedroom, and then exit the garage again. Furthermore, H.F. uses the garage for ordinary household functions. He testified he stored the tree pruner in the garage and that he was preparing to sharpen it in the garage when he first noticed Lacey. Under such circumstances, the attached garage represented another room of the dwelling.

Finding an attached garage a portion of the dwelling comports with the purpose underlying the burglary statutes of protecting the sanctity of the home. Since the burglary statutes aim to protect a person's place of habitation and an attached garage is structurally and functionally part of the habitation, the burglary statutes naturally protect the garage. . . . As just another room of the dwelling, an attached garage receives the same protection as every other room.

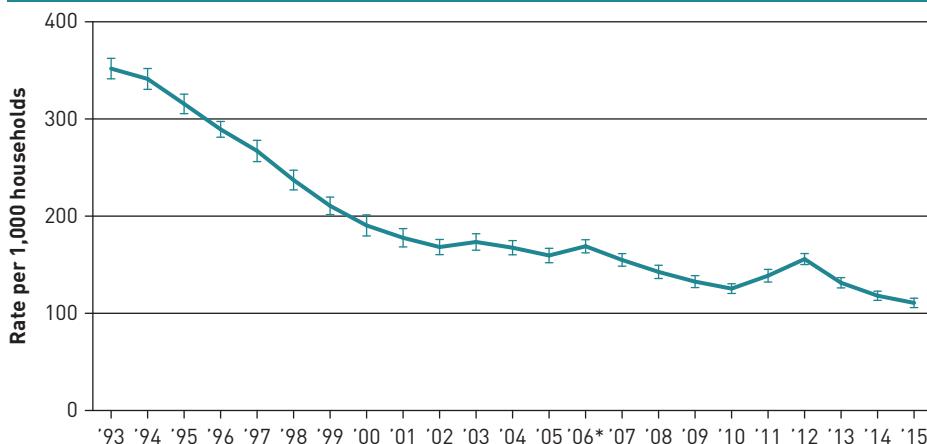
Since the garage was part of the dwelling house and statutory burglary requires a breaking from the outside of the dwelling, Lacey's entry through the open garage door and subsequent breaking of an interior door failed to meet the elements of the offense. Lacey's actions merely represented an intra-house breaking. See *Hitt*, for the notion that "'breaking and entering one of the rooms of such private-dwelling house, where the entrance into the house is accomplished without breaking, is not burglary.'" . . . Since the evidence was insufficient, we reverse the conviction for statutory burglary and dismiss the indictment.

Holding

For the foregoing reasons, we reverse Lacey's conviction for statutory burglary and dismiss the indictment. We affirm his conviction for petit larceny.

Questions for Discussion

1. According to the court, what interests are protected by the law of burglary?
2. Why did the court hold that Lacey's entrance into the garage did not constitute a burglary? Would the court have decided this issue differently had Lacey opened a closed door to enter the garage? What if the garage was detached from the house?
3. Explain based on *Hitt* why Lacey's entry into the utility room did not constitute a burglary.
4. Lacey was convicted of the theft of items from the utility room. Would you have affirmed the trial court verdict convicting Lacey of burglary?

FIGURE 12.2 ■ Crime on the Streets: Rate of Property Crime, 1993–2015

Source: Bureau of Justice Statistics, National Crime Victimization Survey (NCVS), 1993–2015.

YOU DECIDE 12.2

Anthony Holt attempted to remove a window screen from Carolyn Stamper's home. The window was open roughly four inches, and the curtains over the window were drawn other than for a gap of about four inches. Stamper saw Holt at the window as he attempted to remove the aluminum window screen. Holt removed the screen halfway from the window and attempted to get the screen free of the track at the bottom of the window frame. Stamper testified that "while holding the screen, the man's 'fingers were . . . in that area between the window and the screen.'" Holt, after noticing Stamper, stated, "Oh, I'm sorry," and turned and left the premises without opening the window. He was convicted of one count of breaking and entering (burglary). Stamper reported that the screen was "pretty well destroyed" and had to be replaced.

The defendant claimed that this was not burglary because he did not penetrate the structure of the home. The New Mexico statute, section 30-14-8A, requires the jury to find that (1) "[t]he defendant entered [the structure without permission]" and (2) "[t]he entry was obtained by breaking or dismantling a part of the structure." Holt "contends that only penetration of an interior protected space, not the outermost plane of a structure, constitute an 'entry' for purposes of the breaking and entering statute" and that his conviction should be overturned.

Would you convict Holt of breaking and entering into Stamper's home? See *State v. Holt*, 352 P.3d 702 (N.M. Ct. App. 2015), affirmed 368 P.3d 409 (N.M. 2016).

TRESPASS

Criminal trespass is the unauthorized entry or remaining on the land or premises of another. The *actus reus* is entering or remaining on another person's property without the owner's permission. An example is disregarding a No Trespassing sign and climbing over a fence in order to

swim at a private beach. You also may commit a trespass when you swim with permission and then disregard the owner's request to leave.

A **defiant trespass** occurs when individuals knowingly enter or remain on a premises after receiving a clear notice that they are trespassing. Keep in mind that the police, firefighters, and emergency personnel are privileged to enter any land or premises.

Criminal trespass entails an unauthorized entry, and unlike burglary, there is no requirement that the intruder intend to commit a felony. Another important point is that statutes punish a trespass on a broad range of private property. The Texas statute provides that an individual commits a trespass who "knowingly and unlawfully" enters or remains in the dwelling "of another" as well as in a motor vehicle, hotel, motel, condominium, or apartment building, or on agricultural land. The federal and many state governments also have special statutes that punish trespass in schools, military facilities, and medical facilities.

Most statutes require that an owner provide notice that an entry is prohibited or that individuals specifically receive and ignore a notice to leave premises. The Texas statute states that notice requires oral or written communication, fencing, or other enclosures designed to exclude intruders or to contain livestock; posted signs forbidding entry that are reasonably likely to come to the attention of intruders; special identifying purple paint marks on trees or posts; or the visible cultivation of crops fit for human consumption.²²

The intent requirement of trespass typically requires knowingly entering onto the property of another or knowingly remaining on the property of another without the consent of the owner. A hiker who inadvertently walks onto the property of another without consent typically would not be found guilty of a criminal trespass.

Statutes typically divide trespass into various degrees. First-degree criminal trespass typically entails entering or remaining in the dwelling of another and is punished as a minor felony, carrying a jail sentence of between a number of months and several years along with a fine. Second-degree criminal trespass involves entering or remaining in enclosed buildings or fenced-in property and is typically punished as a misdemeanor, resulting in imprisonment for up to several months, as well as by a fine of several thousand dollars. Third-degree criminal trespass is usually categorized as a petty misdemeanor and entails entering in or remaining on unenclosed land and is punished with a fine. Some states punish all criminal trespass as a misdemeanor.²³

A recent development in the law of trespass is the felony of **computer trespassing**. New York's law punishes an individual who "intentionally and without authorization" accesses a computer, computer system, or network with the intent to delete, damage, destroy, or disrupt a computer, computer system, or computer network.²⁴ Colorado does not require an intent to tamper with a computer system and merely requires a knowing and unauthorized use of a computer or intruding without authorization onto a computer system or computer network.²⁵ In *Fugarino v. State*, the defendant acted angrily after learning that he had been fired from his job as a computer programmer. Fugarino announced that he was going to make certain that the company would "never get to make any money" from his design work. He immediately used a company computer to delete data from the firm's computer system and added layers of password protection to prevent his employer from gaining access to the program he designed. Fugarino

was convicted of having “used a computer, owned by his employer, with knowledge that such use was without authority and with the intention of removing programs or data from the computer.”²⁶ Can you think of other ways of applying the law of trespass to modern technology?

Before we leave trespass, consider the following Supreme Court civil rights case from the 1960s. In *Adderley v. Florida*, 32 students at Florida A&M University went to the county jail to protest the jailing of their fellow students who had been arrested in a civil rights demonstration and more generally to protest against racial discrimination. The sheriff alleged that the protesters were blocking the driveway entrance to the jail and ordered them to leave. Those students who refused to leave were charged and convicted of “trespass with a malicious and mischievous intent.” The Court held that the “State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.” Justice William Douglas in his dissenting opinion argued the students were exercising their right to freedom of assembly and the right to petition the government for redress of their grievances and that the sheriff had violated the civil rights of the demonstrators by turning their lawful protest into a criminal act of trespass. What is your view?²⁷ A number of individuals who attacked the U.S. Capitol in January 2021 were charged with the knowing illegal entry or remaining in a restricted area of a federal building.²⁸

MODEL PENAL CODE

Section 221.2. Criminal Trespass

1. A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or surreptitiously remains in any building or occupied structure, or separately secured or occupied portion thereof. An offense under this Subsection is a misdemeanor if it is committed in a dwelling at night. Otherwise it is a petty misdemeanor.
2. A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespasser is given by:
 - a. actual communication to the actor; or
 - b. posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or
 - c. fencing or other enclosure manifestly designed to exclude intruders.An offense under this Subsection constitutes a petty misdemeanor if the offender defies an order to leave personally communicated to him by the owner of the premises or other authorized person. Otherwise it is a violation (punishable by fine).
3. It is an affirmative defense to prosecution under this Section that:
 - a. a building or occupied structure involved in an offense under Subsection (1) was abandoned; or
 - b. the premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises; or
 - c. the actor reasonably believed that the owner of the premises or other persons empowered to license access thereto, would have licensed him to enter or remain.

Analysis

1. Accused persons are guilty of trespass and a petty misdemeanor in the event that the accused know that they lack permission to enter and nevertheless enter or surreptitiously (hiding) remain in any building or occupied structure. This is a misdemeanor if committed in a dwelling at night and is a petty misdemeanor if committed during the daytime.
2. It is a violation (fine) to enter any other “place” without authorization in which a notice against trespass is posted or in which a prohibition against trespass is clear from the enclosure surrounding the area. This is a petty misdemeanor where trespassers defy an order personally communicated to them.
3. The code requires knowledge of trespass. Individuals who accidentally enter on property or mistakenly believe that they possess authorization to enter or remain upon property are not guilty of a trespass.
4. There are three affirmative defenses to trespass.

FIGURE 12.3 ■ The Legal Equation: Criminal Trespass



YOU DECIDE 12.3

J.L. stole a go-cart, a four-wheeler, and a skateboard from the victim’s yard. “These items were leaning against the side of the victim’s residence.” The victim’s mother testified that although the yard was not completely enclosed, there was a fence “in the back” and a fence “between . . . my house and my neighbor’s house.”

In Florida, in order to prove burglary, the State is required to establish that an individual entered a “dwelling” with the intent to commit an offense. A “dwelling” is defined in Florida to include the “curtilage,” which is the area immediately surrounding the home. J.L. claims that he was guilty of trespass rather than burglary. Do you agree? See *Child v. State*, 57 So. 3d 924 (Fla. Dist. Ct. App. 2011).

ARSON

Common law **arson** is defined as the willful and malicious burning of the dwelling house of another. The purpose is to protect the home along with the occupants and their possessions. Blackstone justifies treating arson as a felony punishable by death on the grounds that murder

“seldom extends beyond the felonious act designed,” but “fire too frequently involves in the common calamity persons unknown to the incendiary and not intended to be hurt by him, . . . friends as well as enemies.”²⁹ Common law arson has been substantially modified by state statutes.

Burning

The common law requires a burning. This is commonly defined as the “consuming of the material” of the house or the “burning of any part of the house.” The burning is not required to destroy the structure or seriously damage the home. The burning is required to affect only a small portion of the dwelling, no matter how insignificant or difficult to detect. Even a small “spot” on the floor is sufficient.³⁰ Professors Perkins and Boyce quote a decision that establishes that the test for burning is whether “the fiber of the wood or other combustible material is charred, and thus destroyed,” by fire.³¹

The burning need not involve an actual flame and need merely result in a “charring” of the structure. This does not include “soot,” “smudging,” “blackening or discoloration or shriveling from heat,” or “smoke damage.” The common law did not consider an explosion as arson unless the combustion resulted in a fire.³²

The trend is for state statutes and courts to broadly interpret arson statutes and to find that even smoke damage and soot are sufficient.³³

A New Jersey statute defines third-degree arson without requiring damage and provides that arson is committed when an individual “purposely starts a fire and recklessly places a person in danger of death or bodily injury or recklessly places a building or structure in danger of damage or destruction.”³⁴ Florida explicitly punishes a fire or explosion that damages or causes to be damaged an occupied structure as well as other similar structures.³⁵

Dwelling

Arson at common law must be committed against a dwelling. This is defined by the familiar formula as a place regularly used for sleeping. The definition reflects the fact that criminal laws against arson are designed to protect individuals and their right to the peace and security in the home. The occupants may be absent at the time of the arson, as long as the structure is regularly used for sleep. The burning of a building under construction or of an abandoned building does not constitute arson. The definition of dwelling extends to all structures within the curtilage, the area immediately surrounding the home. This includes a barn, garage, or tool shed.

Statutes no longer limit arson to a dwelling. Illinois, in addition to prohibiting residential arson, punishes damage to real property (buildings and land) and to personal property (e.g., personal belongings). Aggravated arson is directed against injury to individuals resulting from the arson of “any building or structure, including any adjacent building . . . including . . . a house trailer, watercraft, motor vehicle or railroad car.” Statutes that include personal property extend arson to the burning of furniture in a house regardless of whether the fire damages the dwelling.³⁶

This broadening of the coverage of arson statutes means that laws against arson no longer protect only the home. Arson now protects buildings and vehicles in which individuals are likely to spend a portion of the day and is intended to fully combat the danger posed by fire to human life and property.

Dwelling of Another

The common law required that the burned dwelling was occupied by another individual. As with burglary, the central issue is occupancy rather than ownership. A tenant would not be guilty of arson for burning a rented apartment that is owned by a landlord; the landlord, however, would be guilty of arson for burning the house that is rented to the tenant. A husband would not be guilty of arson for burning the home he shares with his wife.

Modern statutes have eliminated the requirement that the arson must be directed at the dwelling “of another.” Florida holds individuals liable for arson in the first degree “whether the property [is] of [themselves] or another.”³⁷ Courts have reasoned that a fire poses a threat to firefighters, as well as to the neighbors, and have held that it is not an unreasonable limitation on property rights to hold defendants liable for burning their own property. Do you agree?

Willful and Malicious

The *mens rea* of common law arson is malice. This does not require dislike or hatred. Malice in arson entails either a purpose to burn or a knowledge that the structure would burn or the creation of an obvious fire hazard that, without justification or excuse, damages a dwelling. An “obvious fire hazard” is created when an individual recklessly burns a large pile of dry leaves on a windy day and in the process creates an unreasonable hazard that burns a neighbor’s house. A negligent or involuntary burning does not satisfy the requirement for common law arson.

State statutes typically retain the common law intent standard and include language such as “willfully and maliciously.” Separate statutes often punish a reckless burning. A number of states also punish a burning committed by an individual with the specific intent to defraud an insurance company.

Grading

State statutes are typically divided into arson and aggravated arson. Some states provide for additional categories. Washington provides for knowing and malicious arson and aggravated arson, as well as for reckless burning. The Washington statute categorizes arson as aggravated based on various factors, including causing a fire or explosion that damages a dwelling or that is dangerous to human life. Aggravated arson also includes causing a fire or explosion on property valued at \$10,000 or more with the intent to collect insurance.³⁸ Washington State punishes aggravated arson by life imprisonment, along with a possible fine of up to \$50,000, while arson is punishable by 10 years, by a fine of up to \$20,000, or by both confinement and a fine.³⁹ California enhances the punishment of “willful and malicious” burning and of “reckless” burning when the perpetrator has been previously convicted of either offense, a police officer or firefighter is injured, more than one victim suffers great bodily injury, multiple structures are burned, or the defendant employed a device designed to accelerate the fire.⁴⁰

The next case, *State v. Second Judicial District Court*, discusses the criminal intent required for arson under Nevada law. Consider why the criminal intent standard was significant in determining whether the defendant in the Nevada case was guilty of arson.

MODEL PENAL CODE

Section 220.1. Arson and Related Offenses

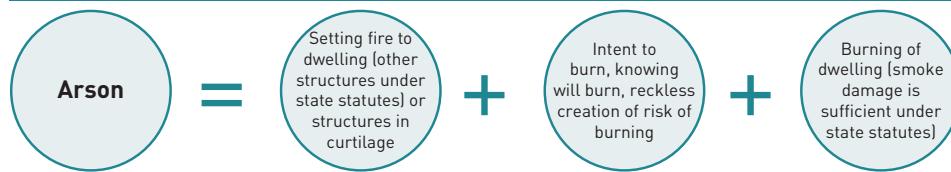
1. *Arson.* A person is guilty of arson, a felony of the second degree, if he starts a fire or causes an explosion with the purpose of:
 - a. destroying a building or occupied structure of another; or
 - b. destroying or damaging any property, whether his own or another's, to collect insurance for such loss. It shall be an affirmative defense . . . that the actor's conduct did not recklessly endanger any building or occupied structure of another or place any other person in danger of death or bodily injury.
2. *Reckless Burning or Exploding.* A person commits a felony of the third degree if he purposely starts a fire or causes an explosion whether on his own property or another's, and thereby recklessly:
 - a. places another person in danger of death or bodily injury; or
 - b. places a building or occupied structure of another in danger of damage or destruction.
3. *Failure to Control or Report Dangerous Fire.* A person who knows that a fire is endangering a life or a substantial amount of property of another and fails to take reasonable measures to put out or control the fire, when he can do so without substantial risk to himself, or to give a prompt fire alarm, commits a misdemeanor if:
 - a. he knows that he is under an official, contractual, or other legal duty to prevent or combat the fire;
 - b. the fire was started . . . lawfully, by him or with his assent, or on property in his custody or control.
4. *Definitions.* “Occupied structure” means any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present. Property is that of another, for the purposes of this section, if anyone other than the actor has a possessory or proprietary interest therein. If a building or structure is divided into separately occupied units, any unit not occupied by the actor is an occupied structure of another.

Analysis

1. The Model Penal Code in section 220.1(1)(a) defines arson in terms of starting a fire or causing an explosion with the purpose of destroying a building or occupied structure of another.
2. Directing punishment at individuals who start or cause a fire or explosion results in their being held liable for arson despite the fact that the fire is extinguished before damage results.
3. Arson is punishable by a maximum of 10 years in prison under the Model Penal Code. This would be in addition to punishment for any resulting injury to individuals.

4. The requirement of a purpose to destroy a building or occupied structure or to destroy or damage property means that a specific intent is required for arson.
5. The commentary states that the terms *building* and *occupied structure* are intended to refer to structures that are capable of occupancy. This restricts arson to fires or explosions dangerous to the life of inhabitants and firefighters. An individual need not be actually present in the dwelling.
6. Arson to defraud in section 220.1(1)(b) includes property owned by the defendant as well as another. There must be an intent to defraud an insurance company, and this provision includes all types of property.
7. An individual is not liable for arson where the property of another or other persons is not endangered. This is designed to avoid the harsh penalties for arson when another person or another person's property is not recklessly endangered.
8. Reckless burning or exploding is punishable by five years in prison. There is no requirement of a purpose to destroy a structure.
9. The duty to undertake affirmative action to prevent and control fires is imposed.

FIGURE 12.4 ■ The Legal Equation: Arson



DID THE DEFENDANT POSSESS THE REQUIRED CRIMINAL INTENT?

STATE V. SECOND JUDICIAL DISTRICT COURT, 462 P.3D 671 (NEV. 2020)

Opinion by Parraguirre, J.

Issue

The State [of Nevada] has charged David Charles Radonski with multiple counts of arson in connection with the July 2018 Perry Fire, which destroyed or severely damaged several structures and resulted in the expenditure of millions of dollars in fire suppression costs. At issue in this case is the level of *mens rea* the State must prove to convict Radonski of arson. The State argues that it must prove only that Radonski willfully and unlawfully started a fire in disregard of the likely harmful consequences of his conduct. Radonski argues that the State must prove that he specifically intended to cause harm emanating from his conduct. . . .

Facts

The State arrested Radonski in connection with the July 2018 Perry Fire that burned over 51,000 acres near Pyramid Lake, north of Reno. The Perry Fire burned over the course of several days and consumed or damaged 13 victim properties at a suppression cost of \$4.8 million. The State charged Radonski with two counts of first-degree arson, two counts of third-degree arson, and one count of destruction by fire of timber, crops, or vegetation. Only the arson counts are at issue here.

Radonski admitted that he caused the fire by shooting fireworks near the desert area where the fire began. He claimed that he had tried to shoot a Roman candle toward a concrete structure but that the firework instead ignited desert brush nearby. He also claimed that he unsuccessfully tried to put the fire out with water from a water bottle and by covering the fire with dirt. Although he admitted to lighting the fireworks and causing the fire, Radonski pleaded not guilty to the charges against him.

The State preliminarily moved the district court to determine the appropriate jury instructions for the *mens rea* elements of arson and argued that arson may be charged as either a specific-intent or a general-intent crime. Explaining to the court that it had charged Radonski under a general-intent theory of arson, the State argued that Radonski could be liable for arson if he merely intended to commit the proscribed act of starting a fire, regardless of whether he intended to cause resulting harm. The State relied primarily on California caselaw for its argument, reasoning that California's arson statute "is identical" to Nevada's, and that because this court had not yet addressed arson's *mens rea* element, the district court should be guided by other jurisdictions interpreting arson as a general-intent crime.

The State proposed the following jury instruction for the "maliciously" element of arson:

[A] person acts "maliciously" if he either (1) acts with specific intent to injure the property burned, or (2) willfully causes a fire without legal justification, with awareness of facts that would lead a reasonable person to realize that the direct, natural and highly probable consequence of igniting and shooting a roman candle or other firecracker under the circumstances . . . would be the burning of the property.

Radonski challenged the State's proposed jury instruction and countered that arson requires the State to prove the defendant's specific intent to harm, not merely the intent to act, and that he could not be liable for arson as a result of accidentally or carelessly starting a fire that subsequently harmed property. . . .

After a hearing on the State's motion, the district court determined that arson is a specific-intent crime based on NRS [Nevada Revised Statutes] 193.0275's definition of "maliciously." . . .

Reasoning

The sole question raised here is whether Nevada's arson statutes require the State to prove that Radonski merely intended to light a firework in disregard of the risk of likely harmful consequences of his act, or whether the State must prove that he intended harm as a result of lighting the firework. The question requires us to interpret NRS 205.010 and NRS 205.020, which define both first- and third-degree arson, respectively, as "willfully and maliciously set[ting] fire to or burn[ing] or caus[ing] to be burned" any property, whether the property belongs to the person charged or to another. . . .

"In every crime or public offense there must exist a union, or joint operation of act and intention, or criminal negligence." NRS 193.190. "A person who willfully and maliciously sets

fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any . . . [d]welling house or other structure or . . . [p]ersonal property . . . is guilty of arson in the first degree. . . ." NRS 205.010. Third-degree arson also requires that a person "willfully and maliciously set[] fire to or burn[] . . . property." NRS 205.020. "Maliciously" is defined in NRS 193.0175 as "import[ing] an evil intent, wish or design to vex, annoy or injure another person."

By their plain language, Nevada's arson statutes punish willful and malicious conduct. The statutes' use of the word "and" to join "willfully" with "maliciously" conveys that the terms are distinct and independent, and that the State must establish both willfulness and malice. There is no basis to conclude that we should interpret the terms synonymously. . . . A defendant acts "willfully" when the defendant acts deliberately, as opposed to accidentally: "The word 'willful' when used in criminal statutes with respect to proscribed conduct relates to an act or omission which is done intentionally, deliberately or designedly, as distinguished from an act or omission done accidentally, inadvertently, or innocently." Liability for arson will not attach where the defendant acts willfully but without malice; the statute requires a volitional act with an "evil intent." Hence, "[a]bsent the required malice and willfulness, [a defendant] cannot be convicted of arson." To interpret the arson statute otherwise is to ignore its plain and unambiguous language.

The Nevada Legislature has defined "maliciously" as "import[ing] an evil intent, wish or design to vex, annoy or injure another person." The Legislature's definition expressly requiring an evil intent to harm or injure indicates that liability for arson requires more than merely a general intent to start a fire. Because arson is punished as a willful and malicious burning of property, there is simply no way around the conclusion that liability for arson requires the State to prove that a defendant's willful or deliberate conduct also involved an "evil intent . . . to vex, annoy or injure" property, that is, a specific intent to harm, not merely a general intent to perform a prohibited act. To the extent that arson proscribes a willful (volitional) act of setting fire to or burning property, coupled with a malicious state of mind, or an "evil intent" to harm or injure, arson may be described as a specific-intent crime.

Courts in other jurisdictions with statutes that define arson as willfully causing a fire with the intent to cause harm have concluded, as we do, that arson is a specific-intent crime. As the Supreme Judicial Court of Massachusetts explained, "[I]n jurisdictions where arson has been declared a specific intent crime, the statutes have been drafted or amended to achieve that end. . . . Nevada's definition of "maliciously" as "an evil intent" to injure compels the conclusion that the State must prove a defendant's specific intent to harm.

In *Ewish v. State*, 871 P.2d 306 (1994), this court indicated that arson is a specific-intent crime, observing that a defendant had "claimed that due to his voluntary intoxication, he could not have formed the requisite specific intent necessary to commit arson." . . . [T]he court's reference in *Ewish* to specific intent was not limited to the charges brought against the defendants in that case for aiding and abetting. In *Ewish*, three defendants were charged with two counts of arson, two counts of murder with a deadly weapon, and nine counts of attempted murder with a deadly weapon after they threw Molotov cocktails at two different homes, resulting in the deaths of two people. One of the defendants, Webb, "took the stand and admitted that he threw" one of the Molotov cocktails. Webb claimed as his "sole defense . . . that he was too intoxicated to form the specific intent necessary to commit arson." . . . This court's conclusion that Webb presented "a viable defense to [the] specific intent crime" of arson specifically applied to Webb's defense against the arson charge in spite of his admittedly causing the fire. . . .

In short, the plain language of Nevada's arson statute clearly and unambiguously requires the State to prove that a destructive burning was caused by willful and malicious

conduct. Nevada's criminal statutes define "maliciously" as more than the intent to do a wrongful act; malice equates with an evil intent to cause harm. We are not at liberty to reach beyond the plain language of the statute. . . . That malice, the specific intent to harm, may be inferred from the circumstances surrounding an act does not relieve the State of its burden to prove that the act was done with the specific intent to harm or injure. The statute . . . allows the specific intent to harm to be inferred when it is not expressly manifested, as is often the case. "[I]ntent can rarely be proven by direct evidence of a defendant's state of mind, but instead is inferred by the jury from the individualized, external circumstances of the crime." The district court therefore properly rejected the State's proffered jury instruction.

Holding

The district court determined that arson is a specific-intent crime and ordered that the jury in Radonski's trial would be instructed accordingly. In light of the foregoing, we conclude that the district court was correct, and we deny the State's petition.

Questions for Discussion

1. What are the facts in David Charles Radonski's appeal?
2. Explain the issue that the Nevada Supreme Court was asked to decide. How does this issue impact the charges against Radonski?
3. Explain the reasoning of the Nevada Supreme Court in holding that the arson statute requires a "willful [volitional] act of setting fire to or burning property" combined with a "malicious state of mind" or an "evil intent to harm or injure."
4. Do you agree with the decision of the Nevada Supreme Court? How could the state legislature change the wording of the arson statute to broaden the criminal intent requirement so as to punish acts of "burning" committed with a general intent?
5. As a matter of public policy, would you favor the argument of the prosecution or the argument of the defense? Which would be the fairest approach in this case?
6. Could the prosecutor persuasively argue that Radonski possessed the required criminal intent to be found guilty of arson under the Nevada Supreme Court's interpretation of the arson statute?
7. Does the decision in this case promote and detract from respect for the rule of law?

YOU DECIDE 12.4

Arbie Jo Buckley poured kerosene onto her husband, George House, as he lay on the sofa. The kerosene soaked into his clothes and onto the sofa and floor of the trailer home. Arbie then threw a match onto George. He awoke to find that he was on fire, and he later died. The fire subsequently spread to the sofa and trailer home. Arbie was convicted of felony murder, carrying the death penalty. The Mississippi statute required a finding that George had been killed during the course of a felony, one of which is arson. Was George killed during the course of an arson? Would you affirm or reverse Arbie's conviction? See *Buckley v. State*, 875 So. 2d 1110 (Miss. Ct. App. 2004).

CRIMINAL MISCHIEF

The common law misdemeanor of malicious mischief is defined as the destruction, or damage to, the personal property (physical belongings) of another. The Model Penal Code refers to this offense as **criminal mischief**, and under modern statutes, criminal mischief includes damage to both personal and real (land and structures) **tangible property** (physical property as opposed to ownership of intangible property, such as ownership of a song or the movie rights to a book). The offense is directed against interference with the property of another and punishes injury and destruction to an individual home or personal possessions.

Malicious mischief under most statutes is a minor felony, and the punishment is reduced or increased based on the dollar amount of the damage. A sentence may also be increased when the damage is directed against a residence or interferes with the delivery of essential services, such as phone, water, or utilities.

Malicious mischief prosecutions in the last few years have been brought against individuals accused of vandalizing property during protests against police-involved violence. There are proposals in various states to adopt legislation to punish vandalism more harshly when committed during the course of a “riot” or “mob action.” President Trump also issued an Executive Order in June 2020 proclaiming that it was a priority of his administration to prosecute protestors accused of damaging statutes and monuments. Section 1361 of title 18, United States Code, authorizes with a penalty of up to 10 years’ imprisonment the willful injury of federal property. The Veterans’ Memorial Preservation and Recognition Act of 2003, 18 U.S.C. § 1369, punishes with the same penalty the willful desecration of a monument on public property commemorating the service of any person in the U.S. armed forces. At least seven southern states have laws that specifically protect monuments commemorating the Confederacy.⁴¹

The Model Penal Code specifies that criminal mischief is composed of three types of acts:

1. *Destruction or Damage to Tangible Property.* Injury to property, including damage by a fire, explosion, flood, or other harmful force.
2. *Tampering With Tangible Property so as to Endanger a Person or Property.* Interference with property that creates a danger, for example, the removal of a stop sign or one-way road sign.
3. *Deception or Threat Causing Financial Loss.* A trick that dupes an individual into spending money. An example is sending a telegram falsely informing individuals that their mother is dying in a distant city, causing the individuals to spend several hundred dollars on an unnecessary plane flight.

FIGURE 12.5 ■ The Legal Equation: Criminal Mischief



Mens Rea

The Model Penal Code requires that these acts be committed purposely or recklessly. Damage to property by “catastrophic means,” such as an explosion or flood, may be committed negligently. The punishment of criminal mischief under the Model Penal Code is based on the monetary damage of the harm. Keep in mind that property damage resulting from a fire or explosion that purposely endangers the person or property of another may be punished as arson.

In the next case, consider whether a 16-year-old high school student was guilty of malicious mischief when he spit on the windshield of a police squad car.

SHOULD THE DEFENDANT BE CONVICTED OF CRIMINAL MISCHIEF FOR SPITTING ON A POLICE CAR?

STATE V. FITCH, WASH. APPEAL NO. 18258-1-II (1996)

Opinion by Turner, J.

Issue

Randy Fitch spit on the windshield of an unoccupied police car. He appeals his juvenile court convictions for resisting arrest and third degree malicious mischief. We affirm.

Facts

On September 28, 1993, Port Orchard Police Officer Michael O’Malley parked his patrol car near the entrance to South Kitsap High School. Outside the school, he saw a group of students walking toward him. Watching from a distance of about 20 feet, he saw 16-year-old Randy Fitch turn and spit onto the windshield of the patrol car. When Fitch tried to walk past O’Malley and into the building, O’Malley grabbed his shoulder.

O’Malley told Fitch to clean the spit off the patrol car. When Fitch refused, O’Malley grasped him harder and told him he was under arrest for malicious mischief. Fitch started to pull away, protesting that it was “bullshit” and that O’Malley “couldn’t arrest him.” When Fitch continued to pull away, O’Malley “felt that he was going to try to run.” So he “grabbed him by the hair and neck and put him on . . . the sidewalk,” handcuffed him, and placed him in the patrol car.

After driving Fitch to juvenile detention and booking him, O’Malley took a closer look at the windshield and discovered “a wad of kind of orangeish colored gum and a lot of slimy mucous” near the driver’s side windshield wiper. He got a rubber glove, removed the gum by hand, and drove the car to a Port Orchard car wash where he had the car washed.

The State initially charged Fitch solely with resisting arrest . . . , but later amended the information to add the third degree malicious mischief charge. At a probable cause hearing, Fitch argued that O’Malley did not have authority to arrest him because “a quantity of spit . . . which can either be wiped off by the windshield wipers or wiped off in combination with . . . the windshield wipers and the washer . . . is not damage.” The court disagreed and

concluded there was probable cause to go to trial because the spit caused a diminution in the value of the police car, reasoning . . . [c]ommon sense would indicate that if someone expectorates or spits on one's windshield, you're going to want to clean it off. That windshield, that vehicle, . . . is worth less to you than it would be had it been cleaned. . . .

At a subsequent bench trial, Fitch was found guilty of both malicious mischief and resisting arrest. The trial court, however, did not order restitution because it was found that: "no \$ dollar amount of physical damage occurred." Fitch appeals. We affirm.

Reasoning

Fitch first argues that the officer lacked probable cause to arrest him because an element of malicious mischief—physical damage—was not present. A person is guilty of malicious mischief in the third degree "if he . . . knowingly and maliciously causes physical damage to the property of another. . . ." Malicious mischief in the third degree is a gross misdemeanor if the damage to the property is in an amount exceeding 50 dollars; otherwise, it is a simple misdemeanor.

If the circumstances are such as would cause a reasonable person to believe that a crime is being committed, a police officer has probable cause to make the arrest.

It was not unreasonable for Officer O'Malley to believe Fitch's act constituted property damage in violation of the malicious mischief statute. He clearly saw Fitch turn his head and spit slimy mucous out of his mouth and onto the police car windshield. We hold, under the totality of the circumstances, that Officer O'Malley had probable cause to place Fitch under arrest.

Next, Fitch argues that the evidence was insufficient to prove, beyond a reasonable doubt, that the police car was physically damaged by his spit. . . .

"Physical damage," for purposes of the malicious mischief statute, is defined under RCW [Revised Code of Washington] 9A.48.100, "in addition to its ordinary meaning," as "any diminution in the value of any property as the consequence of an act. . . ." The trial court found that Fitch "knowingly and maliciously spat gum and phlegm onto the officer's patrol vehicle," and that this "spitting of gum and phlegm caused physical damage to the officer's car." It also found, however, that "no \$ dollar amount of physical damage occurred."

It is well settled that damage can be measured either by the cost of repair or diminution in value. . . . Convictions for misdemeanor third degree malicious mischief need not be dependent upon a showing of a specific dollar figure of damage. ([A] juvenile [was] convicted of third degree malicious mischief when a "couple" of shingles fell off a house after several juveniles threw stones and beat on the side of the house with "a stick or metal rod").

Here, there was arguably a measure of cost to repair the "damage" caused to the windshield, as well as a diminution in the value of the vehicle. Although there was no showing of any immediate out-of-pocket costs to repair, Fitch did inflict damage. The patrol car is a tool to enforce the law. Impairment of time in service deprives the city of the full value of its use. Here, due to Fitch's actions, the vehicle was temporarily out of service for the time it took Officer O'Malley to clean the windshield. Furthermore, because the city employs Officer O'Malley to patrol the city and keep the peace, the city incurred consequential costs for the time O'Malley diverted his attention from law enforcement to clean the windshield.

Fitch argues that washing the entire car was unnecessary because operating the vehicle's windshield wipers would have yielded similar satisfactory results. And, O'Malley took the car to a facility under contract with the city to wash city vehicles on an at-will basis. Thus, the city arguably incurred no additional cost to wash the car.

Fitch argues that something as easily washed off as spit cannot constitute "damage." Following this logic, is it not malicious mischief to spit on a jacket hanging on a coat rack or a flag? These can also be laundered or easily washed clean. To determine whether property is damaged by diminution in value, we ask whether an item is worth less in its "spat on" condition. By analogy, a typical used-car seller cleans the vehicle before offering it for sale, believing it is worth less to a potential buyer when dirty. Likewise, this police car is worth less when it is spattered with phlegm and chewing gum. Even though no measured dollar amount of damage was shown, we conclude, under the diminution in value theory, that the evidence was minimally sufficient to convict Fitch of third degree malicious mischief.

Fitch has not claimed that he was exercising his freedom of expression under the [F]irst [A]mendment to the United States Constitution. We do not engage in the analysis [whether Fitch's conduct constituted symbolic speech].

This case has consumed significant resources to prosecute what appears to be an expression of defiance with [minimal] damage. This was a close case, even without engaging in a First Amendment analysis. We note that although teaching respect for the law to our youth is important, we, as a society, should also carefully consider the effect of punishing non-violent challenges to authority.

Holding

Officer O'Malley had statutory authority to place Fitch under arrest for a misdemeanor occurring in his presence if he had probable cause to believe Fitch had committed "physical harm or threats of harm to any person or property. . . ."

Fitch was sentenced to three to six months community supervision; ordered to perform 16 hours of community service, with 8 hours credit for one day served in detention; and ordered to contribute \$75 cash or 20 hours of community service to the Crime Victims Compensation Fund. He was also ordered to continue living with his parents and regularly attend South Kitsap High School.

[Fitch's convictions for resisting arrest and for malicious mischief are affirmed.]

Questions for Discussion

1. What is the statutory basis for Fitch's conviction for malicious mischief?
2. Explain Fitch's argument that he did not violate the Washington State statute.
3. Why does the court conclude that the evidence was "minimally sufficient" to convict Fitch?
4. Does the defendant have a credible argument that his actions were protected under the First Amendment?
5. As a prosecutor, would you have prosecuted Fitch? As a judge, would you have convicted him for malicious mischief? Do you agree with Fitch's sentence?

CASES AND COMMENTS

In 2012, in *Osmar v. City of Orlando*, Timothy Osmar was arrested on two separate occasions for writing a political message in chalk on a public sidewalk or paved street near the Orlando City Hall. The message was considered to be in violation of a local ordinance that makes

it criminal to write, print, mark, paint, stamp, or paste any sign, notice, or advertisement upon the surface of any sidewalk or paved street in the city. Osmar was part of the national Occupy Wall Street movement engaged in political protest against economic inequality and laws that allegedly worked to the advantage of economic elites. Osmar was arrested before completing his second message. His first message read, "All I want for Christmas is a Revolution, #Occupy." Osmar was the first person arrested under the Orlando ordinance. In the past, the local Rotary Club had been permitted to conduct a chalk art festival, and local merchants had been urged to celebrate the success of the Orlando Magic professional basketball team by decorating the sidewalks in front of the main entrances to their businesses with multicolor chalk.

Federal magistrate judge David A. Baker held that Osmar's chalk message did not violate the Orlando ordinance. A chalk message "as opposed to painting or pasting a sign . . . is not permanent or long-lasting and can be washed away with water, or . . . by wind or rain." Osmar's chalk message did not involve advertising or a "sign, notice or advertisement" prohibited under the ordinance. In the past Orlando had encouraged the use of chalk on sidewalks, and the "City may not selectively interpret and enforce the Ordinance based on its own desire to further the causes of particular favored speeches." The plaza in front of city hall is a "public forum, a place which by tradition has 'been devoted to assembly and debate.'" See *Osmar v. City of Orlando*, 844 F. Supp. 2d 1242 (M.D. Fla. 2012).

Other federal courts have held that "chalking" does not violate federal regulations that prohibit the destruction or damaging of property. See *United States v. Murtari*, 5:07-CR-387 (N.D.N.Y. Oct. 16, 2007). Federal judges, however, have upheld the application of a "sidewalk" chalk ordinance when used to arrest political protesters on the grounds that the laws preserve the esthetic appearance of federal buildings like the White House and have stressed that individuals possess alternative forms of communication such as flags and signs. See *Mahoney v. Doe*, 642 F.3d 1112 (D.C. Cir. 2011).

In the California case of *In re v. Nicholas Y.*, 102 Cal. Rptr. 2d 511 (Cal. Ct. App. 2000), Nicholas wrote "RTK" (meaning Right to Crime) with a Sharpie marker on the window of a projection booth of a movie theater. He argued that he did not "deface" or "damage" the glass because "[y]ou take a rag and wipe it off." An appellate court held that "a marking of the surface is no less a defacement because it is more easily removed."

YOU DECIDE 12.5

On July 17, 2007, the defendant painted a wooden fence belonging to his neighbors without permission. He painted along the side of his yard and the back of his yard. The defendant said that the fence facing his property was "in need of repair and painting" and he proceeded to paint the sides facing his property. His intent was to improve the appearance of the fence. The defendant was charged under a New York statute that punished an individual for "intentionally damaging property of another person . . . having no right to do so nor any reasonable ground to believe that he has such right." Would you convict the defendant of "criminal mischief to property"? See *People v. Stockwell*, 18 Misc. 3d 1145(A) (N.Y. Crim. Ct. 2008).

CRIME IN THE NEWS

In a controversial case, Cameron Todd Willingham, age 23, was convicted of the arson murder of his three young daughters in Corsicana, Texas, on December 2, 1991. Arson investigators testified that Willingham spread accelerant on the floor of the house and ignited a fire with the intent of killing his young daughters.

John H. Jackson, the assistant prosecutor who was assigned to prosecute the case, told the newspapers that Willingham's motive was to rid himself of his young children because they interfered with his "beer drinking and dart throwing." In the past, Willingham had experienced minor scrapes with the law and had been known to drink and to abuse his wife, Stacy. It later was alleged that Willingham had killed the children to conceal Stacy's abuse of the children. The prosecutor Jackson wanted to avoid a trial and offered life imprisonment in return for a guilty plea to murder.

One of Willingham's two assigned attorneys was a former state trooper and the other a local general practitioner. Willingham refused to listen to his lawyers' advice and insisted on his innocence and turned down the plea bargain. Murder charges were filed in January 1992, and the case proceeded to trial.

At trial in August 1992, the prosecutor primarily relied on the testimony of the two arson investigators. In addition, Johnny Webb, a jailhouse informant awaiting trial for robbery, testified Willingham had confessed to him in prison. Webb, who later was diagnosed with bipolar personality disorder, later recanted his testimony and then turned around and affirmed his original testimony. He subsequently was sentenced to 15 years in prison and 5 years later was released based on the recommendation of the prosecutor in the *Willingham* case. Other witnesses modified their earlier statements to the police. One witness initially told the police Willingham was devastated and had to be restrained from risking his life by reentering the burning house to save his daughters. The same witness later testified Willingham's emotional reaction appeared inauthentic and that he had a gut feeling Willingham "had something to do with the setting of the fire." Willingham's lawyers presented a single defense witness, a babysitter who could not believe Willingham would kill his children. The prosecutor Jackson, in his argument to the jury, read from a Bible that had been in Willingham's home. He concluded his closing argument by reciting a passage spoken by Jesus that whoever harmed one of his children is to be cast in the seas with a millstone around his neck.

Following Willingham's conviction, Jackson (the prosecutor) in the sentencing phase of the trial highlighted Willingham's tattoo of a skull encircled by a serpent, which together with other evidence allegedly fit the profile of a sociopath. Jackson presented two psychological expert witnesses. Tim Gregory, a family counselor, analyzed the posters of rock groups such as Iron Maiden and Led Zeppelin that had hung on Willingham's wall and suggested they were indicative of an interest in violence and Satanism and cult activities. The primary psychological expert, Dr. James Grigson, a forensic psychiatrist, had testified so frequently for the prosecution in Texas capital punishment cases that he commonly was referred to as "Dr. Death." Grigson concluded Willingham was an "extremely severe sociopath" who was beyond treatment. Grigson had been expelled from the American Psychiatric Association for unethical conduct in testifying regarding the psychological state of defendants whom he had not personally examined and for having claimed he could predict dangerousness with 100% accuracy. Willingham was sentenced to death.

An independent examination of the forensic evidence by Dr. Gerald Hurst, a leading world expert on explosives and fires, concluded that the forensic report was flawed on all of the 20

indicators that allegedly supported the conclusion that Willingham was guilty of arson. Four days before Willingham's execution, the Texas Board of Pardons and Paroles rejected a plea for clemency based on Hurst's report, and Texas governor Rick Perry refused to stay the execution. On February 17, 2004, Willingham was executed by lethal injection. He insisted, "I am an innocent man convicted of a crime I did not commit. I have been persecuted for twelve years for something I did not do."

In 2005, a report by outside experts submitted to a Texas commission established to investigate allegations of error and misconduct by forensic scientists concluded that the arson investigation in the case of Cameron Todd Willingham was flawed. The *Chicago Tribune* reported in August 2009 that nine of the country's top fire analysts concluded that the investigation of the Willingham fire had been based on outmoded theories and folklore.

Various aspects of the conventional wisdom of fire science in recent decades have been found to be inaccurate. Since 1986, at least 31 individuals convicted of arson have been found to have been improperly convicted at least in part based on faulty arson analysis. Experts indicate that there may be many more individuals currently falsely imprisoned for arson. Louis Taylor, for instance, was freed in 2013 after serving 42 years of a life sentence for a 1970 fire at a Tucson, Arizona, hotel that left 29 people dead. James Hugney, in another example of a false conviction for arson, was released in 2015 after serving nearly 36 years of a life sentence for a fire that killed his 16-year-old son.

Fire science is not the only method of forensic analysis whose accuracy is questioned. A 2016 report by the President's Council of Advisors on Science & Technology raised questions about the scientific validity of a number of techniques of forensic analysis, including bite mark evidence.

CHAPTER SUMMARY

Crimes against habitation protect individuals' interest in safe and secure homes free from uninvited intrusions. Burglary and arson are the cornerstones of the criminal law's protection of dwellings. Modern statutes have significantly expanded the structures protected by burglary and arson.

Burglary at common law is defined as the breaking and entering of the dwelling house of another at night with the intention to commit a felony. State statutes have significantly modified the common law and differ in their approach to defining the felony of burglary. In general, a breaking no longer is required, and burglary has been expanded to include a range of structures and vehicles. Statutes provide that a burglary may involve entering as well as remaining in a variety of structures with the requisite purposeful intent. The intent standard has been broadened under various statutes to include "any offense" or a "felony or misdemeanor theft." Also, burglary is no longer required to be committed at night.

Criminal trespass is the unauthorized entry or remaining on the land or premises of another. Trespass is distinguished from burglary in that it does not require an intent to commit a felony or other offense and extends to property beyond the curtilage, including agricultural land.

Statutes provide that a trespass may be committed knowingly or purposefully, and Missouri defines trespass as a strict liability offense.

Arson at common law is defined as the willful and malicious burning of the dwelling house of another. This is treated as a felony based on the danger posed to inhabitants and neighbors. Statutes no longer require a burning; even smoke damage or soot is sufficient. Arson also extends to a broad range of structures and is no longer limited to the dwelling of another. Arson requires either a purpose to burn or knowledge that a structure will burn. It may also be committed recklessly by creating an unreasonable hazard on an individual's own property that burns a neighbor's dwelling.

Criminal mischief under modern statutes punishes the damage, destruction, or tampering with personal and real tangible property or may involve a deception causing financial loss. Criminal mischief is generally punished as a misdemeanor and may be committed purposefully or recklessly.

Keep in mind that statutes typically aggravate or enhance the penalty for crimes against habitation. Aggravating circumstances include a crime involving a dwelling or an act that endangers human life or safety, is carried out with a weapon, is committed at night, or causes significant financial loss.

CHAPTER REVIEW QUESTIONS

1. What is the definition of burglary? How have the elements of the common law crime of burglary been modified by modern statutes?
2. What is the difference between burglary and trespass?
3. Define *arson*. How have modern statutes modified the common law crime of arson?
4. What are the three types of acts that satisfy the *actus reus* of criminal mischief?
5. Compare and contrast arson and criminal mischief.
6. What are some factors that aggravate burglary, arson, trespass, and criminal mischief?
7. Discuss the justifications for crimes against habitation. Does it make sense to continue to categorize burglary and arson as crimes against habitation?

LEGAL TERMINOLOGY

arson	criminal trespass
burglary	curtilage
computer trespassing	defiant trespass
criminal mischief	tangible property

TEST YOUR KNOWLEDGE ANSWERS

1. True.
2. False.
3. False.
4. True.
5. False.

13

CRIMES AGAINST PROPERTY

TEST YOUR KNOWLEDGE: TRUE/FALSE

1. Larceny may be committed by removing a wallet from the person's pocket and moving the wallet several inches.
2. It is embezzlement if you find and permanently keep property that has been lost by the owner.
3. The primary difference between false pretenses and larceny by trick is that false pretenses involves a misrepresentation of the offender's true identity and larceny by trick involves a misrepresentation of a fact.
4. Identity theft requires that an individual actually uses a stolen identity to purchase an item or to obtain credit.
5. The crime of forgery does not require that an individual attempts to use the forged instrument.
6. The only difference between robbery and larceny is that robbery involves the use of force.
7. There is no difference between extortion and blackmail other than that blackmail requires the use or threat of force.

Check your answers at the end of the chapter on page 725.

Was the Defendant Guilty of Larceny?

An employee of a pharmacy-liquor store observed [Joe] Lee displacing two \$16.47 bottles of cognac. Lee concealed one of the bottles in his pants and held the other in his hand. When approached by the employee, Lee returned both bottles to the shelf and fled the store. He was chased by the employee who flagged down a passing police cruiser. Subsequently, Lee was arrested and convicted. (*Lee v. State*, 474 A.2d 537 [Md. Ct. Spec. App. 1984])

INTRODUCTION

Seventeenth-century English philosopher John Locke asserted in his influential *Second Treatise on Government* that the protection of private property is the primary obligation of government. Locke argued that people originally existed in a “state of nature” in which they were subject to the survival of the fittest. These isolated individuals, according to Locke, came together and agreed to create and to maintain loyalty to a government that, in return, pledged to protect individuals and to safeguard their private property. Locke, as noted, viewed the protection of private property as the most important duty of government and as the bedrock of democracy.

Locke’s views are reflected in the Fifth Amendment to the U.S. Constitution, which prohibits the taking of property without due process of law. Even today, those individuals who may not completely agree with Locke recognize that the ownership of private property is a right that provides us with a source of personal enjoyment, pride, profit, and motivation and serves as a measure of self-worth.

A complex of crimes was developed by common law judges and legislators to protect and punish the wrongful taking of private property. As we shall see, each of these crimes was created at a different point in time to fill a gap in the existing law. The development of these various offenses was necessary because prosecutors ran the risk that a defendant would be acquitted in the event that the proof at trial did not meet the technical requirements of a criminal charge. Today, roughly 30 states have simplified the law by consolidating these various property crimes into a single theft statute.

In this chapter, we will review the main property crimes. These include the following:

- *Larceny*. A pickpocket takes the wallet from your purse and walks away.
- *Embezzlement*. A bank official steals money from your account.
- *False Pretenses*. You sell a car to a friend who lies and falsely promises to pay you in the morning.
- *Receiving Stolen Property*. You buy a car knowing that it is stolen.
- *Forgery and Uttering*. A friend takes one of your checks, makes it payable to the friend but signs your name, and cashes the check at your bank.
- *Robbery*. You are told to hand over your wallet by an assailant who points a loaded gun at you.
- *Extortion*. You are told to pay protection to a gang leader who states that otherwise you will suffer retaliatory attacks in the coming months.

We also will look at the newly developing areas of identity theft, computer crimes, and carjacking. In thinking about the property crimes discussed in this chapter, consider that they all involve the seizure of the property of another individual through either a wrongful taking, fraud, or force.

LARCENY

Early English law punished the taking of property by force, a crime that evolved into the offense of robbery. It became apparent that additional protections for property were required to meet the needs of the expanding British economy. Goods now were being produced, transported, bought, and sold. Robbery did not cover acts such as the taking of property under the cover of darkness from a loading dock. Robbery also did not punish employees who stole cash from their employers or a commercial shipper who removed goods from a container that was being transported to the market. Accordingly, the law of larceny was gradually developed to prohibit and punish the nonviolent taking of the property of others without their consent.

Common law **larceny** is the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive that individual of possession of the property. You should be certain that you understand each element of larceny:

- trespassory
- taking and
- carrying away of the
- personal property of another with the
- intent to permanently deprive that individual of
- possession of the property.

Actus Reus: Trespassory Taking

The “trespassory taking” in larceny is different from the trespass against land that we discussed in Chapter 12 when reviewing crimes against habitation. The term *trespassory taking* in larceny is derived from an ancient Latin legal term and refers to a wrongdoer who removes goods (chattel) or money from the possession of another without consent. Possession means physical control over property with the ability to freely use and enjoy the property. Consent obtained by force, fraud, or threat is not valid. The Illinois Supreme Court observed that there “can be no larceny without a trespass, and there can be no trespass unless the property was in the possession of the one from whom it is charged to have been stolen.” The common law, as we shall soon see, established various rules to distinguish possession from **custody**, or the temporary and limited right to control property.¹

As we observed earlier, the law of larceny developed in response to evolving economic conditions in Great Britain. In the 15th century, England changed from an agricultural country into a manufacturing center. Industry depended on carriers to transport goods to markets and stores. These carriers commonly would open and remove goods from shipping containers and sell them for personal profit. An English tribunal ruled in the *Carrier's Case*, in 1473, that the carrier was a bailee (an individual trusted with property and charged with a duty of care) who had possession of the container and custody over the contents. The carrier was ruled to be liable

for larceny by “break[ing] bulk” and committing a trespassory taking of the contents. How did the judge reach this conclusion? The judge in the *Carrier’s Case* reasoned that possession of the goods inside the crate continued to belong to the owner and that the shipper was liable for a trespassory taking when he broke open the container and removed the contents. Of course, the carrier might avoid a charge of larceny by stealing an unopened container.²

The law of larceny was also extended to employees. An employee is considered to have custody rather than possession over materials provided by an employer, such as construction tools or a delivery truck. The employer is said to enjoy constructive possession over this property, and an employee who walks away with the tools or truck with the intent to deprive the owner of possession of the tools or truck is guilty of larceny. A college student who drives a pizza delivery truck for a local business has custody over the truck. In the event that the student steals the truck, the student has violated the owner’s possessory right and has engaged in a “trespassory taking.”³

Larceny is not limited to business and commerce. Professors Perkins and Boyce note that when eating in a restaurant, you have custody over the silverware, and removing it from the possession of the restaurant by walking out the door with a knife in your pocket constitutes larceny. Another illustration is a pickpocket who, by removing a wallet from your pocket, has taken the wallet from your possession.⁴ Professor Dressler offers the example of an individual who test-drives an automobile at a dealership, returns to the lot, and drives off with the car when the auto dealer climbs out of the vehicle. The test driver is guilty of larceny for dispossessing the car dealer of the auto.⁵ One last, fairly complicated point: Do not confuse ownership with possession. When you wait as a jeweler repairs your watch, you retain possession as well as ownership. The jeweler has custody. In the event that you leave the watch with the jeweler for repair, the law says that although you own the watch, the jeweler has possession over the watch until it is returned to you. The jeweler will not be guilty of larceny in the event that the jeweler refuses to return the watch unless you pay an additional \$50.⁶

Asportation

There must be a taking (caption) and movement (asportation) of the property. The movement of the object provides proof that an individual has asserted control and intends to steal the object. You might notice that an individual waiting in line in front of you has dropped a wallet. Your intent to steal the wallet is apparent when you place the wallet in your pocket or seize the wallet and walk away at a brisk pace in the opposite direction.

A taking requires asserting “dominion and control” over the property, however briefly. The property then must be moved, and even “a hair’s breadth” is sufficient.⁷ A pickpocket who manages to move a wallet only a few inches inside the victim’s pocket may be convicted of larceny.⁸

Larceny may be accomplished through an innocent party. A defendant was convicted of larceny by falsely reporting to a neighbor that the defendant owned the cattle that wandered onto the neighbor’s property. The neighbor followed the defendant’s instructions to sell the cattle and then turned the proceeds over to the defendant. The defendant was held responsible for the neighbor’s caption (taking) and asportation (carrying away), and the defendant was convicted of larceny.⁹ A defendant was also found guilty of larceny for unlawfully selling a neighbor’s bicycle to an innocent purchaser who rode off with the bike.¹⁰

Every portion of the property must be moved. An individual who succeeded only in turning a barrel on its side when apprehended was not determined to have “carried away” the property.¹¹ Various modern state statutes have followed the Model Penal Code in abandoning the requirement of asportation and provide that a person is guilty of theft if the individual “unlawfully takes, or exercises unlawful control” over, property. The Texas statute provides that an individual is guilty of larceny where there is an “appropriation of property” without the owner’s consent. Under these types of statutes, a pickpocket who reaches into an individual’s purse and seizes a wallet is guilty of larceny; there is no requirement that the pickpocket move or carry away the wallet.¹²

Property of Another

At common law, only tangible personal property was the subject of larceny. Tangible property includes items over which an individual is able to exercise physical control, such as jewelry, paintings, crops and trees removed from the land, and certain domesticated animals. Property not subject to larceny at common law included services (e.g., painting a house), real estate, crops attached to the land, and intangible property (e.g., property that represents something of value such as checks, money orders, credit card numbers, car titles, and deeds demonstrating ownership of property). Crops were subject to larceny only when severed from the land. For instance, an apple hanging on a tree that was removed by a trespasser was part of the land and was not subject to larceny. An apple that fell from the tree and hit the ground, however, was considered to have entered into the possession of the landowner and was subject to larceny. In another example, wild animals that were killed or tamed were transformed into property subject to larceny. Domestic animals, such as horses and cattle, were subject to larceny, but dogs were considered to possess a “base nature” and were not subject to larceny. These categories are generally no longer significant, and all varieties of property are subject to larceny under modern statutes.

The property must be “of another.” Larceny is a crime against possession and is concerned with the taking of property from an individual who has a superior right to possess the object. A landlord who removes the furniture from a furnished apartment that is rented to a tenant is guilty of larceny.

Modern statutes, as noted, have expanded larceny to cover every conceivable variety of property. For example, the California statute protects personal property, animals, real estate, cars, money, checks, money orders, traveler’s checks, phone service, tickets, and computer data.¹³

Mens Rea

The *mens rea* of larceny is the intent to permanently deprive another of the property. There must be a concurrence between the intent and the act. The intent to borrow your neighbor’s car is not larceny. It is also not larceny if, after borrowing your neighbor’s car, you find that it is so much fun to drive that you decide to steal it. In this example, the criminal intent and the criminal act do not coincide with one another. Several states have so-called joyriding statutes that make it a crime to take an automobile with an intent to use it and then return it to the owner.

Professor LaFave points out that in addition to a specific intent to steal, there are cases holding that larceny is committed when an individual has an intent to deprive another individual of possession for an unreasonable length of time or has an intent to act in a fashion that will probably dispossess a person of the property.¹⁴ For instance, you may drive your neighbor's car from New York to Alaska with the intent of going on a vacation. The trip takes two months and deprives your neighbor of possession for an unreasonable period, which constitutes larceny. After arriving in Alaska, you park and leave the car in a remote area. You do not intend to steal the car, but it is unlikely that the car will be returned to the owner, and you can also be held liable for larceny based on your having acted in a fashion that will likely dispossess the owner of the car. Lost property or property that is misplaced by the owner is subject to larceny when a defendant harbors the intent to steal at the moment that the property is seized. The defendant is held guilty of larceny, however, only when the defendant knows who the owner is or knows that the owner can be located through reasonable efforts. Property is lost when its owner is involuntarily deprived of an object and has no idea where to find or recover it; property is misplaced when the owner forgets where an object was intentionally placed. Property that is abandoned has no owner and is not subject to larceny because it is not the "property of another individual." Property is abandoned when its owner no longer claims ownership. Property delivered to the wrong address is subject to larceny when the recipient realizes the mistake at the moment of delivery and forms an intent to steal the property.

Individuals may also claim property "as a matter of right" without committing larceny. This occurs when individuals seize property that they reasonably believe has been taken from their possession or seize money of equal value to the money owed to them. In these cases, the defendants believe that they have a legal right to the property and do not possess the intent to "take the property of another."

You can see that intent is central to larceny. What if you go to the store to buy some groceries and discover that you left your wallet in the car? You decide to walk out of the store with the groceries and intend to get your wallet and return to the store and pay for the groceries. Is this larceny?

Grades of Larceny

The common law distinguished between **grand larceny** and **petit larceny**. Grand larceny was the stealing of goods worth more than twelvepence, the price of a single sheep. The death penalty applied only to grand larceny.

State statutes continue to differentiate between grand larceny and petit larceny. The theft of property worth more than a specific dollar amount is the felony of grand larceny and is punishable by a year or more in prison. Property worth less than this designated amount is a misdemeanor and is punished by less than a year in prison. States differ on the dollar amount separating petit and grand larceny. South Carolina punishes the theft of an article valued at less than \$2,000 as a misdemeanor. Stealing an object worth more than \$2,000 but less than

\$10,000 is subject to five years in prison. Theft of an article valued at \$5,000 or more is punishable by 10 years in prison.¹⁵ Texas uses the figure of \$1,500 to distinguish a theft punishable as a misdemeanor from a theft punishable as a felony. Harsher punishment is imposed as the value of the stolen property increases.¹⁶ Some commentators have advocated a uniform national standard for the dollar amount that distinguishes a misdemeanor larceny from a felony larceny so as to ensure that felony punishment is applied in a consistent fashion in the various states.

How is property valued? In the case of the theft of money or of a check made out for a specific amount, this is easily calculated. What about the theft of an automobile? Should this be measured by what the thief believes is the value of the property? The Pennsylvania statute is typical and provides that “value means the market value of the property at the time and place of the crime.” Courts often describe this as the price at which the minds of a willing buyer and a willing seller meet.

The application of this test means that judges will hear evidence concerning how much it would cost to purchase a replacement for a stolen car. What about a basketball jersey worn and autographed by megastar Michael Jordan? You cannot go to the store and purchase this item. The Pennsylvania statute states that if the market value “cannot be satisfactorily ascertained, [the value of the property is] the cost of replacement of the property within a reasonable time after the crime.” In other words, the court will hear evidence concerning the value of a Michael Jordan-autographed jersey in the same condition as the jersey that was stolen. One difficulty is that courts consider the absolute dollar value of items and do not evaluate the long-term investment or sentimental value of the property.¹⁷ The Pennsylvania statute also provides that when multiple items are stolen as part of a single plan or through repeated acts of theft, the value of the items may be aggregated or combined. This means that the money taken in a series of street robberies will be combined and that the perpetrator will be prosecuted for a felony rather than a series of misdemeanors.¹⁸

The value of property is not the only basis for distinguishing between grand and petit larceny. California uses the figure of \$950 to distinguish between grand and petit larceny and categorizes as grand larceny the theft of “domestic fowls, avocados, olives, citrus or deciduous fruits, . . . vegetables, nuts, artichokes, or other farm crops” of a value of more than \$100. California also considers grand larceny to include the theft of “fish, shellfish, mollusks, crustaceans, kelp, algae . . . taken from a commercial or research operation.”¹⁹

Theft of a firearm, theft of an item from the “person of another,” and theft from a home all pose a danger to other individuals and are typically treated as grand larceny.²⁰ The penalty for stealing property may be increased where the stolen items belong to an “elderly individual” or to the government.²¹

The next case, *Lee v. State*, discusses whether an individual may be convicted of theft for shoplifting in a self-service store if the individual does not remove the goods from the premises. This difficult issue illustrates the challenge of adjusting the law of larceny to meet new developments.

FIGURE 13.1 ■ The Legal Equation: Larceny

WAS THE DEFENDANT GUILTY OF SHOPLIFTING?

LEE V. STATE, 474 A.2D 537 (MD. CT. SPEC. APP. 1984)

Opinion by Bell, J.

Issue

Appellant, Joe William Lee, Jr. [Lee] . . . was convicted by the Circuit Court for Baltimore County of two separate charges of theft under \$300.00 and sentenced to the Division of Correction for two consecutive one year sentences. . . .

In the second conviction, however, Lee urges this Court to decide that his concealment of a bottle of liquor in his trousers while shopping in a self-service liquor store does not constitute evidence sufficient to convict him of theft. Since Lee was accosted with the merchandise in the store, abandoned it and then departed from the premises, this case poses a substantial question regarding the law of theft which has never specifically been resolved in this state: May a person be convicted of theft for shoplifting in a self-service store if he does not remove the goods from the premises of that store? . . .

Facts

An employee of a pharmacy-liquor store observed Lee displacing two \$16.47 bottles of cognac. Lee concealed one of the bottles in his pants and held the other in his hand. When approached by the employee, Lee returned both bottles to the shelf and fled the store. He was chased by the employee who flagged down a passing police cruiser. Subsequently, Lee was arrested and convicted. For the reasons set forth in our discussion, we uphold the theft conviction despite the fact Lee was accused and "returned" the merchandise before he left the store.

To resolve the question of whether the evidence . . . is sufficient to satisfy the elements of larceny as defined by the theft statute, the development of the common law of larceny and its evolution into modern statutory form must be briefly addressed. . . .

Larceny at common law was defined as the trespassory taking and carrying away of personal property of another with intent to steal the same. The requirement of a trespassory taking made larceny an offense against possession. . . . [T]he courts gradually broadened the offense by manipulating the concept of possession to embrace misappropriation

by a person who with the consent of the owner already had physical control over the property. . . . [T]he courts began to distinguish "possession" from "custody," thereby enabling an employer to temporarily entrust his merchandise to an employee or a customer while still retaining "possession" over the goods until a sale was consummated. These distinctions and delineations, which ultimately laid the foundation for the statutory offense of theft as it exists today, provided the courts with the judicial machinery with which to sustain a larceny conviction when the customer who had rightful "custody" or "physical possession" converted the property to his own use and thereby performed . . . the requisite "trespassory taking." . . .

The evolution of theft law is particularly relevant to thefts occurring in modern self-service stores where customers are impliedly invited to examine, try on, and carry about the merchandise on display. In a self-service store, the owner has[,] in a sense, consented to the customer's possession of the goods for a limited purpose. . . . [T]he fact that the owner temporarily consents to possession does not preclude a conviction for larceny if the customer exercises dominion and control over the property by using or concealing it in an unauthorized manner. Such conduct would satisfy the element of trespassory taking as it could provide the basis for the inference of the intent to deprive the owner of the property.

Although this is a case of first impression in Maryland, courts in other jurisdictions which have considered this issue appear to be unanimous in holding that a shoplifter need not leave the store to be guilty of larceny. These cases have revealed several different factors which if found may be sufficient to allow a trier of fact to find the requisite larcenous intent.

In New York, the Court of Appeals in *People v. Olivo* sustained convictions of larceny based on fact patterns not unlike the instant case. In that case, the Court found the evidence sufficient to convict the defendants in three separate situations while in a self-service store. In one the defendant concealed goods in his clothing, in a particularly suspicious manner[,] and was stopped before he exited the store. In a second he removed a price tag from a jacket and put it on himself and was stopped prior to leaving the store. In a third the defendant looked furtively up and down the aisle before concealing a book in an attaché case. . . .

In view of the modern definition of the crime of larceny, and its purpose of protecting individual property rights, a taking of property in the self-service store context can be established by evidence that a customer exercised control over merchandise wholly inconsistent with the store's continued rights. Quite simply, a customer who crosses the line between the limited right he or she has to deal with merchandise and the store owner's rights may be subject to prosecution for larceny. Such a rule should foster the legitimate interests and continued operation of self-service shops, a convenience which most members of the society enjoy.

The Criminal Court of the City of New York in *People v. Britto* also sustained a conviction of theft in a self-service store. In that case the court held that evidence indicating the defendant placed six or seven ham steaks under his belt and walked by the register without paying was sufficient to present a *prima facie* case of shoplifting. The fact that the defendant had not left the store with the concealed goods was wholly irrelevant.

In the District of Columbia in *Groomes v. United States*, a defendant, while shopping in a self-service market[,] was seen by a clerk to remove two articles from a shelf and put them in her purse. She closed the purse and after looking around her, walked about the market. The customer claimed that the Government's evidence failed to establish that she had obtained complete control and dominion over the property.

[I]t is quite true, as appellant argues, that the burden of proof to establish a taking and asportation is more onerous on the Government where the larceny alleged occurs in a self-service store. By this system of merchandising the patron is invited to select and take possession of the commodities he intends to purchase. Mere possession of the goods, however, does not pass title to the customer and the possession is of itself conditional in character until the merchandise is taken to the cashier and payment is made.

The Government's evidence in this case tended to prove that appellant's actions were wholly inconsistent with those of a prospective purchaser. It was established that the items once removed from the shelf were immediately secreted in her purse. At the time, the cart used by appellant was about half full of groceries. By concealing the articles in her purse separate and apart from the other goods in the cart, appellant acquired complete and exclusive control over the property. It is well settled that the elements of a taking and asportation are satisfied where the evidence shows that the property was taken from the owner and was concealed or put in a convenient place for removal. The fact that the possession was brief or that the person was detected before the goods could be removed from the owner's premises is immaterial. . . .

In a case almost identical to the case [under consideration] the Supreme Court of Vermont in *State v. Grant* held that a defendant, who had placed two cartons of cigarettes under his shirt, and was apprehended before he left the supermarket, had "wrongfully assumed possession of the cigarettes and had carried them away with the intent of depriving the owner thereof."

In many cases the determinative factor appears to be defendant's act of concealing the goods under his clothing or in a container. In *Bradovich v. United States*, the Supreme Court of Michigan held that a person who had taken a jacket from a rack and concealed it in his own clothing had accomplished the larceny once the clothing was concealed. And in Illinois, the courts have found completed larcenies whenever the defendants' "actions were not those of a prospective customer . . . but rather those of one who feloniously intended to steal the articles" regardless of the fact that the defendants had not left the store.

From this perusal of cases, we conclude that several factors should be assessed to determine whether the accused intended to deprive the owner of property. First, concealment of goods inconsistent with the store owner's rights should be considered. "Concealment" is conduct which is not generally expected in a self-service store and may in many cases be deemed "obtaining unauthorized control over the property in a manner likely to deprive the owner of the property." Other furtive or unusual behavior on the part of the defendant should also be weighed. For instance, if a customer suspiciously surveys an area while secreting the merchandise this may evince larcenous behavior. Likewise, if the accused flees the scene upon being questioned or accosted about the merchandise, as in the instant case, an intent to steal may be inferred. The customer's proximity to the store's exits is also relevant. Additionally, possession by the customer of a shoplifting device with which to conceal merchandise would suggest a larcenous intent. One of these factors or any act on the part of the customer which would be inconsistent with the owner's property rights may be taken into account as relevant in determining whether there was a larcenous intent. . . .

In the instant case, Lee knowingly removed the bottle of liquor from the shelf and secreted it under his clothing. This act in itself meets the requirement of concealment.

Holding

The fact that this concealment was brief or that Lee was detected before the goods were removed from the owner's premises is immaterial. The intent to deprive the owner of his property can be inferred from his furtive handling of the property. Lee not only placed the bottle in the waistband of his pants, but did so in a particularly suspicious manner by concealing the bottle such that it was hidden from the shopowner's view. It cannot be so as a matter of law that these circumstances failed to establish the elements of theft. Once a customer goes beyond the mere removal of goods from a shelf and crosses the threshold into the realm of behavior inconsistent with the owner's expectations, the circumstances may be such that a larcenous intent can be inferred.

Questions for Discussion

1. What is the legal issue addressed by the Maryland court in *Lee*?
2. How did the Maryland court modify the law of larceny to adapt to the development of self-service stores?
3. What factors does the court indicate should be considered in determining whether an individual intended to deprive a store owner of property?
4. Do you agree that Lee should be convicted of larceny when he only briefly concealed the cognac and returned the bottle to the store?

CASES AND COMMENTS

Compare and Contrast With *Lee v. State*. In *People v. Lai Lee*, the defendant Lai Lee was charged with larceny and criminal possession of stolen property. She was observed by a store detective placing a handbag, a pair of tights, and a jacket in a bag; walking past more than one open register; and moving toward another floor in the store without paying for the clothes. Thereafter, defendant was stopped, and the store detective recovered items, valued at \$944, from defendant's bag.

There was no signage advising customers that they were required to purchase items on the floor on which the items were displayed. Lai Lee, unlike the defendants in other cases who were close to or moving toward the exits, was moving in the direction of a second-floor escalator when intercepted. The court noted that customers commonly move throughout a store selecting items they want to purchase before paying for the items. The placing of items in a bag was not sufficient to demonstrate the treatment of property in a fashion inconsistent with the continuing rights of ownership in the department store. Additional evidence that the defendant exercised dominion and control inconsistent with the continued rights of the owner and that she did not intend to pay for the items might include the defendant's removal of garment security devices, the placement of items in a bag typically used to conceal merchandise such as a bag with a false bottom, or the moving toward the exit of the store.

New York City judge Marc Whiten in acquitting Lai Lee noted that "[i]t is a sad commentary on our merchandising structure that some large store owners deem it necessary to sequester patrons by floor, requiring that transactions be completed on one floor before

traveling to a second floor. These retailers seem oblivious to the clear inconvenience occasioned by causing visits to multiple checkout lines on multiple floors of an establishment where desired accessorizing apparel are distributed throughout the many floors of the store." See *People v. Lai Lee*, 24 Misc. 2d 1233(A) (N.Y. Crim. Ct. 2009).

YOU DECIDE 13.1

Jack Carter entered a paint store and placed four 5-gallon buckets of paint, valued at \$398.92, in a shopping cart. His friend Tracy Browning waited for Carter by the return desk where customers take items they previously have purchased and wish to return for a refund. As planned, Browning falsely stated that the paint had been purchased from the store and requested a refund for the paint. A store manager recognized Browning as someone she had been told to look out for and contacted an employee of the store who summoned the police. Were Carter and Browning guilty of larceny? See *Carter v. Commonwealth*, 694 S.E.2d 590 (Va. 2010).

EMBEZZLEMENT

We have seen that larceny requires a taking of property from the possession of another person with the intent to permanently deprive the person of the property. In the English case of *Rex v. Bazeley*, in 1799, a bank teller dutifully recorded a customer's deposit and then placed the money in his pocket. The court ruled that the teller had taken possession of the note and that he therefore could not be held convicted of larceny and ordered his release from custody. The English Parliament responded by almost immediately passing a law that held servants, clerks, and employees criminally liable for the fraudulent misdemeanor of embezzlement of property. Today, embezzlement is a misdemeanor or felony depending on the value of the property.²²

The law of **embezzlement** has slowly evolved, and although there is no uniform definition of embezzlement, the core of the crime is the fraudulent conversion of the property of another by an individual in lawful possession of the property. The following elements are central to the definition of the crime:

- *fraudulent* (deceitful)
- *conversion of* (the serious interference with the owner's rights)
- *the property* (statutes generally follow the law of larceny in specifying the property subject to embezzlement)
- *of another* (you cannot embezzle your own property)
- *by an individual in lawful possession of the property* (the essence of embezzlement is wrongful conversion by an individual in possession).

The distinction between larceny and embezzlement rests on the fact that in embezzlement, the perpetrator lawfully takes possession and then fraudulently converts the property. In contrast,

larceny involves the unlawful trespassory taking of property from the possession of another. Larceny requires an intent to deprive an individual of possession at the time that the perpetrator “takes” the property. The intent to fraudulently convert property for purposes of embezzlement, however, may arise at any time after the perpetrator takes possession of the property.

Typically, embezzlement is committed by an individual to whom you entrust your property. Examples include a bank clerk who steals money from the cash drawer, a computer repair technician who sells the machine that you left to be repaired, and a construction contractor who takes a deposit and then fails to pave your driveway or repair your roof. Embezzlement statutes are often expressed in terms of “property which may be the subject of larceny.” In some states, embezzlement is defined to explicitly cover personal as well as real property (e.g., land).

Keep in mind that if individuals who are not entrusted with property convert the property to their own use, it is not embezzlement. In *Batin v. State*, Marlon Javar Batin’s conviction for embezzlement of money from the “bill validator” of a slot machine was overturned by the Nevada Supreme Court. Batin worked as a slot mechanic at a casino, and his responsibilities included refilling the “hopper,” the part of the machine that “pays coin back,” which is separate from the “bill validator” of the slot machine where the paper currency is kept. Batin had no duties or authorized access in regards to the paper currency in the “bill validators,” and he was prohibited from handling the money in the “bill validator.” The Nevada Supreme Court concluded that Batin was not entrusted with actual or constructive “lawful possession” of the money he stole, and as a result, his conviction for embezzlement was overturned. What would have been the result had Batin been charged with larceny?

The next case, *People v. Casas*, raises the issue of the required intent for embezzlement. The question is whether defendants in converting the property to their own use are required to have the intent to permanently deprive an individual of the property or whether it is sufficient that defendants have the intent to temporarily deprive an individual of the property.

MODEL PENAL CODE

Section 223.2. Theft by Unlawful Taking or Disposition

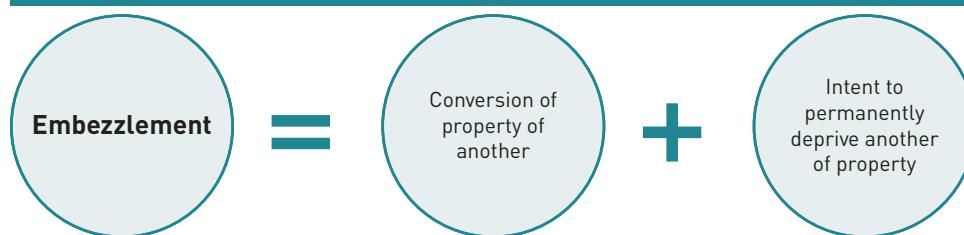
1. *Movable Property.* A person is guilty of theft if he unlawfully takes or exercises unlawful control over movable property of another with purpose to deprive him thereof.
2. *Immovable Property.* A person is guilty of theft if he unlawfully transfers immovable property of another or any interest therein with purpose to benefit himself or another not entitled thereto.

Analysis

1. The Model Penal Code consolidates larceny and embezzlement.
2. The phrase “unlawfully takes” is directed at larceny, while the exercise of “unlawful control” over the property of another is directed at embezzlement. In both instances, the defendant must be shown to possess an intent to “deprive” another of the property. This includes an intent to permanently deprive the other individual of the property as well as treating property in a manner that deprives another of its use and enjoyment.

3. Property is broadly defined to include "anything of value," including personal property, land, services, and real estate.
4. Asportation is not required for larceny.
5. Combining larceny and embezzlement means that the prosecution is able to avoid the confusing issues of custody and possession. The "critical inquiry" is "whether the actor had control of the property, no matter how [the actor] got it, and whether the actor's acquisition or use of the property was authorized."

FIGURE 13.2 ■ The Legal Equation: Embezzlement



DID THE DEFENDANT EMBEZZLE THE OWNER'S AUTOMOBILE?

PEOPLE V. CASAS, 184 CAL. APP. 4TH 1242 (2010)

Opinion by Ramirez, J.

Issue

Defendant, Jorge Jose Casas, a salesman at a car dealership, used a trade-in vehicle to follow a customer home to collect the downpayment, a process referred to as "chasing." However, he did not return to the dealership immediately with the downpayment or the trade-in vehicle, using the vehicle to drive nearly 400 miles in search of drugs to purchase using the cash portion of the downpayment. He was convicted of embezzlement following a jury trial and sentenced to state prison. . . . [The defendant raised two issues on appeal:] (1) whether the trial court erroneously excluded evidence that defendant lacked an intent to permanently deprive the owner of the property, and (2) whether the trial court erred in instructing the jury that an intent to temporarily deprive the owner of the property was enough. Defendant and respondent submitted supplemental briefs. We affirm.

Facts

On January 18, 2008, Clifford B. went to a Ford dealership to purchase a new F-150 truck. Defendant was the salesperson who assisted him in the transaction. Clifford B. was driving a 2004 F-150 truck, which he intended to use as a trade-in. In addition, the purchase

agreement called for a downpayment of \$1,500. At the time of the purchase, Clifford did not have the downpayment with him; in such situations, the practice is for the salesman to follow the buyer home to collect the downpayment and submit it to the finance officer upon return to the dealership. This is referred to as "chasing" the buyer.

On this occasion, after signing the purchase agreement, Clifford B. drove home in the newly purchased truck, followed by defendant who drove the trade-in vehicle. Normally, salespersons are supposed to drive their own vehicles to "chase" a customer. When they arrived at Clifford's residence, Clifford gave defendant a check in the amount of \$1,000 and \$500 in cash. However, defendant did not return immediately with the trade-in truck or the downpayment.

The next day, January 19, 2008, Clifford B. realized he had left something in the old truck that he had traded in, so he called the dealership to arrange to retrieve the item. An assistant sales manager took the call but the trade-in vehicle was missing, along with the keys to the vehicle. Defendant did not show up at the dealership that day, although he was scheduled to work. The sales manager then reported the vehicle as stolen. On January 21, 2008, defendant showed up at the dealership with the trade-in vehicle and the check from Clifford B., but without any cash. When the police arrived, defendant informed the officer he had driven the truck to numerous locations over the two-day period in search of drugs to purchase. The odometer indicated defendant had driven the trade-in vehicle nearly 400 miles. According to defendant's wife, she drove the only vehicle owned by the couple.

Defendant was arrested and charged with embezzlement, as well as driving or taking a vehicle without the owner's permission. It was further alleged that defendant had been previously convicted of a serious or violent felony, within the meaning of the "Three Strikes" law, and one prior conviction for which he had served a prison sentence. He was tried by a jury, which convicted him of the embezzlement charge, but deadlocked on the vehicle count.

At sentencing, the court . . . sentenced defendant to the midterm of four years . . . for the embezzlement count, plus one year for the prison prior, for a total sentence of five years in prison.

Reasoning

[W]e noted an incongruity and inconsistency in the law governing the elements of embezzlement. Our research revealed cases holding that embezzlement, a form of larceny, has the same theft elements. The offense is committed by every person who (1) takes possession (2) of personal property (3) owned or possessed by another (4) by means of trespass (5) with the intent to steal the property, and (6) carries the property away. The general rule . . . is that the intent to steal required for larceny is an intent to deprive the owner permanently of possession of the property.

However, there are decisions which have affirmed convictions for embezzlement after noting that an intent to temporarily deprive the owner of the property is sufficient. Some cases have affirmed embezzlement convictions reasoning that the gist of the offense is the appropriation to the defendant's own use of property delivered to him for a specified purpose other than his own enjoyment of it.

Recently, the First District Court of Appeals held that evidence of a defendant's intent to restore embezzled property was irrelevant because of fraudulent intent, that is, the intent to use the property for a purpose other than that for which the dealership intended. In [*People v. Sisuphan*, 181 Cal.App.4th 800 (2010)], an employee took an envelope containing approximately \$30,000 which had been caught in the hopper at the top of the safe of a car

dealership, but returned the money two weeks later. The defendant contended that an intent to restore property is a defense to embezzlement if the restoration occurs before criminal charges are filed.

The reviewing court noted that the offense of embezzlement contemplates a principal's entrustment of property to an agent for certain purposes and the agent's breach of that trust by acting outside his authority in his use of the property. The court in *Sisuphan*, however, did not address the precise question of whether an intent to permanently deprive the owner is, or is not, an element of the crime.

It is difficult to reconcile the two lines of cases dealing with contradictory mental states. However, to the extent that the cases are consistent in holding that the gist of the offense of embezzlement is the appropriation to one's own use of property delivered to him for devotion to a specified purpose other than his own enjoyment of it, the necessary mental state may be found to exist whenever a person, for any length of time, uses property entrusted to him or her in a way that significantly interferes with the owner's enjoyment or use of the property.

Holding

Here, the owner's use and enjoyment of the trade-in vehicle and monetary deposit for the truck purchase was interfered with significantly by defendant's use of the vehicle to travel approximately 400 miles, over the course of two days, in search of drugs which were purchased with the cash portion of the down payment. Even if defendant had intended to eventually return both the trade-in vehicle and the money, his appropriation of both, for his own personal use, was significant in duration and incompatible with the owner's enjoyment or use of the property.

Questions for Discussion

1. Summarize the facts in *Casas*.
2. State the elements of embezzlement and the two approaches to the intent requirement for embezzlement. Which mental state is more consistent with the purpose of the crime of embezzlement?
3. At what point during Casas's "lengthy" use of the trade-in vehicle was he guilty of embezzlement? Was Casas guilty of embezzlement of the cash portion of the down payment? Who was the victim of embezzlement in *Casas*?
4. Would you hold Casas liable for embezzlement? For larceny?

YOU DECIDE 13.2

Defendant Andres Redondo was a deputy sheriff in the Merced County Sheriff's Department. He was convicted of embezzlement and misdemeanor theft. He claimed that he should not be held liable for embezzlement based on his "momentary use" of his squad car to steal a lawnmower. Officer Wallace Broughton observed Redondo in the early hours of the morning place a lawnmower from the "Small Engine Doctor" in the trunk of Redondo's squad car. As Broughton approached Redondo in his squad car, Redondo sped away, and some time later Broughton spotted Redondo's car leave a tree orchard. The lawnmower later was found in

the orchard, and tire tracks in the orchard were linked to Redondo's squad car, which was owned by the Merced County Sheriff's Department. The embezzlement statute in California punishes the fraudulent appropriation of any property in an individual's "possession or under his control by virtue of his trust" for any use "not in the due and lawful execution of his trust." Was Redondo properly convicted under the California statute? See *People v. Redondo*, 24 Cal. Rptr. 2d 143 [Cal. Ct. App. 1993].

FALSE PRETENSES

Larceny punishes individuals who "take and carry away" property from the possession of another with the intent to permanently deprive the individual of the property. Obtaining possession through misrepresentation or deceit is termed **larceny by trick**. In both larceny and larceny by trick, the wrongdoer unlawfully seizes and takes your property.

Embezzlement punishes individuals who fraudulently "convert" to their own use the property of another that the embezzlers have in their lawful possession. In other words, you trusted the wrong person with the possession of your property.

Common law judges confronted a crisis when they realized that there was no criminal remedy against individuals who tricked another into transferring title or ownership of personal property or land. Consider the case of an individual who trades a fake diamond ring that is falsely represented to be extremely valuable in return for a title to farmland.

The English Parliament responded, in 1757, by adopting a statute punishing an individual who "knowingly and designedly" by false pretense shall "obtain from any person or persons money, goods, wares or merchandise with intent to cheat or defraud any person or persons of the same." American states followed the English example and adopted similar statutes.

State statutes slightly differ from one another in their definitions of false pretenses. The essence of the offense is that a defendant is guilty of **false pretenses** who

- obtains title and possession of property of another by
- a knowingly false representation of
- a present or past material fact with
- an intent to defraud that
- causes an individual to pass title to the property.

Actus Reus

The *actus reus* of false pretenses is a false representation of a fact. The expression of an opinion or an exaggeration ("puffing"), such as the statement that this is a "fantastic buy," does not constitute false pretenses. The most important point to remember is that the false representation must be of a past (this was George Washington's house) or present (this is a diamond ring) fact. A future promise does not constitute false pretenses ("I will pay you the remaining money in a year"). Why? The explanation is that it is difficult to determine whether an individual has

made a false promise, whether an individual will later decide not to fulfill a promise, or whether outside events will prevent the performance of the promise. Prosecuting individuals for failing to fulfill a future promise would open the door to individuals being prosecuted for failing to pay back money they borrowed or might result in business executives being held criminally liable for failing to fulfill the terms of a contract to deliver consumer goods to a store. The misrepresentation must be material (central to the transaction; the brand of the tires on a car is not essential to a sale of a car) and must cause an individual to transfer title. It is false pretenses where a buyer knows that the seller's claim that a home has a new roof is untrue or where the condition of the roof is irrelevant to the buyer.

Silence does not constitute false pretenses. A failure to disclose that a watch that appears to be a rare antique is in reality a piece of costume jewelry is not false pretenses. The seller, however, must disclose this fact in response to a buyer's inquiry as to whether the jewelry is an authentic antique.

Mens Rea

The *mens rea* of false pretenses requires that the false representation of an existing or past fact be made "knowingly and designedly" with the "intent to defraud." This means that an individual knows that a statement is false and makes the statement with the intent to steal. A defendant who sells a painting for an exorbitant price that the defendant mistakenly or reasonably believes was painted by Elvis Presley is not guilty of false pretenses.

"Recklessness" or representations made without information, however, are typically sufficient for false pretenses. Representing that a painting was made by Elvis Presley when you are uncertain or are aware that you have no firm basis for such a representation would likely be sufficient for false pretenses.

In other words, the intent requirement is satisfied by *knowledge* that a representation is untrue, an *uncertainty* whether a representation is true or untrue, or an *awareness* that one lacks sufficient knowledge to determine whether a representation is true or false.

Defendants are not considered to possess an intent to defraud a victim of property when they reasonably believe that they actually own or are entitled to own the property. You cannot steal what you believe you are entitled to own.

Keep in mind that when possession passes to an individual and the owner retains the title, the defendant is guilty of larceny by trick rather than false pretenses. An individual who obtains the permission of an auto dealer to take a car for a drive and intends to and, in fact, does steal the car is guilty of larceny by trick. Obtaining the title to the car with a check that the buyer knows will bounce constitutes false pretenses. Another important difference is that larceny requires a taking and carrying away of the property. False pretenses requires only a transfer of title and possession.

False pretenses generally has been interpreted to include a wider variety of property than larceny and includes the acquisition of lodging, labor (washing your car), and services (telephone). The next case, *Cunningham v. Commonwealth*, asks whether the defendant is guilty of false pretenses.

People v. Abbott is a classic case of false pretenses. Abbott and her son Kevin Gervasio spotted an 89-year-old woman park in a handicapped parking space and enter a supermarket. They poured coffee under her car creating the appearance that fuel was leaking from her vehicle. When the woman left the store, Abbott approached the woman and stated that she was concerned because oil was leaking and called Gervasio over to the car. He stated that there likely was a leak in the master cylinders and that the car probably did not have brakes. Gervasio told the woman that the nearby service station was crooked and that he could fix the car and ultimately charged her \$1,400 for “remedying the problem.” The defendants later admitted that they charged the woman for work that they did not perform and that they “scammed her out of the money.” Abbott subsequently was sentenced to 2–4 years in prison.²³

MODEL PENAL CODE

Section 223.3. Theft by Deception

A person is guilty of theft if he purposely obtains property of another by deception. A person deceives if he purposely:

1. creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise;
2. prevents another from acquiring information which would affect his judgment of a transaction;
3. fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship;
4. fails to disclose a lien, adverse claim or other legal impediment to the enjoyment of property which he transfers or encumbers in consideration for the property obtained, whether such impediment is or is not valid, or is or is not a matter of official record.

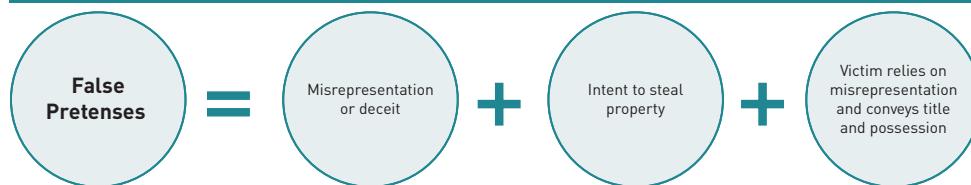
The term “deceive” does not, however, include falsity as to matters having no pecuniary significance or puffing by statements unlikely to deceive ordinary persons in the group addressed.

Analysis

1. The term *deception* is substituted for “false pretense or misrepresentation.”
2. The defendant must possess the intent to defraud. This entails a purpose to obtain the property of another and the purpose to deceive the other person.
3. The act requirement is satisfied by a misrepresentation as well as by reinforcing faulty information. False future promises are considered to constitute false pretenses.
4. There is no duty of disclosure other than when the defendant contributes to the creation of a false impression or where the defendant has a duty of care toward the victim (fiduciary or confidential relationship) or there is a legal claim on the property. A seller also may not interfere with (destroy or hide) information.

5. False pretenses does not include a misrepresentation that has no significance in terms of the value of the property (e.g., the political or religious affiliation of a salesperson) or puffing or nondisclosure.

FIGURE 13.3 ■ The Legal Equation: False Pretenses



WAS THE DEFENDANT GUILTY OF FALSE PRETENSES?

CUNNINGHAM V. COMMONWEALTH, 247 S.E.2D 683 (VA. 1978)

Opinion by I'Anson, C.J.

Issue

Nancy Cunningham, defendant, was convicted by the court, sitting without a jury, of larceny by false pretenses and she was sentenced to four years in the penitentiary. The sentence was suspended and defendant was placed on probation. The Defendant contends that the evidence was insufficient to sustain the conviction.

Facts

The Commonwealth's evidence shows that in the late afternoon of Friday, November 21, 1975, the defendant went to Mountain View Chevrolet to purchase a car. Defendant was interested in a 1969 Chevelle equipped with chrome wheels. She was told by Elvin Graves, Jr., owner of the business, that the car's chrome wheels would not be sold with the car, but that he would replace them with wheels from a different car. The defendant agreed to take the other wheels and gave Graves her check for \$1,100, the purchase price of the car. Graves then assigned the certificate of title to the automobile to the defendant, and at approximately 4:45 p.m. he called the local office of the Division of Motor Vehicles to determine whether the defendant would be able to complete the registration process that day.

Leaving the car on the premises, defendant left Mountain View Chevrolet. Rather than going to the Division of Motor Vehicles office, she went immediately to her bank, and by 5:30 p.m. had stopped payment on the check payable to Mountain View Chevrolet, citing a "broken agreement" as the reason therefor. The defendant had sufficient funds in her account to cover the amount of the check.

Later that evening, the defendant returned to Mountain View Chevrolet and told Graves that she wanted her check returned to her. Graves advised the defendant that his secretary

had taken the check home, but he would return it to her the next day. During this discussion, defendant stated that she did not want the car because she was not getting the chrome wheels. Graves finally told defendant that he would let her have the chrome wheels, but she stated that she did not want the car and would return the next morning to get her check back.

When defendant returned to Mountain View Chevrolet on Saturday morning, she told Graves that she had transferred the license tags and that she wanted the car rather than the check. The defendant then took delivery of the car. The defendant never mentioned to Graves that she had stopped payment on the check. . . .

Defendant testified that when she talked to Graves on Friday night she told him that he "might as well give [her] the check because [she] had already signed to stop payment." She also said that she paid cash when she received the car on Saturday morning.

Defendant argues that the alleged offense was necessarily consummated on Friday afternoon when she obtained title and that she then lacked fraudulent intent which was essential to the crime.

To sustain a conviction of larceny by false pretenses, the Commonwealth must prove beyond a reasonable doubt: "(1) an intent to defraud; (2) an actual fraud; (3) use of false pretenses for the purpose of perpetrating the fraud; and (4) accomplishment of the fraud by means of the false pretenses used for the purpose, that is, the false pretenses to some degree must have induced the owner to part with his property."

Fraudulent intent must also be shown to have existed at the time the false pretenses were made to obtain the property. To determine this intent, the conduct and representations of the defendant must be scrutinized.

An essential element of larceny by false pretenses is that both title to and possession of property must pass from the victim to the defendant (or his nominee).

"That principle that, so long as the defrauded party retains either title or control over the property, the crime of obtaining is not consummated, has general support both in reason and authority."

Viewed in the light most favorable to the Commonwealth, the evidence showed that immediately following the transaction on Friday afternoon, the defendant stopped payment on the check. Later that evening, she returned to Mountain View Chevrolet, and after a discussion with Graves in which it was not revealed to him that payment had been stopped on the check, the parties agreed to the rescission of the contract of purchase and to the return of defendant's check to her the next morning. Thus, control of the vehicle remained with the company. When the defendant appeared on Saturday morning, she stated that she wanted the car, rather than the return of her check, and that she had purchased the license tags that morning. Since Graves had defendant's check for the purchase price, he delivered possession of the car to the defendant and her father drove it off the lot. Defendant concealed the fact at the time that she had stopped payment on the check. Thus, defendant obtained possession of the car with fraudulent intent on Saturday morning.

Holding

The record is replete with indicia of the defendant's fraudulent intent, and it supports the findings of the trial court. The conduct and representations of the defendant show that the crime of larceny by false pretenses was consummated that Saturday morning. When defendant obtained possession of the car by concealing the fact that she had stopped payment on the check, the offense of larceny by false pretenses was complete.

For the reasons stated, the judgment is affirmed.

Questions for Discussion

1. Why was Cunningham not held liable for false pretenses larceny when she first expressed an intent to purchase the Chevelle at the auto dealership and transmitted a check for \$1,100, the purchase price of the car?
2. What is the basis for holding Cunningham guilty of false pretenses on Saturday morning when she stated that she wanted to buy the car after all? What is the significance of the fact that Cunningham alleges that she gave cash to the auto dealer to pay for the Chevelle?
3. Cunningham had sufficient funds in her bank account to cover the cost of the automobile. Would she be successful in arguing that she did not realize that the check was no longer negotiable when she took possession of the car?

CASES AND COMMENTS

1. **Deception.** Helen Kennedy, a 55-year-old widow, and the defendant, Robert Joseph Stinson, age 39, agreed to be married in Las Vegas, Nevada, on June 17, 1978. On June 16, at defendant's suggestion, Mrs. Kennedy withdrew \$10,830.32 from a savings account in the form of a cashier's check made payable to her. On June 17, the couple traveled to Las Vegas. Stinson obtained applications for a marriage certificate, which Mrs. Kennedy signed. In the evening, a person introduced by defendant as a "Reverend Brown" appeared at Mrs. Kennedy's hotel room and purportedly performed a wedding ceremony. Stinson gave Mrs. Kennedy a wedding ring. The couple immediately returned to Denver, and Stinson moved into a house that he falsely told Mrs. Kennedy that he owned. Mrs. Kennedy continued to live in her own home.

On June 23, Mrs. Kennedy and Stinson went to a Denver bank where she cashed the cashier's check. Defendant took the cash and placed it in a "commercial account." He returned and produced a bank book showing the amount as a deposit and purporting to be a joint account established at that bank. No such account, in fact, had been established.

Mrs. Kennedy, subsequently, was informed that there was no record of any marriage between her and Stinson in Nevada. Mrs. Kennedy contacted an attorney who demanded that Stinson return her money, a real estate contract he had secured on her home, and several personal household items. Stinson replied that he and Mrs. Kennedy were married and that her attorney should mind his own business. Mrs. Kennedy notified police officers of the situation, and defendant was arrested.

Stinson later admitted that he was married to another woman. At trial, a 65-year-old widow testified that she had been the victim of a similar "scam" by Stinson two years earlier. Stinson had arranged a "fake" "marriage ceremony." She gave him \$35,000 in cash and personal property and only later discovered that that the marriage ceremony was a "sham." She stated that the items she gave defendant were never returned.

Stinson was convicted of a violation of Colorado law in that he was found to have knowingly obtained or exercised control over anything of "value of another . . . by threat

or deception" and intended to "deprive the other person permanently of the use or benefit of the thing of value." See *People v. Stinson*, 632 P.2d 631 (Col. App. 1981).

2. **Stolen Valor Act.** In *United States v. Alvarez*, the Ninth Circuit Court of Appeals considered the constitutionality of the federal Stolen Valor Act of 2005, 18 U.S.C. § 704(b). The law provides:

Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.

The prescribed prison term is enhanced to one year if the decoration involved is the Congressional Medal of Honor, a Distinguished Service Cross, a Navy cross, an Air Force cross, a silver star, or a Purple Heart. Id. § 704(c), (d).

Xavier Alvarez won a seat on the Three Valley Water District Board of Directors in 2007. At a joint meeting with a neighboring water district board, Alvarez introduced himself and noted that "I'm a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I'm still around." Alvarez had neither served in the military nor been awarded the Congressional Medal of Honor. In the past, Alvarez had falsely claimed to have rescued the U.S. ambassador during the Iranian hostage crisis and had claimed to have been a helicopter pilot during the Vietnam War. Other misrepresentations included playing hockey for the Detroit Red Wings, working as a police officer, and having been secretly married to a Mexican movie star.

Alvarez pled guilty to one count of falsely claiming that he was awarded the Congressional Medal of Honor and was sentenced to pay a \$100 special assessment and a \$5,000 fine, to serve three years of probation, and to perform 416 hours of community service.

The court of appeals held that the Stolen Valor Act was unconstitutional, reasoning that "the right to speak and write whatever one chooses—including, to some degree, worthless, offensive, and demonstrable untruths—without cowering in fear of a powerful government is, in our view, an essential component of the protection afforded by the First Amendment."

The appellate court also observed that the Stolen Valor Act did not constitute a false pretenses fraud statute. The government was not required to establish that Alvarez's "statement was material, intended to mislead, or most critically, did mislead the listener. . . . [I]f anything, Alvarez has no credibility whatsoever and . . . no one detrimentally relied on his false statement."

What of the argument that "Congress certainly has an interest, even a compelling interest, in preserving the integrity of its system of honoring our military men and women for their service and, at times, their sacrifice"? See *United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010).

The U.S. Supreme Court upheld the appellate court decision. Justice Anthony Kennedy stated that the government may validly limit "false" speech that is used to fraudulently obtain a material benefit such as money or employment. However, "[w]ere the Court to hold that the interest in truthful discourse [on military medals] alone is sufficient to maintain a ban on speech, absent any evidence that the speech was used to gain material advantage, it would give government a broad censorial power

unprecedented in the Court's cases or in our constitutional tradition." See *United States v. Alvarez*, 567 U.S. 709, 132 S. Ct. 2537, 2547–2548 (2012).

In 2013, Congress, in response to the Supreme Court decision in *Alvarez*, amended the Stolen Valor Act to include a "combat badge" and to require that individuals "fraudulently" hold themselves "out" as the recipients of a combat badge or medal. Fraudulent misrepresentation as defined in the amendment to the Stolen Valor Act requires an "intent to obtain money, property, or other tangible benefit."

THEFT

Most states have consolidated larceny, embezzlement, and false pretenses into a single **theft statute**. The Model Penal Code and other state provisions also include within their theft statutes the property offenses of receiving stolen property, blackmail or extortion, the taking of lost or mistakenly delivered property, theft of services, and the unauthorized use of a vehicle.

Larceny, embezzlement, and false pretenses are all directed against wrongdoers who unlawfully interfere with the property interests of others, whether through "taking and asportation," "converting," or "stealing." The commentary to the Model Penal Code explains that each of these property offenses involves the "involuntary" transfer of property, and in each instance, the perpetrator "appropriates property of the victim without his consent or with a consent that is obtained by fraud or coercion."²⁴

How do these consolidated theft statutes make it easier for prosecutors to charge and convict defendants of a property offense? A prosecutor under these consolidated theft statutes may charge a defendant with "theft" and, in most jurisdictions, is not required to indicate the specific form of theft with which the defendant is charged. The defendant will be convicted in the event that the evidence establishes beyond a reasonable doubt either larceny, embezzlement, or false pretenses. A prosecutor under the traditional approach would be required to charge a defendant with the separate offenses of larceny, embezzlement, and false pretenses. The defendant would be acquitted in the event that the defendant was charged with deceitfully obtaining possession and title (false pretenses) but the evidence established that the defendant obtained only possession (larceny).²⁵

The classic example of how separately defining property offenses impedes prosecution is a case involving an English woman who wrote to movie star Clark Gable alleging that he was the father of her child. The letter was based on a misrepresentation of fact because Gable had not been in England at the time that the child was conceived. The writer was charged with the use of the mail to defraud Gable, a form of false pretenses. A federal appeals court reversed her conviction, finding that she intended to intimidate Gable into giving her money based on the unstated threat to publicize her allegations and used the mail to "extort" money rather than to "defraud" Gable.²⁶

The Pennsylvania consolidated theft statute, section 3902, provides that conduct considered theft "constitutes a single offense. An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under this chapter, notwithstanding the specification of a different manner in the complaint or indictment."

Consolidated statutes typically grade the severity of larceny, embezzlement, and false pretenses in a uniform fashion based on the value of the property, on whether the stolen property is a firearm or motor vehicle, and on factors such as whether the offense took place during the looting of a disaster area.

MODEL PENAL CODE

Section 223.1. Consolidation of Theft Offenses

1. Conduct denominated theft in this Article constitutes a single offense. An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under the Article, notwithstanding the specification of a different manner in the indictment or information, subject only to the power of the Court to ensure fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise.
2. Grading of Theft Offenses:
 - a. Theft constitutes a felony of the third degree if the amount involved exceeds \$5,000, or if the property stolen is a firearm, automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle, or in the case of theft by receiving stolen property, if the receiver is in the business of buying or selling stolen property.
 - b. Theft not within the preceding paragraph constitutes a misdemeanor, except that if the property was not taken from the person or by threat, or in breach of a fiduciary obligation, and the author proves by a preponderance of the evidence that the amount involved was less than \$50, the offense constitutes a petty misdemeanor.
 - c. The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard, of the property or services which the actor stole or attempted to steal. Amounts involved in thefts committed pursuant to one scheme or course of conduct . . . may be aggregated in determining the grade of the offense.
3. It is an affirmative defense to prosecution for theft that the actor:
 - a. was unaware that the property or service was that of another;
 - b. acted under an honest claim of right to the property or service involved or that he had a right to acquire or dispose of it as he did; or
 - c. took property exposed for sale, intending to purchase and pay for it promptly, or reasonably believing that the owner, if present, would have consented.
4. It is no defense that theft was from the actor's spouse except that misappropriation of household and personal effects, or other property normally accessible to both spouses, is theft only if it occurs after the parties have ceased living together.

Analysis

1. The crimes of larceny, embezzlement, false pretenses, and under specified conditions theft by receipt of stolen property are consolidated into a single statute.
2. Each of these property offenses involves the "involuntary" transfer of property, and in each instance the perpetrator obtains the property of the victim without consent or with consent that is obtained by fraud or by coercion.

3. Consolidating these property offenses in a single statute allows the conviction of a defendant if the elements of either larceny, embezzlement, false pretenses, or under certain conditions theft by receiving stolen property are established beyond a reasonable doubt at trial.
4. Affirmative offenses are specified based on a lack of criminal intent.
5. Offenses are considered a felony or misdemeanor based on the dollar value of the property or type of property stolen.

Two new forms of theft that were not anticipated when the consolidated theft statutes were drafted are identity theft and computer crimes.

IDENTITY THEFT

William Shakespeare wrote that stealing “my good name” enriches the thief, while making the victim “poor indeed.” Today **identity theft**, the theft of your name and identifying information, can lead to economic damage and has been called the crime of the 21st century. The stealing of your Social Security number, bank account information, credit card number, and other identifying data enables thieves to borrow money and make expensive purchases in your name. The end result is the ruining of your credit and creation of financial hardship, forcing you to spend months restoring your “good name.” The Department of Justice points to a case in which a thief accumulated \$100,000 in credit card debt, obtained a federal home loan and bought a house and motorcycle, and filed for bankruptcy in the victim’s name.

In the past, thieves threatened to “take and carry away” tangible property. Today, the theft of intangible property, such as a credit card or Social Security number, may lead to even greater harm because the thief can employ the number to make repeated purchases, to borrow money, or to establish phone service or cable access. You might not even be aware that the information was taken until you apply for credit and are rejected.

Thieves collect data by examining receipts you abandon in the trash, observing the numbers you enter at an ATM, intercepting mail from credit card companies, or enticing you to surrender information to what appears to be a reputable email inquiry. A lost or stolen wallet or burglary of a home or automobile can result in valuable numbers and documents falling into the hands of organized identity theft gangs. Information can also be obtained by breaking into a company database.

Even strict protections over your personal information may not be effective. A study by the Federal Trade Commission, the federal agency concerned with consumer protection, determined that roughly 15% of identity thefts are committed by a victim’s family members, friends, neighbors, or coworkers. The perpetrators of identity theft often transfer the information to sophisticated gangs of identity thieves in return for drugs, cellular phones, guns, and money.

The Bureau of Justice Statistics reports that 17.6 million Americans were victimized by identity theft in 2014 (see Figure 13.1). Victims of identity theft find themselves with unwarranted

financial obligations or may even be falsely charged with crimes as a result of another person assuming their identity. Individuals also may be the victims of multiple types of identity theft. The most common types of identity theft were the misuse or attempted misuse of an existing account such as the fraudulent use of a credit card (8.6 million victims); the unauthorized or attempted unauthorized use of a checking or savings or other type of banking account (8.1 million); and the misuse or attempted misuse of an existing telephone, online, or insurance account (1.5 million victims). The states with the highest rates of identity thefts per 100,000 people in 2011 were Michigan (175.6), Florida (166.8), Delaware (155.9), California (139.5), Illinois (138.0), Connecticut (137.6), Maryland (137.1), Missouri (136.5), Nevada (135.8), and Arizona (126.2).

Consider how easy it is to intercept your mail and to obtain a preapproved credit card. Think about how many times in an average week you are vulnerable to identity theft resulting from sensitive information in a letter, using your credit card, discarding a receipt, or providing someone with your Social Security number.

In 1998, the U.S. Congress passed the Identity Theft and Assumption Deterrence Act. This legislation created the new offense of identity theft and prohibits the knowing transfer or use without lawful authority of the “means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity” that constitutes a violation of federal law or a felony under state or local law.²⁷ A “means of identification” includes an individual’s name, date of birth, Social Security number, driver’s license number, passport number, bank account or credit card number, fingerprints, voiceprint, or eye image. Note that merely obtaining another individual’s personal documents can result in a year or more in prison. Sentences for violation of the Identity Theft Act can be as severe as 15 years in prison and a significant fine in those instances in which the perpetrator obtains items valued at \$1,000 or more over a one-year period. The perpetrators of identity theft typically are also in violation of statutes punishing credit card fraud, mail fraud, or wire fraud.

The Utah statute on identity theft punishes an individual who knowingly or intentionally obtains “personal identifying information of another person” and uses or attempts to use this information “with fraudulent intent, including to obtain, or attempt to obtain[,] credit, goods, services . . . or medical information in the name of another person.” Obtaining items valued at more than \$1,000 is a felony under the Utah law.²⁸

In 2007, in *State v. Green*, a Kansas court of appeals ruled that each time a thief uses a stolen credit card constitutes a separate offense. The defendant opened credit accounts at three stores using another individual’s identity and subsequently was convicted of three counts of identity theft. The court explained that thieves who steal money harm the victim only once, whether or not they later spend the money, while each use of a stolen credit card is a “blow to the body of credit established by an innocent person.” Every use of the innocent’s identity “takes something away from that person in this modern age of credit history and instantaneous commercial transportation.”²⁹ In *State v. Zeferino-Lopez*, a Washington State appellate court was asked to decide whether an undocumented individual who used a The social security number of another person to open a bank account was guilty of identity theft.

WAS THE DEFENDANT GUILTY OF IDENTITY THEFT?

STATE V. ZEFERINO-LOPEZ, 319 P.3D 94 (WASH. CT. APP. 2014)

Opinion by Becker, J.

Issue

Appellant [challenged his conviction for] identity theft in the second degree for using a Social Security number belonging to someone else. [The question was whether he possessed k]nowledge that the number belonged to another person. . . .

Facts

On March 9, 2010, appellant Felipe Zeferino-Lopez used a Social Security card with his name on it to open a bank account at a bank in Burlington in Skagit County.

On April 30, 2012, local police were informed that a minor in California had attempted to set up her first bank account and learned that someone had already used her Social Security number to open a bank account. Investigation led to Zeferino.

The State charged Zeferino with second degree identity theft. A jury convicted him in November 2012. He appeals.

At trial, a bank investigator testified that she had searched the bank's records by Social Security number and discovered that the number in question was on a signature card issued when the account was opened in Mount Vernon. The person who opened the account was Zeferino. The bank had video images of Zeferino accessing the account.

A district manager of the Social Security administration gave testimony to establish that the Social Security number was assigned to another person. The witness testified that Social Security numbers are now assigned randomly, although until recently the first part of the number was assigned based upon the area where the person was applying. She said that a person who is not in the United States legally is not eligible for a Social Security number. The police officer who interviewed Zeferino testified that he admitted being in the country illegally.

Zeferino testified that he entered the United States from Mexico in 1995 when he was around nine years old. He said friends told him he needed a Social Security card to work, so he bought one with his name on it for \$100. He said he had presented the card when he obtained employment at various restaurant jobs and most recently at a recreational vehicle dealership. He testified that he did not know the number on the card belonged to someone else until the police contacted him about his use of the card to open a bank account.

In closing, the prosecutor argued that the testimony by the Social Security district manager proved that the number was assigned to an actual person and was "not just a random number." The prosecutor then argued that the State had proved the element of knowledge by showing that Zeferino knew that he was possessing and using the Social Security number:

And then we have to establish that the defendant knowingly possessed the Social Security number. . . . It's actually rather a lengthy instruction for such a small word.

But basically knowingly means that you are aware of a fact that exists. So when we ask ourselves did the defendant know that he was possessing the Social Security number, of course he did. He knew he possessed it. He bought it. He used it. He possessed it. He knew he possessed it. And so we can kind of check that off. So we, through these means, we've established the defendant knowingly possessed a means of identification that belonged to another person.

Zeferino responded by arguing that the State failed to meet its burden of proving he knew the Social Security number belonged to another person.

In rebuttal, the prosecutor argued that the State had no burden to prove Zeferino knew the number belonged to another person:

We would never be able to prove a case like this if we had to prove that the defendant knew the number belonged to someone else. . . . [W]e'd have to prove he broke into someone's house and stole their Social Security card. We're not going to have that case. Does it make sense that the law would require that? And it doesn't. . . .

Reasoning

The requirement is that the defendant knowingly possessed identification of another person. Knowingly is an adverb. It applies to the verb that follows, which is possession or use. Knowing applies and refers to possession or use. The phrase that comes after it is the object. And knowingly does not apply to that grammatically speaking. . . . He didn't have to know that that number was specifically assigned to another individual. He didn't. He had to know that he was in possession of it and the number. He had to know he was using the number and clearly he did. . . .

Identity theft in the second degree is defined by RCW [Revised Code of Washington] 9.35.020(1) to include a mens rea of knowledge:

- (1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.
- (2) Violation of this section when the accused or an accomplice violates subsection (1) of this section and obtains credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value shall constitute identity theft in the first degree. Identity theft in the first degree is a class B felony punishable according to chapter 9A.20 RCW.
- (3) A person is guilty of identity theft in the second degree when he or she violates subsection (1) of this section under circumstances not amounting to identity theft in the first degree. Identity theft in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

The to-convict jury instruction [issued by the trial court judge] mirrored the statutory language:

To convict the defendant of identity theft in the second degree, the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about March 9, 2010, the defendant knowingly possessed or used a means of identification of another person, living or dead;
- (2) That the defendant acted with the intent to commit any crime;
- (3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

The United States Supreme Court confronted a similar issue on similar facts in *Flores-Figueroa v. United States*, 556 U.S. 46 (2009). The defendant, a Mexican citizen, secured employment in the United States by giving his employer a false name, birth date, and Social Security number, along with a counterfeit alien registration card.

The Social Security number and the number on the alien registration card were not those of a real person. In 2006, Flores presented his employer with new counterfeit Social Security and alien registration cards; these cards (unlike Flores' old alien registration card) used his real name. But this time the numbers on both cards were in fact numbers assigned to other people.

Flores' employer reported his request to U.S. Immigration and Customs Enforcement. Customs discovered that the numbers on Flores' new documents belonged to other people. The United States then charged Flores with two predicate crimes, namely, entering the United States without inspection, and misusing immigration documents. And it charged him with aggravated identity theft, 18 U.S.C. § 1028A(a)(1), the crime at issue here.

The defendant was convicted of aggravated identity theft. A conviction under the federal statute lengthens the sentence of an offender convicted of certain other crimes if, during the commission of those predicate crimes, the offender "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person." The issue on appeal was whether the government had to show the defendant knew the numbers on the counterfeit documents belonged to another person. Upon examination of the statutory term "knowingly" in context, the Court held the government had to prove the defendant knew the "'means of identification'" he or she unlawfully transferred, possessed, or used, in fact belonged to another person. The Court found that, "as a matter of ordinary English grammar," the adverb "knowingly" applies to both the verbs and the object of the sentence.

Similar to the prosecutor's closing argument against Zeferino, the government argued in *Flores-Figueroa* that the difficulty inherent in proving a defendant knew the means of identification belonged to another should compel an interpretation which does not require it to do so. The Court rejected this argument, observing that the element should not be difficult to prove in the classic case of identity theft committed by "dumpster diving" or "computer hacking." For example, where a defendant rummaged through a residential garbage can to find discarded bank statements or pretended to be calling from the victim's bank to get the victim's personal financial information, a jury would be permitted to infer that the defendant knew the means of identification belonged to another.

The State contends *Flores-Figueroa* is not on point because the Court was interpreting a federal statute. But the State does not show there is a material difference between our rules of statutory construction and the rules employed by the United States Supreme Court.

And *Flores-Figueroa* is consistent with *State v. Killingsworth*, 269 P.3d 1064, review denied, 278 P.3d 1112 (2012). There, the issue was a to-convict instruction which required the jury to find that the defendant "'knowingly trafficked in stolen property.'" This court held that the most natural reading of the sentence was that "knowingly" modified both "trafficked" and "stolen property." . . .

Holding

In keeping with the above authorities, we conclude that the element of knowledge in second degree identity theft does not refer only to the defendant's knowledge that he is using or possessing a means of identification or financial information. It also refers to his knowledge that it was "a means of identification or financial information of another person, living or dead." . . .

The statute required the State to prove that Zeferino knew the Social Security number he was using actually belonged to someone else. Zeferino was using a Social Security number assigned to a minor in California. The Social Security card on which it appeared listed his name, not the owner's. The only evidence about how and when Zeferino obtained the card was his own testimony that he bought it from someone for \$100 in order to be able to work in the United States. He used it openly for a number of years for that purpose and then to open a bank account. His testimony does not support an inference that he knew the number on it belonged to another person.

Questions for Discussion

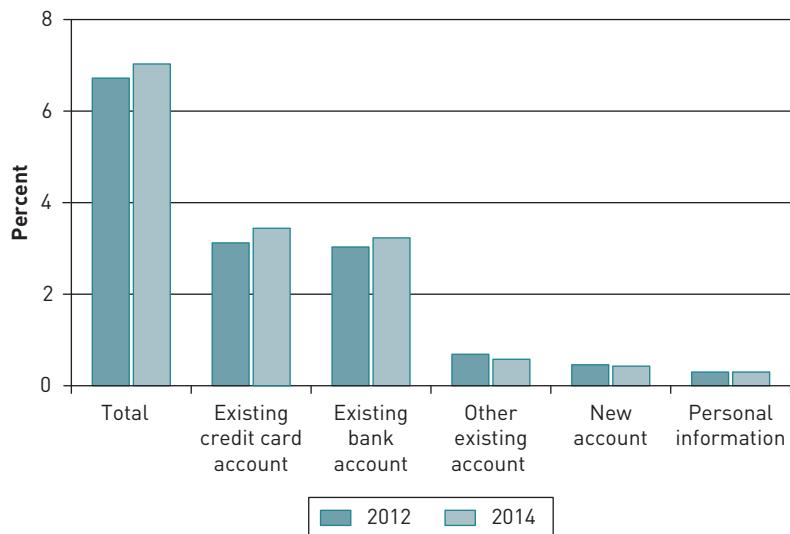
1. What are the facts in *Zeferino-Lopez*?
2. Explain the legal issue to be decided by the court in *Zeferino-Lopez*.
3. Discuss the different interpretations of the identity theft statute by the State of Washington and by *Zeferino-Lopez*.
4. How did the decision in *Flores-Figueroa* guide the court's decision in *Zeferino-Lopez*? Should a state court in interpreting a state statute rely on the precedent of the U.S. Supreme Court on interpreting a congressional statute?
5. In terms of the public interest in preventing and punishing identity theft, is the interpretation of the State of Washington or the interpretation of *Zeferino-Lopez* more persuasive?

CASES AND COMMENTS

Identity Theft. In *Flores-Figueroa v. United States*, Ignacio Flores-Figueroa, a Mexican citizen, provided his employer with a false Social Security number and a counterfeit alien registration number in 2000. In 2006, Flores-Figueroa presented his employer with new counterfeit Social Security and alien registration cards, which unlike Flores-Figueroa's old alien registration card used his real name. The numbers on both cards were, however, assigned to other individuals. The U.S. Supreme Court held that Congress was concerned with classic cases of identity theft in which an individual hacked a computer to obtain bank account numbers or in which an individual went through the trash to find credit card numbers. The Supreme Court held that the federal identity theft statute, 18 U.S.C. §1028A(a)(1), requires that defendants know that the "means of identification" they transfer, possess, or use

belongs to "another person." Flores-Figueroa, as a result, could not be held liable for identity theft under federal law because the government failed to "show that the defendant knew the means of identification at issue belonged to another person." Does requiring knowledge that the numbers belong to "another person" make enforcement of the statute difficult? See *Flores-Figueroa v. United States*, 556 U.S. 646 (2009).

FIGURE 13.4 ■ Crime on the Streets: Victims of Identity Theft, 2012 and 2014



Source: Bureau of Justice Statistics, National Crime Victimization Survey, Identity Theft Supplement, 2012–2014.

YOU DECIDE 13.3

Randal Lee Schwartz worked as an independent contractor for Intel Corporation in the Supercomputer Systems Division (SSD). SSD creates large computer systems used for applications such as nuclear weapons. As a result of a disagreement with his supervisor, Schwartz resigned from Intel SSD, and his passwords were deactivated. Schwartz in order to impress upon Intel that he should be rehired used several programs to download the passwords of 35 SSD users, including the general manager of SSD. Schwartz appealed his conviction for computer theft of information belonging to Intel, arguing that he did not "take, appropriate, obtain or withhold" the passwords because the users could continue to use their passwords "just as they had before" he downloaded them onto another computer. When

Schwartz copied the passwords, did he “take” Intel’s property? In answering this question, consider the discussion of computer crime in the next section of the text. See *State v. Schwartz*, 21 P.3d 1128 (Ore. Ct. App. 1999).

COMPUTER CRIME

Computer crime poses a challenge for criminal law. Larceny historically has protected tangible (material) property. Courts have experienced difficulty applying the traditional law of larceny to individuals who gain access to intangible property without authorization (nonmaterial property that you cannot hold in your hands). The primary property offenses committed in cyberspace include unauthorized computer access to programs and databases and unlawfully obtaining personal information through deceit and trickery. Can you take and carry away access to a computer program?

In *Lund v. Commonwealth*, the defendant, a graduate student in statistics at Virginia Polytechnic Institute, was charged with the larceny and the fraudulent use of “computer operation and services” valued at \$100 or more. The customary procedure at the university was for departments to receive computer dollar credits. These dollar credits were deducted from the departmental account as faculty and students made use of the university’s central computer. This was a bookkeeping procedure, and no funds actually changed hands. Lund’s adviser failed to arrange for his use of the university computer, and Lund proceeded to gain access to the university computer without authorization and spent as much as \$26,384.16 in unauthorized computer time. The Virginia Supreme Court ruled that computer time and services could not be the subject of either false pretenses or larceny “because neither time nor services may be taken and carried away. . . . It [the Virginia statute] refers to a taking and carrying away of a certain concrete article of personal property.”³⁰

State legislatures and the federal government responded to *Lund* by passing statutes addressing computer theft and crime. These statutes punish various types of activity including unauthorized access to a computer or to a computer network or program; the modification, removal, or disabling of computer data, programs, or software; causing a computer to malfunction; copying computer data, programs, or software without authorization; and falsifying email transmissions in connection with the sending of unsolicited bulk email.

In 2013 in *People v. Puesan*, Louis Puesan, a suspended Time Warner employee, installed a keystroke logger on three of Time Warner’s computers and used the information he wrongfully obtained with the keystroke logger to gain access to a Time Warner program that stores confidential customer information. He subsequently was convicted of various offenses in the New York State computer crime statute (Article 156) including computer trespass, computer tampering, unlawful duplication of computer-related material, and criminal possession of computer-related material. Puesan was sentenced to five years’ probation.³¹

In *United States v. Nosal*, the Ninth Circuit Court of Appeals was asked to determine whether Nosal violated the federal Computer Fraud and Abuse Act (CFFA) by gaining access

to information on the computer system of his former employer by using the password of a present employee. The case is significant for asking whether password sharing is a federal criminal offense.

DOES FEDERAL LAW PROHIBITING UNAUTHORIZED ACCESS TO A COMPUTER PROHIBIT PASSWORD SHARING BETWEEN AN INDIVIDUAL WITH AUTHORIZED ACCESS AND AN INDIVIDUAL WITH UNAUTHORIZED ACCESS?

UNITED STATES V. NOSAL, 844 F.3d 1024 (9TH CIR. 2016)

Opinion by McKeown, J.

Issue

The CFAA imposes criminal penalties on whoever “knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value.”

Only the first prong of the section is before us in this appeal: “knowingly and with intent to defraud” accessing a computer “without authorization.” . . . Put simply, we are asked to decide whether the “without authorization” prohibition of the CFAA extends to a former employee whose computer access credentials have been rescinded but who, disregarding the revocation, accesses the computer by [password sharing]. In other words, the issue is whether “without authorization” prohibits knowingly and with intent to defraud password sharing between individuals.] . . .

Facts

Nosal was a high-level regional director at the global executive search firm Korn/Ferry International. Korn/Ferry’s bread and butter was identifying and recommending potential candidates for corporate positions. In 2004, after being passed over for a promotion, Nosal announced his intention to leave Korn/Ferry. Negotiations ensued and Nosal agreed to stay on for an additional year as a contractor to finish a handful of open searches, subject to a blanket non-competition agreement. As he put it, Korn/Ferry was giving him “a lot of money” to “stay out of the market.”

During this interim period, Nosal was very busy, secretly launching his own search firm along with other Korn/Ferry employees. . . . As of December 8, 2004, Korn/Ferry revoked Nosal’s access to its computers, although it permitted him to ask Korn/Ferry employees for research help on his remaining open assignments. In January 2005, Christian left Korn/Ferry and, under instructions from Nosal, set up an executive search firm—Christian & Associates—from which Nosal retained 80% of fees. Jacobson followed her a few months later. As Nosal, Christian and Jacobson began work for clients, Nosal used the name “David Nelson” to mask his identity when interviewing candidates.

The start-up company was missing Korn/Ferry's core asset: "Searcher," an internal database of information on over one million executives, including contact information, employment history, salaries, biographies and resumes, all compiled since 1995. Searcher was central to Korn/Ferry's work for clients. When launching a new search to fill an open executive position, Korn/Ferry teams started by compiling a "source list" of potential candidates. In constructing the list, the employees would run queries in Searcher to generate a list of candidates. To speed up the process, employees could look at old source lists in Searcher to see how a search for a similar position was constructed, or to identify suitable candidates. The resulting source list could include hundreds of names, but then was narrowed to a short list of candidates presented to the client. Korn/Ferry considered these source lists proprietary.

Searcher included data from a number of public and quasi-public sources like LinkedIn, corporate filings and Internet searches, and also included internal, non-public sources, such as personal connections, unsolicited resumes sent to Korn/Ferry and data inputted directly by candidates via Korn/Ferry's website. The data was coded upon entry; as a result, employees could run targeted searches for candidates by criteria such as age, industry, experience or other data points. However, once the information became part of the Searcher system, it was integrated with other data and there was no way to identify the source of the data.

Searcher was hosted on the company's internal computer network and was considered confidential and for use only in Korn/Ferry business. Korn/Ferry issued each employee a unique username and password to its computer system; no separate password was required to access Searcher. Password sharing was prohibited by a confidentiality agreement that Korn/Ferry required each new employee to sign. When a user requested a custom report in Searcher, Searcher displayed a message which stated: "This product is intended to be used by Korn/Ferry employees for work on Korn/Ferry business only."

Nosal and his compatriots downloaded information and source lists from Searcher in preparation to launch the new competitor. Before leaving Korn/Ferry, they used their own usernames and passwords, compiling proprietary Korn/Ferry data in violation of Korn/Ferry's computer use policy. . . .

After Nosal became a contractor and Christian and Jacobson left Korn/Ferry, Korn/Ferry revoked each of their credentials to access Korn/Ferry's computer system. Not to be deterred, on three occasions Christian and Jacobson borrowed access credentials from FH, who stayed on at Korn/Ferry at Nosal's request. In April 2005, Nosal instructed Christian to obtain some source lists from Searcher to expedite their work for a new client. Thinking it would be difficult to explain the request to FH, Christian asked to borrow FH's access credentials, which Christian then used to log in to Korn/Ferry's computer system and run queries in Searcher. Christian sent the results of her searches to Nosal. In July 2005, Christian again logged in as FH to generate a custom report and search for information on three individuals. Later in July, Jacobson also logged in as FH, to download information on 2,400 executives. None of these searches related to any open searches that fell under Nosal's independent contractor agreement.

In March 2005, Korn/Ferry received an email from an unidentified person advising that Nosal was conducting his own business in violation of his non-compete agreement. The company launched an investigation and, in July 2005, contacted government authorities. . . .

The government filed a[n] . . . indictment in February 2013 with three CFAA counts, two trade secrets counts and one conspiracy count. Nosal's remaining CFAA counts were based on the three occasions when Christian and Jacobson accessed Korn/Ferry's system for

their new clients using FH's login credentials. . . . A jury convicted Nosal on all counts. The district court sentenced Nosal to one year and one day in prison, three years of supervised release, a \$60,000 fine, a \$600 special assessment and approximately \$828,000 in restitution to Korn/Ferry.

Reasoning

The CFAA was originally enacted in 1984 as the Counterfeit Access Device and Counterfeit Access Device and Computer Fraud and Abuse Act. The act was aimed at "hackers who accessed computers to steal information or to disrupt or destroy computer functionality." The original legislation protected government and financial institution computers and made it a felony to access classified information in a computer "without authorization."

Just two years later in 1986, Congress amended the statute to "deter[] and punish[] certain 'high-tech' crimes," and "to penalize thefts of property via computer that occur as part of a scheme to defraud[.]" The amendment expanded the CFAA's protections to private computers.

The key section of the CFAA at issue is 18 U.S.C. § 1030 (a)(4), which provides in relevant part:

Whoever . . . knowingly and with intent to defraud, accesses a protected computer without authorization, or exceeds authorized access, and by means of such conduct furthers the intended fraud and obtains anything of value . . . shall be punished. . . .

A key element of the statute is the requirement that the access be "knowingly and with intent to defraud." Not surprisingly, this phrase is not defined in the CFAA as it is the bread and butter of many criminal statutes. . . . This mens rea element of the statute is critical because imposing the "intent to defraud" element targets knowing and specific conduct. . . .

Nosal and his co-conspirators acted "without authorization" when they continued to access Searcher by other means after Korn/Ferry rescinded permission to access its computer system. . . . Nosal [accordingly] is charged with unauthorized access—getting into the computer after categorically being barred from entry. . . .

Employing classic statutory interpretation, we consider the plain and ordinary meaning of the words "without authorization." . . . "[A]uthorization" means 'permission or power granted by an authority.'" *Black's Law Dictionary* defines "authorization" as "[o]fficial permission to do something; sanction or warrant." . . . That common sense meaning is not foreign to Congress or the courts: the terms "authorize," "authorized" or "authorization" are used without definition over 400 times in Title 18 of the United States Code. We conclude that given its ordinary meaning, access "without authorization" under the CFFA is not ambiguous. . . .

That straightforward meaning is also unambiguous as applied to the facts of this case. . . . Implicit in the definition of authorization is the notion that someone, including an entity, can grant or revoke that permission. Here, that entity was Korn/Ferry, and FH had no mantle or authority to override Korn/Ferry's authority to control access to its computers and confidential information by giving permission to former employees whose access had been categorically revoked by the company. Korn/Ferry owned and controlled access to its computers, including the Searcher database, and it retained exclusive discretion to issue or revoke access to the database. By revoking Nosal's login credentials on December 8, 2004, Korn/Ferry unequivocally conveyed to Nosal that he was an "outsider" who was no

longer authorized to access Korn/Ferry computers and confidential information, including Searcher. Korn/Ferry also rescinded Christian and Jacobson's credentials after they left, at which point the three former employees were no longer "insiders" accessing company information. Rather, they had become "outsiders" with no authorization to access Korn/Ferry's computer system....

[W]e . . . conclude based on the ordinary, contemporary, common meaning of "authorization," that an employee is authorized to access a computer when his employer approves or sanctions his admission to that computer. Thus, he accesses a computer "without authorization" when he gains admission to a computer without approval. Similarly, we conclude that an employee "exceeds authorized access" when he has approval to access a computer, but uses his access to obtain or alter information that falls outside the bounds of his approved access....

We are mindful of the examples [cited by Nosal] . . . that ill-defined terms may capture arguably innocuous conduct, such as password sharing among friends and family, inadvertently "mak[ing] criminals of large groups of people who would have little reason to suspect they are committing a federal crime." But these concerns are ill-founded because §1030(a)(4) requires access be "knowingly and with intent to defraud." . . . The circumstance here—former employees whose computer access was categorically revoked and who surreptitiously accessed data owned by their former employer—bears little resemblance to asking a spouse to log in to an email account to print a boarding pass....

We have repeatedly held that statutory requirement that a criminal defendant acted "knowingly" is "not limited to positive knowledge, but includes the state of mind of one who does not possess positive knowledge only because he consciously avoided it. . . . When such awareness is present, 'positive' knowledge is not required." . . .

Nosal wanted his team to obtain information from Searcher all while maintaining his distance from their activities . . . but knew and understood that none of them had access credentials. A juror also could have easily surmised that Nosal, having worked with FH for years on a daily basis, would have known that she had herself never run custom reports, developed source lists or pulled old source lists. When Nosal specifically directed Christian to access Korn/Ferry's computer system to "[g]et what I need," Nosal knew that the only way Christian and Jacobson could access the source lists was "without authorization" because Korn-Ferry had revoked their access credentials.

Holding

We therefore hold that Nosal, a former employee whose computer access credentials were affirmatively revoked by Korn/Ferry[,] acted "without authorization" in violation of the CFFA when he or his former employee co-conspirators used the login credentials of a current employee to gain access to confidential computer data owned by the former employer and to circumvent Korn/Ferry's revocation of access.

Convictions Under the Economic Espionage Act (EEA)

The jury convicted Nosal of two counts of trade secret theft under the EEA: Count 5 charged "unauthorized downloading, copying and duplicating of trade secrets" in violation of 18 U.S.C. § 1832(a)(2) and (a)(4); and Count 6 charged unauthorized receipt and possession of stolen trade secrets in violation of 18 U.S.C. § 1832(a)(3) and (a)(4). Both counts relate to

Christian's use of FH's login credentials to obtain three source lists of CFOs from Searcher. Count 6 also included a "cut and paste" of a list of executives derived from Searcher. Christian emailed Nosal the resulting lists, which contained candidate names, company positions and phone numbers. Nosal primarily challenges the sufficiency of the evidence on the trade secret counts. . . .

The notion of a trade secret often conjures up magic formulas, like Coca Cola's proprietary formula, technical drawings or scientific data. So it is no surprise that such technically complex cases have been brought under the EEA. But the scope of the EEA . . . by its terms, includes financial and business information. . . .

The source lists in question are classic examples of a trade secret that derives from an amalgam of public and proprietary source data. To be sure, some of the data came from public sources and other data came from internal, confidential sources. But cumulatively, the Searcher database contained a massive confidential compilation of data, the product of years of effort and expense. Each source list was the result of a query run through a propriety algorithm that generates a custom subset of possible candidates, culled from a database of over one million executives. . . .

As a former senior executive at Korn/Ferry, Nosal was deeply familiar with the competitive advantage Searcher provided, and was cognizant of the measures the company took to protect the source lists generated. He signed a confidentiality agreement stating that "information databases and company records are extremely valuable assets of [Korn/Ferry's] business and are accorded the legal protection applicable to a company's trade secrets." The source lists were also marked "Korn/Ferry Proprietary & Confidential." . . . [T]he notice and protective measures taken by Korn/Ferry significantly undermine Nosal's claim he was unaware the source lists were trade secret information.

Dissenting, Reinhardt, Circuit Judge

This case is about password sharing. People frequently share their passwords, notwithstanding the fact that websites and employers have policies prohibiting it. In my view, the CFFA does not make the millions of people who engage in this ubiquitous, useful, and generally harmless conduct into unwitting federal criminals. Whatever other liability, criminal or civil, Nosal may have incurred in his improper attempt to compete with his former employer, he has not violated the CFFA. . . .

Today, . . . the majority . . . loses sight of the anti-hacking purpose of the CFFA, and despite our warning, threatens to criminalize all sorts of innocuous conduct engaged in daily by ordinary citizens. . . .

The majority does not provide, nor do I see, a workable line which separates the consensual password sharing in this case from the consensual password sharing of millions of legitimate account holders, which may also be contrary to the policies of system owners. There simply is no limiting principle in the majority's world of lawful and unlawful password sharing. . . .

Accordingly, I would hold that consensual password sharing is not the kind of "hacking" covered by the CFFA. That is the case whether or not the voluntary password sharing is with a former employee and whether or not the former employee's own password had expired or been terminated. . . .

The majority is wrong to conclude that a person necessarily accesses a computer account "without authorization" if he does so without the permission of the system owner. Take the case of an office worker asking a friend to log onto his email in order to print a

boarding pass in violation of the system owner's access policy; or the case of one spouse asking the other to log into a bank website to pay a bill, in violation of the bank's password sharing prohibition. There are other examples that readily come to mind, such as logging onto a computer on behalf of a colleague who is out of the office, in violation of a corporate computer access policy, to send him a document he needs right away. "Facebook makes it a violation of the terms of service to let anyone log into your account," we noted in [an earlier case], but "it's very common for people to let close friends and relatives check their email or access their online accounts."

Was access in these examples authorized? Most people would say "yes." Although the system owners' policies prohibit password sharing, a legitimate account holder "authorized" the access. Thus, the best reading of "without authorization" in the CFAA is a narrow one: a person accesses an account "without authorization" if he does so without having the permission of either the system owner or a legitimate account holder. . . .

The CFAA is essentially an anti-hacking statute, and Congress intended it as such. Under the preferable construction, the statute would cover only those whom we would . . . think of as hackers: individuals who steal or guess passwords or otherwise force their way into computers without the consent of an authorized user, not persons who are given the right of access by those who themselves possess that right. There is no doubt that a typical hacker accesses an account "without authorization": the hacker gains access without permission—*either* from the system owner or a legitimate account holder. . . . We would not convict a man for breaking and entering if he had been invited in by a house guest, even if the homeowner objected. Neither should we convict a man under the CFAA for accessing a computer account with a shared password with the consent of the password holder. . . .

It is impossible to discern from the majority opinion what principle distinguishes authorization in Nosal's case from one in which a bank has clearly told customers that no one but the customer may access the customer's account, but a husband nevertheless shares his password with his wife to allow her to pay a bill. So long as the wife knows that the bank does not give her permission to access its servers in any manner, she is in the same position as Nosal and his associates. . . .

Even if the majority opinion could be limited solely to employment, the consequences would be equally untoward. Very often password sharing between a current and past employee serves the interest of the employer, even if the current employee is technically forbidden by a corporate policy from sharing his password. For example, if a current Korn/Ferry employee were looking for a source list for a pitch meeting which his former colleague had created before retirement, he might contact him to ask where the file had been saved. The former employee might say "it's too complicated to explain where it is; send me your password and I'll find it for you." When the current employee complied and the former employee located the file, both would become federal criminals under the majority's opinion. I am confident that such innocuous password sharing among current and former employees is more frequent than the improper password sharing at issue here. Both employees and Congress would be quite surprised to find that the innocent conduct is prohibited under CFAA. . . .

Nosal's case illustrates some of the special dangers inherent in criminal laws which are frequently violated in the commercial world, yet seldom enforced. To quote a recent comment by a justice of the Supreme Court with regard to a statute that similarly could be used to punish indiscriminately: "It puts at risk behavior that is common. That is a recipe for giving the Justice Department and prosecutors enormous power over [individuals]."

Questions for Discussion

1. Summarize the facts in *Nosal*.
2. What is the issue in *Nosal*?
3. Explain the court's opinion.
4. Why does Judge Reinhardt dissent from the majority opinion?
5. Explain the reason that the majority of judges disagree with Judge Reinhardt's argument that the decision in *Nosal* will criminalize password sharing. After reading 18 U.S.C. § 1030(a)(4), what is your view?
6. A number of commentators agree with Judge Reinhardt's opinion that the decision in *Nosal* will criminalize password sharing. Should password sharing be considered a crime?

CASES AND COMMENTS

1. **Misuse of Database.** In *United States v. Van Buren*, Sergeant Nathan Van Buren of the Cumming, Georgia, Police Department accepted a bribe from Andrew Albo to run a license check on a woman he had met in a strip club to determine whether she was an undercover agent. Van Buren searched for the license plate number in the Georgia Crime Information Center (GCIC) database, an official government database maintained by the Georgia Bureau of Investigation (GBI) and connected to the National Crime Information Center maintained by the FBI. An assistant deputy director of the GCIC testified at trial that the database is to be used for law enforcement purposes and that officers are trained on the proper and improper uses of the system. Van Buren also admitted to the FBI and GBI that he knew it was "wrong" to run the tag search and that he had run the check in exchange for money. The Eleventh Circuit Court of Appeals held that an individual like Cummings with authority to lawfully access a computer database who misuses the database is in violation of the CFAA by "intentionally . . . exceeding authorized access." Note that the computer fraud crime for which Van Buren was convicted is a misdemeanor unless, as in the case of Van Buren, it was committed for private financial gain, in which case it is a felony. How would you decide this case? What of the concern that activities like "chatting with friends, playing games, shopping or watching sports highlights" on a work computer are routinely prohibited by computer use policies, and "under the broad interpretation of the [computer fraud statute], such minor dalliances would become federal crimes"? What of the concern that this would allow an employer to define when an authorized user who has violated a computer-use policy has committed a criminal offense? U.S. Supreme Court Justice Amy Coney Barrett writing in a 6–3 decision reversed the judgment of the Court of Appeals. Justice Barrett held that the computer fraud statute prohibits obtaining information from "particular areas in the computer—such as files, folders, or databases—to which their computer access does not extend. It does not cover those who, like Van Buren, have improper motives for obtaining information that is otherwise available to them." She noted that extending the statute to "every violation of a computer-use policy" would criminalize "millions" of otherwise law-abiding citizens. Employers commonly require

that employees only use their work computers and electronic devices for work-related purposes. An individual who sends a personal email on a work computer or reads a newspaper article online is in violation of federal law. What of individuals who are engaged in “embellishing on [an] online-dating profile” or “using a pseudonym on Facebook,” both of which violate the sites’ terms of service? Should this conduct be considered a violation of federal criminal law? See *United States v. Van Buren*, 593 U.S. ___ (2021).

2. At Least 46 States and the District of Columbia Have Laws Prohibiting “Revenge Porn.”

Revenge porn involves the posting online of nude or sexually explicit photographs or videos of individuals without their consent. This typically involves a former spouse, girlfriend, or boyfriend who wants to exact revenge by uploading the image to websites, several of which are specifically established to host such images. The victim’s name, address, and links to social media profiles may appear along with the image. The Virginia Code section 18.2-386.2 provides that a person is guilty of a misdemeanor if the person, “with the intent to coerce, harass, or intimidate the depicted person, maliciously disseminates or sells any videographic or still image created by any means whatsoever that depicts another person who is totally nude or in a state of undress so as to expose the genitals, pubic area, buttocks, or female breasts, where such person knows or has reason to know that he is not licensed or authorized to do so.” In 2014, a 28-year-old woman was charged in Virginia with posting the nude image of a 22-year-old woman on Facebook. The defendant allegedly had taken the photo from her former boyfriend’s cell phone without his consent.

3. Ransomware is a malicious software that is employed by hackers to deny users access to their data, typically by encrypting the information with a key known only to the hacker. The release of the data is conditioned on a user’s payment of a ransom to the hacker. The ransom usually is paid in a “cryptocurrency” such as Bitcoin. Hackers have targeted hospitals, businesses, universities, and professional firms across the globe. The most recent attacks have focused on cities including Atlanta, Baltimore, and New Orleans. The total cost of ransomware attacks is predicted to reach \$5 billion per year. The typical payment is between \$80,000 and \$100,000. A number of serious attacks were directed in 2021 against companies including Colonial Pipeline, which disrupted gas supplies along the East Coast of the United States. Colonial paid \$4 million in Bitcoin to resume operations. JBS Foods, one of the biggest meat processing companies in the world, paid a ransom of \$11 million, and the computer manufacturing firm Acer paid a \$50 million ransom. In 2017, California became the first state to declare that the use of ransomware is a stand-alone felony subject to up to four years in prison. At least 29 other states subsequently have adopted laws criminally punishing ransomware attacks, and other states are in the process of adopting similar laws. Previously, ransomware was punished under cybercrime statutes or other criminal statutes. A number of states are considering laws prohibiting businesses and government entities from paying ransoms.

YOU DECIDE 13.4

Lori Drew, 49, created a MySpace account in 2007 under the name of Josh Evans, a fictitious 16-year-old male. “Josh” started corresponding with 13-year-old Megan Meier. Josh told Megan that he recently had moved to a nearby town, and they corresponded for

several weeks. Josh's tone changed at some point during the correspondence, and he wrote in an instant message that "the world would be a much better place without you." Megan responded to Josh that he was the kind of boy that "a girl would kill herself over," and shortly thereafter, on October 16, 2008, Megan committed suicide. Lori was angry over Megan's alleged gossip about her daughter Sarah and knew that Megan suffered from depression and harbored thoughts of suicide. Lori was prosecuted by federal authorities under the CFAA. The jury found that Lori intentionally had violated the terms of service of MySpace and that, as a result, she was guilty of "accessing a computer involved in interstate or foreign communication without authorization or in excess of authorization to obtain information. . ." Is the intentional breach of an internet website's terms of service sufficient to constitute a criminal violation of the CFAA? See *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009).

RECEIVING STOLEN PROPERTY

There was no offense of **receiving stolen property** under the common law. An English court, in 1602, condemned a defendant who knowingly purchased a stolen pig and cow as an "arrant knave" and complained that there was "no separate crime of receiving stolen property."³² In the late 17th century, the English Parliament passed a law providing that an individual who knowingly bought or received stolen property was liable as an accessory after the fact to theft. In 1827, Parliament passed an additional statute declaring that receiving stolen property was a criminal offense. This law was later incorporated into the criminal codes of American states and, today, is punished as a misdemeanor or felony, depending on the value of the property.

The offense of receiving stolen property requires that an individual

- receive property,
- know the property to be stolen, and
- have the intent to permanently deprive the owner of the property.

Why do we punish receiving stolen property as a separate offense? Thieves typically sell stolen property to fences, individuals who earn a living by buying and then selling stolen property. The offense of receiving stolen property is intended to deter fencing. Generally, an individual may not be charged with both stealing and receiving stolen property.

Actus Reus

The *actus reus* of receiving stolen property requires that an individual control the stolen property, however briefly. An individual receiving the stolen items may take either actual possession of the property or constructive possession of the property by arranging for the property to be delivered to a specific location or to another individual.

Receiving stolen property traditionally was limited to goods that were taken and carried away in an act of larceny. The trend is to follow the approach of the Model Penal Code and to

punish the receipt of stolen property, whether taken through larceny, embezzlement, false pretenses, or another illegal method.

Most state statutes on receiving stolen property cover both personal and real property. The Model Penal Code limits the statute to personal property on the grounds that this property is disposed of through fences and that this is not the case with real estate.

The property must actually be stolen. A defendant was acquitted of receiving stolen property in a case in which thieves were arrested in the course of breaking and entering into a railroad car and then cooperated with the police in arranging to “sell” the property to a fence. The Sixth Circuit Federal Court of Appeals ruled that the defendant was not guilty, because the defendant had not purchased “stolen property.”³³

Mens Rea

State statutes typically require the *mens rea* of actual knowledge that the goods are stolen. Other statutes broaden this standard by providing that it is sufficient for an individual to believe that the goods are stolen. A court would likely conclude that a jeweler believed that a valuable watch was stolen that the jeweler inexpensively purchased from a known dealer in stolen merchandise. A third group of statutes applies a recklessness or negligence standard to the owners of junkyards, pawn shops, and other businesses where they neglect to investigate the circumstances under which the seller obtained the property. Consider the case of the owner of an art gallery specializing in global art who regularly buys rare and valuable Asian and African artwork that is thousands of years old and who, in one instance, buys a piece for next to nothing from individuals who wander into the shop. These statutes would hold the buyer guilty of receiving stolen property for failing to investigate how the seller obtained the property.

How can we determine whether an individual knows or honestly believes that property is stolen? Courts generally hold that it is sufficient if a reasonable person would have possessed this awareness. In most cases, this is inferred from the price, the seller, whether the type of property is frequently the subject of theft, the circumstances of the sale, and whether the recipient had purchased stolen merchandise from the same individual in the past.

The recipient of stolen property must also have the *mens rea* to permanently deprive the owner of possession. Defendants do not possess the required intent who believe that they are the actual owners of the property, because there is no intent to deprive another of possession. The required intent is also lacking when the recipient intends to return the property to the rightful owner.

A Utah statute makes it a crime to receive property “knowing that it has been stolen or believing that it probably has been stolen . . . with purpose to deprive the owner thereof.” In *State v. Belt*, Belt met with Illsley in an empty parking lot and purchased three VCRs for a total of \$300. Illsley (the seller) claimed that he had previously purchased the VCRs for \$1,200. He told Belt that “the store name and serial numbers had been cut off.” Belt responded that “I don’t want to hear about the serial number or store names” and stated that the two of them should “just do your business.” Illsley also testified that Belt said to him, “If you were a cop, you would have had me by now anyway. I understand you boost this stuff.” Illsley started to answer, but

Belt cut him off and reportedly said that "I don't want to know what you are doing." Can you explain why a Utah appellate court found that the evidence was sufficient to find that Belt knew that he was purchasing stolen VCRs?³⁴

The required intent to permanently deprive an individual of possession must concur with the receipt of the property. The Model Penal Code, however, provides that the required intent may arise when an individual receives and only later decides to deprive the owner of possession.

Hurston v. State, the next case in the textbook, challenges you to determine whether the defendant satisfied the standard for receiving possession of stolen property.

MODEL PENAL CODE

Section 223.6. Receiving Stolen Property

1. A person is guilty of theft if he purposely receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with purpose to restore it to the owner. "Receiving" means acquiring possession, control or title, or lending on the security of the property.
2. The requisite knowledge or belief is presumed in the case of a dealer who:
 - a. is found in possession or control of property stolen from two or more persons on separate occasions;
 - b. has received stolen property in another transaction within the year preceding the transaction charged; or
 - c. being a dealer in property of the sort received, acquires it for a consideration which he knows is far below its reasonable value.

"Dealer" means a person in the business of buying or selling goods, including a pawnbroker.

Analysis

1. Receiving stolen property is limited to property that can be moved and does not include real estate.
2. There is no requirement that the purchaser know that the property is in fact stolen; it is sufficient that an individual believe that the property probably has been stolen.
3. A defendant must know or believe that the property probably has been stolen. The intent to restore the property to the owner is a defense.
4. The required intent may arise after the property is in the possession of the defendant.
5. Knowledge is assumed under certain circumstances, including the fact that an individual is a "dealer."
6. The receiver is liable regardless of the method employed by the thief, whether larceny, embezzlement, false pretenses, or other form of theft.

FIGURE 13.5 ■ The Legal Equation: Receiving Stolen Property

WAS HURSTON GUILTY OF RECEIVING STOLEN PROPERTY?

HURSTON V. STATE, 414 S.E.2D 303 (GA. CT. APP. 1991)

Opinion by Andrews, J.

Illya Hurston was tried jointly with Demetrious Reese and convicted of theft by receiving stolen property. Hurston appeals from the denial of his motion for new trial.

Issue

[The issue to be decided is whether] there was sufficient evidence for a jury to find Hurston guilty of receiving stolen property.

Facts

[A] silver 1986 Pontiac Fiero belonging to Stella Burns was stolen from a parking lot at Underground Atlanta on June 11, 1989, between 10:35 and 11:05 p.m. Two Rockdale County sheriff's deputies observed a silver Fiero at a convenience store later that night at approximately 1:20 a.m. Hurston's co-defendant, Reese, was driving the car and appellant was slumped in the passenger seat. The deputies became suspicious because of the late hour, the cautious manner in which Reese was walking after exiting the car, and the fact that Hurston appeared to be hiding, and decided to follow the Fiero. When Reese drove away from the store with the deputies following in their marked car, he crossed the centerline of the highway. The deputies, who by this time had ascertained from computer records that the car was stolen, turned on the blue lights and siren of their automobile. Reese refused to stop, drove away from the deputies at a speed in excess of 100 miles per hour and attempted at one point to run the police vehicle into a wall. The deputies pursued the Fiero until Reese lost control and wrecked in a field. Reese ran from the scene and was pursued and apprehended by one deputy. Another officer apprehended Hurston, who had gotten out of the car immediately after the accident and appeared to be ready to run.

At trial, Hurston testified that he spent the day at his former girlfriend's home watching television with her and a friend of hers. Later in the day, the friend called her boyfriend, Reese, whom Hurston testified he had never met, to join them. Hurston testified Reese came to the house and stayed for a while, left for several hours, and then returned and invited Hurston to ride in the Fiero with him to a relative's home. Hurston recalled that he was suspicious about the ownership of the vehicle because Reese, a teenager, seemed too young to own such a nice car, but that in response to his inquiry Reese stated that the car belonged

to his cousin. Hurston testified that after they left the convenience store and Reese saw the deputies in pursuit, he began to speed and admitted to Hurston for the first time that the car was stolen. Hurston's trial testimony differed somewhat from an earlier statement he gave regarding the evening's events.

Burns, the vehicle's owner, testified that the vehicle was driven without keys and that the steering wheel had been damaged, which was consistent with it having been stolen. She testified that various papers, including the car registration and business cards bearing the owner's name and address, had been removed from the glove compartment and were on the floor of the car; that grass, mud, food, drink, and cigarettes were scattered in the car; and that a picture of her daughter was displayed on a visor. Hurston denied noticing the personal items or the damaged steering wheel.

Reasoning

OCGA [Official Code of Georgia Annotated] § 16-8-7 provides: "[a] person commits the offense of theft by receiving stolen property when he receives, disposes of, or retains stolen property which he knows or should know was stolen unless the property is received, disposed of, or retained with intent to restore it to the owner. . . . 'Receiving' means acquiring possession or control. . . ."

"Unexplained possession of recently stolen property, alone, is not sufficient to support a conviction for receiving stolen property, but guilt may be inferred from possession in conjunction with other evidence of knowledge. Guilty knowledge may be inferred from circumstances which would excite suspicion in the mind of an ordinary prudent man." "Possession, as we know it, is the right to exercise power over a corporeal thing. . . ." Furthermore, "[i]f there is any evidence of guilt, it is for the jury to decide whether that evidence, circumstantial though it may be, is sufficient to warrant a conviction." . . .

First, there was sufficient evidence for a jury to find that Hurston knew, or should have known, that the vehicle was stolen. At trial, Hurston admitted that he doubted that the vehicle belonged to Reese. There was evidence from which the jury could reasonably have concluded that Hurston was aware during the two hours that he spent in the small vehicle that it was stolen, in that the vehicle was being driven without keys, the steering wheel was damaged and the interior was disorderly, which was inconsistent both with Reese's ownership of the vehicle and with his explanation that he borrowed it from a relative. Hurston's suspicious behavior at the convenience store and his attempt to flee also indicated that he knew the vehicle was stolen.

There was also evidence from which the jury could conclude that Hurston possessed, controlled or retained the vehicle. Although Hurston was only a passenger in the vehicle, the inquiry does not end here, for in some circumstances, a passenger may possess, control or retain a vehicle for purposes of OCGA § 16-8-7. Here, there was sufficient evidence that Hurston exerted the requisite control over the vehicle in that Reese left Hurston alone in the car with the vehicle running when he went into the convenience store.

Dissenting, Sognier, C.J.

I respectfully dissent, for I find the evidence was insufficient to establish the essential element of "receiving" beyond a reasonable doubt.

"A person commits the offense of theft by receiving stolen property when he receives, disposes of, or retains stolen property which he knows or should know was stolen. . . . 'Receiving' means acquiring possession or control . . . of the property." OCGA § 16-8-7(a).

Here, the record is devoid of evidence that appellant exercised or intended to exercise any dominion or control over the car or that he ever acquired possession of it. The "mere presence" of a defendant in the vicinity of stolen goods "furnishes only a bare suspicion" of guilt and thus is insufficient to establish possession of stolen property. Evidence that a defendant was present as a passenger in a stolen automobile, without more, is insufficient to establish possession or control. I disagree with the majority that the circumstantial evidence that appellant, the automobile passenger, was observed to be "slumped" in the seat while Reese parked the car and entered a store was sufficient to constitute the type of "other incriminating circumstances" that would authorize a rejection of the general principle that "the driver of the [stolen] automobile [is] held *prima facie* in exclusive possession thereof." . . .

The only evidence offered by the State to connect appellant to the stolen car was that he was a passenger in the car several hours after it was stolen.

Questions for Discussion

1. What facts does the court rely on to establish that Hurston knew or should have known that the automobile was stolen? Do these facts establish a criminal intent beyond a reasonable doubt?
2. What facts does the court rely on in finding that Hurston possessed or controlled the automobile? On what basis does the dissent dispute the court's determination?
3. What single fact is crucial in the court's finding of guilt? Are there additional facts that are not in the court's opinion that you would find helpful in determining if Hurston is guilty or innocent?
4. As a judge, how would you rule in this case?

YOU DECIDE 13.5

John L. Clough discovered various items missing from his music club. These items included four amplifier speakers, which were used by bands that played at the club. An employee, Gaylord Burton, worked at the club for several months and disappeared at the same time that the speakers were discovered to be missing. Another employee reportedly had seen Burton taking the speakers on the morning of November 2, 1989. The equipment later was discovered at a pawn shop. An employee of the pawn shop, Anthony Smith, testified that two men had tried to pawn the speakers. Smith refused to accept the speakers without identification. The two men returned later with Olga Lee Sonnier, who presented a driver's license and pawned the speakers for \$225. The four speakers were worth at least \$350. Sonnier appealed her conviction for "theft by receiving." There are three elements of this offense. First, there was a theft by another person. Second, the defendant received the stolen property. Third, the defendant received the stolen property knowing that it was stolen. Was Sonnier in possession of the speakers? Sonnier also claimed that she lacked actual knowledge that the speakers were stolen. The speakers were pawned for a reasonable amount of money, and a reasonable person would have no notion of the monetary value of the speakers. Should the Texas appellate court affirm Sonnier's conviction? See *Sonnier v. State*, 849 S.W.2d 828 (Tex. Crim. App. 1992).

FORGERY AND UTTERING

The law of forgery originated in the punishment of individuals who used or copied the king's seal without authorization. The seal was customarily affixed to documents that bestowed various rights and privileges on individuals, and employing this stamp without authorization was viewed as an attack on royal power and prerogative. The law of forgery was gradually expanded to include private as well as public documents.

Forgery is defined as creating a false legal document or the material modification of an existing legal document with the intent to deceive or to defraud others. The crime of forgery is complete upon the drafting of the document regardless of whether it is actually used to defraud others. **Uttering** is a separate and distinct offense that involves the *actus reus* of circulating or using a forged document.

Forgery and uttering are typically limited to documents that possess "legal significance." This means that the document, if genuine, would carry some legal importance, such as conveying property or authorizing an individual to drive. A falsified document is not a forgery when it merely impacts an individual's reputation or professional advancement, such as a fabricated newspaper account of a political candidate's evasion of military service.

The Model Penal Code extends forgery and uttering to all varieties of documents. This would include the attempt several years ago to sell a book alleged to be Adolf Hitler's diary that, in truth, was a skillfully produced fraud. Fraudulent documents that may be punished as a forgery under state statutes include checks, currency, passports, driver's licenses, deeds, diplomas, tickets, credit cards, immigration visas, and residency and work permits.

There are several elements to establish forgery; each must be proven beyond a reasonable doubt:

- a false document or material modification of an existing document that is
- written with intent to defraud and,
- if genuine, would have legal significance.

The elements of uttering are

- offering a
- forged instrument that is
- known to be false and is
- presented as authentic
- with the intent to defraud or deceive.

Forgery is similar to other property crimes in that the forger is unlawfully obtaining a benefit from another individual. The larger public policy behind criminalizing forgery is to ensure that people are able to rely on the authenticity or truth of documents. You want to be confident that when you buy a car, the title you receive is genuine and that the automobile has not been stolen. Combating the forgery of passports and visas has taken on particular importance in securing the borders of the United States against the entry of terrorists.

Actus Reus

The important point to remember is that forgery is falsely making or materially altering an existing document. This may entail creating a false document or materially (fundamentally) changing an existing document without authorization. A material modification is a change or addition that has legal significance.

A forgery may involve manufacturing a “false identification” for a friend who is too young to drink, creating false passports for individuals seeking to illegally enter the United States, or fabricating tickets to a sold-out rock concert. Forgery may also involve materially or fundamentally altering or modifying an existing document. Stealing a check, signing the name of the owner of the account without authorization, and making the check payable to yourself for \$100 is forgery. In this example, although the check itself is genuine, the details do not reflect the intent of the owner of the check. On the other hand, merely filling in the date on an undated check ordinarily does not constitute a material alteration because this change typically has no legal significance.

In other words, the question in forgery is whether a document is a “false writing.” The document itself may be false, or the material statements in the document may be materially false.

Mens Rea

Forgery requires an intent to defraud; this need not be directed against a specific individual.

Uttering

Uttering is offering a document as genuine that is known to be false with the intent to deceive. This is a different offense from forgery, although the two are often included in a single statute. Merely presenting a forged check to a bank teller for payment knowing that it is inauthentic completes the crime of uttering. The teller need not accept the forged check as genuine.

Simulation

Several states follow the Model Penal Code in providing for the crime of **simulation**. This punishes the creation of false objects with the purpose to defraud, such as antique furniture, paintings, and jewelry. Simulation requires proof of a purpose to defraud or proof that individuals know that they are “facilitating a fraud.”

MODEL PENAL CODE

Section 224.1. Forgery

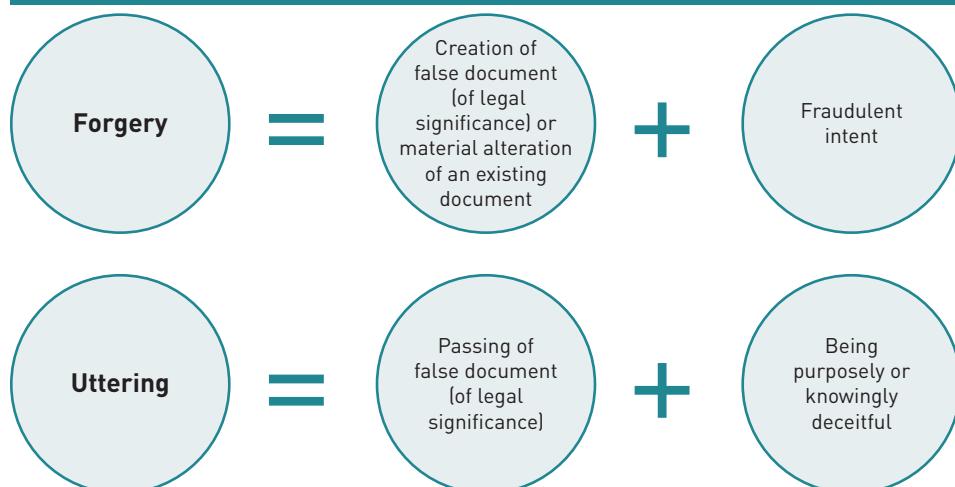
1. A person is guilty of forgery if, with purpose to defraud or injure anyone, or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone, the actor:
 - a. alters any writing of another without his authority; or
 - b. makes, completes, executes, authenticates, issues or transfers any writing so that it purports to be the act of another who did not authorize that act, or to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such original existed; or

- c. utters any writing which he knows to be forged in a manner specified in paragraphs (a) or (b).
 - d. "Writing" includes printing or any other method of recording information, money, coins, tokens, stamps, seals, credit cards, badges, trade-marks, and other symbols of value, right, privilege, or identification.
2. Forgery is a felony of the second degree if the writing is or purports to be part of an issue of money, securities, postage or revenue stamps, or other instruments issued by the government, or part of an issue of stock, bonds or other instruments representing interests in or claims against any property or enterprise. Forgery is a felony of the third degree if the writing is or purports to be a will, deed, contract, release, commercial instrument, or other document evidencing, creating, transferring, altering, terminating, or otherwise affecting legal relations. Otherwise forgery is a misdemeanor.

Analysis

1. This section applies to "any writing" and to "any other method of recording information, money, coins, credit cards and trade-marks and other symbols." Forgery is not limited to documents having legal significance. As a result, documents such as medical prescriptions, diplomas, and trademarks are encompassed within this provision. The section is not limited to economic harm and may include circulating a false document that injures an individual's reputation.
2. Serious forgeries that have the most widespread and serious impact are second-degree felonies, carrying a maximum penalty of 10 years. Other forgeries are punishable as felonies of a third degree, carrying a maximum of 5 years. Forgeries of documents that do not have legal significance, such as diplomas, are misdemeanors.
3. Counterfeiting of currency is included in this section rather than being made a separate offense.
4. Section 1(c) punishes uttering.

FIGURE 13.6 ■ The Legal Equation: Forgery and Uttering



WAS THE DEFENDANT GUILTY OF FORGERY WHEN HE SIGNED HIS NAME TO THE CORPORATE CHECK?

PEOPLE V. CUNNINGHAM, 813 N.E.2D 891 (N.Y. 2004)

Opinion by Rosenblatt, J.

Defendant was convicted of forgery in the second degree for signing his own name to a corporate check, in excess of his authority. . . .

Facts

As the owner of a logging operation, Peter Morat planned to open a sawmill business in Madison County, under the name Herkimer Precut, Inc. He engaged defendant as a consultant to arrange for financing and related activities. In exchange for his services, defendant was to receive a 20% interest in the new venture. As the project progressed, Morat turned over various financial aspects of the business to defendant, entrusting him with control over the corporate checkbook. Because defendant was responsible for paying bills, Morat would sometimes provide defendant with blank, signed checks. At no time, however, did Morat authorize defendant to sign any checks.

After Morat discovered that corporate bills were not being paid, he examined the company's bank records and found unauthorized payments, some on checks he had signed in blank and others bearing a signature he did not recognize. Morat alleged that by improperly signing or issuing checks, defendant stole thousands of dollars from Herkimer Precut. . . .

[The court was found to lack jurisdiction over 19 of the charges.] A single count survived the trial: the forgery conviction before us, stemming from a \$195.50 Herkimer Precut check defendant wrote to Nancy Herrick for work performed by Northeast Woodcraft. The defendant signed his own name to that check, telling Herrick that he owned Herkimer Precut. Herrick was acquainted with defendant personally and professionally and knew that he was affiliated with Herkimer Precut. She did not know, however, that Morat owned the company and that defendant lacked authority to sign checks. The check was for defendant's personal expenses. . . .

Reasoning

In *People v. Levitan*, 399 N.E.2d 1199 (N.Y. 1980), . . . Levitan signed her name to deeds purporting to convey real property she did not own. In reversing her forgery conviction, we noted that "no pretense was ever made that the signatory was anyone other than defendant." We also observed that "under our present Penal Law, as under prior statutes and the common law, a distinction must be drawn between an instrument which is falsely made, altered or completed, and an instrument which contains misrepresentations not relevant to the identity of the maker or drawer of the instrument."

Although the Legislature has updated the statute to cover credit cards and certain other technological advances, it has not abrogated *Levitan's* classic approach to forgery. In defining forgery, Penal Law § 170.00(4) provides, in pertinent part, that "a person falsely makes a written instrument when he makes or draws a complete written instrument . . . which purports to be an *authentic creation of its ostensible maker or drawer*, but which is not such . . . because the ostensible maker or drawer . . . did not authorize the making or drawing thereof."

Issue

The terms “authentic creation” and “ostensible maker” are pivotal. In most prosecutions, the forger, acting without authority, signs someone else’s name. Thus, in a typical case, the forger, John Doe, wrongfully signs Richard Roe’s name, (mis)leading the payee into believing that the check is the authentic creation of Richard Roe, its ostensible maker. Roe, of course, has not granted Doe any such authority and, in most such instances, has never even met Doe. In this simple formulation, the ostensible maker (Roe) and the actual maker (Doe) are two different people. If, however, the ostensible maker and the actual maker are one and the same, there can be no forgery under the statute. . . .

The People contend that Herkimer Precut is the ostensible maker because its name appears on the check as owner of the account. Further, they argue that because defendant lacked authority to sign company checks, the check in question was not the authentic creation of the company, and a forgery is made out. Defendant counters that the check was an authentic creation of its ostensible maker and that because he signed his own name, he cannot be guilty of forgery: as the ostensible maker, he did not pretend to be anyone other than himself—the actual maker. Moreover, defendant argues that even if Herkimer Precut was the “ostensible maker” of the check, defendant’s relationship with Herkimer Precut was sufficient to make the check the “authentic creation” of the company. We have observed that “when an individual signs a name to an instrument and acknowledges it as his own, that person is the ‘ostensible maker.’” . . .

Forgery is a crime because of the need to protect signatures and make negotiable instruments commercially feasible. In its common law roots, forgery had little to do with abstract questions of authority. At Queen’s Bench, Chief Justice Cockburn wrote that forgery “by universal acceptance . . . is understood to mean . . . the making or altering of a writing so as to make the writing or alteration purport to be the act of some other person, which it is not.” As one treatise explains, “it is not forgery for a person to sign his own name to an instrument, and falsely and fraudulently represent that he has authority to bind another by doing so” and “the signer is guilty of false pretenses only.” Although statutes vary, most jurisdictions in this country have tended to follow [this] approach to forgery. . . .

[As Blackstone wrote, forgery is] “the fraudulent making or alteration of a writing to the prejudice of another man’s right.”

Holding

We conclude that authority and authenticity are not the same thing. Defendant did not commit forgery merely by exceeding the scope of authority delegated by the corporation. Our interpretation leaves no gap in the Penal Law. Although embezzlers who use their own names to sign checks beyond their authority are not guilty of forgery in New York, their conduct would ordinarily fall within our larceny statutes.

Moreover, a contrary ruling would create vexing problems in adjudging forgery cases. If, for example, a corporate officer authorized to sign corporate checks does so for a personal purchase, is that forgery? Would an officer authorized to sign checks up to \$20,000 who signs a check for \$25,000 be guilty of forgery? While the prosecution argues that we should read our statute to justify convictions in those instances, it has not identified any New York decision interpreting the statute so expansively.

Questions for Discussion

1. Why does the prosecutor allege that Cunningham is guilty of forgery? What is his defense?
2. Explain the reason that the court does not find that Cunningham is guilty of forgery.
3. How would you rule?
4. Could the defendant be successfully prosecuted under a different criminal charge?
5. Should the law be changed to recognize Cunningham's acts as forgery? What facts would the prosecution have to demonstrate under existing law to convict Cunningham of forgery? What facts could convict him of uttering?
6. Do you agree with the decision in this case?

YOU DECIDE 13.6

James McGovern owed \$1,800 to John Scull. McGovern purchased \$2,400 in traveler's checks from Citibank for purposes of repaying Scull. The checks may be redeemed for money at most banks or stores when signed by the individual to whom the check is issued. Scull and McGovern entered into a corrupt arrangement designed to reimburse Scull. Scull practiced McGovern's signature and took McGovern's driver's license and the traveler's checks and proceeded to cash the checks at two banks and collected \$2,400. McGovern then reported to the police that the checks had been stolen from his car, and in accordance with the highly advertised policy concerning traveler's checks, McGovern was provided with replacement checks in the amount of \$2,400 by Citibank. Did Scull's impersonation of McGovern constitute forgery? See *United States v. McGovern*, 661 F.2d 27 (3rd Cir. 1981).

ROBBERY

Robbery is typically described as aggravated larceny. You should think of robbery as larceny from an individual with the use of violence or intimidation. Professors Perkins and Boyce observe that in ancient law, the thief who stole quietly and secretly was viewed as deserving harsher punishment than the robber who openly employed violence. The common law reversed this point of view and categorized robbery as among the most serious of felonies, which should be treated as a separate offense deserving of harsher punishment than larceny.³⁵

Robbery is the trespassory taking and carrying away of the personal property of another with intent to steal. Robbery is distinguished from larceny by additional requirements:

- The personal property must be taken from the victim's person or presence.
- The taking of the personal property must be achieved by violence or intimidation.

The California Criminal Code defines robbery as the “felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” In this chapter, robbery is treated as a property crime, although the Federal Bureau of Investigation categorizes robbery as a violent crime against the person.³⁶

Actus Reus

The *property must be taken from the person or presence of the victim*. Property is considered to be on the person of the victim if it is in the victim’s hands or pockets or is attached to the victim’s body (an earring) or clothing (a key chain).

The requirement that an object must be taken from the “presence of the victim” is much more difficult to apply. The rule is that the property must be within the proximity and control of the victim. What does this mean? The prosecution is required to demonstrate that had the victim not been subjected to violence or intimidation, the victim could have prevented the taking of the property.

In one frequently cited case, the defendants forced the manager of a drugstore to open a safe at gunpoint. The defendants then locked the manager in an adjoining room and removed the money from the safe. An Illinois court found that the money was under the victim’s personal control and protection and that he could have prevented the theft had he not been subjected to an armed threat.³⁷ Professor LaFave illustrates the requirement that property be taken from the presence of the victim by noting that it would not be robbery to immobilize a property owner at one location while a confederate takes the owner’s property from a location several miles away, because the owner could not have prevented the theft.³⁸

The *property must be taken by violence or intimidation*. The Florida statute provides that robbery involves a taking through “the use of force, violence, assault, or putting in fear.”³⁹ Keep in mind that it is the use of violence or intimidation that distinguishes robbery from larceny. The line between robbery and larceny, however, is not always clear. In general, any degree of force is sufficient for robbery. You are walking down the street loosely carrying your backpack when a thief snatches the backpack out of your grasp. You are so surprised that you fail to resist. Is this robbery? The consensus is that the incident is not a robbery. This would qualify as robbery in the event that you were pushed or shoved or you struggled to hold on to the backpack. It is also robbery where force is applied to remove an item attached to your clothing or body, such as an earring or necklace. Does it make sense to distinguish between robbery and larceny based on whether the perpetrator employed a small amount of force?

The Model Penal Code attempts to avoid this type of technical analysis and provides that robbery requires “serious bodily injury.” This approach has been rejected by most states on the grounds that it excludes street crimes in which victims are pushed to the ground or receive minor injuries. Before we leave this topic, we should note that it is a robbery when an assailant steals your personal items by rendering you helpless through liquor or drugs.

Property may also be seized as a result of intimidation or the fear of immediate infliction of violence. The threat of immediate harm must place the victim in fear, meaning in apprehension or in anticipation of injury.

The threat may be directed against members of the victim's family or relatives, and some courts have extended this to anyone present as well as to the destruction of the home. The threat must also be shown to have caused the victim to hand over the property.

Again, a threat may be "implied." This might involve a large and imposing panhandler who follows an elderly pedestrian down a dark and isolated street and angrily and repeatedly demands that the pedestrian "give up the money in your pocket." The threat must place the victim in apprehension of harm and cause the victim to hand over the property. The jury is required to find that the victim was actually frightened into handing over the property. Some courts require that a reasonable person would have acted in a similar fashion.

Mens Rea

The assailant must possess the intent to permanently deprive an individual of property. Defendants may rely on the familiar defense that they intended only to borrow the property or were playing a practical joke. Courts are divided over whether it is a defense that the thieves acted under a "claim of right," that the thieves acted under an honest belief that the victim owed them money, or that the defendants reasonably believed that they owned the property. Some courts hold that even a claim of right does not justify the resort to force or intimidation to reclaim property.

Concurrence

The traditional view is that the intent to steal and the application of force or intimidation must coincide. The violence or intimidation must be employed for the purpose of the taking. This means that the threat or application of force must occur at the time of the taking. An individual does not commit a robbery who seizes property and then employs force or intimidation. A pick-pocket who removes a victim's wallet and resorts to force only in response to the victim's accusation of theft is not guilty of robbery.

A number of states have followed the Model Penal Code in adopting language that provides that force or intimidation may occur "in the course of committing a theft." This is interpreted to mean that force or threat occurs "in an attempt to commit theft or in flight after the attempt or commission." The commentary explains that a thief's use of force against individuals in an effort to escape indicates that the thief would have employed force "to effect the theft had the need arisen." Even under this more liberal approach, an assailant who knocks the victim unconscious and then forms an intent to steal would not be guilty of robbery.⁴⁰ The Florida robbery statute defines robbery to include force or intimidation "in the course of the taking" of money or other property. This includes force or threats "prior to, contemporaneous with, or subsequent to the taking of the property . . . if it and the act of taking constitute a continuous series of acts or events."⁴¹

Grading Robbery

At common law, the theft of property that terrorized the victim resulted in the death penalty. Today, robbery statutes generally distinguish between simple and aggravated robbery. This is

based on the degree of dangerousness caused by the defendant's act and the fear and apprehension experienced by the victim, rather than the value of the property. The factors that aggravate robbery include the following:

- the robber was armed with a dangerous or deadly weapon or warned the victim that the robber possessed a firearm;
- the robber used a dangerous instrumentality, such as a knife, hammer, axe, or aggressive animal;
- the robber inflicted serious bodily injury; and
- the robber carried out the theft with an accomplice.

You might question whether we need the crime of robbery. Is there any justification for the crime of robbery other than historical tradition? Why not simplify matters and merely charge a defendant with larceny along with assault and battery? Should robbery be considered a crime against the person or a crime against property? The next case, *Rockmore v. State*, raises the issue of whether the application or threat of violence requirement in robbery should include force used to flee the crime scene.

MODEL PENAL CODE

Section 222.1. Robbery

1. A person is guilty of robbery if, in the course of committing a theft, he:
 - a. inflicts serious bodily injury upon another; or
 - b. threatens another with or purposely puts him in fear of immediate serious bodily injury; or
 - c. commits or threatens immediately to commit any felony of the first or second degree.An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission.
2. Robbery is a felony of the second degree, except that it is a felony of the first degree if in the course of committing the theft the actor attempts to kill anyone, or purposely inflicts or attempts to inflict serious bodily harm.

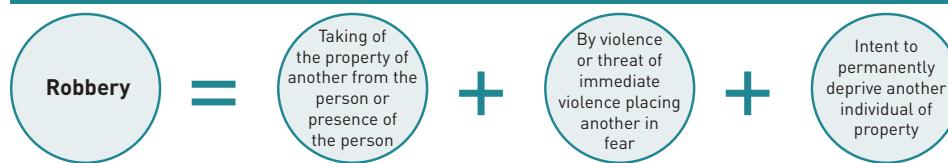
Analysis

1. The infliction or threat of harm is limited to "serious bodily injury." The inclusion of the commission or threat to commit a felony of the first or second degree as an element of robbery is intended to encompass the threat or commission of serious injury to an individual other than the victim as well as the threat to destroy or the destruction of property.
2. The harm may be inflicted or threatened "in the course of committing the theft." This includes violence or the threat of violence to obtain or retain property and to prevent pursuit or to escape.

3. The commentary explains that the same punishment is imposed for both robbery and attempted robbery. It is immaterial whether the assailant actually succeeds in the taking of property. This reflects the view that the essence of robbery is the placing of individuals in danger rather than the deprivation of property.
4. The infliction or threat of harm must be immediate.
5. The taking is not required to be from the person or in the presence of the victim. An offender might threaten the victim in order to extract ransom from an individual who is not present.
6. Robbery is generally punished as a felony of the second degree, subject to 10 years' imprisonment. Life imprisonment is viewed as an extreme penalty that is reserved for violent offenders.

In reading *Rockmore v. State*, pay attention to how the Florida robbery statute modified the common law of robbery.

FIGURE 13.7 ■ The Legal Equation: Robbery



DID ROCKMORE USE FORCE IN THE COURSE OF TAKING THE CLOTHING?

ROCKMORE V. STATE, 114 SO. 3D 958 (FLA. DIST. CT. APP. 2012)

Opinion by Torpy, J.

Issue

Appellant challenges his conviction for robbery with a firearm, asserting that the trial court should have granted his motion for judgment of acquittal because he "abandoned" the stolen merchandise before he threatened a pursuing store employee with a firearm. . . .

Facts

The robbery conviction arose from Appellant's theft of clothing from a Wal-Mart store. A store employee confronted Appellant as he attempted to exit the store. Appellant fled with the merchandise, and the store employee pursued him. During the pursuit, the store

employee grabbed Appellant's jacket, causing him to drop some or all of the merchandise. The employee continued to pursue Appellant until Appellant reached his get-away car. Before entering the car, Appellant displayed a firearm that had been concealed in his waistband and warned the employee to stop the pursuit. At that point, the employee retreated, and Appellant escaped.

Appellant was apprehended by police and charged with robbery. He admitted stealing the merchandise, but denied that he had committed robbery because he claimed that he had not possessed a firearm. He asserted as an alternative defense to the robbery charge that even if he had displayed a firearm, he had abandoned the merchandise before the display. He argued that this defense entitled him to a judgment of acquittal or, at the very least, a jury instruction that he should be found not guilty if he "abandoned" the stolen property before he threatened force. We conclude that this case was a proper one for the jury to determine whether the threatened violence was used "in the course of taking," as defined in the robbery statute. . . .

Reasoning

We start our analysis with *Royal v. State*, 490 So.2d 44 (Fla. 1986), because *Royal* sparked a statutory amendment to the robbery statute. In *Royal*, when the defendants were confronted by a store detective, they pushed him, fled from the store, and attempted to escape in a vehicle with the detective and other store employees in hot pursuit. After an employee attempted to grab the ignition key to prevent the defendants from escaping, one of the defendants punched him. Then, the other defendant pointed a gun at the employees, causing them to retreat. Our high court held that the defendants could not be convicted of robbery because the acts of pushing the detective, punching an employee, and displaying the firearm in a threatening manner did not constitute a taking "by force," because the violence occurred "after the taking."

In response to *Royal*, in 1987 the Legislature amended section 812.13(1), Florida Statutes, to change the definition of robbery from a taking by force (or threat) to a taking where force (or threatened force) was used "in the course of the taking." The amendment added a definition for the phrase "in the course of the taking," to include acts that are either "prior to, contemporaneous with, or subsequent to the taking," provided that the acts and the taking "constitute a continuous series of acts or events." The statute retained a definition of "in the course of committing the robbery" for purposes of applying statutory enhancements. The revised statute provides in material part as follows:

- (1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another, with intent to either permanently or temporarily deprive the person or the owner of the money or other property, when in the course of the taking there is the use of force, violence, assault, or putting in fear. . . .
- (2) (a) An act shall be deemed "in the course of committing the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt or commission.
 - (b) An act shall be deemed "in the course of the taking" if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events.

The intent of this change was to expand the common law crime of robbery to include, among other circumstances, where the force is used after the taking, provided it is used during a "continuous series of acts or events." Clearly, in a case like *Royal*, the Legislature intended the use of force or threatened force during flight to fall within the statutory

definition of robbery. *Messina v. State*, 728 So.2d 818 (Fla. Dist. Ct. App. 1999), is analogous to *Royal*. There, the victim chased the defendant thief through a parking lot and sat on the hood of his car to prevent his escape with her stolen purse. The defendant started and stopped his car abruptly and then made a sharp turn, causing the victim to fall off the car and suffer injuries. . . . [The court concluded that “a robbery can be proven by evidence that force was used to elude the victim or to retain the victim’s property once it has been taken.”] *Thomas v. State*, 36 So.3d 853 (Fla. Dist. Ct. App. 2010), also held that an attempt to knock the victim off the car used to escape was within a continuous series of events and satisfied the requirements of robbery.] In *Royal*, *Messina*, and *Thomas*, the thieves retained possession of the stolen merchandise throughout the subsequent pursuit, arguably a fact that distinguishes this case.

On the other side of the coin are cases like *Baker*, 540 So.2d 847, and *Simmons v. State*, 551 So.2d 607 (Fla. Dist. Ct. App. 1989), wherein the courts held, as a matter of law, that the chain of events was broken by “abandonment” of the stolen property, precluding robbery convictions. In *Baker*, upon seeing store security personnel approaching, the defendant put down the stolen video recorder inside the shopping mall and began to flee. During the ensuing chase, he used force to evade capture. In affirming the dismissal of the robbery charge, our sister court concluded that, because the defendant did not use force as part of a “continuous series of acts or events’ involved with taking the property,” the charge was properly dismissed. . . . [T]he *Baker* court noted that “[t]he defendant would have to have been in continuous possession of the property during the escape and the subsequent flight or resisting of arrest in order for the act to fall within the amended statute.”

Similarly, our Court in *Simmons* addressed a situation where the defendant discarded the merchandise before using force to resist capture. There, store employees confronted the defendant outside a department store after observing her remove merchandise without paying for it. They escorted her back inside the store, where she removed the merchandise and threw it to the floor. When the employees instructed her to accompany them to the security office, the defendant forcibly resisted. This Court, citing *Baker*, reversed the robbery conviction because “the property [had been] abandoned before any force was employed.”

Appellant urges that this case is like *Baker* and *Simmons*, and unlike *Royal* and its progeny, because he dropped the merchandise before he made the alleged threat. Even assuming for the sake of discussion that dropping merchandise when grabbed by a pursuing merchant is the same as “abandonment,” . . . a factual dispute at trial precluded a judgment of acquittal here. Although Appellant testified that he had discarded all of the stolen merchandise before he allegedly brandished the firearm, the employee testified that he had not. . . .

Appellant’s argument . . . presents the question of whether the “abandonment” of stolen goods by a thief who is being pursued is a sufficient break in the “continuous series of events” such that a robbery conviction cannot be sustained. Appellant contends that *Baker* and *Simmons* apply anytime an escaping thief discards or drops the ill-gotten-gains before employing force or threatened force to evade capture by someone in pursuit. We think *Baker* and *Simmons* can be distinguished.

Simmons can be distinguished because the defendant there had been apprehended and escorted by employees back inside the store. This was an intervening event that interrupted the defendant’s volitional course, thereby negating the continuity requirement of the statute. *Baker* is also distinguishable. There, the property was discarded in the shopping mall before the ensuing flight began. Arguably, the “taking” ended before the next act of flight began. Thus, the series of acts was not continuous because the defendant ceased the crime of theft before he began the flight. The observation in *Baker*—that a fleeing thief must be

in continuous possession of the stolen item(s) until the point of violence to constitute robbery—was unnecessary to the holding and in contravention of the plain language of the statute. Under this construction, if a fleeing thief drops the merchandise to retrieve a gun and shoot the pursuer, it is not robbery. We specifically reject *Baker* because it is repugnant with the plain and unambiguous language of the statute and legislative history outlining the reason for the statutory amendment.

Under the statutory definition of “in the course of taking,” there is no question that the violent act (or threat) necessary for a robbery conviction may occur subsequent to the taking. The more difficult question is when do the subsequent violent act and the taking “constitute a continuous series of acts or events.” A “series of acts or events” is simply a sequence of related acts or events. Section 812.13(3) in no way suggests that these sequential acts or events must be in furtherance of an effort to retain the stolen property, or, as the *Baker* court put it, “involved with taking property.” Thus, flight upon detection, for example, is an “act” that is sequential to and related to the act of taking. Discarding the stolen goods would also be such an act. The further qualifier that these series of acts be “continuous” means only that the sequential acts are not interrupted.

Applying this statute to the facts in *Royal* illustrates what was intended. There the series of related acts were the taking, the push, the flight, the struggle at the car, the punch, the threat with the gun, and the escape by vehicle. The possession of merchandise during these acts was not a separate and distinct “act,” any more than wearing a hat while walking is an act distinct from the act of walking. They were continuous acts because they happened one after the other without any significant temporal void. They were all related to the taking because the taking and the flight were part of the same episode. The escape is as much a part of the crime as is the taking itself. Whether the act of violence was motivated by a desire to retain the goods, avoid capture, or both, is of no moment. ([A] robbery conviction [is] proper even if taking and subsequent murder [are] not motivated by desire to steal property but to escape apprehension). The emphasis should be on whether the entire chain of acts is a part of a continuous series of events. That is all the statute requires.

Holding

A conviction for the crime of robbery requires proof that money or other property was taken from the victim and that the offender used force or violence “in the course of the taking.” The temporal relationship between the use of force and the taking of the property is addressed in section 812.13(3)(b), which provides that “an act shall be deemed ‘in the course of the taking’ if it occurs either prior to, contemporaneous with, or subsequent to the taking of the property and if it and the act of taking constitute a continuous series of acts or events.” As this definition reveals, the statute is not limited to situations in which the defendant has used force at the precise time the property is taken.

The rationale for this view is that the force used in the flight after the taking of property is no different from that used to effect the taking. As explained in the comments to the Model Penal Code, “the thief’s willingness to use force against those who would restrain him in flight suggests that he would have employed force to effect the theft had the need arisen.” Florida courts have held that the crime of robbery can be proven by evidence that the defendant used force against the victim after the taking has been completed. The common feature of these cases is that in each case, there was no break in the chain of events between the taking and the use of force.

Questions for Discussion

1. Summarize the facts in *Rockmore*.
2. How did the judicial decision in *Royal v. State* lead the Florida legislature to amend the law of robbery? How did the amendment enacted by the legislature to section 812.13 change the law of robbery in Florida?
3. What is the definition of “in the course of a taking” under section 812.13?
4. How does the court distinguish *Rockmore* and *Messina* from *Baker* and *Simmons*?
5. Should it matter that the force in *Rockmore* was used to escape rather than to take the merchandise?
6. Why do you agree or disagree with the decision in *Rockmore*?

CASES AND COMMENTS

Compare the decision in *Rockmore* to the decision of the Washington Supreme Court. In *People v. Johnson*, Richard Johnson walked into Wal-Mart, placed a \$179 television-VCR combo into a shopping cart, removed the security tag, and pushed the cart out the front door. Two security guards observed and followed him into the parking lot, and confronted him. Johnson abandoned the shopping cart and began to run away. Johnson suddenly turned back toward the guards. One of the guards grabbed Johnson’s arm. Johnson punched the guard in the nose and fled. The guards were unable to apprehend Johnson, and he was blocked by a police squad car and arrested.

The Washington Supreme Court held that Johnson was trying to escape when he punched the security guard in the nose. “[T]he transactional view of robbery includes force used during an escape. But . . . the force must relate to the taking or retention of the property, either as force used directly in the taking or retention or as force used to prevent or overcome resistance ‘to the taking.’ Johnson was not attempting to retain the property when he punched the guard but was attempting to escape after abandoning it.” See *People v. Johnson*, 121 P.2d 91 (Wash. 2005).

YOU DECIDE 13.7

Ronald Williams and the victim were drinking wine with Frank Morrow and an unidentified male. The victim passed out, and Williams rolled the victim onto his side and removed his wallet from his pants pocket. Williams appealed his robbery convictions. The Pennsylvania appellate court was asked to determine whether robbery may be committed against a voluntarily unconscious victim. Did Williams take the victim’s wallet through the use of force, however slight? See *Commonwealth v. Williams*, 550 A.2d 579 (Pa. Super. Ct. 1988).

CARJACKING

Carjacking is a newly recognized form of property crime that is punished under both federal and state statutes. California is typical in defining carjacking as a form of robbery, and it punishes the taking of a motor vehicle “in the possession of another, from his or her person or immediate presence . . . against his or her will.” This must be accomplished by “force or fear.” The perpetrator is not required to intend to permanently steal the automobile. The California statute is satisfied by an intent to either “permanently or temporarily deprive the victim of possession of the car.”⁴²

Several state statutes provide that force must be directed against an occupant of the car. The New Jersey statute requires that while committing the unlawful taking of the automobile, there must be the infliction or use of force against an occupant or person in possession or control of the motor vehicle.⁴³ Virginia stipulates that the taking be carried out by violence to the person, by assault, or by otherwise putting a person in fear of serious bodily injury.⁴⁴

The trend is to find a defendant guilty of carjacking when an automobile is seized and not to require that the perpetrator move the automobile. A carjacking may be directed against an occupant of the car or against an individual outside the car who is in possession of the keys and is sufficiently close to control the vehicle.

The punishment for carjacking is based on the degree of harm and apprehension caused by the offense. New Jersey punishes carjacking by between 10 and 20 years in prison and a fine of up to \$200,000. The Florida statute punishes carjacking with life imprisonment when committed with a firearm or another deadly weapon.⁴⁵

EXTORTION

The common law misdemeanor of **extortion** punished the unlawful collection of money by a government official. William Blackstone defined extortion as “an abuse of public justice, which consists in any officer’s unlawful taking, by color of his office, from any man, any money or thing of value that is not due to him, or more than is due, or before it is due.”⁴⁶

The law of extortion was gradually expanded to punish threats by private individuals as well as public officials. The elements of the statutory crime of extortion are as follows:

- the taking of property from another by
- a present threat of future violence or threat to circulate secret, embarrassing, or harmful information; threat of criminal charges; threat to take or withhold official government action; or threat to inflict economic harm and other harms listed in the state statute, with
- a specific intent to deprive a lawful possessor of money or property.

Note that while robbery involves a threat of immediate violence, extortion entails a threat of future violence or other harms. The threat to disclose secret or embarrassing information is

commonly referred to as the crime of **blackmail**. Robbery must be committed in the presence of the victim, while extortionate threats may be communicated over the phone or in a letter.

The majority of state statutes provide that the crime of extortion is complete when the threat is made. The prosecution must demonstrate that the victim believed that there was a definite threat and believed that this threat would be carried out. A Michigan statute punishes “any person who shall . . . maliciously threaten to accuse another of any crime . . . or . . . maliciously threaten any injury to . . . [a] person or property . . . with intent to thereby . . . extort money or any pecuniary advantage . . . or . . . to compel the person to do . . . any act against his will.”⁴⁷

Other statutes require the handing over of money, property, or valuable items in response to the threat. The prosecution must establish a causal relationship between the threat and the conveying of the money or property. The “handing over” requirement is illustrated by the language of the New York statute, which provides that individuals are guilty of extortion when they compel others to deliver property to themselves “or to a third person by means of instill[ing] . . . fear.”⁴⁸

The object of extortion may be money, property, or “anything of value,” including labor or services. The Iowa Supreme Court ruled that a college student who attempted to extort a date from a female acquaintance had attempted to extort “something of value for himself,” and that value should be broadly interpreted to include “relative worth, utility, or importance” rather than “monetary worth.”⁴⁹

Harrington, a divorce lawyer, represented a female in a divorce action who had been the victim of severe physical abuse by her husband. Harrington arranged for a female to seduce the husband, and while the two were in a romantic embrace in bed, Harrington entered and took photographs. Harrington subsequently threatened to disclose the husband’s adultery unless he paid his wife a divorce settlement of \$175,000. The Vermont Supreme Court ruled that Harrington “acted maliciously and without just cause . . . with the intent to extort a substantial fee . . . to [Harrington’s] personal advantage.”⁵⁰

Several commentators contrast extortion with *bribery*. Extortion involves taking money, property, or anything of value from another through threat of violence or harm. In bribery, money or a valuable benefit is offered or provided to a public official in return for an official’s action or inaction. This act may involve a legislator voting in favor of or against a law, a judge acquitting or convicting a defendant, or a clerk giving priority to an applicant for a driver’s license or passport; the inaction entails a failure to act, such as a building inspector overlooking safety violations in a music club. There must be an intent to corruptly influence an official in the conduct of the official’s office. Individuals are held guilty of bribery for offering as well as accepting a bribe. We will discuss bribery in greater detail in Chapter 14 on white-collar crime.

CRIME IN THE NEWS

Hollywood actresses Felicity Huffman and Lori Loughlin along with a number of high-profile business leaders in 2019 were criminally charged in a college admissions bribery scandal.

College consultant William Singer told parents that although their children could take their chances being admitted to selective colleges through the “front door,” in return for a

significant financial fee he could guarantee their admissions through a “side door.” In some instances, the parents paid the money into a foundation established by Singer, which allowed them to take a charitable tax deduction. Singer allegedly collected over \$25 million from parents between 2011 and 2018 who wanted to get their children into selective universities. Singer’s scheme, in effect, resulted in the fraudulent representation of applicants’ credentials and cheated the universities of the honest services of their employee.

Singer pled guilty to federal racketeering charges and to other crimes and cooperated with prosecutors.

Huffman pled guilty to conspiracy to commit mail fraud and honest services fraud by paying Singer \$15,000 to arrange for her daughter to be certified with a learning disability and to take the SAT with a proctor. Singer, in turn, arranged for the proctor to correct her answers after she completed the SAT. This resulted in a score of 1420, roughly 400 points higher than her daughter received on the preliminary SAT. Huffman in pleading guilty stated that she was “ashamed” and apologized to students who work hard to get into college and to their parents who “make tremendous sacrifices” to support their children and do so “honestly.” Her desire to assist her daughter was “no excuse to break the law.” The evidence indicated that her daughter’s answers were corrected after she completed the test and that she was unaware of the scheme. In other instances, Singer arranged for individuals to take the SAT or ACT on behalf of the applicants. Huffman subsequently was sentenced to 14 days in federal prison.

Loughlin initially pled not guilty to the accusation that she conspired with Singer to present her daughter as a coxswain on a crew team although she had never rowed in her life. A bribe was paid through Singer to the senior associate athletic director at the University of Southern California (USC) who labeled Loughlin’s daughter as a potential recruit to the crew team. Loughlin sent additional money to Singer’s foundation once her daughter’s admission to USC was ensured. A similar scheme was followed to assist her younger daughter’s admission to USC. Loughlin paid a total of \$500,000 for her daughters to be admitted to the university.

Loughlin later entered into a plea agreement and served nearly two months in prison, and her husband Mossimo Giannulli served five months in prison. Loughlin also paid a \$150,000 fine and is subject to two years of supervised release and is required to perform 100 hours of community service while Giannulli paid a \$250,000 fine, is subject to two years of supervised release, and is required to perform 250 hours of community service.

Singer used a portion of the money paid by parents to pay athletic coaches in minor sports to advocate for the admission of his clients’ children. Singer arranged for the students he was assisting to falsify their involvement and achievement in minor sports, which typically have limited scholarships and depend on the ability of coaches to recruit nonscholarship students as “walk-ons” in sports like gymnastics, sailing, water polo, rugby, or volleyball with the promise of admission to the school. These sports do not generally attract national attention or large crowds or donor support, and admissions officers have limited ability to determine whether students are accurately representing their athletic achievements. As a result, they generally do not question a coach’s request to admit a student to the school. Singer went so far as to alter the images of applicants and staged photographs of applicants allegedly involved in athletic activity.

A number of coaches were charged and convicted. Michael Center, the former tennis coach at the University of Texas at Austin, pled guilty to receiving \$60,000 from Singer and also accepting a contribution of \$40,000 to the tennis program in return for recommending the admission of a student as a tennis recruit who, in fact, did not play tennis. Gordon Ernst, tennis coach at Georgetown, received roughly \$7 million that was falsely labeled as “consulting fees” from Singer. One young woman whom Singer was instrumental in being

admitted to Georgetown falsely claimed to be ranked among the top 50 junior women tennis players in the United States.

Over 50 individuals were charged in the admissions scandal. Coaches and administrators at USC received as much as \$1.3 million in bribes. Other schools at which coaches or administrators received money included the University of Texas at Austin, Wake Forest, Georgetown, Yale, and UCLA.

A pharmaceutical billionaire on mainland China paid Singer \$6.5 million to get his daughter into Stanford. Singer provided a falsified list of the young woman's accomplishments in sailing and paid \$500,000 to the sailing program. Another Chinese family paid Singer \$1.2 million to get their daughter into Yale. Both young women were expelled from school after the scheme was made public.

The parents who were criminally convicted for involvement in the admissions scandal with several exceptions are professionally successful and financially advantaged. This includes senior partners in prestigious law firms, Silicon Valley investors, powerful real estate developers, and the head of a powerful Wall Street hedge fund. The schools for the most part have rescinded the application of students involved in the admissions scandal or have expelled the students from the school, and some have gone so far as to vacate the credits earned by the students.

The parents who paid money to Singer could not be confident that their children would be admitted to these selective universities based on merit. Stanford, for example, admits slightly more than 4% of students out of over 47,000 applicants. USC received 66,000 applicants for admission in 2018 and admitted roughly 11% of applicants.

What was the social harm that was caused by the college admissions bribery scandal? Should these parents have been criminally prosecuted? What of their sons and daughters?

CHAPTER SUMMARY

The common law initially punished only the violent taking of property. This soon proved insufficient. Individuals accumulated farm animals, crops, and consumer goods that were easily stolen by stealth and under the cover of darkness. Larceny developed to protect individuals against the wrongful taking and carrying away of their personal property by individuals harboring the intent to deprive the owner of possession. The economic development of society resulted in clear shortcomings in the coverage of the law that led to the development of embezzlement, false pretenses, and receiving stolen property.

Embezzlement was introduced by the English Parliament to fill a gap in the law of larceny. Embezzlement involves the fraudulent conversion of the property of another by an individual who is in lawful possession of the property. Some statutes extend embezzlement to real (real estate) as well as personal property. The English Parliament also introduced false pretenses to punish individuals who obtain title and possession of the property of another by a false representation of a present or past material fact with the intent to defraud that causes individuals to pass title to their property.

A number of states have consolidated larceny, embezzlement, and false pretenses into a single theft statute. These statutes provide a uniform grading of offenses and, in some states, serve to

prevent a defendant from being acquitted based on the prosecutor's failure to satisfy the technical factual requirements of the property crime with which the defendant is charged. The grading of larceny, embezzlement, and false pretenses is generally based on the monetary value of the property. Modern theft statutes also provide protection to all varieties of personal property and do not distinguish between tangible (physical objects) and intangible (legal documents) personal property. As noted, various states also extend protection to real property (real estate).

Two new forms of criminal conduct provide a challenge to the law. Identity theft is the fastest-growing crime and involves the stealing of individuals' personal information and the use of this information to make purchases or to borrow money. States have responded to computer theft and cybercrime by passing statutes punishing a range of computer offenses, including the unauthorized access to computers, computer networks, and programs and causing computers to malfunction.

Forgery involves the creation of a false legal document or the material modification of an existing legal document with the intent to deceive or to defraud others. The crime of forgery is complete upon the drafting and modification of the document with the intent to defraud others, regardless of whether the document is actually used to commit a fraud. Uttering is the separate offense of circulating or using a forged document.

Robbery is a crime that threatens both the property and the safety and security of the individual. It involves the taking of personal property from the victim's person or presence through violence or intimidation. The grading of robbery depends on the harm inflicted or threatened. The use of a firearm is subject to particularly severe punishment. Carjacking is an increasingly prevalent offense that involves the use of force to unlawfully gain control and possession over a motor vehicle. Extortion is the taking of property from another through the threat of future violence; the threat to circulate secret, embarrassing, or harmful information; the threat to bring criminal charges; the threat to take or withhold official government action; or the threat of economic harm.

All the offenses in this chapter involve the seizure of the property of another individual through unlawful taking, fraud, or force.

CHAPTER REVIEW QUESTIONS

1. Provide an example of how the common law of larceny developed in response to the growth of business and commerce.
2. Distinguish between the requirements of larceny, embezzlement, and false pretenses.
3. Why did various states adopt consolidated theft statutes?
4. Describe the harm to society caused by identity theft. What is the reason that states found it necessary to adopt new criminal statutes punishing identity theft?
5. Why have states passed legislation to address computer crimes rather than using existing statutes punishing crimes against property? What types of acts are prohibited under these statutes?

6. What is a prosecutor required to prove beyond a reasonable doubt in order to establish the crime of receiving stolen property? How does the punishment of this offense deter theft?
7. What is the difference between forgery and uttering?
8. How does robbery differ from larceny?
9. Distinguish robbery from extortion.
10. What are the elements of carjacking?
11. How do courts interpret the “taking and carrying away” element of larceny? Why did the common law require a “carrying away” of property?
12. Discuss the use or threat of harm requirement in regard to robbery.
13. What are some of the factors that aggravate a property offense?
14. Write an essay briefly summarizing property crimes. Address whether we still require the various property offenses that were developed by the common law.

LEGAL TERMINOLOGY

blackmail	identity theft
carjacking	larceny
computer crime	larceny by trick
custody	petit larceny
embezzlement	receiving stolen property
extortion	robbery
false pretenses	simulation
forgery	theft statute
grand larceny	uttering

TEST YOUR KNOWLEDGE ANSWERS

1. True.
2. False.
3. False.
4. False.
5. True.
6. False.
7. False.

14

WHITE-COLLAR CRIME

TEST YOUR KNOWLEDGE: TRUE/FALSE

1. White-collar crime is defined as any criminal offense committed by a wealthy individual.
2. Air and water pollution are regulated by civil law and are not subject to criminal prosecution.
3. The Occupational Safety and Health Act focuses on workers' exposure to illness, disease, and injury and does not address death on the job.
4. Any purchase of a stock in the company in which an individual is employed constitutes the crime of insider trading.
5. The federal government has no jurisdiction over fraudulent business practices.
6. Traveling across state lines to commit criminal offenses that ordinarily are considered state crimes like arson, murder, and bribery provides a basis for the federal jurisdiction over the crime.
7. It is unlawful for a health care provider to charge federal insurance for unnecessary medical procedures.
8. There is no law prohibiting a bank from accepting deposits that are known to be the proceeds of unlawful narcotics trafficking.
9. It is not a crime for several corporations to agree to charge the same price for an item so as to prevent price competition that will limit their profits.
10. There is no difference between the bribery of a public official and graft.

Check your answers at the end of the chapter on page 755.

Did Reverend Davis Engage in Money Laundering?

Reverend Davis became the preacher at the 15th Street Baptist Church in the mid-1980s. Shortly thereafter he began to sell drugs, and by mid-1987 was actively selling crack from two houses. . . . Davis deposited some of the cash he collected from the houses in bank accounts maintained in the name of the 15th Street Baptist Church Development Corporation . . . and the 15th Street Baptist Church . . . and at Illini Federal, a local savings and loan. . . .

Davis could write checks on these accounts. Some of these checks were made out to cash, which Davis diverted to his personal use. Others were made out to local vendors who provided services such as beepers and mobile telephones. Still others were made out to the landlord who owned the Swansea, Illinois, residence where Davis lived. Davis also purchased numerous cars, spending over \$79,000 on a variety of vehicles for personal and church use. (*United States v. Jackson*, 935 F.2d 832 [7th Cir. 1991])

INTRODUCTION

In 1949, sociologist Edwin H. Sutherland published his pioneering study, *White Collar Crime*. This volume called attention to the largely overlooked criminal behavior of business managers, executives, and professional groups, which Sutherland labeled **white-collar crime**. Sutherland defined white-collar crime as an offense committed by “person[s] of respectability and high social status in the course of [their] occupation.” This definition stresses the social background of offenders and focuses on nonviolent offenses committed in the course of employment. Sutherland’s central thesis is that theories that explain crime based on poverty, low social class, and lack of education fail to account for “crimes in the suites.” The focus on the poor and disenfranchised diverts our attention from the fact that the financial cost of white-collar crime is several times greater than the economic consequences of common crimes. A second point raised by Sutherland is that despite the social harm caused by the crimes of the powerful, these offenses are typically punished by fines and less severe penalties than the offenses committed by average individuals.¹

The U.S. Justice Department’s definition of white-collar crime focuses on the nature of the criminal activity as well as on the job of the offender. This definition also does not limit white-collar crime to employment-related offenses. White-collar crime is defined as

- illegal acts that employ deceit and concealment rather than the application of force
- to obtain money, property, or service;
- to avoid the payment or loss of money; or
- to secure a business or professional advantage.

White-collar criminals occupy positions of responsibility and trust in government, industry, the professions, and civil organizations.

A third approach defines white-collar crime in terms of the type of criminal activity involved. This has the advantage of drawing attention to the fact that tax and consumer fraud and other offenses characteristic of white-collar crime are committed by individuals of various socioeconomic backgrounds.

You might want to review our previous discussions of corporate criminality. In previous chapters, we discussed the vicarious and strict liability of business owners for regulatory (social welfare) offenses (Chapter 5) and considered the merits of holding corporations as well as individual executives liable for homicide (Chapter 10). You also should keep in mind that many of the property offenses we reviewed (Chapter 13) often are committed by corporate criminals in the course of carrying out fraudulent schemes. This includes larceny, false pretenses, embezzlement, extortion, and bribery.

The focus of the present chapter differs from our previous discussions in that most white-collar crime prosecutions are brought by the U.S. government rather than by state and local officials. You may recall that we discussed the division between federal and state powers in Chapter 1. In this chapter, we primarily examine the federal statutes that most frequently are used to combat white-collar crime, which include the following:

- *Environmental Crimes.* Offenses harming and polluting the environment.
- *Occupational Health and Safety.* Injury and harm to workers.
- *Securities Fraud.* Manipulation of stocks and bonds.
- *Mail and Wire Fraud.* The use of the mail and telephone to commit a fraud.
- *The Travel Act.* Committing certain offenses through the use of interstate travel or the mail.
- *Health Fraud.* Obtaining reimbursement or payment for unwarranted and undelivered medical treatments.
- *Money Laundering.* Transactions involving money derived from illegal activities.
- *Antitrust Violations.* Interference with the competitive marketplace.
- *Public Corruption.* Betrayals of the public trust by government officials.

White-collar crime offenses are typically committed in the regular course of business in an effort to make or save money. These offenses generally involve a betrayal of the trust that we place in business and government. Let me caution that this chapter does not cover the entire field of white-collar crime. Some areas, such as tax evasion and accounting fraud, are not discussed.

Despite the fact that white-collar crime is one of the most active areas of federal prosecution, textbooks generally do not devote significant attention to the subject. This is partially based on the belief that white-collar crime is not a distinct category of crime. It is argued that there is little difference between the theft of money by a corporate executive and the theft of money

by a waitress or the theft of tools by a construction worker. As you read this chapter, consider whether the concept of white-collar crime is useful. Should we pay special attention to “crimes in the suites”? Do you believe that the government should devote additional resources to the prosecution and punishment of corporate misconduct? Another question concerns the appropriate form of punishment for white-collar offenders. Should respectable business executives be punished like any other criminals? We begin the chapter with environmental crimes to illustrate the harm that can result from white-collar crime.

ENVIRONMENTAL CRIMES

At times, the drive for corporate profit may lead business executives to disregard their legal obligation to protect the natural environment. There are considerable costs involved in environmental safety and cleanup that can absorb a significant percentage of corporate revenues. The Federal Bureau of Investigation (FBI) notes that **environmental crimes** threaten the health and natural resources of the United States and that such crimes range from air and water pollution to the illegal transportation and disposal of hazardous waste.

Americans were exposed to the potential danger that illegal business practices pose to the environment when a public health emergency was declared at Love Canal in Niagara Falls, New York. In 1978, a local paper reported that in 1953, Hooker Electrochemical Company had buried more than 21,000 tons of toxic waste on land that the company and city government knew was now the site of a housing development and school. Studies revealed that women living nearby experienced an excessive rate of miscarriages and that children suffered high rates of birth defects and disorders of the nervous system. The state and federal government ultimately evacuated the area at a cost of over \$42 million, and the area would not be reclaimed for housing until 1990. A second well-known case in Woburn, Massachusetts, in 1979, involved the pollution of the water supply by industrial waste. The industrial firms responsible for the pollution ultimately agreed to a cleanup that cost more than \$70 million.

In 1980, Pennsylvania authorities discovered that Hudson Oil Refining Corporation of New Jersey had been dumping waste down an old mine shaft. The waste accumulated and, in July 1979, began pouring out of the mine tunnel into the Susquehanna River. Millions of gallons of toxic waste linked to cancer and birth defects formed an oil slick that threatened the water supply of Danville, Pennsylvania. The company was fined \$750,000, and the president of Hudson Oil, the first corporate official imprisoned for illegal environmental dumping in American history, was sentenced to one year in prison. In the mid-1980s, Pennsylvania convicted a corporate executive of illegally dumping 10,000 drums of waste in a Scranton, Pennsylvania, landfill.

In 1989, Rockwell International, a company that had managed the Rocky Flats nuclear weapons plant since 1975, pled guilty to 10 federal counts and paid \$18.5 million in fines stemming from its mismanagement of the 6,500-acre site 15 miles northwest of Denver, Colorado. The plant was described as being littered with over 12.9 metric tons of dangerous plutonium, asbestos, lead, and other toxic chemicals.

On March 24, 1989, the oil tanker *Exxon Valdez* ran aground in Alaska, spilling 11 million gallons of oil into Prince William Sound and polluting roughly 1,300 miles of Alaska shoreline. Exxon agreed to pay a \$150 million criminal fine. In 2008, the U.S. Supreme Court reduced the civil monetary judgment imposed on Exxon by a jury. The court did affirm the jury's judgment that Exxon was responsible for the actions of the ship's captain, finding that the jury could have reasonably concluded that Exxon "knowingly allowed a relapsed alcoholic repeatedly to pilot a vessel filled with millions of gallons of oil" and that "it was only a matter of time before a crash or spill . . . occurred."

Today, the increased concern with environmental crimes has led the federal and various state governments to establish special prosecution units. The national dedication to combating environmental crime is illustrated by a recent federal case in which Department of Justice prosecutors obtained the conviction of two individuals for violating the Clean Air Act and the Toxic Substances Control Act. This resulted in the longest federal jail sentences for environmental crimes in history. Alexander Salvagno received 25 years in prison and was ordered to forfeit more than \$2 million in illegal proceeds and to provide more than \$23 million in restitution to the victims. His father, Raul Salvagno, was sentenced to 19 years in prison and was required to forfeit close to \$2 million in illegal proceeds and to pay more than \$22 million in restitution. The two falsely represented to clients that they had completely removed dangerous toxic asbestos from homes and schools, and they directed their young workers to enter into asbestos "hot zones" without adequate protection, exposing more than 500 of their employees to the risk of cancer.

In 2012, BP agreed to plead guilty to 14 criminal counts and to pay \$4.5 billion in fines stemming from the explosion of the Deepwater Horizon oil rig, which resulted in the death of seven workers and created a significant oil spill in the Gulf of Mexico. One of the two rig supervisors pled guilty to a misdemeanor violation of the Clean Water Act, and a BP engineer who deleted text and voice messages pled guilty to damaging a computer.

The State of Michigan in 2016 filed criminal charges against 15 state and city officials and employees alleged to be responsible for the tainted water in Flint, Michigan, which exposed a significant number of young children to toxic levels of lead. Seven low-level employees pled guilty. Other high-ranking government officials were charged with involuntary manslaughter for the death of 12 individuals from Legionnaires' disease. The charges against these officials later were dismissed because of a "flawed investigation," and nine officials subsequently were reindicted following a new and expanded investigation.² Former governor Rick Snyder was charged with two counts of willful neglect of duty, each punishable by one year in prison and a \$1,000 fine. Two individuals were charged with multiple counts of involuntary manslaughter, and one official was charged with felony extortion.³

The FBI reports that at any given time, there are roughly 450 environmental criminal cases pending, roughly half of which involve violations of the Clean Water Act. The FBI's investigative priorities are protecting workers against hazardous wastes and pollutants, preventing large-scale environmental damage that threatens entire communities, pursuing organized crime interests that illegally dump solid waste, and monitoring businesses with a history of damaging the environment. The FBI notes that a single instance of dumping can poison a river and cost

the public millions of dollars in cleanup costs. In Tampa, Florida, Durex Industries repeatedly disregarded warnings to safely dispose of hazardous materials used in the manufacture of aluminum cans. In 1993, two 9-year-old boys playing in a Dumpster died when they were overcome by fumes from materials that Durex illegally discarded. The company was ordered to pay a \$1.5 million fine, and several Durex officials were criminally convicted.

Most prosecutions for environmental crimes are undertaken by the federal government. Criminal provisions and penalties are typically incorporated into civil statutes regulating the environment. Investigations in this area, for the most part, are carried out by the Environmental Protection Agency (EPA), which refers matters to the Department of Justice for criminal prosecution. In addition to the FBI and EPA, environmental investigations are initiated by the Interior Department through the Fish and Wildlife Service and Bureau of Land Management. The Coast Guard conducts investigations of pollution from ships, and the Forest Service investigates violations of timber regulations.⁴

The central environmental laws include the following:

- *Rivers and Harbors Appropriation Act (1899)*. Imposes criminal penalties for improper discharge of refuse (foreign substances and pollutants) into navigable or tributary waters of the United States.
- *Federal Water Pollution Control Act (1972)*. Imposes criminal penalties for the discharge of certain pollutants beyond an authorized limit into navigable waterways and a prohibition on unauthorized dredging, the filling of wetlands, and the failure to clean up oil and other hazardous substances.
- *Resource Conservation and Recovery Act (1976)*. Punishes knowingly storing, making use of, or disposing of hazardous wastes without a permit. Severe penalties are imposed for placing individuals in danger.
- *Clean Air Act (1990)*. Imposes criminal penalties for the knowing violation of emission standards and other related requirements.
- *Safe Drinking Water Act (1974)*. Prohibits contamination of the public water system.
- *Toxic Substances Control Act (1976)*. Imposes criminal penalties for the failure to follow standards for use of toxic chemicals in manufacturing and industry.
- *Federal Insecticide, Fungicide, and Rodenticide Act (1996)*. Imposes criminal penalties for the failure to follow standards for the manufacture, registration, transportation, and sale of toxic pesticides.

The *mens rea* for these statutes is generally knowingly committing the prohibited act. A defendant is not required to have knowledge that the act is contrary to a federal statute or that the act poses a health hazard.⁵

Brandon L. Garrett finds that roughly 25% of white-collar crime prosecutions between 2001 and 2012 involved environmental crimes.⁶

OCCUPATIONAL HEALTH AND SAFETY

In 1970, Congress responded to the increasingly high number of job-related deaths and injuries by passing the **Occupational Safety and Health Act** (OSHA) and establishing an agency within the Department of Labor, also known as OSHA, to enforce the act. The act declared that workplace injuries and deaths were resulting in lost production and wages and in preventable medical expenses and disability compensation payments. The act also stated that every working person should be guaranteed safe and healthful working conditions.⁷

OSHA primarily relies on the civil process and financial penalties to ensure compliance. The original OSHA statute provided that a willful violation of the law that resulted in the death of an employee is a criminal misdemeanor carrying a fine of not more than \$10,000 or a prison sentence of up to six months, or both. A second conviction resulted in a fine of not more than \$20,000 or a prison sentence of up to a year, or both. False statements in any document submitted or required to be maintained under the act may also result in a fine of not more than \$10,000 or imprisonment for not more than six months, or both.⁸

Fines for the death of a worker under OSHA were increased by the Sentencing Reform Act of 1984 to as much as \$250,000 for an individual, and up to \$5 million for an organization. The federal government, to impose criminal liability for the death of a worker, must establish that (1) the defendant is an employer (legal entity or corporate officer) engaged in a business affecting commerce; (2) the employer violated a “standard, prescribed under OSHA”; (3) the violation was willful or knowing or committed with intentional disregard or plain indifference; and (4) the violation caused the death of an employee.⁹

OSHA violations are prosecuted by the Department of Justice. OSHA also may refer violations for prosecution by state authorities and, in recent years, to the EPA.

According to the Bureau of Labor Statistics (BLS), in 2018 there were over 2.8 million worker injuries and fatalities. The number of fatalities and injuries has remained stable in the past few years at 2.8 per 100 full-time workers and has been on the decline in the past 15 years. The BLS’s Survey of Occupational Injuries and Illnesses provides a list of the occupations with the most workplace nonfatal injuries, which also tend to be the same occupations with the most job-related illnesses. Health care was the occupational category with the greatest number of injuries and illnesses with almost 545,000 workplace injuries and 32,700 workplace illnesses. This was followed by retail, manufacturing, and accommodation and food service. Twenty-two states had a rate of nonfatal workplace injuries and illnesses that was significantly above the national average.

Although nonfatal workplace injuries have been on the decline, the number of fatal workplace injuries has been on the rise.¹⁰ There were 5,250 fatal work injuries recorded in the United States in 2018, according to the BLS, a 2 percent increase from the 5,147 workplace fatalities in 2017. This translates into 3.5 fatalities per 100,000 full-time workers. The occupations with the highest rate of fatalities were agriculture, forestry, fishing, and hunting with 23.4 fatalities per 100,000 full-time workers. This was followed by transportation and warehousing and construction. Construction traditionally has been a cause for concern, and OSHA reports that construction accounted for roughly 20% of workplace fatalities, one third of which resulted

from falls. OSHA lists the “fatal four” causes of construction fatalities as falls, striking by an object, electrocution, and being caught between objects. The states with the highest incident rates of job-related fatalities per 100,000 full-time workers were Wyoming (11.5), Alaska (9.9), and North Dakota (9.6). There were 453 workplace homicides.¹¹

OSHA has issued guidance to various industries on work-related standards to protect workers against COVID-19. There have been a significant number of infections and fatalities among workers in retail sales, construction, health care, law enforcement, transportation, and food processing plants. OSHA under the Trump administration suspended the requirement that industries keep detailed records of infections because of the difficulty of attributing these infections to a workplace and because of a decision to encourage employers to focus their energy on measures to protect workers rather than on compiling reports.¹²

President Joseph Biden directed OSHA to draft rules mandating that companies with more than 100 workers require workers to be vaccinated or to submit to weekly testing. Companies also are expected to offer employees paid time off to get vaccinated. This order will affect an estimated 80 million workers. A number of major companies already required vaccination. President Biden also is requiring vaccinations for federal government workers and contractors and for 17 million health care workers in facilities that receive federal Medicare and Medicaid funding.¹³

Between 2006 and 2013, OSHA referred over 85 cases for criminal prosecution. One comprehensive study examined data between 1982 and 2002 and found that corporations generally have not been criminally prosecuted either by the federal government or by the roughly 26 states with their own forms of OSHA. OSHA and state agencies initiated 1,798 workplace death investigations and sent a total of 196 cases to federal or state authorities for prosecution. This, in turn, led to 104 prosecutions, 81 convictions, and 16 jail sentences totaling 30 years.¹⁴ The OSHA Defense Report in 2016 found that since OSHA was established in 1971, over 400,000 workers have died on the job, fewer than 80 total OSHA criminal cases have been prosecuted, and only approximately a dozen have resulted in criminal convictions.¹⁵

An example of an OSHA investigation that worked relatively effectively involved James J. McCullagh Roofing Inc. in Jenkintown, Pennsylvania. McCullagh Roofing was cited for 10 safety violations following an investigation of a fatal June 2013 accident in which a worker fell 45 feet while performing roofing repairs on a church in Philadelphia. Three willful violations against the company were based on a lack of fall protection for employees performing roofing work.

James J. McCullagh, the owner of the company, was found to have misled OSHA investigators when he claimed that his employees had been wearing safety harnesses tied off to an anchor point, and he also was found to have directed other employees to falsely state that they had fall protection, including safety harnesses, on the day of the fall. The roofing company was fined over \$70,000. McCullagh pled guilty in federal courts to four counts of making false statements, one count of obstruction of justice, and one count of willfully violating an OSHA regulation causing death to an employee and was sentenced to 10 months in prison.

Individuals found guilty of OSHA violations may be prosecuted in state rather than in federal court. In 2019, Kevin Otto, the owner of Atlantic Drain Service, was found guilty by a Massachusetts court of manslaughter stemming from the death of two employees in 2016,

when the trench in which they were working collapsed and filled with water from a fire hydrant supply line. OSHA fined the company roughly \$1.48 million based on 18 willful, repeat serious and other serious violations of workplace safety.¹⁶

In 1992, in a widely discussed North Carolina case, a fire in a poultry plant, which was not equipped with either a fire alarm or a sprinkler system, resulted in the death of 25 employees and injury to 36 workers. The owner pled guilty to 25 counts of involuntary manslaughter and was sentenced to 20 years in prison. Another most important homicide case involved Film Recovery Systems, an Illinois firm that extracted silver from used X-ray plates. Stefan Golab died after ingesting poisonous cyanide fumes while working at a plant operated by Film Recovery and its sister corporation, Metallic Marketing. The air inside the plant was found to be foul, breathing was difficult and painful, and the ventilation was inadequate. The plant workers were never informed that they were working with cyanide or of the danger of breathing cyanide gas. They were provided with neither safety instructions nor protective clothing. OSHA subsequently cited the firm for 17 separate safety violations. The homicide convictions against executives and the firms were reversed on appeal based on a technicality. The case nonetheless established that individuals as well as corporations will be held criminally liable for disregarding worker safety.¹⁷ In another case, *People v. Pymm*, OSHA fined Pymm Thermometer Corporation in New York for failing to protect workers against mercury poisoning.¹⁸

Several executives of Massey Energy Company pled guilty to various charges resulting from the 2010 explosion at Upper Big Branch Mine in West Virginia that killed 29 miners in the worst U.S. mine disaster in the past 40 years. Massey paid \$209 million in restitution and in civil and in criminal fines as a result of the company's misconduct. Don Blankenship, the CEO of Massey Energy at the time of the mine explosion, was convicted in 2015 of conspiring to willfully violate safety standards. In another case, the former owner of the Peanut Corporation of America, Stewart Parnell, was sentenced to 28 years in prison for knowingly shipping salmonella-tainted peanut butter, which was linked to nine deaths and 714 illnesses in 2009.¹⁹

SECURITIES FRAUD

Stock market fraud emerged as a subject of intense public interest when it was announced, in June 2002, that domestic diva Martha Stewart was the subject of a criminal investigation for lying to investigators about the sale of stock.

On December 27, 2001, Stewart sold 3,928 shares of stock in the biotech company ImClone, one day before the Food and Drug Administration (FDA) announced that it would not approve the company's new cancer drug, Erbitux. Stewart made roughly \$228,000 by selling the stock. Following the FDA announcement, ImClone's stock rapidly fell in value; had Stewart waited to sell, she would have lost an estimated \$45,000. It later was revealed that Stewart lied to federal authorities when she denied having been informed by her stockbroker, Peter Bacanovic, and his assistant, Douglas Faneuil, that the head of ImClone, Sam Waksal, was selling his family's shares at a profit of \$7.3 million after learning of the test results.

Stewart and Bacanovic were each sentenced to five months in prison and five months of home detention as a result of their convictions for lying to investigators. Waksal was sentenced

to seven years and three months in prison and was ordered to pay more than \$4 million in fines and taxes stemming from a variety of criminal offenses, including insider trading. Faneuil, in return for cooperating with authorities, was fined \$2,000. Following Stewart's release from prison, she was confined to home detention on her \$16 million estate while being permitted to receive her \$900,000 salary and leave her home for up to 48 hours a week to work or run errands. Stewart reportedly devoted herself to running her company, Martha Stewart Living Omnimedia Inc.; writing a magazine column; and preparing for two television shows.

Critics contended that Stewart had been targeted because she was a woman and that the government had wasted valuable resources prosecuting her for the minor offense of lying to authorities about the fact that she had relied on inside information concerning the test results on ImClone's cancer drug. Sixty Wall Street traders were convicted of insider trading between 2009 and 2012. Why does the law punish individuals for buying or selling stocks based on information that is not available to the public at large?

Insider Trading

The stock market rather than banks is increasingly where Americans deposit and look to grow their savings. The average individual has twice as much money in the stock market as in banks. As a result, the federal government has become increasingly concerned with ensuring that the stock market functions in a fair fashion and has aggressively brought criminal charges against individuals for stock market fraud.

A corporation that wants to raise money to build new plants, hire workers, or manufacture innovative products typically sells stocks to the public. Individuals purchase stock in hopes that as corporate profits rise, the stock will increase in value, and they eventually will be able to sell it at a substantial profit. This investment in stocks is an important source of money for businesses and provides individuals with the opportunity to invest their money and to save for a house or retirement. Corporate executives and corporate boards of directors possess a **fiduciary relationship** (a high duty of care) to safeguard and to protect the investments of stockholders.

The federal Securities and Exchange Commission (SEC) is charged with ensuring that corporate officials comply with the requirements of the Securities Exchange Act of 1934 in the offering and selling of stocks. The act, for instance, requires corporations to provide accurate information on their economic performance in order to enable the public to make informed investment decisions. The SEC typically seeks civil law financial penalties against corporations that violate the law and refers allegations of fraud to the Department of Justice for prosecution. In 2002, Congress passed the **Sarbanes-Oxley Act**. This is a corporate criminal fraud statute that requires the heads of corporations to certify that their firms' financial reports are accurate. A violation of this act is punishable by up to 25 years in prison.²⁰

In the past decade, the Department of Justice has focused its white-collar crime investigations on **insider trading** in violation of section 10(b) and Rule 10b-5 of the 1934 act. The enforcement of these provisions is intended to ensure that the stock market functions in a fair and open fashion.

Let us return to the ImClone example. Imagine that you are an executive in ImClone and are informed that the company has invented a cure for cancer that has been approved by the

federal government. You know that once the information is made public, everyone will be looking to buy ImClone stock and that this will mean that the price of the stock will increase. You tell your relatives the good news and ask them to buy the stock in their name before the announcement and then to sell the stock and to divide the profits with you. When the information is announced, you and your grateful family find that you have made a substantial profit. You believe that this is a just reward for your dedication to the company. The government unfortunately indicts you (the tipper) and your relatives (the tippees) for insider trading. Why is this illegal? Because most people would not put their money in the stock market if a small number of people exploited information that was not available to the public at large to make a profit. This would reduce the money available to businesses and would harm the economy.

Several business law textbooks illustrate insider trading by *Diamond v. Oreamuno*. In this case, several executives of Management Assistance Inc., a computer firm, sold 56,500 shares of company stock for \$28 a share at a time when they were aware that the firm's profits were rapidly falling. Then, they publicly announced the company's poor economic performance, and the stock declined to \$11 a share. The defendants, by selling the stock prior to their announcement, made \$800,000 more than they would have earned had they waited to sell the stock. The New York court ruled that "there can be no justification for permitting officers and directors . . . to retain . . . profits which . . . they derived solely from exploiting information gained by virtue of their inside position as corporate officials."²¹

There are two theories of insider trading, both of which prohibit the use of information that is not available to the public to buy or sell a stock. Both theories impose criminal liability on **tipplers** (individuals who transmit information) and **tippees** (individuals who receive the information). The **disclose or abstain doctrine** states that corporate officials must publicly reveal information to the public relating to the economic condition of a corporation before they buy or sell the company's stock. The **misappropriation doctrine** as we shall see in our discussion of *United States v. Carpenter*, expands the law beyond individuals who work for a corporation and criminally punishes all individuals who take and use inside corporate information that is in the possession of their employer. An example is the U.S. Supreme Court case of *United States v. O'Hagan*, in which a lawyer was convicted of using information that his law firm obtained from a corporate client to make a profit of \$4.3 million.²²

Between 2009 and 2012, the SEC filed 168 insider trading cases, more than in any other three-year period in the agency's history. These cases included roughly 400 individuals and organizations whose unlawful activities involved roughly \$600 million.

Insider trading is difficult to establish. Investigators must look at who purchases or sells stock and determine whether these individuals relied on inside information in purchasing or selling the securities. The prosecution also must prove a fraudulent intent. In other words, the government must establish that a defendant intentionally purchased or sold the stock knowing that the transaction was in violation of the law. What type of facts would you use to establish a case of insider trading by a corporate executive?

Insider trading is one example of securities fraud. **Pump and dump** involves spreading false information about a company to drive up the stock price. The individuals behind the scheme then sell the shares that they inexpensively purchased for a significant profit. In 2002, 17-year-old Cole Bartiromo was sentenced to 33 months in prison for using the internet to spread false

information about various companies in which he had invested. As a result of his scheme, Bartiromo made \$91,000 in profit when he sold the securities.

United States v. Carpenter is an interesting case involving a prosecution for insider trading. R. Foster Winans was a *Wall Street Journal* reporter and one of the writers of “Heard on the Street,” a widely read and influential column in the *Journal*. Winans entered into a conspiracy to commit securities fraud with two stockbrokers at Kidder, Peabody & Co., Kenneth P. Felis and Peter Brant. Winans delivered through his assistant David Carpenter securities-related information that was about to be published in the “Heard” columns to Felis and Brant. Based on this advance information, the two brokers, in anticipation that Winans’s column would raise or lower stock prices, purchased and sold securities that were about to be discussed in the column. The net profits from the scheme over the course of a year approached \$690,000.

Winans and Carpenter were aware that the *Wall Street Journal* considered all news material learned by employees during the course of their employment to be confidential. They breached their responsibility to the *Journal* and together with Felis and Brant relied on the timing and content of this stolen information to make profitable investments. The Second Circuit Court of Appeals explained that

[o]bviously, one may gain a competitive advantage in the marketplace through conduct constituting skill, foresight, industry, and the like. But one may not gain such advantage by conduct constituting secreting, stealing, purloining, or otherwise misappropriating material, nonpublic information in breach of an employer-imposed fiduciary duty of confidentiality. Such conduct constitutes chicanery, not competition; foul play, not fair play. Indeed, underlying section 10(b) and the major securities laws generally is the fundamental promotion of “the highest ethical standards’ . . . in every facet of the securities industry.” . . . We think the broad language and important objectives of section 10(b) and Rule 10b-5 render appellants’ conduct herein unlawful.²³

In 2016, in *Salman v. United States*, the U.S. Supreme Court held that gifts of confidential information to relatives intended to be used for insider trading are a violation of securities laws.²⁴

In 2018, 213 individuals were sentenced for securities and investment fraud, a decline of 10.25% from 2014. The average sentence for these offenders was 54 months in prison.²⁵

MAIL AND WIRE FRAUD

The U.S. government has relied on the mail and wire fraud statutes to prosecute a variety of corrupt schemes that are not specifically prohibited under federal laws. **Fraud** may be broadly defined as an intentional and knowing misrepresentation of a material (important) fact intended to induce another person to hand over money or property. Mail and wire fraud prosecutions range from fraudulent misrepresentations of the value of land and the quality of jewelry to offering and selling nonexistent merchandise. The common element in these schemes that permits the assertion of federal jurisdiction is the use of the U.S. mail or wires across state lines (phone, radio, television). The federal **mail fraud** statute reads as follows²⁶:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses . . . for the purpose of executing such scheme . . . places in any . . . authorized depository for mail . . . any matter or thing whatever to be sent or delivered by the Postal Service, . . . or takes or receives therefrom, any such matter or thing, . . . shall be fined under this title or imprisoned not more than 20 years, or both.

A conviction for mail fraud requires the prosecution to demonstrate each of the following:

- *Scheme.* Knowing participation in a scheme or artifice to defraud.
- *Falsehood.* Intentional false statement or promise.
- *Money or Property.* The intent to obtain money or property.
- *Reliance.* The statement or promise was of a kind that would reasonably influence a person to part with money or property.
- *Mail.* The mails were used for the purpose of executing the scheme. This includes private mail delivery services. The mail is required to be only incidental to an essential part of the criminal design.

The requirements of mail and **wire fraud** are similar, with the exception that the wire communication must cross state or foreign boundaries.²⁷ A conspiracy to commit mail or wire fraud is also prohibited under federal statutes. A prosecutor under the conspiracy statute is required to demonstrate that the use of the mail or wires would naturally occur in the course of the scheme or that the use of the mail or wires was reasonably foreseeable, although not actually intended.²⁸

In *United States v. Duff*, the defendants falsely represented that certain businesses were Minority Business Enterprises (MBEs) and Women’s Business Enterprises (WBEs) that qualified for special set-asides in the awarding of Chicago city contracts. The businesses in fact were controlled by prominent businessman James M. Duff. As a result of the “masquerade of Duff-owned and controlled businesses as MBEs and WBEs,” these entities obtained, “fraudulently, large fees,” which were sent through the mail. Under the federal wire fraud statute, a mailing will be considered in furtherance of a scheme to defraud if it is “incidental to an essential part of the scheme. If the City had not mailed checks to the . . . contractors, defendants’ entities would have gained nothing from their . . . fraudulently obtained status as qualified subcontractors.” Duff was sentenced to 10 years in prison and was ordered to pay more than \$22 million in fines.²⁹

The Department of Justice in September 2020 charged 57 individuals with fraudulently obtaining funds under the Paycheck Protection Program intended to assist small businesses affected by COVID-19. The individuals used the funds that were intended to pay workers or to meet business expenses for personal expenses or to buy luxury items and in other instances fraudulently applied for funds to support a fictitious business (discussed in Chapter 15).³⁰

In January 2020, Boeing paid \$2.5 billion to settle criminal charges of defrauding safety regulators in regards to the 737 MAX aircraft. The aircraft's mechanical failures had resulted in two crashes that claimed hundreds of lives.³¹

THE TRAVEL ACT

The **Travel Act** of 1961 was intended to assist state and local governments to combat organized crime. The Travel Act, 18 U.S.C. § 1952, authorizes the federal government to prosecute what are ordinarily considered the state criminal offenses of gambling, the illegal shipment and sale of alcohol and controlled substances, extortion, bribery, arson, prostitution, and money laundering. Federal jurisdiction is based on the fact that the crimes have been committed following travel in interstate or foreign commerce or through the use of the U.S. mail or any other facility in interstate or foreign commerce.

In *United States v. Jenkins*, the Second Circuit Court of Appeals stated that a conviction under the Travel Act requires (1) travel or the use of the mail or some other facility (e.g., wires) in interstate or foreign commerce, (2) with the intent to commit a criminal offense listed in the Travel Act or crime of violence or to distribute the proceeds of an illegal activity, and (3) the commission of a crime or attempt to commit a crime.³² Performing or attempting to perform an act of violence is punishable by not more than 20 years in prison or a fine or both. Other offenses are punishable by not more than 5 years in prison or a fine or both.

In *United States v. Goodman*, Goodman promoted records by contacting and persuading radio stations to place records from the companies he represented on their "playlists." Goodman, however, went beyond mere persuasion and was determined to have illegally paid as much as \$182,615 a year in cash through the mail to program directors and disc jockeys in return for placing records on their playlists. Goodman was convicted under the Travel Act of the use of interstate mail to commit bribery. The federal appellate court rejected the argument that the payments occurred after the records were added to the playlists and that the payments therefore did not constitute a bribe to induce station managers and disc jockeys to play specific records. The court noted that the receipt of the mailed money was intended to both "reward a past transgression and to influence or promote a future one."³³

Goodman was also convicted of payola under 47 U.S.C. § 508, the Communications Act, which prohibits the payment of money to radio station employees for the inclusion of material as part of a program unless the payment is disclosed to the recipient's employer. The federal appellate court ruled that the offense is complete upon the payment of money and that the records need not actually be played.

HEALTH CARE FRAUD

Roughly one fifth of the federal budget is devoted to health care, most of which involves reimbursing doctors and health care workers for services provided under various federal and state programs to the elderly, children, the physically and mentally challenged, and the economically disadvantaged. The difficulty of administering programs of this size and complexity creates

an opportunity for doctors and other health care providers to submit fraudulent claims for the reimbursement of services that, in fact, were never provided or to seek payment for unnecessary procedures. In 1996, Congress acted to prevent this type of fraud when it adopted a statute on health care fraud that punishes individuals who knowingly and willfully execute or attempt to execute a scheme or artifice

to defraud any health care benefit program; or to obtain by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of any health care benefit program.³⁴

Health care fraud is punishable by a fine and imprisonment of up to 10 years or both. Fraudulent acts that cause serious injury are punishable by a term of imprisonment of up to 20 years, while fraudulent acts that result in death are punishable by up to life in prison.

It is estimated that health care fraud costs the taxpayers \$68 billion annually. In *United States v. Baldwin*, the defendants were convicted of submitting a false claim of \$275,000 for four dental chairs.³⁵ The health care fraud statute was interpreted to cover individuals outside the medical profession in *United States v. Lucien*. The defendants paid individuals to cause collisions with other vehicles and to claim that they suffered serious injuries. The defendants referred these alleged “victims” to various medical clinics in return for a fee. The clinics sought reimbursement from New York for medical procedures that, in fact, had not been provided. The “victims” then sued the drivers of the other vehicles in hopes of obtaining a settlement from the drivers’ insurance companies.³⁶

The type of extreme and grossly fraudulent abuse of the health care system that can take place is illustrated by *United States v. Miles*.³⁷ Affiliated Professional Home Health (APRO) was formed in 1993 in Houston, Texas, by Carrie Hamilton, Alice Miles, and Richard Miles. Richard Miles, a vice principal of a Houston-area high school, was married to Alice Miles, a registered nurse, and is the brother of both Hamilton, also a registered nurse, and Harold Miles, an APRO employee. When APRO obtained certification from the Texas Department of Health and a Medicare provider number, the company began to treat Medicare-covered patients and obtain reimbursement for in-home visits to such patients.

In this case, the government presented evidence that the defendants, through APRO, submitted cost reports that grossly inflated expenses for items ranging from mileage to employee salaries. For example, Hamilton was reimbursed for a whopping 282,000 travel miles from 1994 to 1996, a period when she also frequently visited Louisiana casinos. Alice Miles, another avid gambler, was reimbursed for 150,000 travel miles over three years, while her husband, whose primary job kept him occupied for most of the workday, was reimbursed for 180,000 miles over four years.

APRO also obtained reimbursement for costs that included personal expenses, such as renovations to the Hamiltons’ home, renovations to the Miles’s parents’ residence, and various home appliances. Eventually, the amount of money coming in to APRO for fake charges became so large that in order to sustain the claimed level of expenses over the next year—so that APRO would not have to return overpayments to the federal government—the APRO principals began to use a variety of other methods to bilk Medicare out of taxpayer funds. These methods included their writing large-dollar checks to employees for “expenses” or “back pay”

and then requiring the employees to cash the checks and hand the funds back to the APRO principals. Appellants billed expenses to Medicare for 2 or 3 times the actual cost incurred. At times, they engaged in more intricate schemes involving the splitting of large reimbursement checks into smaller cashier's checks that were then deposited into the APRO principals' bank accounts or used for personal expenses. On one occasion, Hamilton split an APRO check into cash and three cashier's checks at one bank. She deposited two of the cashier's checks into her own account at another bank and used a portion of the funds to obtain a fourth cashier's check to purchase a new Ford Mustang convertible. The third cashier's check from the original bank was cashed at the Star Casino.

Medicaid provides federal assistance for medical care for some elderly and low-income individuals and for various other categories of individuals. In May 2012, more than 100 individuals were arrested in seven cities for a conspiracy involving more than \$450 million in fraudulent medical billings. Another major crackdown against insurance fraud occurred in July 2017 when 412 individuals in 20 states were arrested for defrauding the federal government of an estimated \$1.3 billion. One third of the individuals were accused of opioid-related crimes. The health care providers were accused of fraudulent billing for drugs, rehabilitation treatments, and tests, and of trading prescriptions for cash.³⁸

In April 2019, the Department of Justice brought criminal charges against 24 defendants, including the CEOs and other individuals associated with five telemedicine companies, the owners of dozens of durable medical equipment (DME) companies, and three licensed medical professionals, for allegedly participating in health care fraud schemes involving more than \$1.2 billion in losses to Medicare. The telemedicine companies allegedly paid physicians to write medically unnecessary DME orders, which were fraudulently billed to Medicare.³⁹ In December 2019, an additional 149 individuals were indicted in medical fraud schemes involving hundreds of millions of dollars.⁴⁰ In November 2020, Purdue Pharma pled guilty to criminal charges related to the fraudulent marketing of the painkiller OxyContin. The settlement included \$3.54 billion in criminal fines and \$2 billion in criminal forfeiture of profits. The charges included marketing the drug to doctors who were illegally prescribing OxyContin, paying illegal kickbacks to doctors who prescribed OxyContin, and pressuring doctors through computer alerts to write additional prescriptions for OxyContin.⁴¹

The Federal Trade Commission reports that Americans lost more than \$77 million in COVID-19-related fraud in the first six months of 2020. Consumers with over 400,000 domain names using the word *coronavirus* found it difficult to distinguish between real and fake solicitations. The main consumer complaint categories included fake protective equipment and vaccines, curative teas and oils, and "Silver Solution" immunity boosts. A Texas website was shut down that offered vaccine "kits," although at the time there were no available vaccines. Other schemes offer bogus home testing and drive-up testing sites. Individuals posing as doctors and laboratory representatives went door-to-door or gained entry to nursing homes and assisted living facilities and offered fake tests as part of a plan to obtain individuals' Medicare and Medicaid information and access to bank accounts and financial information. On the so-called dark web, there have been offers of blood and saliva samples that allegedly were able to bolster individuals against COVID-19.⁴²

MONEY LAUNDERING

Individuals involved in criminal fraud or drug or vice transactions confront the problem of accounting for their income. These individuals may want to live a high-profile lifestyle and buy a house or automobile that they cannot afford based on the income reported on their tax forms. An obvious gap between lifestyle and income may attract the attention of the Internal Revenue Service or law enforcement. How can individuals explain their ability to purchase a million-dollar house when they report an income of only \$30,000 a year? Where did the cash come from that they used to buy the house? Bank regulations require that deposits of more than \$10,000 must be reported by the bank to the federal government. How can individuals explain to government authorities the source of the \$50,000 that they deposit in a bank?

The solution is **money laundering**. This involves creating some false source of income that accounts for the money used to buy a house, purchase a car, or open a bank account. This typically involves schemes such as paying the owner of a business in cash to list a drug dealer as an employee of the individual's construction business. In other instances, individuals involved in criminal activity may claim that their income is derived from a lawful business such as a restaurant. Money laundering statutes are intended to combat the "washing" of money by declaring that it is criminal to use or transfer illegally obtained money or property. This is punishable by a fine of up to \$500,000 and imprisonment for up to 20 years.

Money laundering includes the following elements:

- The defendant engaged or attempted to engage in a monetary transaction.
- The defendant knew the transaction involved funds or property derived from one or more of a long list of criminal activities listed in the statute.
- The transaction was intended to conceal or disguise the source of the money or property; or
- The transaction was intended to promote the carrying on of a specified unlawful activity.
- The money constituted the "proceeds" or "profit" from an unlawful activity.⁴³

In *United States v. Johnson*, the defendant generated millions of dollars from a fraudulent scheme involving Mexican currency. The Tenth Circuit Court of Appeals ruled that the use of these funds to purchase an expensive home and a Mercedes violated the money laundering statute in that these purchases furthered the defendant's continued illegal activities by providing him with a legitimacy that he used to impress, attract, and ultimately victimize additional investors.⁴⁴ In *United States v. Carucci*, a real estate agent was acquitted who assisted a well-known organized crime figure to purchase several homes. The federal appellate court agreed with the government prosecutors that the organized crime figure was unable to account for the source of the money that he used to buy real estate. The court, however, ruled that the government failed to clearly establish that these funds were derived from an illegal activity, such as illegal gambling, extortion, narcotics, or loan sharking.⁴⁵

The next case in the text, *United States v. Jackson*, illustrates a money laundering scheme. Can you explain in a clear and straightforward fashion why Reverend Davis was convicted of money laundering?

WAS REVEREND DAVIS GUILTY OF MONEY LAUNDERING?

UNITED STATES V. JACKSON, 935 F.2D 832 (7TH CIR. 1991)

Opinion by Flaum, J.

Issue

Mandell Jackson, Joseph Davis, and Romano Gines were each indicted and convicted of one count of conspiring to distribute over 50 grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 846. In addition, Davis was indicted and convicted of one count of engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848 and three counts of money laundering in violation of 18 U.S.C. § 1956(a). Jackson and Gines were sentenced to 210 months each. Davis was sentenced to 30 years. . . . [Did the evidence support the conviction of Reverend Joseph Davis for money laundering?]

Facts

The Reverend Joseph Davis describes himself as “a small-time, hellfire and brimstone country preacher.” The evidence at trial, however, presented a more complete view of Mr. Davis’ talents. It showed how he repaired a run-down East St. Louis church and revitalized its congregation, helping to restore the social fabric of a community in distress. Sadly, it also showed that Davis devoted his considerable skills to a variety of schemes that ranged from shady to downright illegal. One of these schemes was the ongoing distribution of late-twentieth century America’s counterpart to brimstone, crack cocaine.

Davis became the preacher at the 15th Street Baptist Church in the mid-1980s. Shortly thereafter he began to sell drugs, and by mid-1987 was actively selling crack from two houses, the first at 735 Wabashaw and the second at 1479 Belmont. The Wabashaw house was managed by Dwayne Scruggs and the Belmont house by Mandell Jackson. Scruggs and Jackson directed teams of addicts who would sell crack on the streets around the houses as well as to passing motorists. They were paid for their efforts in crack. These addicts had occasional contacts with Davis, who would visit the houses to replenish the drug supply and collect cash. . . . If the cocaine Davis supplied came in powder form, Jackson or Scruggs would cook it into cocaine base which they would then divide into smaller portions and distribute to the sellers for resale. At the Belmont house, Romano Gines helped with the cooking and otherwise assisted Jackson in running the house.

Davis deposited some of the cash he collected from the houses in bank accounts maintained in the name of the 15th Street Baptist Church Development Corporation (“Development Corporation account”) and the 15th Street Baptist Church (“Church account”) and at Illini Federal, a local savings and loan. Also deposited in the Development Corporation accounts were funds that Davis and the Corporation obtained from other activities. One of Davis’

other activities was steering his parishioners and others to used-car outlets in the East St. Louis area in return for commissions from the dealers, a practice known as "bird-dogging." Davis would secure consumer credit for the cars and other purchases he helped to arrange through Sam Bennett, a loan officer at Jefferson Bank & Trust in St. Louis. Bennett, it is alleged, would turn a blind eye to the inability of many of the borrowers Davis sent his way to repay their obligations to Jefferson. In return, he and Davis would split the fees they received for arranging these loans. Davis also deposited in the Church and the Development Corporation accounts funds he received from more legitimate activities, including a contract for the Corporation to demolish a building in East St. Louis.

Davis could write checks on these accounts. Some of these checks were made out to cash, which Davis diverted to his personal use. Others were made out to local vendors who provided services such as beepers and mobile telephones. Still others were made out to the landlord who owned the Swansea, Illinois, residence where Davis lived. Davis also purchased numerous cars, spending over \$79,000 on a variety of vehicles for personal and church use between October 1987 and November 1988. . . .

Scruggs plead guilty to conspiracy and testified against his former confederates at their joint trial. At the close of this trial, Davis, Gines, and Jackson were each found guilty of conspiring to distribute cocaine base. The jury also found Davis guilty of engaging in a continuing criminal enterprise, and of three of the four counts of money laundering. . . .

Reasoning

The two provisions of 18 U.S.C. § 1956 under which Davis was charged provide, in relevant part, that:

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of illegal activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or . . .

(B) knowing that the transaction is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; . . .

shall be sentenced to a fine of not more than \$500,000 or twice the value of the property derived in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. . . .

In a case brought under § 1956(a)(1)(B)(i), the government must prove that the transaction was designed to conceal one or another of the enumerated attributes of the proceeds involved. . . .

Agent Wehrheim testified as to Davis' sources of cash and established that Davis and the Development Corporation made bank deposits equal to approximately twice the amount that could be accounted for out of legitimate sources of income. Over half the total amount of these deposits was in cash.

The evidence at trial also established that Davis had access to large amounts of cash. For example, Marcie Rupert testified she had helped him count approximately \$35,000 in currency. Pierre Manley, who worked as a runner transporting cash from the Wabashaw

house to Davis, testified that he would often pick up \$1,500 a day from the house. Reasonable jurors could certainly infer that the cash contained in the deposits Davis made or ordered to be made were derived to a large extent from Davis' drug operations and that Davis knew this. . . .

Count three charged Davis with issuing seven Development Corporation checks to vendors providing beeper services and mobile telephone services. Pierre Manley testified that Davis gave him a beeper when he began to serve as one of Davis' runners, and that Davis would call Manley's beeper to tell him to contact Davis. When Manley called back, Davis instructed him to drive to the Wabashaw house to make pickups. This and other evidence of the use of beepers as an integral part of Davis' conduct of his continuing criminal enterprise suffice to establish that the use of the funds derived from Davis' drug activities to purchase beepers was intended to promote this activity. . . .

These transactions . . . fall within the second money laundering provision. . . . The conversion of cash into goods and services as a way of concealing or disguising the wellspring of the cash is a central concern of the money laundering statute. . . . To convict under § 1956(a) (1)(B)(i) the government must prove not just that the defendant spent ill-gotten gains, but that the expenditures were designed to hide the provenance of the funds involved.

We believe that the government met this burden. Davis chose to place the proceeds of his drug sales not in a personal bank account but in bank accounts ostensibly maintained by the 15th Street Baptist Church and the 15th Street Baptist Church Development Corporation. He nevertheless treated the funds in these accounts as his own, using them to pay for cellular telephones he installed in his many cars and vans, his rent, and his credit card and home phone bills. The jury could reasonably infer that the use of the church accounts was an attempt to hide the ownership and source of Davis' drug money while preserving his ready access to the funds in the accounts, which were as close as the church's checkbook. Moreover, the evidence also established that Davis frequently removed himself still further from the funds in the church accounts by using the church secretary to present Development Corporation checks made out to cash at Illini Federal. She would then hand over cash she received to Davis. . . .

Holding

For the foregoing reasons, the convictions of Davis . . . are affirmed.

Questions for Discussion

1. Describe Reverend Joseph Davis's criminal activity.
2. What are the elements of money laundering under 18 U.S.C. § 1956?
3. Why is Reverend Davis guilty of money laundering?
4. Explain the reason that money laundering is a crime.
5. Defendant Errol Jackson also was convicted of money laundering based on using the proceeds of narcotics activity to purchase various items in cash, including several automobiles. Jackson, who did not report any income to the state or federal government, employed various aliases to purchase automobiles through a series of periodic cash payments of less than \$10,000. He explained to one of the car dealerships that he was aware that the dealer was required to report to the federal government any currency payment of \$10,000 or more. Jackson was convicted of "structuring"

currency transactions to avoid federal reporting requirements in violation of 31 U.S.C. § 5324. The federal appellate court in affirming Jackson's conviction found that "Jackson structured a currency transaction with the intent to evade the reporting requirements." See *United States v. Jackson*, 983 F.2d 757 (7th Cir. 1993).

ANTITRUST VIOLATIONS

The **Sherman Antitrust Act of 1890** is intended to ensure a free and competitive business marketplace. The Sherman Act, according to former Supreme Court justice Hugo Black, is designed to be a "comprehensive charter of economic liberty aimed at preserving free unfettered competition as the rule of trade." Imagine if every bar and restaurant in a college town agreed to sell beer at an inflated price rather than compete with one another for the business of students. The theory behind the Sherman Act, as explained by Justice Black, is that economic competition results in low prices and high quality and promotes self-reliance and democratic values. Can you explain why free competition leads to these benefits?⁴⁶

The criminal provisions of the Sherman Act state that any person "who shall make any contract or engage in any combination or conspiracy" to interfere with interstate commerce is guilty of a felony. A corporation shall be punished with a fine of \$10 million and an individual by a fine of \$1 million or by imprisonment not exceeding three years, or both.⁴⁷

A conviction requires proof that two or more persons or organizations

- knowingly entered into a contract or formed a combination or conspiracy; and
- the combination or conspiracy produced or potentially produced an unreasonable restraint of interstate trade.

In *United States v. Azzarelli Construction Co. and John F. Azzarelli*, the defendant was the owner of a construction company who agreed with the owners of other construction businesses to rig the process of bidding on state contracts to ensure that each firm would receive state contracts. One firm would be designated to receive a contract and would submit an unreasonably high bid on the job. The competing firms would submit grossly inflated bids, ensuring that the first firm would receive the contract. The firms that intentionally lost the job then would be compensated by receiving a kickback from the successful contractor. The court noted that this fraudulent practice interfered with interstate commerce by raising the cost of highway construction and resulted in less money being available to upgrade the highway system.⁴⁸

Antitrust violations directly affect consumers. A price-fixing conspiracy by two major soft-drink bottling companies in the Baltimore-Washington and Richmond, Virginia, areas was estimated by a federal district court to have resulted in consumers paying between \$10 million and \$12 million more to purchase soft drinks than they would have paid had the companies competed against one another rather than artificially fixing the price.⁴⁹

PUBLIC CORRUPTION

In the past two decades, 20,000 public officials and private citizens have been convicted of crimes including bribery, illegal campaign contributions, and unlawful expenditure of public funds. A recent example is the conviction of former Illinois governor Rod Blagojevich for soliciting bribes from individuals who sought to be appointed to the Senate seat vacated by President Barack Obama. Blagojevich, once thought of as a potential candidate for president of the United States, was sentenced to 14 years in prison. These **crimes of official misconduct** are defined as the knowingly corrupt behavior by a public official in the exercise of official responsibilities.⁵⁰

The overwhelming number of prosecutions for public corruption are brought by federal authorities against state and federal officials. One study of public corruption between 1976 and 2013 found that the location with the highest number of federal public corruption convictions was New York with 2,657 convictions, followed by California, Illinois, Florida, Texas, Pennsylvania, Ohio, the District of Columbia, Louisiana, and New Jersey. The most corrupt jurisdiction per capita was the District of Columbia with 171.6 convictions per 100,000 population, followed by Louisiana, Mississippi, South Dakota, Alaska, North Dakota, Illinois, Kentucky, Montana, and Tennessee. The least corrupt states include Washington, Oregon, Minnesota, Utah, Nebraska, and New Hampshire.⁵¹ We all suffer when officials are corrupt because decisions are made based on monetary rewards rather than on the basis of what is best for the public. The cost of corruption in Illinois is estimated to be roughly \$500 million per year.

The most frequently prosecuted state and federal official misconduct crime is the **bribery of a public official**. This offense, as we noted in discussing property offenses in Chapter 13, is committed by an individual who gives, offers, or promises a benefit to a public official, as well as by a public official who demands, agrees to accept, or accepts a bribe. In other words, bribery punishes either giving or receiving a bribe and requires an intent to influence or to be influenced in carrying out a public duty. Bribery does not require a mutual agreement between the individuals. If you offer money to a police officer with the intent that the officer not charge you with a traffic offense, you are guilty of the bribery of a public official, regardless of whether the officer agrees to accept the bribe.

The offense of offering a bribe to a public official requires that

- the accused wrongfully promised, offered, or gave money or an item of value to a public official;
- the individual occupied an official position or possessed official duties; and
- the money or item of value was promised, offered, or given with the intent to influence an official decision or action of the individual.

The offense of soliciting a bribe requires that

- the accused wrongfully asked for, accepted, or received money or an item of value from a person or organization;

- the accused occupied an official position or exercised official duties; and
- the accused asked for, accepted, or received money or an item of value with the intent to have a decision or action influenced with respect to this matter.

Bribery is distinguished from **graft**. Graft does not require an intent to influence or to be influenced. Graft is defined as asking for, accepting, receiving, or offering money or an item of value as compensation or a reward for an official decision. A builder who received a state contract to repair highways may express appreciation and attempt to receive favorable consideration in the future by renovating a politician's summer home. Various state and federal statutes declare that it is a crime for a public official to ask for or to receive a reward for an official act. In such cases, the public is deprived of the right to receive "honest and faithful services."⁵²

Why punish public bribery? Public officials are charged with acting in the interests of society rather than acting in the interest of individuals who provide a financial or other benefit. Corrupt behavior undermines confidence and trust in government, leads to dominance by the rich and powerful, and is contrary to the notion that every individual should be treated equally. In other words, government should be responsive to the majority of Americans rather than to the minority of millionaires.

In 2016, in *McDonnell v. United States*, the U.S. Supreme Court clarified the scope of the federal bribery statute in regard to public officials. The bribery statute, as noted, prohibits a public official from accepting anything of value in return for the performance of an official act. Governor Bob McDonnell of Virginia was approached by Jonnie Williams who headed Star Scientific, a company developing a nutritional supplement. McDonnell introduced Williams to state officials, and suggested that the supplement be included in the state health care plan and approached university researchers to help promote the scientific validity of the supplement. Williams bought designer clothing for McDonnell's wife, purchased McDonnell a Rolex watch at the governor's suggestion, and gave the McDonnells \$65,000, much of which was a loan, to fund their daughter's wedding, along with providing the McDonnells other gifts and benefits. The U.S. Supreme Court held that an "official act" under the bribery statute means a specific matter that may become law that is before a public official, and that it is not a violation of the bribery statute for an official to accept something of value in anticipation or in exchange for setting up a meeting, talking to other state officials, or organizing an event. The Court explained that it did not want to interpret the bribery statute to criminalize the normal services that elected officials provide for constituents and financial donors to their campaigns. On the other hand, sponsoring or signing legislation in return for something of value was a betrayal of a public official's obligation to act in the public interest, and it constituted a violation of the bribery statute. Do you agree with the Court's decision? Would Governor McDonnell, despite his interest in creating jobs in Virginia, have personally assisted a Virginia business that did not provide him with expensive gifts?⁵³

In 2020, in *Kelly v. United States*, the U.S. Supreme Court unanimously overturned the criminal convictions of two New Jersey government officials, Bridget Kelly and William Baroni, associated with former governor Chris Christie. Kelly formerly served as Christie's deputy chief of

staff and Baroni had been named by Christie to serve as the deputy executive director of the Port Authority of New York and New Jersey. Three of the 12 toll lanes on the upper deck of the George Washington Bridge used by commuters from New Jersey into New York City during the morning rush hours had been cordoned off with traffic cones for many years to enable local traffic from Fort Lee, New Jersey, to move more quickly cross the bridge. In 2013, Mark Sokolich, the mayor of Fort Lee, announced that he would not endorse Christie for reelection. Baroni, Kelly, and David Wildstein, a Port Authority employee, retaliated against Sokolich by reducing the number of lanes reserved for Fort Lee traffic from three lanes to one lane. The new configuration was implemented on the first day of school in September 2013 and created massive traffic jams. The three justified the change in the alignment of the lanes by devising a fictitious study of traffic patterns.

The federal wire fraud statute, §18 U.S.C. 1343, makes it a crime to use the wires to engage in any “deceptive schemes to deprive [the victim of] money or property.” Baroni and Kelly were criminally charged and convicted based on their having executed a fraud on the Port Authority, which administers various transportation systems between New York and New Jersey. Justice Elena Kagan in her majority opinion reversing the defendants’ conviction reasoned that taking control of the toll lanes did not constitute the required taking of property under the wire fraud statute and that compelling the government to hire additional traffic personnel to execute the scheme was a consequence of implementing the traffic plan rather than a primary object of the scheme.

Justice Kagan explained that although Baroni and Kelly engaged in an “abuse of power,” their actions did not violate the federal fraud laws because the “scheme here did not aim to obtain money or property.” Justice Kagan stressed that not “every corrupt act by state or local officials is a federal crime.” She observed that a broad reading of the notion of “property” under the wire fraud act would open the door to allow the federal government to use the criminal law to “enforce (its view of) integrity in . . . state and local policymaking.” Although the impact of the Court majority in *Kelly* is not entirely clear, the important point is that the Court once again indicated that the remedy for political disagreements is the ballot box rather than the criminal justice process.⁵⁴

The **Foreign Corrupt Practices Act (FCPA)** extends the concern with good government abroad and declares that it is illegal for an individual or U.S. company to bribe a foreign official in order to cause that official to assist in obtaining or retaining business. The statute makes an exception for “facilitating payments” to speed or ensure the performance of a “routine governmental action,” such as paying money to a foreign official to guarantee that an entry visa is quickly issued to a corporate employee.⁵⁵ In 2018, 16 companies paid a record \$2.89 billion to resolve FCPA cases. There were three large-scale enforcement actions involving Petrobras (\$1.78 billion), SocGen (\$585 million), and Panasonic (\$280 million).⁵⁶

YOU DECIDE 14.1

In 2012, Rajak K. Gupta was convicted of conspiracy and of three counts of securities fraud and was sentenced by federal district court judge Jed S. Rakoff to 24 months in prison to be followed by one year of supervised release. Judge Rakoff also imposed a fine of \$5 million along with restitution to the victims. Gupta’s crime was to breach his duty of confidentiality

as a member of a board of directors of Goldman Sachs, a major New York investment firm. He provided information to Raj Rajaratnam, the head of the investment firm Galleon Group, enabling Galleon both to profit and to avoid losses totaling more than \$5 million. Prominent individuals wrote letters on Gupta's behalf attesting to his "big heart and helping hand" as demonstrated by his involvement in the Global Fund to Fight AIDS, Tuberculosis and Malaria; the Public Health Foundation of India; the Indian School of Business; and the Pratham foundation providing education to underprivileged youth. Gupta already was a multimillionaire, based on his prior employment as head of McKinsey, perhaps the best and most powerful consulting firm in the world. There is no evidence that Gupta personally benefitted directly from conveying the information to Rajaratnam.

Prosecutors asked Judge Rakoff to sentence Gupta to 8–10 years in prison. Do you agree with Judge Rakoff's sentence? Should Judge Rakoff have sentenced Gupta to prison, or should he have followed the suggestion of Gupta's lawyers and sentenced Gupta to a lengthy term of public service? See *United States v. Gupta*, 904 F.Supp.2d349 (SDNY 2012).

CRIME IN THE NEWS

In December 2008, prominent New York investment broker Bernard L. Madoff called his sons into his office and announced that his business was a "big lie" and "basically a giant Ponzi scheme." Madoff sadly noted that there was "nothing left" and that he expected to "go to jail." He was arrested on December 11 and confessed to the FBI that he had looted investors of as much as \$50 billion, making this the largest fraud in U.S. history. Madoff's scheme was relatively unsophisticated. He would use the money provided by new investors to pay returns to old investors. This enabled Madoff to pay investors a consistent return of 10% to 15% a year. He was so successful that he could afford to turn investors away who lacked the "right background" and required most people who wanted to invest their money to provide at least \$1 million. Other Wall Street brokers made millions of dollars by turning all their clients' funds over to Madoff for investment. This "house of cards" collapsed when the U.S. economy took a downturn and a large number of Madoff's investors asked for the return of their money and found that their money had disappeared.

A portion of the money undoubtedly was used to support Madoff's quiet but luxurious lifestyle. This included memberships in most of the leading golf clubs in New York and Florida, partial ownership of two corporate jets and of two boats, and multiple homes, including one in France. Madoff reportedly was a frequent visitor to a luxury hotel in France where rooms rented at roughly \$7,000 per night. Despite his affluent lifestyle, Madoff was respected for his public service and his charitable foundation and gave generously to worthy organizations in New York City including Carnegie Hall, the Public Theater, the Special Olympics, and the Gift of Life Bone Marrow Foundation. He also served on the boards of directors of various worthy causes, including Yeshiva University and the Yeshiva business school. Yeshiva recognized his contribution with a special award of appreciation. Madoff's public profile and prominent role in the community attracted investors eager to claim that they were represented by Bernard Madoff.

Madoff defrauded his friends, his own sister, and the institutions that trusted him, and he demonstrated that even the most educated and sophisticated members of U.S. society can be tricked by a skilled con man. Madoff's clients included the family that owned the New York Mets baseball team and the former owner of the Philadelphia Eagles football team.

His victims included Yeshiva University, the institution that had embraced and honored him. New York Law School and Tufts University also suffered a loss of portions of their endowments. A number of charitable organizations lost most of their resources, including the foundation of Elie Wiesel, the famed Holocaust survivor and commentator. The collapse of charitable foundations meant that many nonprofit foundations that had received donations now found that they had a shortage of money and confronted the prospect of closing their doors. The Picower Foundation lost roughly \$268 million, threatening the foundation's ability to fund groups like the Children's Health Fund and the New York Public Library. The JEHT Foundation lost most of its assets and no longer would be able to fund social action organizations such as the Innocence Project, Human Rights First, the Center for Investigative Reporting, and the Juvenile Law Center. The foundation of the famed film producer Steven Spielberg, which supported prominent hospitals, also lost a portion of its assets.

The collapse of Madoff's empire reverberated across the financial landscape and across the globe, affecting an estimated 38,000 investors in 136 countries. A number of New York real estate developers were forced to cancel construction projects due to a lack of funds. In the past several years, Madoff had attracted significant investments from individuals, banks, and institutions in Austria, South America, Spain, Sweden, Switzerland, Asia, and the Middle East. Several days following the announcement that Madoff's firm was an empty shell, a French investment broker, R. Thierry Magon de la Villehuchet, slashed his wrists and was found dead in his New York City office. The newspapers reported instances in which the elderly and infirm who counted on Madoff's investments to keep them economically secure found that they had been "wiped out" financially and faced the prospect of selling their homes or apartments in order to survive.

There is no obvious explanation for Madoff's corrupt conduct. He was from an extremely modest background, had lifted himself out of poverty through sheer intelligence, and had saved the money he earned as a young man from menial jobs and proceeded to build one of the most successful firms on Wall Street. Madoff pioneered the use of computers for investing and was a past president of a national organization of financial analysts and served on the group's board of governors. The salaries in his firm were modest by Wall Street standards, and yet he attracted a loyal group of employees who praised him for his personal kindness and concern for their welfare. He also made it a point to bring his brother, sons, and niece into the firm. Madoff prided himself on his integrity and accountability to his investors and proclaimed that his motto was that "the name is on the door." It was Madoff's prominence and his powerful clientele that may have intimidated the Securities and Exchange Commission and deterred the organization from investigating the performance of his investments, which most experts agreed was "too good to be true." Some observers have commented that investors were willing to tolerate Madoff's suspected illegalities so long as they were benefiting financially.

Madoff was given a 150-year sentence. Judge Denny Chin noted that Madoff's crimes were "extraordinarily evil" and that the sentence fit his "moral culpability." In an interview, Madoff accused the judge of making him into the "human piñata of Wall Street" and caustically observed that he was surprised that the judge did not "suggest stoning in the public square." He complained that "serial killers get a death sentence, but that's virtually what he gave me." Was Madoff's 150-year sentence disproportionate? In 2020, Judge Chin rejected Madoff's petition for compassionate release from prison. On April 14, 2021, Madoff died at age 82 of complications related to kidney disease in a federal facility for inmates with special health needs.

CHAPTER SUMMARY

Sociologist Edwin H. Sutherland pioneered the concept of white-collar crime, defining this as crimes committed by individuals of respectability and high social status in the course of their occupation. The Justice Department, in contrast, focuses on the types of offenses that constitute white-collar crime as well as on the economic status of offenders. The Justice Department defines white-collar crime as offenses that employ deceit and concealment rather than the application of force to obtain money, property, or service; to avoid the payment or loss of money; or to secure a business or professional advantage. The definition notes that white-collar criminals occupy positions of responsibility and trust in government, industry, the professions, and civil organizations. In this chapter, we discussed some of the common white-collar criminal offenses.

Most white-collar crime prosecutions are undertaken by the federal government. These laws are based on the federal authority over interstate and foreign commerce and other constitutional powers. Environmental crimes threaten the health and natural resources of the United States and range from air and water pollution to the illegal transport and disposal of hazardous waste and pesticides. OSHA protects the health and safety of workers. Willful violations of the act that result in death are punished as a misdemeanor and may result in both a fine and imprisonment. A modest number of these violations have been pursued, and cases are increasingly being referred to the EPA for prosecution.

The stock market is an important source of investment and retirement income for Americans. Securities law is designed to ensure a free and fair market in order to maintain investor trust and confidence. The most active area of prosecution is insider trading, the use of information that is not publicly available to buy and sell stocks. Prosecutions for trading on the basis of inside information are brought against corporate insiders under a theory of “disclose or abate” and against corporate outsiders under a theory of “misappropriation.”

A significant number of white-collar crime prosecutions are undertaken under the federal mail and wire fraud statutes. The mail fraud statute prohibits the knowing and intentional participation in a scheme or artifice to defraud money or property, the execution of which is undertaken through the use of the mails. The wire fraud statute requires the execution of an artifice or fraud through the use of wires that cross interstate or foreign boundaries. The mails or wires need only be used incident to an essential aspect of the scheme. A conspiracy to commit either of these offenses requires that the use of mails or wires will naturally occur in the course of the scheme or was reasonably foreseeable, although not actually intended.

The Travel Act is intended to assist state and local governments in combating organized crime and is directed at what ordinarily are considered the status offenses of illegal gambling, the shipment and sale of alcohol and controlled substances, extortion, bribery, arson, prostitution, and money laundering. This law punishes interstate or foreign travel or the use of the mails or any facility in interstate or foreign commerce with the intent to distribute the proceeds of one of the unlawful activities listed in the statute, to commit a crime of violence, or to commit a

crime listed in the Travel Act. The law requires that a defendant thereafter attempts to commit or does commit a criminal offense.

Health fraud is an increasingly frequent and serious area of criminal activity. The federal health fraud statute addresses frauds against health insurance programs or the fraudulent obtaining of money or property from a health care benefit program. This typically involves claims by doctors to be reimbursed for unnecessary medical care or for medical care that was never provided.

A significant challenge confronting criminal offenders is to convert money or property obtained from illegal activity into what individuals can claim to be lawful income. The federal money laundering statute combats the “washing of money” by declaring that it is a crime to knowingly conduct a financial transaction involving the proceeds of a crime or to engage in a transaction involving property derived from criminal activity with the intent to conceal the source of the money or property or to promote an illegal enterprise.

The Sherman Antitrust Act is intended to ensure free and competitive markets and declares that it is a crime to knowingly enter into a contract or to form a combination or conspiracy to interfere with interstate commerce. An example is price fixing.

Public corruption costs the taxpayers a significant amount of money each year. These crimes of official misconduct are defined as the knowingly corrupt behavior by a public official in exercising official responsibilities. An example is the bribery of a public official. Liability is imposed on the individuals both offering and accepting a bribe. Bribery is defined as wrongfully promising, offering, or giving money or a benefit with the intention of influencing an official decision or action. It is also bribery to ask for, accept, or receive money or a benefit with the intent to influence an official decision or action. Graft is defined as the unlawful compensation or reward for official action. The Foreign Corrupt Practices Act prohibits the bribery of overseas officials in order to assist in obtaining or retaining business.

In thinking about this chapter, consider whether sufficient attention is paid to the investigation and prosecution of white-collar crime. Would you punish white-collar criminals more or less severely than other offenders?

CHAPTER REVIEW QUESTIONS

1. What are the various approaches to defining white-collar crime?
2. Should criminal law textbooks devote a separate chapter to the discussion of white-collar crime?
3. Do you believe that the federal government should make it a priority to prosecute white-collar crime?
4. List some of the acts that are considered environmental crimes.
5. What is the purpose of criminal prosecutions for violations of OSHA?
6. Define insider trading. Why is insider trading considered a crime?

7. What are the elements of mail and wire fraud? How do they differ from one another?
8. Discuss the purpose of the Travel Act.
9. Give some examples of health fraud.
10. Why is money laundering considered a criminal offense? Provide an example of money laundering.
11. Discuss the purpose of the Sherman Antitrust Act. Give an example of an antitrust violation.
12. What is public bribery? Why is bribery a crime? How is it distinguished from graft?
13. Who poses a greater threat to society, white-collar or common criminals?

LEGAL TERMINOLOGY

bribery of a public official	money laundering
crimes of official misconduct	Occupational Safety and Health Act
disclose or abstain doctrine	pump and dump
environmental crimes	Sarbanes-Oxley Act
fiduciary relationship	Sherman Antitrust Act of 1890
Foreign Corrupt Practices Act (FCPA)	tippees
fraud	tipplers
graft	Travel Act
insider trading	white-collar crime
mail fraud	wire fraud
misappropriation doctrine	

TEST YOUR KNOWLEDGE ANSWERS

1. False.
2. False.
3. False.
4. False.
5. False.
6. True.
7. True.
8. False.
9. False.
10. False.

15

CRIMES AGAINST PUBLIC ORDER AND MORALITY

TEST YOUR KNOWLEDGE: TRUE/FALSE

1. Individuals breach the peace when they engage in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct. There is no requirement that the conduct tends to cause or provoke a disturbance.
2. The crime of riot requires the participation of more than a single individual.
3. A vagrancy statute likely would be held constitutional that made it a criminal offense for individuals to appear in public who are prostitutes or thieves or owners of drug houses.
4. A city may constitutionally make it a criminal offense for two or more gang members to assemble together on a public street.
5. The crime of prostitution requires an explicit agreement between individuals to exchange sexual activity for a specific amount of money and some act in furtherance of the agreement.
6. The difference between obscenity and pornography is that obscenity is a visual depiction and pornography is a written description of sexual activity.
7. Cruelty to animals is a violation of civil rather than criminal law.

Check your answers at the end of the chapter on page 817.

Were the Defendants Guilty of Disorderly Conduct?

The prosecution's gang expert testified that a gesture of putting one's hands up in the air would be seen as "challenging the other person." He also opined that the "common response" to someone making a gang sign is violence. The expert testified that there was "no other reason" for a person to make a gang sign besides "challenging them to fight." The presence of a girl would not eliminate

the risk of violence in such a situation. The gang expert testified that the Poor Side Chicos gang would benefit from a challenge such as that made by Cesar and Antonio because “[i]t would further the violent reputation” of the gang “within the community.” (*In re Cesar V.*, 192 Cal. App. 4th 989 [Cal. Ct. App. 2011])

INTRODUCTION

You undoubtedly have been walking down the street and have been approached by a panhandler asking for money in an annoying or aggressive manner. This person might even have followed you down the street or blocked the sidewalk. You may have felt that your “personal space” was invaded or that you were being personally assaulted and might have vowed to avoid walking down this particular street again. Although you did not suffer physical harm, you may have developed a sense of insecurity or even fear. Did the panhandler in this example commit a crime or merely exercise the freedom of speech and assembly?

Crimes against public order and morality are intended to ensure that individuals walking on sidewalks, traveling on the streets, or enjoying the public parks and facilities are free from harassment, fear, threat, and alarm. This category of crime includes a large number of seemingly unrelated offenses that threaten the public peace, quiet, and tranquility. The challenge presented by these offenses is to balance public order and morals with the right of individuals to exercise their civil liberties.

A prime example of a crime against public order is individual disorderly conduct. This broadly defined offense involves acts that create public inconvenience and annoyance by directly threatening *individuals'* sense of physical safety. Disorderly conduct entails offenses ranging from intentionally blocking the sidewalk and acting in an abusive and threatening manner to discharging a firearm in public. Group disorderly conduct (riot) entails tumultuous or violent conduct by three or more persons.

The second category of crimes against public order and morality covered in this chapter includes offenses against the public order that threaten the order and stability of a *neighborhood*. We focus on two so-called quality-of-life crimes. At common law, vagrancy was defined as moving through the community with no visible means of support. Loitering at common law was defined as idly standing on the corner or sidewalk in a manner that causes people to feel a sense of threat or alarm for their safety. These broad vagrancy and loitering statutes historically have been employed to detain and keep “undesirables” off the streets. The U.S. Supreme Court in recent years has consistently found these laws void for vagueness and unconstitutional. The same arguments, however, are still being used today to challenge ordinances directed against the homeless and gangs.

The last section of the chapter on crimes against public order and morality examines the overreach of the criminal law, or so-called victimless crimes. These are offenses against *morality*. The individuals who voluntarily engage in victimless crimes typically do not view their involvement as harmful to themselves or to others. We initially center our discussion of victimless crimes on prostitution and soliciting for prostitution. The next section on victimless crimes

examines whether the prohibition on obscenity should be extended to violent video games that are thought to harm children or whether these games are protected under the First Amendment to the U.S. Constitution. We conclude our discussion of crimes against public order and morality by examining the use of the criminal law to protect domestic animals.

In this chapter, several issues arise. Ask yourself whether the statutes punishing crimes against public order and morality are, at times, employed to target certain undesirable individuals in order to keep them off the streets rather than to protect society. Are some of these laws so broadly drafted that the police are provided with an unreasonable degree of discretion in determining whether to arrest individuals? Last, consider whether the criminal law reaches too far in punishing so-called victimless crimes. The overriding question is whether the enforcement of offenses against public order and morality is required in order to maintain social order and stability.

DISORDERLY CONDUCT

The common law punished a **breach of the peace**. This was defined as an act that disturbs or tends to disturb the tranquility of the citizenry. Sir William Blackstone notes that breaches of the peace included both acts that actually disrupted the social order, such as fighting in public, and what he terms constructive breaches of the peace or conduct that is reasonably likely to provoke or to excite others to disrupt social order. Blackstone cites as examples of constructive breaches of the peace both the circulation of material causing a person to be subjected to public ridicule or contempt and the issuing of a challenge to another person to fight.¹

The common law crime of breach of the peace constituted the foundation for American state statutes punishing **disorderly conduct**. An example of a statutory definition of the misdemeanor of disorderly conduct is the Wisconsin law that punishes anyone who, “in a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct under circumstances in which the conduct tends to cause or provoke a disturbance.”² Other statutes specify the conduct constituting disorderly conduct. The Illinois statute defines disorderly conduct as any act knowingly committed in an unreasonable manner so as to “alarm or disturb another and to provoke a breach of the peace.” The Illinois law then elaborates on this definition and lists specific acts that constitute a breach of the public peace, including a false fire alarm or false report of criminal activity to the police, a false report of an explosive device, a false report of child or elder abuse, and an annoying or intimidating telephone call made to collect a debt.³ The Arizona statute requires an act committed with a specific intent to disturb the peace or quiet of a neighborhood, family, or person or committed with the knowledge that it is disturbing the peace. The Arizona law lists fighting, unreasonable noise, use of abusive or offensive language to any person likely to cause retaliation, commotion intended to prevent a meeting or procession, refusal to obey a lawful order to disperse, and recklessly handling, displaying, or discharging a deadly weapon or dangerous instrument.⁴

We can see that the *mens rea* of the Illinois statute is knowingly, while the *mens rea* of the Arizona statute is an intentional or knowing intent. Other state statutes extend disorderly conduct to include the reckless disturbance of the peace. The Illinois and Arizona statutes

differ in one other respect. The Arizona law covers acts intended to disturb or that knowingly disturb the peace or quiet of a neighborhood, family, or person, while the Illinois statute is generally directed at threats or acts that alarm the community. The commentary to the Model Penal Code notes that defining disturbing the peace to include disturbing individuals authorizes the police to intervene and arrest individuals whose playing of their radio or television is considered unreasonably loud by their next-door neighbor. Disorderly conduct is a misdemeanor, although some states punish as felonies acts that create or threaten to create a significant disturbance.

As you can see, a broad range of conduct is punished under disorderly conduct statutes. For instance, a parent was convicted of disorderly conduct who loudly and aggressively disputed a referee's decision at his son's football game, refused the referee's request to leave the stadium, swore at spectators, placed his hands on the referee, and caused a halt in the game. The Minnesota Court of Appeals ruled that the parent's profanity combined with his aggressive acts caused anxiety and concern to the spectators and referees, and constituted disorderly conduct. How does the court know that the defendant's behavior "disturbed the peace"? Do people assume the risk that they will be subjected to emotional outbursts by spectators attending a football game?⁵ In an Illinois case, a defendant who declared to ticketing agents at the airport that he had a bomb in his shoe was sentenced to more than six months in prison. The Illinois Appellate Court affirmed the defendant's conviction for transmitting a false alarm relating to a bomb or other explosive device. The court noted that disorderly conduct under Illinois law requires only the uttering of a threat regardless of the response of other individuals. The court explained this strict standard by observing that the defendant must have known that there was a strong probability that the threat of a bomb in an airport would "cause alarm and mass disruption."⁶

Another challenge that is frequently presented by prosecutions for disorderly conduct is drawing the line between disorderly conduct and constitutionally protected speech. The Wisconsin Supreme Court affirmed that the statement by a 13-year-old that he was going to kill everyone at his school and make people suffer constituted disorderly conduct. The court explained that speech alone could constitute disorderly conduct where "a reasonable speaker . . . would foresee that reasonable listeners would interpret his statements as serious expressions of an intent to intimidate or inflict bodily harm."⁷

Disorderly conduct addresses relatively minor acts of criminality. Nevertheless, the commentary to the Model Penal Code stresses that this is an important area because disorderly conduct statutes affect a large number of defendants. Arrests for disorderly conduct in a given year are generally equal to the number arrested for all violent crimes combined. Thus, the enforcement of disorderly conduct statutes is critical in shaping public perceptions as to the fairness of the criminal justice system. A final point is that the concern of Americans with balancing crime control with civil liberties dictates that we take the time to consider whether disorderly conduct statutes intrude upon the rights of individuals and are in need of reform (for a discussion of the Jussie Smollett case, see Crime in the News at the end of this chapter). The next case in the book, *In re Cesar*, in which two juveniles are charged with "making a challenge to fight in a public place," illustrates the type of factual analysis that is engaged in by courts in determining

whether a defendant is guilty of disorderly conduct. Do you agree with the court's decision that the defendants' actions were likely to evoke a violent response in a public place?

MODEL PENAL CODE

Section 250.2. Disorderly Conduct

1. A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he
 - a. engages in fighting or threatening, or in violent or tumultuous behavior; or
 - b. makes unreasonable noise or offensively coarse utterances, gesture or display, or addresses abusive language to any person present; or
 - c. creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor."Public" means affecting or likely to affect persons in a place to which the public or substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.
2. An offense under this section is a petty misdemeanor if the actor's purpose is to cause substantial harm or serious inconvenience, or if he persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a violation [subject to a fine].

Analysis

1. The Model Penal Code limits disorderly conduct to specific acts likely to create what the code terms a public nuisance. The commentary notes that the proposed statute does not include conduct tending to corrupt or to annoy other individuals.
2. The act must be committed with the purpose to cause public inconvenience, annoyance, or alarm or recklessly creating a risk thereof. Guilt cannot be based on the argument that an individual should have foreseen the risk of public annoyance or alarm; "nothing less than conscious disregard of a substantial and justifiable risk of public nuisance will suffice for liability. Conviction cannot be had merely on proof that the actor should have foreseen the risk of public annoyance or alarm."
3. Disorderly conduct is directed at disturbing the peace and quiet of the community. The code excludes family disputes within the home.
4. The section limits imprisonment to circumstances in which an individual's purpose is to cause significant harm or serious inconvenience or in which an individual continues the crime despite warnings or requests to halt.
5. The Model Penal Code also includes specific sections on the abuse of a corpse; cruelty to animals; desecration of graves, monuments, and places of worship; disruption of meetings and processions; false public alarms; harassment; loitering or prowling; obstructing highways or other public passages and processions; public drunkenness; unlawful eavesdropping; surveillance; and breaching the privacy of messages.

DID THE DEFENDANTS' FLASHING OF GANG SIGNS CONSTITUTE A CHALLENGE TO FIGHT?

IN RE CESAR V., 192 CAL. APP. 4TH 989 (CAL. CT. APP. 2011)

Opinion by Mihara, J.

Issue

Appellants Cesar V. and Antonio V. challenge the juvenile court's findings that they violated Penal Code section 415, subdivision (1) by making a challenge to fight in a public place. . . . They contend that the offense is not supported by substantial evidence. . . .

Facts

Santa Cruz Police Sergeant Loran Baker . . . testified that on November 19, 2009, at 12:30 p.m., he was driving east . . . near downtown Santa Cruz. He was in plain clothes and driving an unmarked car. The traffic was "stop-and-go," so he was proceeding at just "a few miles per hour." Baker saw 16-year-old Cesar and 17-year-old Antonio walking westbound along the sidewalk on the other side of Laurel Street. Cesar and Antonio had "their attention directed towards the traffic and [were] making some hand signs." Baker was particularly attentive to this activity because a 16-year-old boy had been stabbed to death "where the same kind of exchange was occurring" just a month earlier, a block away from this location.

Baker "couldn't tell if" the hand signs being made by Cesar and Antonio were directed at "a car or somebody on the [other side of the] street," but he saw that "their gestures . . . seemed to be getting more aggressive and [they were] moving towards them like they were challenging them to fight, [and] I realized then, hey, this is for real, and they are challenging somebody." Since their behavior was "aggressive," Baker could tell that they were not "fooling around." Cesar and Antonio "changed directions" and "were moving towards the street." Cesar and Antonio put their hands up in the air while taking "a few steps towards the cars like, hey, let's go," a gesture that Baker "took . . . as a challenge, let's go." They "held their arms up in an inviting manner" which was "like, hey, it's on, you're open to somebody approaching you."

Because Cesar and Antonio had moved to the edge of the sidewalk, and Baker was concerned that violence would ensue, he "did a U-turn in traffic," drove up behind Cesar and Antonio, activated his lights, called for backup, and told Cesar and Antonio to "wait right there." When a uniformed officer arrived to assist Baker less than two minutes later, Baker and the other officer separated Cesar and Antonio and spoke with them individually.

Antonio told Baker that he had "been using hand signals to display a gang slogan . . . towards a car." Antonio described the car as a white Cadillac and "wanted to know why I wasn't stopping it. . . ." He told Baker that "one of the occupants in the rear seat [of the Cadillac] had actually thrown him a four, meaning [a] Norteño sign" which would identify that person as a Norteño gang member. Antonio told Baker that he had made signs for P, S, and C to signify the Poor Side Chicos gang, a Watsonville Sureño gang. Antonio asserted that he "took it [the occupant's alleged sign] as being a challenge, a form of disrespect." He said he was "not really afraid because . . . there was a girl in the car." Antonio told Baker that he thought a fight was unlikely to occur because "typically there won't be a gang fight

when the girl was present." Antonio also said that any fight would have been "fair" because there were two people in the Cadillac. Antonio denied being a gang member, but he admitted that he associated with Poor Side Chicos gang members. He said that he "had to . . . kind of like stand up for his friends." Antonio acknowledged that he was aware that his conduct had occurred in an area "where Norteños and Sureños would actually cross paths and it would be not good." Antonio also admitted that the blue "swoosh" on the Nike shoes he was wearing was intended to "signify" his Sureño affiliation.

Baker then spoke to Cesar. Like Antonio, Cesar admitted making a "hand gesture" of "a P an S and a C for Poor Side Chicos" and claimed that an occupant of a white Cadillac had made a gesture. Cesar maintained that he "was just holding his ground and not trying to challenge the occupants" of the Cadillac. Cesar said he was not a gang member but admitted he associated with members of the Poor Side Chicos gang.

Cesar and Antonio had been stopped previously by police in the company of a Poor Side Chicos gang member. On another occasion, they were stopped by police, and Antonio was wearing attire associated with the Poor Side Chicos gang. Baker testified that he was not "operating under any assumption" as to whether there actually was a white Cadillac with an occupant who made a gang gesture. He thought it was "a possibility" that Cesar and Antonio were responding to such a gesture, but he did not think it mattered.

The prosecution's gang expert testified that a gesture of putting one's hands up in the air would be seen as "challenging the other person." He also opined that the "common response" to someone making a gang sign is violence. The expert testified that there was "no other reason" for a person to make a gang sign besides "challenging them to fight." The presence of a girl would not eliminate the risk of violence in such a situation. The gang expert testified that the Poor Side Chicos gang would benefit from a challenge such as that made by Cesar and Antonio because "[i]t would further the violent reputation" of the gang "within the community." . . .

The prosecutor argued that a gang sign "thrown at someone that is perceived as a rival, is an invitation to a fight, a challenge to a fight." Cesar's trial counsel argued that Cesar and Antonio "were in fact not challenging someone to fight. They were responding to something that turned out to be not a challenge at all." Antonio's trial counsel joined in Cesar's counsel's arguments and also argued that Antonio "didn't think a fight was going to happen, so clearly in his mind he is not challenging someone to fight."

The court found that Cesar and Antonio had violated Penal Code section 415, subdivision (1) [punishing "[a]ny person who unlawfully fights in a public place or challenges another person in a public place to fight." In this case the defendants violated the statute] by making gang signs in an "aggressive" manner and using a gesture to indicate "[l]et's go." It also found true the [defendants'] gang allegations. [Antonio and Cesar each were placed on probation and] filed notices of appeal. . . .

Reasoning

But for the statements of Cesar and Antonio, no evidence was presented that a white Cadillac was within sight of Cesar and Antonio when they were observed by Baker, or that any occupant of any car or any other person made a gang sign that instigated the conduct of Cesar and Antonio observed by Baker. While the evidence before the juvenile court indicated that Cesar and Antonio were probably reacting to *something* they observed, the precise nature of their observations was unknown. They may have been reacting to a person, either in a vehicle or on the other side of the street, who was wearing red or whom one or both of them

recognized as a Norteño gang member. Or they may have simply been trying to intimidate someone to whom they took a dislike. As the juvenile court was not obligated to credit the statements by Cesar and Antonio to Baker that they were merely *responding* to a gang sign made by another person, the evidence did not preclude the court from finding that Cesar and Antonio were not reacting to [the occupants of the white Cadillac.] . . .

A *challenge* to fight is prohibited because such a challenge may provoke a violent response that endangers not only the challenger but any other persons who may be in the public place where the challenge occurs. Because the statute is aimed at the inherent danger that a challenge will result in violence, it is irrelevant whether the challenger intended to actually cause a fight. The mere fact that the challenger may naively believe that his challenge will go unanswered does not reduce the danger that the challenge poses to both the challenger and the public. Since the danger that a challenge to fight creates, and that the Legislature intended to prohibit, is unaffected by the challenger's . . . intent to actually cause a fight or his . . . belief that a fight will not occur or is unlikely to occur, no specific intent is required. If a person challenges another person to fight in a public place, he or she violates Penal Code section 415, subdivision (1).

Holding

Since no specific intent was required, the alleged absence of evidence of such an intent is irrelevant. Baker's testimony was sufficient to support a finding that the gestures that Cesar and Antonio made toward someone in a car or on the other side of the street were a challenge to fight. It was undisputed that these gestures were made in a public place. Thus, substantial evidence supports the juvenile court's findings that Cesar and Antonio violated Penal Code section 415, subdivision (1). . . .

[The defendants' display of gang signs is made more serious by the fact that] the gang expert testified that the Poor Side Chicos gang would benefit from a challenge such as that made by Cesar and Antonio because "[i]t would further the violent reputation" of the gang "within the community." . . .

There was no reason for Cesar and Antonio to make a gang challenge except to promote further criminal activity by Poor Side Chicos gang members. The juvenile court could have drawn the reasonable inference from this evidence that Cesar and Antonio made a gang challenge that identified them with the Poor Side Chicos gang because they wanted to enhance that gang's violent reputation and thereby further future criminal conduct by their Poor Side Chicos gang member friends.

Questions for Discussion

1. What actions are prohibited under section 415, subdivision (1)?
2. Why did the court find that Cesar and Antonio's flashing of gang signs violated section 415, subdivision (1)?
3. What were the surrounding circumstances that led Officer Baker to conclude that there was a particular risk of violence in response to the defendants' flashing of gang signs?
4. Did the defendants intend to provoke a violent response, and did the defendants provoke a violent response?
5. What is the significance of the fact that Cesar and Antonio claim they reacted in response to a provocation by an individual in a white Cadillac?
6. As a judge, would you find that the defendants' actions constituted a breach of the peace?

CASES AND COMMENTS

1. **Provoking a Violent Response.** Terry Summers, during afternoon rush hour in downtown Cincinnati, Ohio, was protesting police brutality by walking slowly back and forth across the street dragging a sign and shaking a small black baseball bat over his head. Summers later stated he was yelling "Black Power" to passing motorists. Police officers arrested Summers for disorderly conduct because they "perceived his actions as [recklessly] threatening the passing motorists" and as having the potential to provoke a violent response from passersby. The police testified after arresting Summers that they could not hear what Summers was saying. Summers was convicted of disorderly conduct and ordered to pay a \$100 fine. An Ohio appellate court determined that there was "no evidence that Summers had acted recklessly or had taunted or challenged any passing motorists." He crossed the street at the light and walked within the crosswalk and did not interfere with traffic. Although there was testimony that Summers had raised his bat in the air and shaken it, neither officer testified that Summers had shaken the bat or had swung his bat at any passing car. The court concluded that "peacefully protesting in a crosswalk while raising a small bat in the air and yelling 'Black Power,' without swinging the bat so as to hit a passing vehicle, was not something that was likely to provoke a violent response." Is this judgment consistent or inconsistent with *In re Cesar*? See *City of Cincinnati v. Summers*, 2003-Ohio-2773 (Ohio Ct. App. 2003).
2. **Lewd Conduct.** In *United States v. Mather*, Mather and Linn were convicted of disorderly conduct in a national park. The two defendants were "just inside the tree line" and were observed by a national park ranger masturbating in front of one another. The ranger watched as Linn then performed fellatio on Mather. A U.S. district court concluded that "[b]ecause we find that appellants engaged in an obscene act that recklessly created a risk of public alarm, we shall affirm their convictions for disorderly conduct. The National Park Service expends significant public funds in its efforts to attract visitors, including countless children, to national parks. Those visitors explore wherever they please in this Park, and should be able to do so without concern of happening upon an open sex act. As demonstrated by their behavior, these appellants clearly knew that the public would accept Congress's invitation to wander about the Park, but proceeded nevertheless." Do you agree with the court's decision? See *United States v. Mather*, 902 F. Supp. 560 (E.D. Pa. 1995).

RIOT

The common law punished group disorderly conduct as a misdemeanor. An **unlawful assembly** was defined as the assembling of three or more persons with the purpose to engage in an unlawful act. Taking steps toward the accomplishment of this common illegal purpose was punished as a **rout**. The law recognized a **riot** where three or more individuals engaged in an unlawful act of violence. The participants must have agreed to the illegal purpose prior to engaging in violence. However, the individuals were not required to enter into a common agreement to commit an illegal act prior to the assembly; the illegal purpose could develop during the course of the meeting. The English Riot Act of 1549 punished as a felony an assembly of 12 or more persons

gathered together with an unlawful design that failed to obey an order to disperse within one hour of the issuance of the order to disband. The Riot Act was reintroduced in 1714. You may be interested to know that it is the reading of the act to an assembly that constitutes the basis of the popular phrase “reading the Riot Act.”⁸

The American colonists were understandably reluctant to adopt a British statute that had been employed by the English Crown to punish people who gathered for purposes of political protest. However, all the states eventually adopted riot laws loosely based on the English statute. These laws continue to remain in force and, in effect, punish group disorderly conduct.

Why is there a separate offense of riot? After all, we could merely punish riot as aggravated disorderly conduct. A group has a mind of its own and both poses a greater threat to society and is less easily deterred than a single individual. Collective action also presents a problem for the police, who may have to resort to aggressive force to control the crowd. Courts have recognized that a clear distinction must be made between riots and the right of individuals to freely assemble to petition the government for the redress of grievances. In 1949, the U.S. Supreme Court upheld the constitutionality of an Arkansas riot statute, holding that it did not abridge free speech or assembly for the “state to fasten themselves upon one who has actively and consciously assisted” in the “promoting, encouraging and aiding of an assembly the purpose of which is to wreak violence.”⁹

Under a New York statute, an individual is guilty of misdemeanor riot when, with four other persons, the individual engages in “tumultuous and violent conduct” and thereby “intentionally or recklessly causes or creates a grave risk of causing public alarm.” The New York statutory scheme punishes riot as a felony when a group of 10 or more persons engages in “tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm” and a person other than one of the participants suffers “physical injury or substantial property damage.” What is the difference between misdemeanor and felony riot under the New York statute?¹⁰

New York also punishes the misdemeanor of unlawful assembly. An unlawful assembly is defined as the assembly of an individual with four or more others for the purpose of engaging or preparing to engage with them in “tumultuous and violent conduct likely to cause public alarm, or when, being present at an assembly which either has or develops such a purpose, [the individual] remains there with intent to advance that purpose.” How does this differ from a riot? New York punishes incitement to riot when an individual “urges ten or more persons to engage in tumultuous and violent conduct of a kind likely to create public alarm.”¹¹ Other states provide criminal penalties for the English statutory crime of a knowing failure to obey an order to disperse. An Ohio statute punishes five or more persons engaged in a course of disorderly conduct “who knowingly fail to obey an order to disperse where there are other persons in the vicinity whose presence creates the likelihood of physical harm to persons or property or of serious public inconvenience, annoyance, or alarm.”¹²

Riot statutes are typically used when a conspiracy or accessoryship cannot be easily applied. The Utah riot statute provides that an individual is guilty of riot if “he assembles with two or more other persons with the purpose of engaging, soon thereafter, in tumultuous or violent conduct, knowing that two or more other persons in the assembly have the same purpose.” In *J.B.A. v. State*, the Utah Court of Appeals convicted a juvenile of riot and held him to be a delinquent. J.B.A. was determined to have been aware that his friends were collecting weapons and preparing to return to school to “settle some differences.” The defendant voluntarily stood as part of a show of force in support of his friends as they fought with members of a rival group.

The Utah court noted that J.B.A. was not an uninterested bystander and that he would have been expected to intervene in the event that his friends were in jeopardy of losing the fight. Does this situation fit your conception of participation in a riot? Why not merely punish this as conspiracy or as aiding and abetting disorderly conduct?¹³

In the next case, *People v. Upshaw*, the defendant was charged with inciting to riot and disorderly conduct after he and his friends confronted a crowd and praised the World Trade Center bombing and threatened crowd members. Consider whether the defendant was guilty of incitement to riot.

MODEL PENAL CODE

Section 250.1. Riot; Failure to Disperse

1. A person is guilty of riot, a felony of the third degree, if he participates with two or more others in a course of disorderly conduct:
 - a. with purpose to commit or facilitate the commission of a felony or misdemeanor;
 - b. with purpose to prevent or coerce official action; or
 - c. when the actor or any other participant to the knowledge of the actor uses or plans to use a firearm or other deadly weapon.
2. Where three or more persons are participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance or alarm, a peace officer or other public servant engaged in executing or enforcing the law may order the participants and others in the immediate vicinity to disperse. A person who refuses or knowingly fails to obey such an order commits a misdemeanor.

Analysis

1. The Model Penal Code requires that an individual participate together with two or more other persons in a course of disorderly conduct with the required purpose or knowledge. It is not sufficient that an individual was present at the assembly or disturbance.
2. The Model Penal Code also punishes a failure to disperse.

DID THE DEFENDANT INCITE A RIOT?

PEOPLE V. UPSHAW, 741 N.Y.S.2D 664 (CRIM. CT. N.Y.C. 2002)

Opinion by Harrington, J.

Facts

It is alleged that, within days of the September 11, 2001[,] terrorist assault on the World Trade Center, defendant and several alleged accomplices, on 42nd Street in the vicinity of Times Square, shouted at a gathering crowd of approximately fifty people in praise of the

terrorist attack and the resulting deaths of police officers, firefighters, and civilians; vehemently expressed their shared disappointment that the carnage had not been greater; and accosted people in the crowd, yelling in the onlookers' faces, "We've got something for your a___. It is further alleged that arguments ensued between defendants and some of the crowd and that defendant and his alleged accomplices refused to disperse after police officers asked them to do so. Defendant argues that the accusatory instrument [indictment], which charges him and two codefendants with inciting to riot and disorderly conduct, is not facially sufficient and must be dismissed. Specifically, defendant argues that his actions, rather than criminal, were an exercise of his right to free speech under the First Amendment of the United States Constitution. . . . After reviewing the complaint, and after consideration of defendant's motion to dismiss and the People's opposition thereto, the court concludes that the accusatory instrument is facially sufficient. Therefore, and for the following reasons, defendant's motion is denied.

Penal Law § 240.08 provides that a person is guilty of inciting to riot "when he urges ten or more persons to engage in tumultuous and violent conduct of a kind likely to create public alarm." Although Penal Law § 240.08 does not expressly provide for the element of intent, courts have recognized that in order to pass constitutional muster the incitement statute necessarily includes the "elements of 'intent' and 'clear and present danger' before one's freedom of speech may be abridged under the First Amendment." "Thus, the People must prove not only that defendant's conduct . . . created a clear and present danger of riotous behavior, but also that by such conduct he in fact intended a riot to ensue." The complaint contains the following narrative of defendant's alleged criminal conduct:

Deponent [Police Officer Charles Carlstrom] states that he observed each defendant at [234 W. 42nd Street in the County and State of New York] yelling and stating in substance: IT'S GOOD THAT THE WORLD TRADE CENTER WAS BOMBED. MORE COPS AND FIREMEN SHOULD HAVE DIED. MORE BOMBS SHOULD HAVE DROPPED AND MORE PEOPLE SHOULD HAVE BEEN KILLED. WE'VE GOT SOMETHING FOR YOUR A___.

Deponent states that a total of 5 defendants (Eric White, Reggie Upshaw, Steven Murdock, Jesse Atkinson and Kyle Jones) where [sic] yelling the above statements to a crowd of approximately 50 people. Deponent states that said people gathered around defendants and some of said people yelled back at defendants.

Deponent states that defendants did approach people in the crowd and yell in their faces.

Deponent further states that defendants were asked to disperse and refused to do so.

Deponent states that defendants' conduct caused the crowd to gather and arguments to ensue.

Issue

Arguing that the complaint does not allege that he acted with the requisite intent to incite a riot, defendant contends that the complaint alleges merely that he "spoke in praise of the assault on the World Trade Center and stated that worse should have happened," but does not allege that "defendant urged or encouraged people to commit acts of terrorism

or treason." . . . [D]efendant analogizes his conduct to "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence" in contrast to "preparing a group for violent action and steeling it to such action." In defendant's view, "the language attributed to defendant was an expression of a political nature, intended to spur debate and thought, not to create the type of public harm contemplated by the statute."

Reasoning

In analyzing whether the allegations in the complaint evince defendant's intent that his alleged conduct led to riotous behavior, and whether his alleged conduct created a clear and present danger of riotous behavior, it is necessary to consider defendant's words and deeds in the context in which he and his alleged accomplices spoke and acted. The alleged crime took place only days after one of the greatest catastrophes this nation has suffered—the overwhelming brunt of which was felt most keenly here in New York—and within sight of the massive smoke plume emanating from the still-smoldering mass grave site that had been the twin towers of the World Trade Center. It took place while many New Yorkers were grieving for the loss of loved ones or praying in hope that the missing might yet be found, and as New Yorkers, indeed, all Americans, held their collective breath at what, at the time, appeared to be the likelihood, if not the inevitability, of additional terrorist attacks. It was under these circumstances that defendant and his cohorts allegedly chose a crowded 42nd Street near Times Square as their venue not merely to engage in what any reasonable person would consider to be a vile and morally reprehensible diatribe, but to intentionally confront the gathering crowd, at point blank range, for the purpose of inciting riotous behavior. [It is estimated that approximately 3,000 people died in the World Trade Center attack. By comparison, 2,403 Americans were killed in the attack on Pearl Harbor.]

There can be no doubt that the words and deeds alleged in the complaint make out the elements of the crime of inciting to riot. According to the complaint, defendant and his accomplices used extremely inflammatory language calculated to cause unrest in the crowd; praising the tragic deaths of thousands of innocents at the hands of terrorists and wishing for even more carnage while the threat of further attacks loomed over the city which cannot be considered "an expression of a political nature, intended to spur debate and thought. . . . The talismanic phrase "freedom of speech" does not cloak all utterances in legality. "It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace."

Holding

Viewed in context, defendant's words—IT'S GOOD THAT THE WORLD TRADE CENTER WAS BOMBED. MORE COPS AND FIREMEN SHOULD HAVE DIED. MORE BOMBS SHOULD HAVE DROPPED AND MORE PEOPLE SHOULD HAVE BEEN KILLED—were plainly intended to incite the crowd to violence, and not simply to express a point of view.

But the allegations extend beyond mere words. It is further alleged that defendant accosted people in the crowd and shouted a threat—WE'VE GOT SOMETHING FOR YOUR A__—directly into the faces of some of the onlookers. It is also alleged that as the confrontation escalated, defendant and his accomplices refused police entreaties to disperse. This conduct went well beyond protected speech and firmly into the realm of criminal behavior.

It was far more than “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence”; under the circumstances, it constituted the very real threat of violence itself. . . .

Penal Law § 240.20 provides, in pertinent part, that a person is guilty of disorderly conduct “when, with intent to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof . . . he engages in fighting or in violent, tumultuous or threatening behavior.” . . . Defendant’s words and deeds as alleged in the complaint demonstrate his intent to cause public inconvenience, annoyance, or alarm, or recklessly create a risk thereof by engaging in tumultuous or threatening behavior. Therefore, defendant’s request to dismiss both counts in the accusatory instrument is denied. . . .

[A]ll that is required [under Penal Law § 240.08] is that defendant urge 10 or more persons to engage in tumultuous and violent conduct of a kind likely to create public harm. Angrily confronting and threatening a crowd of onlookers with the intent to stir the crowd to violence is sufficient; the object of that tumultuous or violent conduct is irrelevant so long as the conduct defendant urges is of a kind likely to cause public harm.

Questions for Discussion

1. What is the prosecution required to prove to convict a defendant of incitement to riot?
2. Did the defendant possess the necessary intent? Did his speech create the clear and present danger of a violent response? Was there any violence resulting from the defendant’s statements?
3. Was the decision of the court influenced by the topic and timing of the defendant’s statements?
4. Would you convict the defendant of incitement to riot or disorderly conduct?
5. Should the defendant’s freedom of speech be limited by the “heckler’s veto,” the fact that others object to the defendant’s expression? The leading Supreme Court cases addressing freedom of expression and disorderly conduct are *Hess v. Indiana*, 414 U.S. 105 (1973), and *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

PUBLIC INDECENCIES: QUALITY-OF-LIFE CRIMES

Criminal law texts traditionally devote very little attention to **public indecencies**. These offenses include public drunkenness, vagrancy, loitering, panhandling, graffiti, and urinating and sleeping in public. A significant number of arrests and prosecutions are devoted to these **crimes against the quality of life**, but for the most part, they receive limited attention because they are misdemeanors, are swiftly disposed of in summary trials before local judges, and disproportionately target young people, racial-ethnic minorities, and individuals from lower socioeconomic backgrounds.

In the 1980s, scholars began to argue that seemingly unimportant offenses against the public order and morality were key to understanding why some neighborhoods bred crime and hopelessness while other areas prospered. This so-called **broken windows theory** is identified with criminologists James Q. Wilson and George Kelling. Why the name *broken windows*? Wilson and Kelling argue that if one window in a building is broken and left unrepaired, this

sends a signal that no one cares about the house, and soon every window will be broken. The same process of decay is at work in a neighborhood. A home is abandoned, weeds sprout, the windows are smashed, and graffiti is sprayed on the building. Rowdy teenagers, drunks, and drug addicts are drawn to the abandoned structure and surrounding street. Residents find themselves confronting panhandlers, drunks, and addicts and develop apprehension about walking down the street and flee the area as property values drop and businesses desert the community. The neighborhood now has reached a tipping point and is at risk of spiraling into a downward cycle of crime, prostitution, drugs, and gangs. The solution, according to Wilson and Kelling, is to address small concerns before they develop into large-scale crimes.¹⁴

We can question, along with some researchers, whether small incidents of disorder inevitably lead to petty crime, then to serious offenses, and finally to neighborhood decay. Nevertheless, surveys indicate that most people are more concerned with the immediate threat to their quality of life posed by rowdy juveniles, drug dealers, prostitutes, and public drunkenness than they are with the more distant threats of rape, robbery, and murder.

Another concern about the enforcement of quality-of-life crimes was raised by a 2015 investigation by the U.S. Department of Justice, Civil Rights Division, which found that the city of Ferguson, Missouri, was following an intentional strategy of enforcing various minor crimes, including quality-of-life offenses, as a method of raising revenue and that the enforcement of these laws had little or nothing to do with public safety. These laws also were disproportionately enforced against African Americans. Ferguson subsequently entered into an agreement with the Department of Justice to correct this policy.¹⁵

A central focus of the broken windows theory in cities where it has been adopted is combatting vagrancy and loitering.

Vagrancy and Loitering

Vagrancy is defined under the common law as wandering the streets with no apparent means of earning a living (without visible means of support). **Loitering** is a related offense defined as standing in public with no apparent purpose.

Vagrancy can be traced to laws passed in England as early as the 13th century. The early vagrancy statutes were passed in reaction to the end of the feudal system and required the vast army of individuals wandering the countryside to seek employment. These same laws were relied on during the labor shortage resulting from the Black Death in the 14th century to force individuals into the labor market. There was also the fear that these bands of men might loiter or gather together to engage in crime or rebellion.

The Statute of Labourers of 1349 authorized the imprisonment of males under 60 without means of financial support who refused to work. The Vagabonds Act of 1530 stipulated that an impotent beggar who wandered from home and was engaged in begging was to be whipped or placed in stocks for three days and nights and to subsist for that duration on bread and water. Able-bodied, but unemployed, wanderers were later subjected to harsh penalties, including branding and slicing off portions of the ear. Another provision stated that any person found begging or wandering shall be “stripped naked from the middle upwards, and be openly whipped until [the] body be bloody.” An English law in force in the second half of the 19th

century divided vagrants into three criminal classes: idle and disorderly persons (people who refuse to work), rogues and vagabonds (wanderers), and incorrigible rogues (repeat offenders). This descriptive language eventually found its way into the texts of American statutes.¹⁶

Statutes punishing vagrancy were adopted in virtually every American state. These laws typically punished a broad range of behavior, including wandering or loitering, living without employment and having no visible means of support, begging, failing to support a wife and child, and sleeping outdoors. Individuals were also punished for their status or lifestyle. Laws, for instance, condemned and categorized as criminals prostitutes, drunkards, gamblers, gypsies engaged in telling fortunes, nightwalkers, corrupt persons, and individuals associating with thieves.¹⁷

The fear and distrust of the poor and unemployed led the U.S. Supreme Court to observe, in reference to an 1837 effort by New York City to prevent the inflow of the poor, that it is as necessary for a “state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported or from a ship, the crew of which may be laboring under an infectious disease.”¹⁸

By 1941, the U.S. Supreme Court had adopted a more sympathetic attitude toward the poor. California passed a statute in the early 20th century preventing the influx of indigents. This was an unapologetic effort to limit budgetary expenditures for the poor and to prevent the introduction into the state of disease, rape, incest, and labor unrest. The Supreme Court criticized California and observed that it now was recognized in an industrial society that “the relief of the needy has become the common responsibility and concern of the whole nation” and that “we do not think it will now be seriously contended that because a person is without employment and without funds he constitutes a ‘moral pestilence.’ Poverty and immorality are not synonymous.” Justice Jackson added that it is contrary to the history and tradition of the United States to make an individuals’ rights dependent on their economic status, race, creed, or color. As Justice Douglas noted, to hold a law constitutional that prevented those labeled as “indigents, paupers, or vagabonds” from seeking “new horizons” in California would be to reduce these individuals to an “inferior class of citizenship.”¹⁹

In 1972, in the case of *Papachristou v. City of Jacksonville* (discussed in Chapter 2), the U.S. Supreme Court held a Jacksonville, Florida, ordinance unconstitutional that authorized the arrest of vagrants. This was a typical statute that classified a wide range of individuals as vagrants, including rogues; vagabonds; dissolute persons who go about begging; common gamblers; persons who use juggling or unlawful games; common drunkards; nightwalkers; pilferers or pickpockets; keepers of gambling places; common brawlers; habitual loafers; persons frequenting houses of ill fame, gambling houses, and places where alcoholic beverages are sold; and individuals living on the earnings of their wives or minor children.

The U.S. Supreme Court ruled that the statute was void for vagueness in that it failed to give a person of ordinary intelligence fair notice of the conduct that is prohibited by the statute and encourages the police to engage in arbitrary and erratic arrests and convictions. The Court explained that the true evil in the law was its employment by the police to target the young, the poor, and other underrepresented groups. The “rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together.”²⁰

Eleven years later, in *Kolender v. Lawson* (discussed in Chapter 2), the U.S. Supreme Court ruled a California loitering statute unconstitutional that authorized the arrest of persons who loiter or wander on the streets who fail to provide “credible and reliable” identification and to “account for their presence.” The lack of a clear statement of what constitutes credible and reliable identification, according to the Court majority, left citizens uncertain how to satisfy the letter of the law and empowered the police to enforce the law in accordance with their individual biases and discretion.²¹

States now have amended their vagrancy and loitering statutes and have followed the Model Penal Code in punishing loitering or prowling under specific circumstances that “warrant alarm for the safety of persons or property.”

MODEL PENAL CODE

Section 250.6. Loitering or Prowling

A person commits a violation if he loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object. Unless flight by the actor or other circumstance makes it impracticable, a peace officer shall prior to any arrest for an offense under this section afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct. No person shall be convicted of an offense under this Section if the peace officer did not comply with the preceding sentence, if it appears at trial that the explanation given by the actor was true and, if believed by the peace officer at the time, would have dispelled the alarm.

Analysis

1. Loitering or prowling rather than focusing on categories of individuals is defined as conduct warranting alarm for the safety of persons or property.
2. Various objective factors that along with other factors may warrant alarm are listed in the statute.
3. Individuals are provided with the opportunity to dispel an officer's alarm prior to an arrest.

Homelessness

City and local governments have increasingly relied on municipal ordinances to stem the tide of a growing homeless population. The National Law Center on Homelessness and Poverty issued a report in December 2019 titled *Housing Not Handcuffs 2019: Ending the Criminalization of Homelessness in U.S. Cities* that surveys laws affecting the homeless in 187 cities. The report documents the increase and enforcement of laws prohibiting urban

camping, sleeping in the parks and subways, aggressive panhandling, trespassing in areas under bridges and adjacent to parks, and blocking sidewalks. The report also finds laws against loitering, jaywalking, and open alcoholic containers. Several cities in addition prohibit charities, churches, and other organizations from serving food to the needy outside designated areas. The report concludes that these local ordinances have the effect of making it a crime to be homeless. The report also singles out five cities for the “Hall of Shame”: Ocala, Florida; Sacramento, California; Wilmington, Delaware; Kansas City, Missouri; and Redding, California.

The survey highlights several types of laws that are characterized as “criminalizing homelessness.” The adoption and use of most of these laws are increasing across the country.

Camping in Public. 37% of cities impose citywide bans on camping in public; 57% prohibit camping in certain designated public places.

Sleeping in Public. 21% of cities prohibit sleeping in public citywide; 39% of cities prohibit sleeping in particular places.

Begging in Public. 38% of cities impose citywide bans on panhandling in public; 65% prohibit panhandling in designated public places.

Loitering, Loafing, and Vagrancy. 35% of cities have citywide bans on loitering; 60% prohibit loitering in designated areas.

Sitting or Lying in Public. 55% of cities prohibit sitting or lying in public.

Sleeping in Vehicles. 50% of cities prohibit sleeping in vehicles.

Food Sharing. 9% of cities have laws prohibiting food sharing.²²

These laws on homelessness, according to the survey report, result in the criminalization of homelessness because the shortage of housing leaves the homeless little alternative to sleeping in public and panhandling for money and food.

In 1992, in *Pottinger v. City of Miami*, a federal district court ruled that the Miami police had employed the criminal law for the purpose of “eliminating or eradicating the presence of the homeless” or for “getting the homeless to move out of certain locations.” One component of this strategy was to harass the homeless by preventing them from congregating in areas where pantries made free food available. The federal court found that the evidence supported the complainants’ assertion that “there is no public place where they can perform basic, essential acts such as sleeping without the possibility of being arrested” and issued a judicial order directing the Miami police to halt this abuse of the criminal law. Another troubling trend is random violence by groups of young people against the homeless.²³

The next case, *Martin v. City of Boise*, involves a legal action seeking to prohibit Boise, Idaho, from criminally prosecuting individuals for sleeping outside on public property when these individuals lack an available home or shelter.

DOES THE EIGHTH AMENDMENT PROHIBIT BOISE, IDAHO, FROM CRIMINALLY PROSECUTING THE HOMELESS?

MARTIN V. CITY OF BOISE, 902 F.3d 1031 (9TH CIR. 2018)

Opinion by Berzon, C.J.

"The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread."

—Anatole France, *The Red Lily*

Issue

We consider whether the Eighth Amendment's prohibition on cruel and unusual punishment bars a city from prosecuting people criminally for sleeping outside on public property when those people have no home or other shelter to go to. . . .

The plaintiffs-appellants are six current or former residents of the City of Boise ("the City"), who are homeless or have recently been homeless. Each plaintiff alleges that, between 2007 and 2009, he or she was cited by Boise police for violating one or both of two city ordinances. The first, Boise City Code § 9-10-02 (the "Camping Ordinance"), makes it a misdemeanor to use "any of the streets, sidewalks, parks, or public places as a camping place at any time." The Camping Ordinance defines "camping" as "the use of public property as a temporary or permanent place of dwelling, lodging, or residence." The second, Boise City Code § 6-01-05 (the "Disorderly Conduct Ordinance"), bans "[o]ccupying, lodging, or sleeping in any building, structure, or public place, whether public or private . . . without the permission of the owner or person entitled to possession or in control thereof." . . .

Reasoning

Boise has a significant and increasing homeless population. According to the Point-in-Time Count ("PIT Count") conducted by the Idaho Housing and Finance Association, there were 753 homeless individuals in Ada County—the county of which Boise is the seat—in January 2014, 46 of whom were "unsheltered," or living in places unsuited to human habitation such as parks or sidewalks. In 2016, the last year for which data is available, there were 867 homeless individuals counted in Ada County, 125 of whom were unsheltered. The PIT Count likely underestimates the number of homeless individuals in Ada County. It is "widely recognized that a one-night point in time count will undercount the homeless population," as many homeless individuals may have access to temporary housing on a given night, and as weather conditions may affect the number of available volunteers and the number of homeless people staying at shelters or accessing services on the night of the count.

There are currently three homeless shelters in the City of Boise offering emergency shelter services, all run by private, nonprofit organizations. As far as the record reveals, these three shelters are the only shelters in Ada County.

One shelter—"Sanctuary"—is operated by Interfaith Sanctuary Housing Services, Inc. The shelter is open to men, women, and children of all faiths, and does not impose any religious requirements on its residents. Sanctuary has 96 beds reserved for individual men

and women, with several additional beds reserved for families. The shelter uses floor mats when it reaches capacity with beds.

Because of its limited capacity, Sanctuary frequently has to turn away homeless people seeking shelter. In 2010, Sanctuary reached full capacity in the men's area "at least half of every month," and the women's area reached capacity "almost every night of the week." In 2014, the shelter reported that it was full for men, women, or both on 38% of nights. Sanctuary provides beds first to people who spent the previous night at Sanctuary. At 9:00 pm each night, it allots any remaining beds to those who added their names to the shelter's waiting list.

The two other shelters in Boise are both operated by the Boise Rescue Mission ("BRM"), a Christian nonprofit organization. One of those shelters, the River of Life Rescue Mission ("River of Life"), is open exclusively to men; the other, the City Light Home for Women and Children ("City Light"), shelters women and children only. BRM's facilities provide two primary "programs" for the homeless, the Emergency Services Program and the New Life Discipleship Program. The Emergency Services Program provides temporary shelter, food, and clothing to anyone in need. Christian religious services are offered to those seeking shelter through the Emergency Services Program. The shelters display messages and iconography on the walls, and the intake form for emergency shelter guests includes a religious message.

Homeless individuals may check into either BRM facility between 4:00 and 5:30 pm. Those who arrive at BRM facilities between 5:30 and 8:00 pm may be denied shelter, depending on the reason for their late arrival; generally, anyone arriving after 8:00 pm is denied shelter.

Except in winter, male guests in the Emergency Services Program may stay at River of Life for up to 17 consecutive nights; women and children in the Emergency Services Program may stay at City Light for up to 30 consecutive nights. After the time limit is reached, homeless individuals who do not join the Discipleship Program may not return to a BRM shelter for at least 30 days. Participants in the Emergency Services Program must return to the shelter every night during the applicable 17-day or 30-day period; if a resident fails to check in to a BRM shelter each night, that resident is prohibited from staying overnight at that shelter for 30 days. BRM's rules on the length of a person's stay in the Emergency Services Program are suspended during the winter.

The Discipleship Program is an "intensive, Christ-based residential recovery program" of which "[r]eligious study is the very essence." The record does not indicate any limit to how long a member of the Discipleship Program may stay at a BRM shelter.

The River of Life shelter contains 148 beds for emergency use, along with 40 floor mats for overflow; 78 additional beds serve those in non-emergency shelter programs such as the Discipleship Program. The City Light shelter has 110 beds for emergency services, as well as 40 floor mats to handle overflow and 38 beds for women in non-emergency shelter programs. All told, Boise's three homeless shelters contain 354 beds and 92 overflow mats for homeless individuals.

Plaintiffs Robert Martin, Robert Anderson, Lawrence Lee Smith, Basil E. Humphrey, Pamela S. Hawkes, and Janet F. Bell are all homeless individuals who have lived in or around Boise since at least 2007. Between 2007 and 2009, each plaintiff was convicted at least once of violating the Camping Ordinance, the Disorderly Conduct Ordinance, or both. With one exception, all plaintiffs were sentenced to time served for all convictions; on two occasions, Hawkes was sentenced to one additional day in jail. During the same period,

Hawkes was cited, but not convicted, under the Camping Ordinance, and Martin was cited, but not convicted, under the Disorderly Conduct Ordinance.

Plaintiff Robert Anderson currently lives in Boise; he is homeless and has often relied on Boise's shelters for housing. In the summer of 2007, Anderson stayed at River of Life as part of the Emergency Services Program until he reached the shelter's 17-day limit for male guests. Anderson testified that during his 2007 stay at River of Life, he was required to attend chapel services before he was permitted to eat dinner. At the conclusion of his 17-day stay, Anderson declined to enter the Discipleship Program because of his religious beliefs. As Anderson was barred by the shelter's policies from returning to River of Life for 30 days, he slept outside for the next several weeks. On September 1, 2007, Anderson was cited under the Camping Ordinance. He pled guilty to violating the Camping Ordinance and paid a \$25 fine; he did not appeal his conviction.

Plaintiff Robert Martin is a former resident of Boise who currently lives in Post Falls, Idaho. Martin returns frequently to Boise to visit his minor son. In March of 2009, Martin was cited under the Camping Ordinance for sleeping outside; he was cited again in 2012 under the same ordinance....

After this litigation began, the Boise Police Department promulgated a new "Special Order," effective as of January 1, 2010, that prohibited enforcement of either the Camping Ordinance or the Disorderly Conduct Ordinance against any homeless person on public property on any night when no shelter had "an available overnight space." City police implemented the Special Order through a two-step procedure known as the "Shelter Protocol."

Under the Shelter Protocol, if any shelter in Boise reaches capacity on a given night, that shelter will so notify the police at roughly 11:00 pm. Each shelter has discretion to determine whether it is full, and Boise police have no other mechanism or criteria for gauging whether a shelter is full. Since the Shelter Protocol was adopted, Sanctuary has reported that it was full on almost 40% of nights. Although BRM agreed to the Shelter Protocol, its internal policy is never to turn any person away because of a lack of space, and neither BRM shelter has ever reported that it was full.

If all shelters are full on the same night, police are to refrain from enforcing either ordinance. Presumably because the BRM shelters have not reported full, Boise police continue to issue citations regularly under both ordinances....

Although the 2014 amendments [to the Camping and Disorderly Conduct Ordinance [which codify the 2010 police "Special Order"]]] preclude the City from enforcing the ordinances when there is no room available at any shelter, the record demonstrates that the City is wholly reliant on the shelters to self-report when they are full. It is undisputed that Sanctuary is full as to men on a substantial percentage of nights, perhaps as high as 50%. The City nevertheless emphasizes that since the adoption of the Shelter Protocol in 2010, the BRM facilities, River of Life and City Light, have never reported that they are full, and BRM states that it will never turn people away due to lack [of] space.

The plaintiffs have pointed to substantial evidence in the record, however, indicating that whether or not the BRM facilities are ever full or turn homeless individuals away for *lack of space*, they *do* refuse to shelter homeless people who exhaust the number of days allotted by the facilities. Specifically, the plaintiffs allege, and the City does not dispute, that it is BRM's policy to limit men to 17 consecutive days in the Emergency Services Program, after which they cannot return to River of Life for 30 days; City Light has a similar 30-day limit for women and children. Anderson testified that BRM has enforced this policy against him in the past, forcing him to sleep outdoors.

The plaintiffs have adduced further evidence indicating that River of Life permits individuals to remain at the shelter after 17 days in the Emergency Services Program only on the condition that they become part of the New Life Discipleship program, which has a mandatory religious focus. For example, there is evidence that participants in the New Life Program are not allowed to spend days at Corpus Christi, a local Catholic program, "because it's . . . a different sect." There are also facts in dispute concerning whether the Emergency Services Program itself has a religious component. Although the City argues strenuously that the Emergency Services Program is secular, Anderson testified to the contrary; he stated that he was once required to attend chapel before being permitted to eat dinner at the River of Life shelter. Both Martin and Anderson have objected to the overall religious atmosphere of the River of Life shelter, including the Christian messaging on the shelter's intake form and the Christian iconography on the shelter walls. A city cannot, via the threat of prosecution, coerce an individual to attend religion-based treatment programs consistently with the Establishment Clause of the First Amendment. Yet at the conclusion of a 17-day stay at River of Life, or a 30-day stay at City Light, an individual may be forced to choose between sleeping outside on nights when Sanctuary is full (and risking arrest under the ordinances), or enrolling in BRM programming that is antithetical to his or her religious beliefs.

The 17-day and 30-day limits are not the only BRM policies which functionally limit access to BRM facilities even when space is nominally available. River of Life also turns individuals away if they voluntarily leave the shelter before the 17-day limit and then attempt to return within 30 days. An individual who voluntarily leaves a BRM facility for any reason—perhaps because temporary shelter is available at Sanctuary, or with friends or family, or in a hotel—cannot immediately return to the shelter if circumstances change. Moreover, BRM's facilities may deny shelter to any individual who arrives after 5:30 pm, and generally will deny shelter to anyone arriving after 8:00 pm. Sanctuary, however, does not assign beds to persons on its waiting list until 9:00 pm. Thus, by the time a homeless individual on the Sanctuary waiting list discovers that the shelter has no room available, it may be too late to seek shelter at either BRM facility.

So, even if we credit the City's evidence that BRM's facilities have never been "full," and that the City has never cited any person under the ordinances who could not obtain shelter "due to a lack of shelter capacity," there remains a genuine issue of material fact as to whether homeless individuals in Boise run a credible risk of being issued a citation on a night when Sanctuary is full and they have been denied entry to a BRM facility for reasons other than shelter capacity. If so, then as a practical matter, no shelter is available. We note that despite the Shelter Protocol and the amendments to both ordinances, the City continues regularly to issue citations for violating both ordinances; during the first three months of 2015, the Boise Police Department issued over 175 such citations. . . .

At last, we turn to the merits—does the Cruel and Unusual Punishments Clause of the Eighth Amendment preclude the enforcement of a statute prohibiting sleeping outside against homeless individuals with no access to alternative shelter? We hold that it does, for essentially the same reasons articulated in the now-vacated *Jones* opinion.

In *Jones v. City of Los Angeles*, 44 F.3d 118 (9th Cir. 2006), vacated, 505 F.3d 1006 (9th Cir. 2007), a panel of this court concluded that "so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds [in shelters]" for the homeless, Los Angeles could not enforce a similar ordinance against homeless individuals "for involuntarily sitting, lying, and sleeping in public." *Jones* is not binding on us, as there was an underlying settlement between the parties and our opinion was vacated as a result. We

agree with *Jones*'s reasoning and central conclusion, however, and so hold that an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them.

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. The Cruel and Unusual Punishments Clause "circumscribes the criminal process in three ways." First, it limits the type of punishment the government may impose; second, it proscribes punishment "grossly disproportionate" to the severity of the crime; and third, it places substantive limits on what the government may criminalize. It is the third limitation that is pertinent here.

"Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." Cases construing substantive limits as to what the government may criminalize are rare, however, and for good reason—the Cruel and Unusual Punishments Clause's third limitation is "one to be applied sparingly."

Robinson v. California, 370 U.S. 660 (1962), the seminal case in this branch of Eighth Amendment jurisprudence, held a California statute that "ma[de] the 'status' of narcotic addiction a criminal offense" invalid under the Cruel and Unusual Punishments Clause. The California law at issue in *Robinson* was "not one which punishe[d] a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration"; it punished addiction itself. Recognizing narcotics addiction as an illness or disease—"apparently an illness which may be contracted innocently or involuntarily"—and observing that a "law which made a criminal offense of . . . a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment," *Robinson* held the challenged statute a violation of the Eighth Amendment.

As *Jones* observed, *Robinson* did not explain at length the principles underpinning its holding. In *Powell v. Texas*, 392 U.S. 513 (1968), however, the Court elaborated on the principle first articulated in *Robinson*.

Powell concerned the constitutionality of a Texas law making public drunkenness a criminal offense. Justice Marshall, writing for a plurality of the Court, distinguished the Texas statute from the law at issue in *Robinson* on the ground that the Texas statute made criminal not alcoholism but conduct—appearing in public while intoxicated. "[A]ppellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate appellant's behavior in the privacy of his own home."

The *Powell* plurality opinion went on to interpret *Robinson* as precluding only the criminalization of "status," not of "involuntary" conduct. "The entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary.' . . ."

Four Justices dissented from the Court's holding in *Powell*; Justice White concurred in the majority result alone. He reasoned that evidence was lacking that Powell was unable to refrain from drinking in public. Justice White, however, noted that many chronic alcoholics are also homeless, and that for those individuals, public drunkenness may be unavoidable as a practical matter. "For all practical purposes the public streets may be home for these

unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. . . . For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk."

The four dissenting Justices adopted a position consistent with that taken by Justice White: that under *Robinson*, "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change," and that the defendant, "once intoxicated, . . . could not prevent himself from appearing in public places." Thus, five Justices gleaned from *Robinson* the principle . . . "that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being."

This principle compels the conclusion that the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter. As *Jones* reasoned, "[w]hether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human." Moreover, any "conduct at issue here is involuntary and inseparable from status—they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping." As a result, just as the state may not criminalize the state of being "homeless in public places," the state may not "criminalize conduct that is an unavoidable consequence of being homeless—namely sitting, lying, or sleeping on the streets."

Our holding is a narrow one. Like the *Jones* panel, "we in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place." We hold only that "so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters]," the jurisdiction cannot prosecute homeless individuals for "involuntarily sitting, lying, and sleeping in public." That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.

We are not alone in reaching this conclusion. As one court has observed, "resisting the need to eat, sleep or engage in other life-sustaining activities is impossible. Avoiding public places when engaging in this otherwise innocent conduct is also impossible. . . . As long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the [E]ighth [A]mendment—sleeping, eating and other innocent conduct."

Here, the two ordinances criminalize the simple act of sleeping outside on public property, whether bare or with a blanket or other basic bedding. The Disorderly Conduct Ordinance, on its face, criminalizes "[o]ccupying, lodging, or sleeping in any building, structure or place, whether public or private" without permission. Boise City Code § 6-01-05. Its scope is just as sweeping as the Los Angeles ordinance at issue in *Jones*, which mandated that "[n]o person shall sit, lie or sleep in or upon any street, sidewalk or other public way."

The Camping Ordinance criminalizes using "any of the streets, sidewalks, parks or public places as a camping place at any time." Boise City Code § 9-10-02. The ordinance defines "camping" broadly:

The term "camp" or "camping" shall mean the use of public property as a temporary or permanent place of dwelling, lodging, or residence, or as a living accommodation at

anytime between sunset and sunrise, or as a sojourn. Indicia of camping may include, but are not limited to, storage of personal belongings, using tents or other temporary structures for sleeping or storage of personal belongings, carrying on cooking activities or making any fire in an unauthorized area, or any of these activities in combination with one another or in combination with either sleeping or making preparations to sleep (including the laying down of bedding for the purpose of sleeping).

It appears from the record that the Camping Ordinance is frequently enforced against homeless individuals with some elementary bedding, whether or not any of the other listed indicia of "camping"—the erection of temporary structures, the activity of cooking or making fire, or the storage of personal property—are present. For example, a Boise police officer testified that he cited plaintiff Pamela Hawkes under the Camping Ordinance for sleeping outside "wrapped in a blanket with her sandals off and next to her," for sleeping in a public restroom "with blankets," and for sleeping in a park "on a blanket, wrapped in blankets on the ground." The Camping Ordinance therefore can be, and allegedly is, enforced against homeless individuals who take even the most rudimentary precautions to protect themselves from the elements. We conclude that a municipality cannot criminalize such behavior consistently with the Eighth Amendment when no sleeping space is practically available in any shelter.

Holding

For the foregoing reasons, we affirm . . . the plaintiffs' requests. . . . We . . . remand with respect to the plaintiffs' requests for prospective relief, both declaratory and injunctive.

Questions for Discussion

1. How many homeless individuals are estimated to be in Boise, Idaho? What shelters are available to the homeless in Boise?
2. What are the policies of the shelters that restrict access? Why does the Court of Appeals conclude that "insufficient" housing is available to the homeless in Boise?
3. What has been the police response to individuals who are "unsheltered" in Boise?
4. Explain why the Court of Appeals concludes based on the precedents in *Robinson* and in *Powell* that the City of Boise is violating the Eighth Amendment rights of homeless individuals who are arrested in Boise. Do you agree with the Court of Appeals analysis? In answering this question, keep in mind the decision in *People v. Kellogg* (discussed in Chapter 4).
5. What realistic steps can the City of Boise take if it wants to continue to enforce the camping and disorderly conduct ordinances against the homeless? Should Boise rely on law enforcement to address the situation of unsheltered individuals?

CASES AND COMMENTS

1. **Panhandling.** A number of jurisdictions have adopted ordinances prohibiting street begging or panhandling. The Second Circuit Court of Appeals, in *Loper v. New York City Police Department*, 999 F.2d 699 (2d Cir. 1993), held that a statute that prohibited

all panhandling on city sidewalks and streets violated the First Amendment. In *Speet v. Schuette*, 726 F.3d 967 (6th Cir. 2013), the Sixth Circuit Court of Appeals overturned Michigan's criminalization of all "begging" in a "public place." The court recognized that Michigan had an interest in preventing fraud and duress against individuals solicited. Even the U.S. Department of Justice has recognized "[t]his potential for fraud" and has issued a publication on panhandling, which states that "some panhandlers pretend to be disabled and/or war veterans" and that the panhandlers' "primary purpose is to immediately buy alcohol or drugs." The court noted that fraudulent solicitations are best addressed by a statute that directly targets fraud.

A "blanket ban" reaches a substantial amount of begging protected by the First Amendment. The Grand Rapids, Michigan, Police Department produced 409 incident reports related to its enforcement of the anti-begging statute. Of the people that the police stopped, 38% were holding signs requesting help, containing messages like "Homeless and Hungry: Need Work," "Homeless Please Help God Bless," "Lost My Job Need Help," and "Homeless and Hungry Vet." The other 62% of the stops (255 instances) involved people verbally soliciting charity. In 43% of the cases, the police immediately arrested the people who were begging. In 211 cases, people convicted of begging were sentenced directly to jail time. The Sixth Circuit concluded that the record in this case bolsters our "judicial prediction" that "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."

Indianapolis, in July 1999, prohibited "aggressive panhandling." This illegal activity was defined as touching the solicited person, approaching an individual standing in line and waiting to be admitted to a commercial establishment, blocking an individual's entrance to any building or vehicle, following a person who walks away from the panhandler, using profane or abusive language or statements or gestures that would "cause a reasonable person to be fearful or feel compelled," and panhandling in a group of two or more persons. The ordinance also prohibited soliciting at various locations, including bus stops, sidewalk cafes, vehicles parked or stopped on a public street, and within 20 feet of an automatic teller machine. Panhandling is also prohibited under the ordinance after sunset or before sunrise. Each act in violation of the ordinance is punishable by a fine of not more than \$2,500. The court was authorized to issue an injunction or order prohibiting an individual convicted of violating the ordinance from repeating this violation. Violation of the injunction was punishable with imprisonment.

The ordinance was challenged by Jimmy Gresham, a homeless person who lived on a Social Security disability benefit of \$417 per month. Gresham supplemented this income by panhandling. The Seventh Circuit Court of Appeals ruled that Indianapolis possessed a legitimate interest in promoting the safety and convenience of its citizens on the public streets, places, and parks and that the ordinance was a reasonable time, place, and manner restriction of speech. The court noted that the ordinance does not ban all panhandling; it merely restricts solicitations to situations that are considered "especially unwanted or bothersome" in which people would "feel a heightened sense of fear or alarm, or might wish especially to be left alone."

Panhandlers are also provided with reasonable alternative avenues to solicit funds. Panhandling is defined as a solicitation made in person upon any street, public place, or park in which a person requests an immediate donation of money or other gratuity.

Individuals are free to directly ask for money during the day so long as they do not violate the ordinance. In addition, individuals have the right during the daytime or evening hours to engage in “passive panhandling” in which they display signs or engage in street performances during the evening.

The Seventh Circuit also dismissed the contention that the ordinance was void for vagueness. For instance, the contention that a polite request for a donation might be considered threatening by an unusually sensitive or fearful individual and that a panhandler would not be certain on how to conform to the ordinance according to the court was answered by the provision of a “reasonable person” standard in the ordinance. In another example, the court ruled that the prohibition on “following” an individual should be viewed as entailing a continuing request for a donation combined with following an individual. Walking in the same direction as the solicited person, as a result, would not be prohibited where the walking was “divorced from the request.” Do you agree that it is possible to distinguish between “aggressive” and “passive” panhandling? What additional provisions might you propose to this ordinance? Would you vote for this ordinance as a member of the Indianapolis City Council? See *Gresham v. Peterson*, 225 F.3d 899 (7th Cir. 2000).

2. **Homelessness and Status Offenses.** The Ninth Circuit Court of Appeals held that homeless individuals arrested for “sitting, lying, or sleeping on a public street and sidewalks at all times and in all places within Los Angeles” had been subjected to cruel and unusual punishment in violation of their Eighth Amendment rights. The so-called Skid Row area of Los Angeles has the largest concentration of homeless in the United States, and there generally is a shortage of over 1,000 beds each evening. The area is dominated by single-residence hotels that charge \$379 per month. The monthly welfare stipend for single adults in Los Angeles County is \$221. Wait lists for public housing and for housing assistance vouchers in Los Angeles are from 3 to 10 years. The court of appeals held that “just as the Eighth Amendment prohibits the infliction of criminal punishment on an individual for being a drug addict, or for involuntary public drunkenness that is an unavoidable consequence of being a chronic alcoholic without a home,” the Eighth Amendment prohibits the City from punishing “involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without shelter in the City of Los Angeles.” See *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006). (The decision was withdrawn following a settlement between the plaintiffs and Los Angeles.)

3. **Necessity Defense.** In *Commonwealth v. Magadini*, the Massachusetts Supreme Judicial Court held that Magadini was entitled to present a necessity defense to five charges of trespassing on private property to escape cold weather. Magadini had been turned away from a homeless shelter based on “certain issues.” He had the money to rent an apartment although he was unable to find a unit because of the required security deposit. As a result, he had lived in a park for several years. The Massachusetts court held: “Our cases do not require a defendant to rebut every alternative that is conceivable; rather, a defendant is required to rebut alternatives that likely would have been considered by a reasonable person in a similar situation. Moreover, we are not prepared to say as a matter of law that a homeless defendant must seek shelter outside of his or her home town in order to demonstrate a lack of lawful alternatives. . . . [T]he necessity defense allows a jury to consider the plight of a homeless person

against any harms caused by a trespass before determining criminal responsibility.” See *Commonwealth v. Magadini*, 474 Mass. 593, 601–602 (Mass. 2016).

4. Living in a Motor Vehicle. In *Destrain v. City of Los Angeles*, the Ninth Circuit Court of Appeals held a Los Angeles ordinance unconstitutional that stated that no person shall use a vehicle “as living quarters either overnight, day-by-day, or otherwise.” The court noted that individuals are “left guessing as to what behavior would subject them to citation and arrest by an officer. Is it impermissible to eat food in a vehicle? Is it illegal to keep a sleeping bag? Canned food? Books? What about speaking on a cell phone? Or staying in the car to get out of the rain? These are all actions Plaintiffs were taking when arrested for violation of the ordinance, all of which are otherwise perfectly legal. And despite Plaintiffs’ repeated attempts to comply with Section 85.02, there appears to be nothing they can do to avoid violating the statute short of discarding all of their possessions or their vehicles, or leaving Los Angeles entirely. All in all, this broad and cryptic statute criminalizes innocent behavior, making it impossible for citizens to know how to keep their conduct within the pale.” See *Destrain v. City of Los Angeles*, 754 F.3d 1147 (9th Cir. 2014).

Gangs

It is estimated that there are roughly 21,000 gangs active in the United States, with an estimated 700,000 gang members. Gangs are no longer limited to large urban areas and today are active in nearly every city, suburb, and rural area. These gangs are involved in criminal activity ranging from drugs and prostitution to extortion and theft, and some have members throughout the United States as well as in Mexico and Central America. The Illinois legislature made several legislative “findings” concerning the peril posed by gangs.

- Urban, suburban, and rural communities are being “terrorized and plundered by street gangs.”
- Street gangs are often “controlled by criminally sophisticated adults” who manipulate or threaten young people into serving as drug couriers and into carrying out brutal crimes on behalf of the gang.
- Street gangs present a “clear and present danger to public order and safety.”

An example is the Varrio Sureño Town gang that was described by the California Supreme Court, in the 1997 case of *Gallo v. Acuna*, as having converted the four-square-block neighborhood of Rocksprings in San Jose, California, into an “urban war zone.” The gang was described as congregating on sidewalks and lawns and in front of apartment complexes at all hours. They openly drank, smoked dope, sniffed glue, snorted cocaine, and transformed the neighborhood into a drug bazaar. The court’s opinion described drive-by shootings, vandalism, arson, and theft as commonplace. Garages were used as urinals; homes were “commandeered as escape routes” and served as storage sites for drugs and guns; and buildings, sidewalks, and automobiles

were “turned into a . . . canvas of gang graffiti.” The California Supreme Court concluded that community residents had become “prisoners in their own homes.” Individuals wearing the color of clothing identified with rival gangs were at risk, and relatives and friends were reluctant to visit. Verbal and physical retaliation was directed against anyone who complained to the police or who served as an informant.²⁴

Gallo v. Acuna is an example of the type of innovative civil remedies that are being employed. In *Gallo*, the California Supreme Court affirmed an injunction (a court order halting certain acts) issued by a California trial court. The order declared the Varrio Sureño Town gang a “public nuisance,” meaning that the gang’s continued presence in the community prevented residents from the enjoyment of life and property, disrupted the quiet and security of the neighborhood, and interfered with the use of the streets and parks. Thirty-eight members of the gang were ordered to “abate” (end) the nuisance by halting conduct ranging from spray-painting to the possession and sale of drugs and the playing of loud music, public consumption of alcohol, littering, urinating in a public place, communicating through the use of gang signals, and wearing gang insignia. An individual or group violating the injunction would be in contempt of court and subject to punishment by a fine or short-term incarceration.

States have adopted various legal approaches to controlling gangs. Special gang statutes make it a crime to solicit, to cause any person to join, or to deter any person from leaving a gang, and enhanced punishment is provided for crimes committed to further the interests of gangs. Gang members have also been prosecuted under organized crime statutes, and laws also provide for the vicarious civil liability of parents for the conduct of their children. Various school districts prohibit the display of gang paraphernalia and colors, and some correctional systems provide rewards for gang members who leave the gang and cooperate with authorities. In 2009, the City of Los Angeles successfully sued and collected a multimillion-dollar judgment for damages against individual gang members.

Critics of these antigang efforts question whether we are sacrificing the civil liberties of both gang members and innocent young people in order to combat the violence perpetrated by a relatively small number of individuals. They point to the fact that young minority males who, in fact, may not be gang members are often targeted for harassment, detention, interrogation, and arrest by the police.

One of the most significant efforts to curb gang activity was the gang ordinance adopted by the Chicago City Council in 1992. This local law authorized the police to order suspected gang members who, along with at least two other individuals, were “loitering” in public to vacate the area. Between 1992 and 1995, the police issued 89,000 orders to disperse and arrested more than 42,000 people for disobeying an order to move on. In *City of Chicago v. Morales*, the U.S. Supreme Court considered the constitutionality of the ordinance. In reading the case, do you understand what type of behavior is prohibited under the ordinance? How do we balance the constitutional right of freedom of assembly against society’s interest in combating gangs? Do you think that this type of ordinance is an effective approach to preventing gangs from terrorizing neighborhoods?

SHOULD INDIVIDUALS REASONABLY BELIEVED BY THE POLICE TO BE GANG MEMBERS HAVE THE RIGHT TO ASSEMBLE ON STREET CORNERS?

CITY OF CHICAGO V. MORALES, 527 U.S. 41 (1999)

Opinion by Stevens, J.

Issue

[In 1992, the Chicago City Council enacted the] Gang Congregation Ordinance[, which] prohibits “criminal street gang members” from loitering [with one another or with other persons] in public places. [The question presented is whether the Supreme Court of Illinois correctly held that the ordinance violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.]

Facts

Before the ordinance was adopted, the city council’s Committee on Police and Fire conducted hearings to explore the problems created by the city’s street gangs, and more particularly, the consequences of public loitering by gang members. Witnesses included residents of the neighborhoods where gang members are most active, as well as some of the aldermen who represent those areas. Based on that evidence, the council made a series of findings that are included in the text of the ordinance and explain the reasons for its enactment.

The council found that a continuing increase in criminal street gang activity was largely responsible for the city’s rising murder rate, as well as an escalation of violent and drug-related crimes. It noted that in many neighborhoods throughout the city, “the burgeoning presence of street gang members in public places has intimidated many law abiding citizens.” Furthermore, the council stated that gang members “establish control over identifiable areas . . . by loitering in those areas and intimidating others from entering those areas; and . . . members of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present. . . .” It further found that “loitering in public places by criminal street gang members creates a justifiable fear for the safety of persons and property in the area” and that “aggressive action is necessary to preserve the city’s streets and other public places so that the public may use such places without fear.” Moreover, the council concluded that the city “has an interest in discouraging all persons from loitering in public places with criminal gang members.”

The ordinance creates a criminal offense punishable by a fine of up to \$500, imprisonment for not more than six months, and a requirement to perform up to 120 hours of community service. Commission of the offense involves four predicates. First, the police officer must reasonably believe that at least one of the two or more persons present in a “public place” is a “criminal street gang member.” Second, the persons must be “loitering,” which the ordinance defines as “remaining in any one place with no apparent purpose.” Third, the officer must then order “all” of the persons to disperse and remove themselves “from the area.” Fourth, a person must disobey the officer’s order. If any person, whether a gang member or not, disobeys the officer’s order, that person is guilty of violating the ordinance.

The ordinance states in pertinent part:

(a) Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

(b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.

(c) As used in this section:

(1) "Loiter" means to remain in any one place with no apparent purpose.

(2) "Criminal street gang" means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3) and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity. . . .

(5) "Public place" means the public way and any other location open to the public, whether publicly or privately owned.

(e) Any person who violates this Section is subject to a fine of not less than \$100 and not more than \$500 for each offense, or imprisonment for not more than six months, or both.

In addition to or instead of the above penalties, any person who violates this section may be required to perform up to 120 hours of community service. . . .

Two months after the ordinance was adopted, the Chicago Police Department promulgated General Order 92-4 to provide guidelines to govern its enforcement. That order purported to establish limitations on the enforcement discretion of police officers "to ensure that the anti-gang loitering ordinance is not enforced in an arbitrary or discriminatory way." The limitations confine the authority to arrest gang members who violate the ordinance to sworn "members of the Gang Crime Section" and certain other designated officers, and establish detailed criteria for defining street gangs and membership in such gangs. In addition, the order directs district commanders to "designate areas in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community," and provides that the ordinance "will be enforced only within the designated areas." The city, however, does not release the locations of these "designated areas" to the public.

During the three years of its enforcement, the police issued over 89,000 dispersal orders and arrested over 42,000 people for violating the ordinance. There were 5,251 arrests under the ordinance in 1993, 15,660 in 1994, and 22,056 in 1995. In the ensuing enforcement proceedings, 2 trial judges upheld the constitutionality of the ordinance, but 11 others ruled that it was invalid. In respondent Youkhana's case, the trial judge held that the "ordinance fails to notify individuals what conduct is prohibited, and it encourages arbitrary and capricious enforcement by police."

The city believes that the ordinance resulted in a significant decline in gang-related homicides. It notes that in 1995, the last year the ordinance was enforced, the gang-related homicide rate fell by 26%. In 1996, after the ordinance had been held invalid, the gang-related homicide rate rose 11%. However, gang-related homicides fell by 19% in 1997, over a year after the suspension of the ordinance. Given the myriad factors that influence levels of violence, it is difficult to evaluate the probative value of this statistical evidence, or to reach any firm conclusion about the ordinance's efficacy. . . .

Reasoning

The basic factual predicate for the city's ordinance is not in dispute. As the city argues in its brief, "the very presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways intimidates residents, who become afraid even to leave their homes and go about their business. That, in turn, imperils community residents' sense of safety and security, detracts from property values, and can ultimately destabilize entire neighborhoods." The findings in the ordinance explain that it was motivated by these concerns. We have no doubt that a law that directly prohibited such intimidating conduct would be constitutional, but this ordinance broadly covers a significant amount of additional activity. Uncertainty about the scope of that additional coverage provides the basis for respondents' claim that the ordinance is too vague.

In fact, the City already "has several laws that serve this purpose." . . . Deputy Superintendent Cooper, the only representative of the police department at the Committee on Police and Fire hearing on the ordinance [before the Chicago City Council, testified that 90% of the conduct people complained that they were being arrested for was actually a criminal offense for which people could be arrested even absent the gang ordinance. These offenses included intimidation, criminal drug conspiracy, and mob action.]

We are confronted at the outset with the city's claim that it was improper for the state courts to conclude that the ordinance is invalid on its face. . . . [A]n enactment . . . may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. . . . [A]s the United States recognizes, the freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. We have expressly identified this "right to move from one place to another according to inclination" as "an attribute of personal liberty" protected by the Constitution. . . . Indeed, it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage" or the right to move "to whatsoever place one's own inclination may direct."

Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement. Accordingly, we first consider whether the ordinance provides fair notice to the citizen and then discuss its potential for arbitrary enforcement.

"It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. . . ." The Illinois Supreme Court recognized that the term "loiter" may have a common and accepted meaning, but the definition of that term in this ordinance—"to remain in any one place with no apparent purpose"—does not. It is difficult to imagine how any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an "apparent purpose." If she were talking to another person, would she have an

apparent purpose? If she were frequently checking her watch and looking expectantly down the street, would she have an apparent purpose? . . . “[T]he purpose simply to stand on a corner cannot be an ‘apparent purpose’ under the ordinance; if it were, the ordinance would prohibit nothing at all.”

Since the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of “loitering,” but rather about what loitering is covered by the ordinance and what is not. The Illinois Supreme Court emphasized the law’s failure to distinguish between innocent conduct and conduct threatening harm. Its decision followed the precedent set by a number of state courts that have upheld ordinances that criminalize loitering combined with some other overt act or evidence of criminal intent. However, state courts have uniformly invalidated laws that do not join the term “loitering” with a second specific element of the crime.

One of the trial courts that invalidated the ordinance gave the following illustration: “Suppose a group of gang members were playing basketball in the park, while waiting for a drug delivery. Their apparent purpose is that they are in the park to play ball. The actual purpose is that they are waiting for drugs. Under this definition of loitering, a group of people innocently sitting in a park discussing their futures would be arrested, while the ‘basketball players’ awaiting a drug delivery would be left alone.”

The city’s principal response to this concern about adequate notice is that loiterers are not subject to sanction until after they have failed to comply with an officer’s order to disperse. “Whatever problem is created by a law that criminalizes conduct people normally believe to be innocent is solved when persons receive actual notice from a police order of what they are expected to do.” We find this response unpersuasive for least two reasons.

First, the purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law. “No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.” Although it is true that a loiterer is not subject to criminal sanctions unless he or she disobeys a dispersal order, the loitering is the conduct that the ordinance is designed to prohibit. If the loitering is in fact harmless and innocent, the dispersal order itself is an unjustified impairment of liberty. . . . [T]he police are able to decide arbitrarily which members of the public they will order to disperse. . . . Because an officer may issue an order only after prohibited conduct has already occurred, it cannot provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse. Such an order cannot retroactively give adequate warning of the boundary between the permissible and the impermissible applications of the law.

Second, the terms of the dispersal order compound the inadequacy of the notice afforded by the ordinance. It provides that the officer “shall order all such persons to disperse and remove themselves from the area.” This vague phrasing raises a host of questions. After such an order issues, how long must the loiterers remain apart? How far must they move? If each loiterer walks around the block and they meet again at the same location, are they subject to arrest or merely to being ordered to disperse again? As we do here, we have found vagueness in a criminal statute exacerbated by the use of the standards of “neighborhood” and “locality.” . . . “[B]oth terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles.”

Lack of clarity in the description of the loiterer’s duty to obey a dispersal order might not render the ordinance unconstitutionally vague if the definition of the forbidden conduct were clear, but it does buttress our conclusion that the entire ordinance fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted. The Constitution does not permit a legislature to “set a net large enough to catch all possible offenders, and leave

it to the courts to step inside and say who could be rightfully detained, and who should be set at large." This ordinance is therefore vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."

The broad sweep of the ordinance also violates "the requirement that a legislature establish minimal guidelines to govern law enforcement." There are no such guidelines in the ordinance. In any public place in the city of Chicago, persons who stand or sit in the company of a gang member may be ordered to disperse unless their purpose is apparent. The mandatory language in the enactment directs the police to issue an order without first making any inquiry about their possible purposes. It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark; in either event, if their purpose is not apparent to a nearby police officer, she may—indeed, she "shall"—order them to disperse.

Recognizing that the ordinance does reach a substantial amount of innocent conduct, we turn, then, to its language to determine if it "necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat." As we discussed in the context of fair notice, the principal source of the vast discretion conferred on the police in this case is the definition of loitering as "to remain in any one place with no apparent purpose."

As the Illinois Supreme Court interprets that definition, it "provides absolute discretion to police officers to determine what activities constitute loitering." We have no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court. "The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined."

Nevertheless, the city disputes the Illinois Supreme Court's interpretation, arguing that the text of the ordinance limits the officer's discretion in three ways. First, it does not permit the officer to issue a dispersal order to anyone who is moving along or who has an apparent purpose. Second, it does not permit an arrest if individuals obey a dispersal order. Third, no order can issue unless the officer reasonably believes that one of the loiterers is a member of a criminal street gang.

Even putting to one side our duty to defer to a state court's construction of the scope of a local enactment, we find each of these limitations insufficient. That the ordinance does not apply to people who are moving—that is, to activity that would not constitute loitering under any possible definition of the term—does not even address the question of how much discretion the police enjoy in deciding which stationary persons to disperse under the ordinance. Similarly, that the ordinance does not permit an arrest until after a dispersal order has been disobeyed does not provide any guidance to the officer deciding whether such an order should issue. The "no apparent purpose" standard for making that decision is inherently subjective because its application depends on whether some purpose is "apparent" to the officer on the scene.

Presumably, an officer would have discretion to treat some purposes—perhaps a purpose to engage in idle conversation or simply to enjoy a cool breeze on a warm evening—as too frivolous to be apparent if he suspected a different ulterior motive. . . .

It is true, as the city argues, that the requirement that the officer reasonably believe that a group of loiterers contains a gang member does place a limit on the authority to order dispersal. That limitation would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect, or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members. But this ordinance, for reasons

that are not explained in the findings of the city council, requires no harmful purpose and applies to nongang members as well as suspected gang members. It applies to everyone in the city who may remain in one place with one suspected gang member as long as their purpose is not apparent to an officer observing them. Friends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member.

Ironically, the definition of loitering in the Chicago ordinance not only extends its scope to encompass harmless conduct but also has the perverse consequence of excluding from its coverage much of the intimidating conduct that motivated its enactment. As the city council's findings demonstrate, the most harmful gang loitering is motivated either by an apparent purpose to publicize the gang's dominance of certain territory, thereby intimidating nonmembers, or by an equally apparent purpose to conceal ongoing commerce in illegal drugs. As the Illinois Supreme Court has not placed any limiting construction on the language in the ordinance, we must assume that the ordinance means what it says and that it has no application to loiterers whose purpose is apparent. The relative importance of its application to harmless loitering is magnified by its inapplicability to loitering that has an obviously threatening or illicit purpose.

Finally, in its opinion striking down the ordinance, the Illinois Supreme Court refused to accept the general order issued by the police department as a sufficient limitation on the "vast amount of discretion" granted to the police in its enforcement. That the police have adopted internal rules limiting their enforcement to certain designated areas in the city would not provide a defense to a loiterer who might be arrested elsewhere. Nor could a person who knowingly loitered with a well-known gang member anywhere in the city safely assume that they would not be ordered to disperse no matter how innocent and harmless their loitering might be.

Holding

In our judgment, the Illinois Supreme Court correctly concluded that the ordinance does not provide sufficiently specific limits on the enforcement discretion of the police "to meet constitutional standards for definiteness and clarity." We recognize the serious and difficult problems testified to by the citizens of Chicago that led to the enactment of this ordinance. "We are mindful that the preservation of liberty depends in part on the maintenance of social order." However, in this instance, the city has enacted an ordinance that affords too much discretion to the police and too little notice to citizens who wish to use the public streets.

Accordingly, the judgment of the Supreme Court of Illinois is affirmed.

Dissenting, *Scalia, J.*

Until the ordinance that is before us today was adopted, the citizens of Chicago were free to stand about in public places with no apparent purpose—to engage, that is, in conduct that appeared to be loitering. In recent years, however, the city has been afflicted with criminal street gangs. As reflected in the record before us, these gangs congregated in public places to deal in drugs and to terrorize the neighborhoods by demonstrating control over their "turf." Many residents of the inner city felt that they were prisoners in their own homes. Once again, Chicagoans decided that to eliminate the problem, it was worth restricting some of the freedom that they once enjoyed. . . .

The majority today invalidates this perfectly reasonable measure . . . by elevating loitering to a constitutionally guaranteed right and by discerning vagueness where, according to

our usual standards, none exists. . . . [R]espondent Jose Renteria—who admitted that he was a member of the Satan Disciples gang—was observed by the arresting officer loitering on a street corner with other gang members. The officer issued a dispersal order, but when she returned to the same corner 15 to 20 minutes later, Renteria was still there with his friends, whereupon he was arrested. In another example, respondent Daniel Washington and several others—who admitted they were members of the Vice Lords gang—were observed by the arresting officer loitering in the street, yelling at passing vehicles, stopping traffic, and preventing pedestrians from using the sidewalks. The arresting officer issued a dispersal order, issued another dispersal order later when the group did not move, and finally arrested the group when they were found loitering in the same place still later. Finally, respondent Gregorio Gutierrez—who had previously admitted to the arresting officer his membership in the Latin Kings gang—was observed loitering with two other men. The officer issued a dispersal order, drove around the block, and arrested the men after finding them in the same place upon his return. . . .

The citizens of Chicago have decided that depriving themselves of the freedom to “hang out” with a gang member is necessary to eliminate pervasive gang crime and intimidation—and that the elimination of the one is worth the deprivation of the other. This Court has no business second-guessing either the degree of necessity or the fairness of the trade.

Dissenting, Thomas, J.

The duly elected members of the Chicago City Council enacted the ordinance at issue as part of a larger effort to prevent gangs from establishing dominion over the public streets. By invalidating Chicago’s ordinance, I fear that the Court has unnecessarily sentenced law-abiding citizens to lives of terror and misery. . . .

The city of Chicago has suffered the devastation wrought by this national tragedy. Last year, in an effort to curb plummeting attendance, the Chicago Public Schools hired dozens of adults to escort children to school. The youngsters had become too terrified of gang violence to leave their homes alone. The children’s fears were not unfounded. In 1996, the Chicago Police Department estimated that there were 132 criminal street gangs in the city. Between 1987 and 1994, these gangs were involved in 63,141 criminal incidents, including 21,689 nonlethal violent crimes and 894 homicides. Many of these criminal incidents and homicides result from gang “turf battles,” which take place on the public streets and place innocent residents in grave danger. . . . In 1996 alone, gangs were involved in 225 homicides, which 28 percent of the total homicides committed in the city. . . . Nationwide, law enforcement officials estimate that as many as 31,000 street gangs, with 846,000 members, exist. . . .

Following [their] hearings, the Chicago City Council found that “criminal street gangs establish control over identifiable areas . . . by loitering in those areas and intimidating others from entering those areas.” It further found that the mere presence of gang members “intimidates many law abiding citizens” and “creates a justifiable fear for the safety of persons and property in the area.” It is the product of this democratic process—the council’s attempt to address these social ills—that we are asked to pass judgment upon today. . . .

Today, the Court focuses extensively on the “rights” of gang members and their companions. It can safely do so—the people who will have to live with the consequences of today’s opinion do not live in our neighborhoods. Rather, the people who will suffer . . . are . . . people who have seen their neighborhoods literally destroyed by gangs and violence and drugs. . . . [O]ne resident described, “There is only about maybe one or two percent of the people in the city causing these problems maybe, but it’s keeping 98 percent of us in our houses and

off the streets and afraid to shop." By focusing exclusively on the imagined "rights" of the two percent, the Court today has denied our most vulnerable citizens . . . "freedom of movement." And that is a shame. I respectfully dissent.

Questions for Discussion

1. Summarize Chicago's Gang Congregation Ordinance.
2. The majority concludes that the ordinance fails to provide both citizens and the police with clear guidelines and is unconstitutionally void for vagueness. By reading the law, would you know what conduct is prohibited? As a police officer, would it be clear under what circumstances you were authorized to order people to disperse?
3. Why is the ordinance void for vagueness?
4. Why does Justice Scalia take the time in his dissent to discuss the arrest of several individuals? How do Justices Scalia and Thomas balance civil liberties against public safety?
5. Do you believe that the Chicago Gang Congregation Ordinance is an effective approach to curbing gang activity?
6. As a member of the Chicago City Council, would you vote for the ordinance?

CASES AND COMMENTS

Chicago Gang Ordinance. On February 16, 2000, the Chicago City Council revised the 1992 Gang Congregation Ordinance. The amended ordinance defined "gang loitering" as remaining in any one place under circumstances "that would warrant a reasonable person" to believe that the purpose or effect of that behavior is to enable a criminal street gang "to establish control over identifiable areas, to intimidate others from entering these areas, or conceal illegal activities." The new ordinance authorizes the superintendent of police to designate areas of Chicago in which enforcement is required because "gang loitering has enabled street gangs to establish control over identifiable areas, to intimidate others from entering the areas or to conceal illegal activities" (Municipal Code of Chicago § 8-4-015, 8-4-017). The revised ordinance has not yet been tested in court. How does this differ from the 1992 Gang Congregation Ordinance? Do you think that the revised 2000 law is constitutional? Are there other amendments that you would make to the ordinance?

THE OVERREACH OF CRIMINAL LAW

Criminologists Norval Morris and Gordon Hawkins, writing in 1969, argue that the function of criminal law is to protect property and persons, particularly juveniles and those in need of special protection. They point out that roughly 50% of all arrests are for acts threatening public morality. These, for the most part, are acts that individuals engage in voluntarily and do not view as harmful to themselves or to others. In other words, people are arrested who do not believe that they should be treated as criminals or victims and who are not deterred by the threat of either arrest or punishment. This list of victimless crimes includes drunkenness, use

of narcotics, gambling, prostitution, the possession of obscene materials, and various sexual offenses. Some may be included under the heading of victimless offenses, seatbelt and motorcycle helmet laws, adultery and fornication, and the prohibition on assisted suicide. Morris and Hawkins criticize what they view as the moralist orientation of American criminal law and the long tradition of employing the law as an instrument for coercing individuals into acting in a virtuous fashion. In their view, people possess a complete right to choose a path that may lead to purgatory so long as they do not directly injure the person or property of another. Morris and Hawkins also point to the fact that criminalizing consensual, private behavior actually increases rather than decreases crime.²⁵

- *Crime Tariff.* Making an activity illegal means that those engaged in the activity do not confront competition from legal businesses and will be free to charge a high price. This profit, in turn, is used to fund other organized crime activities. Also, addicts must resort to crime to support their expensive gambling, drug, and alcohol addictions.
- *Inconsistency.* The condemnation of activities such as gambling is undermined by the fact that there are legal lotteries and gambling casinos in Atlantic City, in Las Vegas, and on Native American reservations. This creates an inconsistency in legal rules and contributes to a lack of respect for the law.
- *Romanticism.* Declaring an activity illegal tends to make it appear romantic and appealing to younger people.
- *Law Enforcement.* Scarce law enforcement resources are devoted to enforcing these laws rather than more harmful offenses. Often, there are no complaining victims, and the police must resort to controversial undercover and sting operations. The amount of money involved in activities such as drug trafficking and the absence of complaining victims creates a situation with the potential for bribery, extortion, and corruption.
- *Criminal Subculture.* Making activities like gambling and prostitution illegal means that people involved in these activities are driven into a criminal environment and may be victimized or become involved in other crimes. Prostitutes often are exploited by pimps who offer protection and threaten customers.

This view is challenged by Englishman Lord Patrick Devlin, who argues that society must be equally vigilant in protecting itself against threats from abroad and at home. Lord Devlin contends that the loosening of moral bonds is typically the first step toward the disintegration of the social order and that the maintenance of values is the proper concern of government. Lord Devlin argues that the notion that allegedly private behavior does not affect society is misguided. He concedes that while great social harm may not result from a single individual engaging in an alcoholic or gambling binge, society would crumble if the same activity is embraced by a quarter or more of the population. These so-called victimless crimes, according to Lord Devlin, impose hardships on the families of addicts, require society to spend money in treating addictions, corrupt the young, and ruin the lives of addicts. In short, a compassionate society

does not permit individuals to “do their own thing.” Lord Devlin concludes that we cannot, on the one hand, encourage people to live in a moral fashion and, on the other hand, tolerate immoral behavior. Where do you stand on the debate over so-called victimless crimes? Some studies have found an “epidemic” of illegal gambling by college students. Is this a “victimless crime”?²⁶

The Vera Institute of Justice reports that approximately 10.5 million arrests occur annually in the United States. The number of arrests are at a historic low that has not been witnessed since the 1980s. Critics of “broken windows” policing nonetheless continue to argue that there is a problem of “over-policing that disproportionately affects minority communities. Vera finds that “low-level offenses” such as “drug abuse violations” and “disorderly conduct” comprise over 80% of arrests, while “serious (violent offenses)” comprise fewer than 5% of arrests. The largest category of arrests are for “low-level offenses,” categorized by the FBI as “other non-traffic offenses,” which comprise more than 30% of all arrests. The Vera report speculates that a focus on these low-level offenses strains police and community relations and creates distrust, which, in part, accounts for the fact that the majority of serious criminal offenses are not reported to the police. Do you agree?²⁷

The next section considers the **immorality crime** of prostitution, an activity that the famous British *Wolfenden Report* argued, in 1957, should not be subject to criminal punishment when carried on between consenting adults.

Prostitution and Solicitation

Prostitution is defined as engaging in sexual intercourse or other sexual acts in exchange for money or other items of value. You undoubtedly have heard someone refer to prostitution as “the world’s oldest profession.” Why is an activity that has been characteristic of both ancient and modern societies considered a crime? There are several reasons:

- *Disease.* Encourages transmission of infections such as AIDS.
- *Family.* Weakens marriage and the family.
- *Exploitation.* Exploits and degrades women.
- *Immorality.* Promotes social immorality and a culture tolerant of alcoholism, drug abuse, gambling, and acts of immorality.

Critics of laws punishing prostitution point out that the legitimacy of law enforcement is undermined by the fact that the police typically must resort to posing as “prostitutes” or “customers” in order to enforce prostitution laws and that this lowers respect for law enforcement. There is also an inconsistency in the fact that the police target street prostitutes while “call girls” who service the relatively wealthy are rarely arrested. Critics further note that despite the resources devoted to eliminating prostitution, the police have not been able to deter individuals from engaging in this activity. The argument is also made that categorizing prostitution as a crime ensures that it will be controlled by organized crime and pimps (individuals who live off

the proceeds of prostitution). This results in prostitutes being labeled as criminals, places them in danger, and deprives the government of tax revenues. Others argue that prostitution laws deprive women of the opportunity to utilize their bodies to advance their economic well-being. The most radical commentators point to the fact that prostitutes are no different from the large number of people who engage in sex with the intent of obtaining employment or material gain. Some favor decriminalization of prostitution and subjecting the practice to state regulation, the policy followed in the Netherlands. State regulation has the advantage of ensuring that precautions are taken against the spread of HIV and other sexually transmitted diseases. A small number of commentators favor complete legalization.

Nevada is the only state in which prostitution is legal. Each of the smaller population counties in the state is free to determine whether to permit prostitution, and the practice is heavily regulated. Brothels must pay a licensing fee, and prostitutes are required to submit to monthly HIV tests. Condoms are required, and prostitutes must be at least 21 years old. Prostitution is not permitted anywhere other than in the brothels, and the brothels may not advertise in counties in which the practice is illegal. Nevada possesses roughly 30 legal brothels that employ roughly 300 prostitutes.

The Crime of Prostitution

Prostitution punishes both men and women who

- solicit or engage in
- any sexual activity
- in exchange for money or other consideration.

As you can see, prostitution is committed by exchanging sexual activity for money or other consideration or by **solicitation for prostitution**, asking or requesting another person to engage in prostitution. Note that it is the solicitation or actual exchange of money or value for sex that distinguishes prostitution from the legal act of approaching another person for consensual sexual activity. The crime of prostitution is not limited to sexual intercourse and encompasses all varieties of sexual interaction. Georgia's prostitution law provides that a person "commits the offense of prostitution when he or she performs or offers or consents to perform a sexual act, including but not limited to sexual intercourse or sodomy, for money or other items of value."²⁸

Pennsylvania follows the Model Penal Code by providing that a person is guilty of prostitution who "is an inmate of a house of prostitution or otherwise engages in sexual activity as a business." An inmate is a person who engages in prostitution as a business in conjunction with a house of prostitution or as a "call girl" who makes use of an agency to obtain clients. An individual is guilty under this provision who engages in prostitution in affiliation with a house of prostitution. It is unnecessary to establish that the accused engaged in a specific act of prostitution.²⁹

State statutes also commonly punish loitering for prostitution. California declares that it is "unlawful for any person to loiter in any public place with the intent to commit prostitution."

An individual's *mens rea* is demonstrated by acts that indicate an intent to induce, entice, or solicit prostitution. The California statute notes that this intent may be established by the stopping and soliciting of pedestrians or of the occupants of passing automobiles. This type of provision recognizes that public loitering for solicitation is an essential step in engaging in the business of prostitution and that solicitation negatively impacts a neighborhood's sense of safety and stability.³⁰

Prostitution statutes are gender neutral; prostitution may be committed by a male or female prostitute, and both prostitutes and customers may be guilty of soliciting or loitering for the purpose of prostitution. Several states explicitly punish a person who "hires a prostitute or any other person to engage in sexual activity . . . or if that person enters or remains in a house of prostitution for the purpose of engaging in sexual activity." Pennsylvania also provides that convictions and sentences for a second and all subsequent acts of prostitution shall be published in the newspaper.³¹

Another prostitution-related offense is **pimping**, which involves procuring a prostitute for another individual, arranging a meeting for the purpose of prostitution, transporting an individual to a location for the purpose of prostitution, receiving money or other thing of value from a prostitute knowing that it was earned from prostitution, or owning, managing, or leasing a house of prostitution or prostitution business. **Pandering** is the encouraging and inducing of another to become or remain a prostitute; this is punished more harshly when duress or coercion is employed.³² **Living off prostitution** is committed by a person, other than a prostitute and the prostitute's minor child or other dependent, who is "knowingly supported in whole or substantial part by the proceeds of prostitution."³³ **Keeping a place of prostitution** involves "keeping a place of prostitution when [an individual] knowingly grants or permits the use of such place for the purpose of prostitution."³⁴ Pimping, pandering, and keeping a place of prostitution are also generally encompassed under the crime of **promoting prostitution**, which involves aiding or abetting prostitution by "any means whatsoever."³⁵ States also have extended their laws to criminally punish a "masseur or masseuse" who commits the offense of **masturbation for hire** when the individual "stimulates the genital organs of another, whether resulting in orgasm or not, by manual or other bodily contact exclusive of sexual intercourse or by instrumental manipulation for money or the substantial equivalent thereof."³⁶

Prostitution is a misdemeanor. It is typically punished somewhat more severely for the third and subsequent offenses and is a felony in the event that individuals knew that they were infected with HIV. Georgia provides a sentence of between 5 and 20 years and a fine of up to \$10,000 for keeping a place of prostitution, pimping, pandering, or solicitation involving an individual under 18 years old.³⁷

We should note in passing that there are several other misdemeanor sexual offenses that appear in various state statutes:

- **Adultery.** Consensual sexual intercourse between a male and a female, at least one of whom is married.
- **Bigamy.** Marrying another while already having a living spouse.

- **Fornication.** An unmarried person who engages in voluntary sexual intercourse with another individual.
- **Lewdness.** Public acts offending community standards, including the display of genitals, sexual intercourse, lewd sexual contact, and deviate sexual intercourse.

Legal Regulation of Prostitution

The difficulty of controlling prostitution through individual criminal prosecutions led the city of Milwaukee, Wisconsin, to obtain a court order declaring that prostitutes in designated areas of the city constituted a nuisance. A Wisconsin appellate court found that the police had received a high volume of complaints concerning prostitutes on the streets and private property in this neighborhood. The court further ruled that the enforcement of the laws against prostitution posed a danger to the police, who were forced to act undercover to apprehend prostitutes, and that these officers were endangered by the fact that the prostitutes frequently carried sharpened objects, knives with long blades, and razors. The injunction issued by the court prohibited prostitutes from soliciting customers by stopping pedestrians and automobiles and from waiting at bus stops and pay phones and loitering in the doorways of businesses.³⁸

In the next case, *People v. McGinnis*, a New York City court is asked to determine whether the facts are sufficient to support the defendant's arrest for loitering for the purpose of prostitution.

DO THE FACTS SUPPORT THE CHARGE OF LOITERING FOR THE PURPOSE OF PROSTITUTION?

PEOPLE V. MCGINNIS, 972 N.Y.S.2D 882 (CRIM. CT. N.Y.C. 2013)

Opinion by Mennin, J.

Issue

The defendant, Felicia McGinnis, has moved for an order dismissing the sole charge in the complaint [loitering for prostitution] as factually insufficient. . . .

Facts

The facts alleged in the complaint closely track those supplied in the supporting deposition of P.O. [Police Officer] Fitzpatrick attached to the complaint. The supporting deposition is a form document and is comprised of a brief introductory narrative, followed by fill-in-the-blank and check-off allegations. The initial narrative alleges that the defendant was observed in front of 729 Seventh Avenue at 2:15 a.m., on January 9, 2013, and that the informant observed the defendant "remain and wander about in that vicinity" for a period of approximately 20 minutes. The form goes on to offer the affiant three choices to describe what the defendant did during the time when she or he was observed. The form supporting

deposition alleges that the defendant: "a) beckoned to passing traffic or motorists; b) stopped or attempted to stop approximately __ passerby(s) and/or __ motorists; and c) engaged in conversations with approximately __ passerby(s) and/or motorists." In response to all of these choices, the informant in this case has checked only the third option, indicating that the defendant had "engaged in conversations with 3 passerby(s) and/or motorists."

The boilerplate supporting deposition then goes on to list how the defendant's general deportment and clothing choice and the surrounding circumstances indicated that the defendant was loitering for the purpose of prostitution and offers a number of allegations that may be checked off or filled in by the informant, if applicable. In this section, the supporting deposition has language that may be checked off relating to the officer's experience regarding prostitution cases generally, and with the defendant personally. It also has a check-off section to indicate whether the location was frequented by people who engaged in prostitution, as well as an option to indicate whether the officer has previously personally arrested the defendant for "prostitution-related offenses." Each of these items is checked off on the form by the officer. The form does not include a blank check-off section which would allow the officer informant to write in additional facts based upon his personal observation in support of the complaint.

Reasoning

Penal Law § 240.37(2), which prohibits loitering for the purpose of engaging in a prostitution offense, provides that

[a]ny person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the purpose of prostitution, or of patronizing a prostitute . . . shall be guilty of a violation and is guilty of a class B misdemeanor if such person has previously been convicted of a violation of this section or of [patronizing a prostitute].

The statute requires for guilt of this offense that the defendant "repeatedly" engage in actions such as beckoning, stopping or attempting to stop, attempting to engage passers-by in conversation or stopping or attempting to stop motor vehicles. This language reflects the purpose behind enactment of the legislation, the prevention of the commandeering of public places by persons whose aim is to proffer sex for money:

Law abiding citizens in our cities have been increasingly subjected to harassment, interference, and embarrassment by persons engaged in and promoting prostitution activities. Moreover, vehicular traffic in our congested cities is often disrupted by persons engaged in this illicit activity. The public demands and should have protection from invasion of its privacy.

Nowhere is the legislative intention expressed more stridently than in the Preamble to the . . . statutory section itself:

The legislature hereby finds and declares that loitering for the purpose of prostitution, . . . is disruptive of the public peace in that certain persons engaged in such conduct in public places harass and interfere with the use and enjoyment by other persons of such public places thereby constituting a danger to the public health and safety.

The legislature further finds that in recent years the incidence of such conduct in public places has increased significantly in that persons aggressively engaging in promoting, patronizing or soliciting for the purposes of prostitution have, by their course of conduct in public places, caused citizens who venture into such public places to be the unwilling victims of repeated harassment, interference and assault upon their individual privacy, as a result of which such public places have become unsafe and the ordinary community and commercial life of certain neighborhoods has been disrupted and has deteriorated.

It is clear from the legislative history that the conduct targeted was aggressive, affirmative action by prostitutes (and pimps) plying their trade. The . . . statute . . . even had a specific target area: Times Square and its surrounding streets, which were described in one contemporary newspaper article as "a locale with elements of the Barbary Coast and a Hieronymus Bosch painting," with prostitutes "brazenly seeking trade sometimes grabbing men." . . .

The accusatory instrument alleges that the defendant remained and wandered about on a city block in the vicinity of Times Square in the early morning hours. No details are offered as to that alleged wandering, and the allegation is merely a repetition of the statutory language. The instrument goes on to allege that the defendant engaged in conversations with three passers-by over the course of 20 minutes, but it is not alleged that she approached those persons or that she was the one to initiate the conversations. She is not even alleged to have gestured in some manner to draw the attention of the passers-by to herself or to have slowed their passage in any way. Moreover, it is unreasonable to infer from the facts alleged in the boilerplate supporting deposition that these encounters involved three separate events. As the defendant argues, it is indeed just as reasonable to infer that the three passers-by were together and that the conversations amounted to a single, joint encounter. Finally, there is nothing to indicate that those conversations were related to prostitution activity just because they occurred at 2:15 a.m. at a location frequented by persons who engaged in prostitution. The conversations could just as well have concerned a drug transaction, or completely innocent subject matter such as the defendant's request for a cigarette or a match.

The accusatory instrument does allege that the officer informant had seen the defendant at the location on other occasions and had arrested her before for "prostitution-related offenses" (unspecified) and that the area is often frequented by persons engaged in prostitution. Such factors may be taken into account as to whether an accusatory instrument has established reasonable cause to believe that loitering for the purpose of engaging in a prostitution offense has taken place.

In this case, the supporting deposition indicates that Officer Fitzpatrick has made or assisted in over 50 prior prostitution arrests. At least one court has held that such professional history must be pleaded for the accusatory instrument to be facially sufficient. The accusatory instrument also alleges that the officer had arrested the defendant previously for "prostitution-related offenses," whatever that might include. As noted earlier in this decision, such broad formulaic language does not distinguish between loitering for the purpose of engaging in a prostitution offense and the completed offense of prostitution, nor does it give any indication of whether those arrests resulted in convictions, or whether the complaints in those arrests, like this one, were found to be facially insufficient by a court.

However, neither a police officer's extensive experience in making arrests for a particular type of offense nor his extensive prior experience with a particular defendant requires a court to make a leap of faith by accepting the officer's opinion that such offense occurred in a

given case in the absence of salient cited facts backing up that opinion. Such circumstantial factors do not, in and of themselves, establish reasonable cause to believe that the defendant committed the current offense. An arrest or conviction “based on simple loitering by a known prostitute” is not authorized [under the penal law].

What is essential to a legally sufficient complaint are allegations of “loitering plus additional objective conduct evincing that the observed activities are for the purpose of prostitution. . . .” The observed acts must be consistent with the efforts that a prostitute would be expected to make to attract the attention of potential clientele. The accusatory instrument fails to identify the defendant as the person who initiated the alleged conversations with the three passers-by. It does not identify the three passers-by as male. Nor does it even allege that the defendant approached the passers-by rather than the other way around. The defendant is not alleged to have touched anyone, detained any motorists, or blocked the passage of any person. [There is no allegation that the accused stopped passers-by or motorists or stood in the middle of the street beckoning or stopping motorists or obstructed traffic.] . . .

The informant’s emphasis on the defendant’s clothing as a telltale sign that she was marketing herself commercially is astonishing. The defendant is alleged to have been wearing a black pea coat, skinny jeans which revealed the outline of her legs and platform shoes. This information was again supplied in the supporting deposition in response to a request to “fill in the blank.” Any current issue of a fashion magazine would display plenty of women similarly dressed. However, the choice of such outfit hardly demonstrates the wearer’s proclivity to engage in prostitution. Indeed, the complaint’s characterization of the jeans as “revealing” because they “outline[d] [the] defendant’s legs” seems more to be expected in the dress code of a 1950s high school than a criminal court pleading.

The defendant’s clothing in this case stands in stark contrast to the clothing relied upon as circumstantial proof of loitering for purposes of prostitution in the cases cited by the People. For instance, in *Byrd*, the defendant’s clothing exposed her buttocks. In *Jones*, the defendant was allegedly dressed in a skirt and a black bra with no other covering on her upper body. In *Farra S.*, the defendant was wearing a shirt, the cut of which revealed the sides of her breasts. In *Koss*, one defendant was dressed in a black leopard two-piece bathing suit and high heels. In such instances, reliance upon attire as a factor appears more reasoned.

Finally, not even the defendant’s alleged statement (“You guys haven’t seen me for a minute. Can’t you give me a break. [sic]”) included in the accusatory instrument, provides any meaningful support. The statement is at best ambiguous and contains no admission of guilt.

Holding

[The complaint filed against the defendant is insufficient. There is a] need for an individualized recitation of facts which set forth the elements of an offense based upon the actual observations of the deponent [officer] in a given case.

Questions for Discussion

1. What is required under the New York statute to establish the offense of loitering for the purpose of prostitution?
2. Explain the public policy reasons for the offense of loitering for the purpose of prostitution.
3. List the facts Officer Fitzpatrick relies on to justify his arrest of Felicia McGinnis.

4. Why did Judge Mennin find that Officer Fitzpatrick's account did not justify the defendant's arrest for loitering for the purpose of prostitution? Do you agree with her analysis?
5. How would you decide this case?
6. Do you believe that loitering for the purpose of prostitution should be a crime? Should the police arrest individuals for loitering for the purpose of prostitution absent evidence of what was said during an individual's conversation with others?
7. Can laws against prostitution be effectively enforced without making loitering for the purpose of prostitution a crime?

MODEL PENAL CODE

Section 251.2. Prostitution and Related Offenses

1. A person is guilty of prostitution, a petty misdemeanor, if he or she:
 - a. is an inmate of a house of prostitution or otherwise engages in sexual activity as a business; or
 - b. loiters in or within view of any public place for the purpose of being hired to engage in sexual activity.
 - c. "Sexual activity" includes homosexual and other deviate sexual relations. A "house of prostitution" is any place where prostitution or promotion of prostitution is regularly carried on by one person under the control, management or supervision of another. An "inmate" is a person who engages in prostitution in or through the agency of a house of prostitution. "Public place" means any place to which the public or any substantial group thereof has access.
2. *Promoting Prostitution.* . . . The following acts shall . . . constitute promoting prostitution:
 - a. owning, controlling, managing, supervising or otherwise keeping . . . a house of prostitution or prostitution business; or
 - b. procuring an inmate for a house of prostitution or a place in a house of prostitution for one who would be an inmate; or
 - c. encouraging, inducing, or otherwise purposely causing another to become or remain a prostitute; or
 - d. soliciting a person to patronize a prostitute; or
 - e. procuring a prostitute for a patron; or
 - f. transporting a person into or within this state with the purpose to promote that person engaging in prostitution, or procuring or paying for transportation with that purpose; or
 - g. leasing or otherwise permitting a place controlled by the actor . . . to be regularly used for prostitution or the promotion of prostitution, or failure to make reasonable efforts to abate such use by ejecting the tenant, notifying law enforcement authorities, or other legally available means; or
 - h. soliciting, receiving, or agreeing to receive any benefit for doing or agreeing to do anything forbidden by this Subsection.

3. *Grading of Offenses.* An offense under Subsection (2) constitutes a felony of the third degree if:
 - a. the offense falls within paragraph (a), (b) or (c) of Subsection (2); or
 - b. the actor compels another to engage in or promote prostitution; or
 - c. the actor promotes prostitution of a child under 16 . . . ; or
 - d. the actor promotes prostitution of his wife, child, ward or any person for whose care, protection or support he is responsible.Otherwise the offense is a misdemeanor.
4. *Presumption From Living off Prostitutes.* A person, other than the prostitute or the prostitute's minor child or other legal dependent incapable of self-support, who is supported in whole or substantial part by the proceeds of prostitution is presumed to be knowingly promoting prostitution. . . .
5. *Patronizing Prostitutes.* A person commits a violation if he hires a prostitute to engage in sexual activity with him, or if he enters or remains in a house of prostitution for the purpose of engaging in sexual activity.
6. *Evidence.* On the issue [of] whether a place is a house of prostitution the following shall be admissible evidence: its general repute; the repute of the persons who reside in or frequent the place; the frequency, timing and duration of visits by non-residents. Testimony of a person against his spouse shall be admissible to prove offenses under this Section.

Analysis

1. The statute is a comprehensive approach to prostitution and makes acts of prostitution a petty misdemeanor while punishing as a felony the procuring, soliciting, promotion, transporting, or organizing of others to engage in prostitution.
2. The statute is directed at sex trafficking rather than the act of prostitution.

CASES AND COMMENTS

1. **Patronizing a Prostitute.** Indiana punishes patronizing a prostitute with the same penalties that apply to sex workers. Patronizing a prostitute occurs when a person knowingly or intentionally pays, or offers or agrees to pay, another person for sexual intercourse or other deviate sexual conduct. In *Banks v. State*, 975 N.E.2d 854 (Ind. Ct. App. 2012), Banks was convicted when in response to a female undercover officer's question "So are you good for head for \$20?" he nodded and said, "'[Y]eah, we're good.'" The Model Penal Code section 251.1 treats prostitution as a petty misdemeanor although section 251.5 treats patronizing prostitution as a violation subject only to a fine. The Model Penal Code reasons that this lenient treatment is consistent with the social acceptance of the sexual activity of males. The Model Penal Code notes that in practice, even when statutes require equal treatment for all customers, females are singled out for arrest and prosecution. Other individuals argue that law enforcement

should focus on the upper-level individuals who profit from prostitution and traffic in prostitution. What is your view? See *Model Penal Code and Commentaries: Part II: Definition of Specific Crimes* sections 240.0 to 251.4 (American Law Institute, 1985), pp. 331–332. How do you feel about jurisdictions that provide for the impoundment of an individual's automobile, or for revocation of drivers' licenses when individuals are arrested for prostitution offenses in their automobiles, or for publication of the names and photos of individuals arrested for patronizing prostitution?

Several courts have ruled that a "customer" contacting a sex worker by text is not guilty of violating a statute that prohibits soliciting a prostitute in a public place. See *State v. Suspitsyn*, 941 N.W.2d 423 (Minn. App. 2020).

2. Payment. In *State v. Henderson*, the defendant approached a female undercover police officer who was working as a prostitution decoy and offered to exchange bubble gum for sex. The defendant was convicted and sentenced to six months' probation and fined \$100. Henderson was convicted under a statute that prohibited solicitation of "another to engage . . . in sexual activity for hire." The appellate court concluded that "[i]n view of the statement Henderson made to [Officer St. Clair after he was arrested, the trial court could reasonably find that Henderson made a serious, if unusual, offer to [Officer] Briggs to engage in sex with him in exchange for some bubble gum." As the trial court noted, "bubble gum has economic value, even if that value is slight. . . . There is nothing . . . specifying the amount of compensation" required to constitute the offense of solicitation for prostitution. "Nor is there anything in the statute requiring that the proposed transaction be commercially reasonable." Do you agree? See *State v. Henderson*, 2007-Ohio-5367 (Ohio Ct. App. 2007).

3. Decriminalization. Audrey James, 21, and Laverne McCray, 23, were first offenders, arrested and charged with prostitution. Both were enrolled in business school and worked as prostitutes in order to pay their tuition. They filed a petition under a provision of New York criminal procedure requesting the judge to dismiss the charges "in the interests of justice." This motion was opposed by the district attorney, despite the fact that first offenders were traditionally released without punishment. Judge Stanley Gartenstein of the Criminal Court of New York City noted that prostitution is a victimless crime that the law had proven unable to control. He observed that this was a testimony to the fact that "morality cannot be legislated." In addition, Judge Gartenstein noted that the "the real victim of prostitution is the prostitute herself and the real criminal, her pimp, who keeps her virtually enslaved" and asked whether it "might . . . be more productive to focus society's efforts on the parasite rather than the host." Judge Gartenstein concluded that the time each of the defendants already had spent in jail was sufficient to communicate that prostitution was "self-destructive and degrading." The traditional punishment of the assessment of a fine with the alternative of jail time for nonpayment merely increased dependency on pimps and drove women back to the streets to earn even more money. Releasing these two young women without penalty might save them from this self-perpetuating cycle of prostitution. Judge Gartenstein concluded by arguing that resources and money were being spent on prostitution and gambling offenses, which detracted from efforts to combat violent crime. The average cost for processing a prostitution case was \$505.11, and for a gambling case, \$625.78. This was compared to \$464.27 for a kidnapping and \$470.49 for the average robbery. See *People v. James*, 415 N.Y.2d 342 (Crim. Ct. N.Y.C. 1979).

In January 2018, the Ninth Circuit Court of Appeals affirmed the constitutionality of a California law criminalizing the commercial exchange of sexual activity. The court held there was a reasonable basis for the legislature prohibiting sex work based

on the relationship between prostitution and trafficking in women and children, the association of sex work with violence against women, and the relationship between sex work and illegal drug use and the transmission of AIDS. The California law did not violate the constitutional right of association, because commercial sex relationships are not sufficiently intimate, selective, or lengthy to be constitutionally protected. See *Erotic Service Provider Legal Education and Research Project v. Gascon*, ___ F.3d ___ (9th Cir. 2018); *People v. Conroy*, 2019 Ill. App. (2d) 180693.

4. **Sex Trafficking: Trafficking of Women.** The Department of Homeland Security defines human trafficking as a “modern-day form of slavery involving the illegal trade of people for exploitation or commercial gain.” The International Labour Organization found that there are roughly 20.9 million human trafficking victims worldwide. Sexual exploitation is named by the United Nations Office on Drugs and Crime as the most prevalent form of forced labor.

International criminal gangs are estimated by the United Nations to generate well over \$7 billion a year from the illegal trafficking of women. There are thought to be between 200,000 and 500,000 sex workers in Europe, two thirds of whom are from Eastern Europe and the former Soviet Union and one third of whom are from the developing world. The United States has estimated that between 14,500 and 17,500 individuals are trafficked into the country annually for sexual exploitation and forced labor. Globally, the estimate is that between 600,000 and 800,000 individuals are illegally transported across borders for various forms of exploitation. Studies indicate that roughly 70% of these individuals participate in the commercial sex trade. Europe, Asia, and the Pacific are the destination of roughly 80% of the victims of trafficking.

Women have experienced particularly high rates of unemployment and poverty in the collapsing economies and are susceptible to false promises of domestic and secretarial jobs in Canada, Western Europe, Japan, and the United States. Once the women reach their destination, their passports are confiscated, and they are told that they must work to pay off the cost of their travel and other expenses. The women are typically sold by the traffickers to pimps and bar owners who, in turn, may resell them to other individuals in the sex trade. According to the United Nations, Asian prostitutes in North America and Japan can sell for as much as \$20,000. The United Nations reports that Russian prostitutes in Germany can earn about \$7,500 a month, most of which is kept by the pimp or bar owner.

Women who resist are typically subjected to beatings and rape. Escape is difficult for the women. They typically lack language skills and money and may fear that in the event that they contact the police, they will be prosecuted for prostitution. Many of these women are from strict and conservative cultures and anticipate that in the event the authorities send them home, they will suffer rejection and discrimination. The women find that there is little choice other than to cooperate with their captors and continue to risk contracting sexually transmitted diseases.

The American organization Human Rights Watch issued a report on the sex industry in Bosnia, formerly part of Yugoslavia. The report finds that women who managed to contact the police found themselves prosecuted for prostitution. The local authorities generally were connected with traffickers and shared in the profits. As a consequence, they took no action against the individuals who kidnapped and exploited the women.

In 2000, the United Nations adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Countries that sign this agreement agree to prevent and combat trafficking, to protect and assist victims of trafficking, and to promote cooperation among nation-states to meet these goals.

Signatories are to criminally punish traffickers and to consider providing support services for victims.

In 2000, the U.S. Congress passed the Victims of Trafficking and Violence Protection Act, which proclaims that the degrading institution of slavery continues in the world, including the sexual exploitation of women. The detailed law punishes by 20 years in prison individuals who provide or obtain the labor of another through threat of serious harm or restraint or who traffic in persons who are to be subjected to slavery or forced labor. Aggravated forced labor and sex trafficking and the sex trafficking of minors are subject to a punishment of up to life in prison. Various protections are afforded to the victims of sex trafficking. The Justice Department reports that between 2008 and 2010, over 250 individuals were convicted for sex trafficking. Several states have laws that enable the victims of sex trafficking to petition a court to expunge their convictions for prostitution.

Congress strengthened the criminal penalties attached to human trafficking and the services available to the victims of human trafficking in the Justice for Victims of Trafficking Act of 2015.

The 2018 Allow States and Victims to Fight Online Sex Trafficking Act provides both civil and criminal liability for individuals hosting websites that knowingly assist, support, or facilitate advertising activity that violates federal sex trafficking law.

An example of a prosecution for sex trafficking is *United States v. Jimenez-Calderon*. In *Jimenez-Calderon*, the defendants pled guilty to sex trafficking. The defendants targeted young girls from poor areas in Mexico, and tricked them into leaving home with false promises of a better life in the United States. Once illegally entering the United States, the girls were held captive and forced into prostitution in brothels in New Jersey. The women were forced into prostitution seven days per week, 15 hours per day, and were required to turn over all their earnings to the defendants. They were prohibited from talking to customers, or to one another, and they were beaten and threatened with beatings if they broke the rules. See *United States v. Jimenez-Calderon*, 183 Fed. App'x 274 (3d Cir. 2006).

OBSCENEY

Until the 18th century, **obscenity** in England was punished before religious courts. In 1727, royal judges asserted jurisdiction over obscenity, asserting that possession of such material constituted an offense against the peace and weakened the “bonds of civil society, virtue, and morality.”³⁹

In *Roth v. United States*, the U.S. Supreme Court held that obscenity was not constitutionally protected speech or press within the First Amendment, reasoning that this form of expression is “utterly without redeeming social importance.”⁴⁰ The lack of protection afforded to obscenity is based on several public policy considerations:

- *Protection of the Community.* A community is entitled to protect itself against threats to the moral fabric of society.
- *Antisocial Conduct.* Obscenity causes antisocial conduct.

- *Women.* Obscenity degrades women.
- *Communication.* Obscenity produces a sexual, rather than mental, response and is a form of sexual communication rather than the expression of ideas.

These assertions all have been challenged. For instance, the government *Report of the Commission on Obscenity and Pornography*, in 1970, concluded that exposure to explicit sexual materials does not play a significant role in causing delinquent or criminal behavior.

In *Miller v. California*, in 1973, the U.S. Supreme Court affirmed that obscene material is not protected by the First Amendment and established a three-part test for obscenity. Obscenity (as noted in Chapter 2) is defined as a description or representation of sexual conduct that, taken as a whole by the average person applying contemporary community standards, does each of the following⁴¹:

- *Prurient Interest.* Appeals to the prurient interest in sex (an obsession with obscene, lewd, or immoral matters).
- *Offensive.* Portrays sex in a patently offensive way.
- *Value.* Applying a reasonable person standard, lacks serious literary, artistic, political, or scientific value when taken as a whole.

In *New York v. Ferber*, the U.S. Supreme Court held that **child pornography** could be prohibited despite the fact that the material did not satisfy the *Miller* standard. The Court upheld a New York law that prohibited the depiction of a child under 16 years old in a “sexual performance,” defined as engaging in actual or simulated sexual activity or the lewd display of the genitals. The sexual performance was considered criminal under the statute regardless of whether it possessed literary, artistic, political, or scientific value.⁴²

It is illegal in every state to buy, sell, exhibit, produce, advertise, distribute, or possess with the intent to distribute obscene material or illegal child pornography. The offense of lewdness involves conduct that is obscene, such as willfully exposing the genitals of one person to another in a public place for the purpose of arousing or gratifying the sexual desire of either individual. **Indecent exposure** generally entails an act of public indecency, including sexual intercourse, exposure of the sexual organs, a lewd appearance in a state of partial or complete nudity, or a lewd caress or fondling of the body of another person.

Several municipalities have expanded the definition of obscenity to include other forms of communication that are considered harmful. An Indianapolis ordinance, for instance, was ruled unconstitutional that prohibited the portrayal of women as sex objects who enjoy pain or humiliation or who experience sexual pleasure in being raped or who are presented as sex objects for domination or violation. The ordinance was ruled unconstitutional by the Seventh Circuit Court of Appeals, which held that Indianapolis was improperly penalizing speech based on the content of the message: Communication depicting women in the approved way was lawful no matter how sexually explicit, and speech portraying women in the unapproved way was unlawful whatever the literary or artistic value.⁴³

In the next case in the text, *Brown v. Entertainment Merchants Association*, the U.S. Supreme Court considered the constitutionality of a California law regulating violent and sexually explicit video games based on evidence that exposure to these games is related to harmful effects on minors. Does the First Amendment protect materials that California reasonably believes cause aggressive behavior by minors? Why must society wait until a young person commits a crime to intervene?

MAY CALIFORNIA PROHIBIT JUVENILES FROM PURCHASING OR RENTING VIOLENT VIDEO GAMES?

BROWN V. ENTERTAINMENT MERCHANTS ASSOCIATION, 564 U.S. 768 (2011)

Opinion by Scalia, J.

Issue

We consider whether a California law imposing restrictions on violent video games comports with the First Amendment.

Facts

California Assembly Bill 1179 (2005), Cal. Civ. Code Ann. §§1746–1746.5, prohibits the sale or rental of “violent video games” to minors unless accompanied by an adult, and requires their packaging to be labeled “18.” The Act covers games “in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted” in a manner that “[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors,” that is “patently offensive to prevailing standards in the community as to what is suitable for minors,” and that “causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.” Violation of the Act is punishable by a civil fine of up to \$1,000.

Respondents, representing the video-game and software industries, brought a pre-enforcement challenge to the Act in the United States District Court for the Northern District of California. That court concluded that the Act violated the First Amendment and permanently enjoined its enforcement. . . .

California correctly acknowledges that video games qualify for First Amendment protection. The Free Speech Clause exists principally to protect discourse on public matters, but we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try. “Everyone is familiar with instances of propaganda through fiction. What is one man’s amusement, teaches another’s doctrine.” Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player’s interaction with the virtual world). That suffices to confer First Amendment protection. Under our Constitution,

"esthetic and moral judgments about art and literature . . . are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority." And whatever the challenges of applying the Constitution to ever-advancing technology, "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary" when a new and different medium for communication appears.

The most basic of those principles is this: "[A]s a general matter . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." There are of course exceptions. "'From 1791 to the present' . . . the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.'" These limited areas—such as obscenity, incitement, and fighting words—represent "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." . . .

California does not argue that it is empowered to prohibit selling offensively violent works to *adults*. . . . Instead, it wishes to create a wholly new category of content-based regulation that is permissible only for speech directed at children.

That is unprecedented and mistaken. "[M]inors are entitled to a significant measure of First Amendment protection." . . . No doubt a State possesses legitimate power to protect children from harm, but that does not include a free-floating power to restrict the ideas to which children may be exposed. "Speech that is neither obscene . . . nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them."

California's argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence, but there is none. Certainly the books we give children to read—or read to them when they are younger—contain no shortage of gore. Grimm's Fairy Tales, for example, are grim indeed. As her just deserts for trying to poison Snow White, the wicked queen is made to dance in red hot slippers "till she fell dead on the floor, a sad example of envy and jealousy." Cinderella's evil stepsisters have their eyes pecked out by doves. And Hansel and Gretel (children!) kill their captor by baking her in an oven.

High-school reading lists are full of similar fare. Homer's Odysseus blinds Polyphemus the Cyclops by grinding out his eye with a heated stake. In the *Inferno*, Dante and Virgil watch corrupt politicians struggle to stay submerged beneath a lake of boiling pitch, lest they be skewered by devils above the surface. And Golding's *Lord of the Flies* recounts how a schoolboy called Piggy is savagely murdered by *other children* while marooned on an island. . . .

California claims that video games present special problems because they are "interactive," in that the player participates in the violent action on screen and determines its outcome. The latter feature is nothing new: Since at least the publication of *The Adventures of You: Sugarcane Island* in 1969, young readers of choose-your-own-adventure stories have been able to make decisions that determine the plot by following instructions about which page to turn to. As for the argument that video games enable participation in the violent action, that seems to us more a matter of degree than of kind. As Judge Posner of the Seventh Circuit Court of Appeals has observed, all literature is interactive. "[T]he better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own."

Justice Alito has done considerable independent research to identify video games in which "the violence is astounding." "Victims are dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces. . . . Blood gushes, splatters, and pools." Justice

Alito recounts all these disgusting video games in order to disgust us—but disgust is not a valid basis for restricting expression. And the same is true of Justice Alito’s description of those video games he has discovered that have a racial or ethnic motive for their violence—“ethnic cleansing” [of] . . . African Americans, Latinos, or Jews.” To what end does he relate this? Does it somehow increase the “aggressiveness” that California wishes to suppress? Who knows? But it does arouse the reader’s ire, and the reader’s desire to put an end to this horrible message. Thus, ironically, Justice Alito’s argument highlights the precise danger posed by the California Act: that the ideas expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason for governmental proscription.

Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. The State must specifically identify an “actual problem” in need of solving, and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard. “It is rare that a regulation restricting speech because of its content will ever be permissible.”

California cannot meet that standard. . . . The State’s evidence is not compelling. California relies primarily on the research of Dr. Craig Anderson and a few other research psychologists whose studies purport to show a connection between exposure to violent video games and harmful effects on children. These studies have been rejected by every court to consider them, and with good reason: They do not prove that violent video games cause minors to act aggressively. Instead, “[n]early all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology.” They show at best some correlation between exposure to violent entertainment and minuscule real-world effects, such as children’s feeling more aggressive or making louder noises in the few minutes after playing a violent game than after playing a nonviolent game.

Even taking for granted Dr. Anderson’s conclusions that violent video games produce some effect on children’s feelings of aggression, those effects are both small and indistinguishable from effects produced by other media. In his testimony in a similar lawsuit, Dr. Anderson admitted that the “effect sizes” of children’s exposure to violent video games are “about the same” as that produced by their exposure to violence on television. And he admits that the same effects have been found when children watch cartoons starring Bugs Bunny or the Road Runner, or when they play video games like *Sonic the Hedgehog* that are rated “E” or even when they “vie[w] a picture of a gun.”

Of course, California has (wisely) declined to restrict Saturday morning cartoons, the sale of games rated for young children, or the distribution of pictures of guns. The consequence is that its regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint. Here, California has singled out the purveyors of video games for disfavored treatment—at least when compared to booksellers, cartoonists, and movie producers—and has given no persuasive reason why.

The Act is also seriously underinclusive in another respect. . . . The California Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it’s OK. And there are not even any requirements as to how this parental or avuncular relationship is to be verified; apparently the child’s or putative parent’s, aunt’s, or uncle’s say-so suffices. That is not how one addresses a serious social problem.

California claims that the Act is justified in aid of parental authority: By requiring that the purchase of violent video games can be made only by adults, the Act ensures that parents can decide what games are appropriate. At the outset, we note our doubts that punishing third parties for conveying protected speech to children just in case their parents disapprove of that speech is a proper governmental means of aiding parental authority. Accepting that position would largely undermine the rule that “only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to [minors].” . . .

The video-game industry has in place a voluntary rating system designed to inform consumers about the content of games. The system, implemented by the Entertainment Software Rating Board (ESRB), assigns age-specific ratings to each video game submitted: EC (Early Childhood); E (Everyone); E10+ (Everyone 10 and older); T (Teens); M (17 and older); and AO (Adults Only—18 and older). The Video Software Dealers Association encourages retailers to prominently display information about the ESRB system in their stores; to refrain from renting or selling adults-only games to minors; and to rent or sell “M” rated games to minors only with parental consent. In 2009, the Federal Trade Commission (FTC) found that, as a result of this system, “the video game industry outpaces the movie and music industries” in “[1] restricting target-marketing of mature-rated products to children; [2] clearly and prominently disclosing rating information; and [3] restricting children’s access to mature-rated products at retail.” This system does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home. Filling the remaining modest gap in concerned-parents’ control can hardly be a compelling state interest.

And finally, the Act’s purported aid to parental authority is vastly overinclusive. Not all of the children who are forbidden to purchase violent video games on their own have parents who care whether they purchase violent video games. While some of the legislation’s effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of what the State thinks parents *ought* to want. . . .

Holding

We have no business passing judgment on the view of the California Legislature that violent video games (or, for that matter, any other forms of speech) corrupt the young or harm their moral development. Our task is only to say whether or not such works constitute a “well-defined and narrowly limited clas[s] of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem” (the answer plainly is no); and if not, whether the regulation of such works is justified by that high degree of necessity we have described as a compelling state interest (it is not). Even where the protection of children is the object, the constitutional limits on governmental action apply. . . .

As a means of protecting children from portrayals of violence, the legislation is seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental or avuncular veto. And as a means of assisting concerned parents it is seriously overinclusive because it abridges the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime. . . .

Dissenting, Breyer, J.

California’s law imposes no more than a modest restriction on expression. The statute prevents no one from playing a video game, it prevents no adult from buying a video game, and it prevents no child or adolescent from obtaining a game provided a parent is willing to help.

All it prevents is a child or adolescent from buying, without a parent's assistance, a gruesomely violent video game of a kind that the industry itself tells us it wants to keep out of the hands of those under the age of 17. . . .

The interest that California advances in support of the statute is compelling. As this Court has previously described that interest, it consists of both (1) the "basic" parental claim "to authority in their own household to direct the rearing of their children," which makes it proper to enact "laws designed to aid discharge of [parental] responsibility," and (2) the State's "independent interest in the well-being of its youth." . . .

As to the need to help parents guide their children, the Court noted in 1968 that "parental control or guidance cannot always be provided." Today, 5.3 million grade-school-age children of working parents are routinely home alone. Thus, it has, if anything, become more important to supplement parents' authority to guide their children's development.

As to the State's independent interest, we have pointed out that juveniles are more likely to show a "lack of maturity" and are "more vulnerable or susceptible to negative influences and outside pressures," and that their "character . . . is not as well formed as that of an adult." And we have therefore recognized "a compelling interest in protecting the physical and psychological well-being of minors." . . .

There are many scientific studies that support California's views. Social scientists, for example, have found causal evidence that playing these games results in harm. Longitudinal studies, which measure changes over time, have found that increased exposure to violent video games causes an increase in aggression over the same period. Experimental studies in laboratories have found that subjects randomly assigned to play a violent video game subsequently displayed more characteristics of aggression than those who played nonviolent games. . . .

I can find no "less restrictive" alternative to California's law that would be "at least as effective." The . . . voluntary system has serious enforcement gaps. . . . [A]s of the FTC's most recent update to Congress, 20% of those under 17 are still able to buy M-rated video games, and, breaking down sales by store, one finds that this number rises to nearly 50% in the case of one large national chain. . . . The industry also argues for an alternative technological solution, namely "filtering at the console level." But it takes only a quick search of the Internet to find guides explaining how to circumvent any such technological controls. . . .

The upshot is that California's statute, as applied to its heartland of applications (i.e., buyers under 17; extremely violent, realistic video games), imposes a restriction on speech that is modest at most. . . .

I add that the majority's different conclusion creates a serious anomaly in First Amendment law. . . . [A] State can prohibit the sale to minors of depictions of nudity; today the Court makes clear that a State cannot prohibit the sale to minors of the most violent interactive video games. But what sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her? What kind of First Amendment would permit the government to protect children by restricting sales of that extremely violent video game *only* when the woman—bound, gagged, tortured, and killed—is also topless? . . . [E]xtreme violence, where interactive, and *without literary, artistic, or similar justification*, can prove at least as, if not more, harmful to children as photographs of nudity. And the record here is more than adequate to support such a view.

Questions for Discussion

1. Summarize Justice Scalia's reasons for concluding that the California statute is both "underinclusive" and "overinclusive."
2. Do you agree with Justice Breyer that the California law should be upheld as a constitutionally valid means of advancing the interest in protecting children from the uniquely destructive effects of violent video games?
3. Are video games different from other media formats?
4. How do Justices Scalia and Breyer differ on their evaluation of the social science studies on the relationship between video games and violence?
5. Should the Supreme Court be involved in overturning a decision by the California legislature to regulate juveniles' access to video games?

CRUELTY TO ANIMALS

The crime of cruelty to animals is recognized as an offense against public order and decency. These laws were originally based on the belief that respect for animals helped to teach people to act with sensitivity and regard for their fellow citizens, particularly the most vulnerable members of human society. Today, laws against cruelty to animals also reflect the emotional attachment that people have toward their pets and other animals and the increasingly common belief that animals experience pleasure and pain and possess rights. Violence toward animals and neglect of animals is also thought to encourage aggression toward human beings. Prior to 1990, only 6 states punished cruelty to animals as a felony. At last count 48 states have felony provisions in their animal cruelty laws. Every state has laws against dog fighting and cock fighting. The Animal Legal Defense Fund ranks the five states with the strongest anticruelty laws as Illinois, Maine, Michigan, Oregon, and California. The states considered to have the weakest anticruelty laws are Kentucky, North Dakota, Idaho, Mississippi, and Iowa. In an interesting California case, a defendant was convicted of animal cruelty for keeping 92 cats in a confined space to protect them from being euthanized in an animal shelter. The court held that the necessity defense was not available to protect animals.⁴⁴

The Animal Welfare Act of 1966, 7 U.S.C. § 2137, is a comprehensive federal law that regulates research, exhibition, transport, and treatment of animals by commercial dealers. In 2010, in *United States v. Stevens*, the U.S. Supreme Court held that a congressional act prohibiting the creating, selling, or possessing depictions of animal cruelty with the purpose of placing the depiction in "interstate commerce . . . for commercial gain" was in violation of First Amendment freedom of expression.⁴⁵

Federal courts in a number of recent cases have held that the use of deadly force against a dog while executing a warrant to search a home for illegal drug activity is reasonable under the Fourth Amendment "when, given the totality of the circumstances and viewed from the perspective of an objectively reasonable officer, the dog poses an imminent threat to the officer's safety."⁴⁶

CRIME IN THE NEWS

In February 2020, Jussie Smollett, an actor in the television series *Empire*, was charged by a Chicago, Cook County, Illinois, grand jury with six counts of felony disorderly conduct. The charges were based on his allegedly falsely reporting to the police that he had been the victim of a hate crime. Felony disorderly conduct carries a maximum penalty of three years in prison.

Smollett, who is African American and openly gay, was best known for his portrayal of a gay musician on *Empire*. He reported to the police that he had been attacked around 2 a.m. by two masked men who made racist and homophobic insults and proclaimed that this was "MAGA (Make America Great Again) country," an apparent reference to President Donald J. Trump. The attackers allegedly hit Smollett in the face, poured bleach on him, and placed a noose around his neck. Surveillance cameras captured only a partial view of the assailants. At the hospital, Smollett was found to have scratches and some bruising on his face although he did not suffer serious injuries.

A week before the attack, Smollett reported that he had received a racist letter picturing a man being hanged with the phrase "you will die" in an envelope containing white powder, which later was found to be a harmless crushed ibuprofen.

Smollett following the attack received widespread support from the public, the entertainment industry, and prominent politicians.

Chicago police investigators tracked the assailants on surveillance cameras and using ride share data identified the two attackers. The police discovered that the perpetrators were brothers, Olabinjo and Abimbola Osundairo, both of whom knew Smollett. The brothers subsequently admitted that Smollett had paid them with a \$3,500 check to stage a false attack and told the police that Smollett had written and sent himself the racist letter. The attack had been planned ahead of time with Smollett. The brothers agreed to shout racist and homophobic slogans and hit but not hurt Smollett. Both of the brothers had been employed as "extras" on the set of *Empire*, and Abimbola had worked as Smollett's personal trainer and on occasion sold him designer drugs. Phone records indicate that Smollett had talked to the brothers an hour before as well as an hour following the attack.

Smollett continued to insist that he had been attacked in a hate crime and vigorously defended himself in a national television interview. He accused individuals who questioned his account of diminishing the seriousness of racist hate crimes.

Following Smollett's arrest for disorderly conduct, he was removed from the final two episodes of *Empire*. Commentators speculated that Smollett staged the attack to raise his public profile and to command a higher salary (he reportedly was paid between \$65,000 and \$100,000 per episode).

Chicago Police Superintendent Eddie T. Johnson criticized Smollett for taking advantage of the pain and suffering of individuals who had experienced racism and for diverting the resources of the police from investigating crime and for smearing the reputation of Chicago.

The Center for the Study of Hate and Extremism at California State University, San Bernardino, found that between 2016 and 2018 there were 21,000 hate crimes and that fewer than 58 reports were determined to be false. Investigators report that most false reports are intended to attract attention and public support and are made by individuals who believe that portraying themselves as victims of a hate crime will give them public prominence and importance.

Cook County state's attorney Kim Foxx, an African American progressive prosecutor, removed herself from the Smollett case a week before his arrest because she had been in

contact with individuals representing Smollett prior to the filing of charges against him and appointed her deputy Joseph Magate to supervise the prosecution. In late March, the state's attorney dropped all 16 felony counts with which Smollett had been charged and explained that the state's attorney "prioritized violent crime" and that Smollett did not have a criminal record, did not pose a threat to public safety, possessed a record of public service, and had agreed to forfeit the \$10,000 bond he posted for bail. Although Magate stated that Smollett had not been "exonerated," Smollett was not required as part of the plea agreement to admit wrongdoing. The state's attorney subsequently released a number of letters from community and national organizations documenting Smollett's record of public service on behalf of various schools and youth organizations.

Emails made available to the public subsequently indicated that Kim Foxx believed that Smollett was being treated too harshly although there is no evidence that she communicated her views to Magate. Chicago mayor Rob Emanuel criticized what he viewed as Smollett's preferential treatment and the "whitewash of justice."

Judge Michael P. Toomin subsequently found that Foxx once having removed herself from the case should have appointed a special prosecutor to handle the prosecution, and the judge appointed former federal prosecutor Dan Webb to act as a special prosecutor to "restore" public confidence in the "integrity" of the criminal justice system. Webb was authorized by the judge to reopen the case if "reasonable grounds exist." Webb following his investigation stressed that the state's attorney had initially concluded that Smollett was guilty of disorderly conduct and then inexplicably changed its mind and failed to pursue the charges. There was no evidence that the state's attorney in the past had decided against prosecuting individuals charged with similar offenses. In February 2020, Webb convened a grand jury, which charged Smollett with six counts of disorderly conduct based on his false statements to Chicago police officers.

Kim Foxx during her successful reelection campaign in 2020 defended the decision to dismiss the charges against Smollett on the grounds that as a newly elected state's attorney she had shifted the priorities of the office to gun crimes. Foxx criticized Dan Webb's decision to file charges against Smollett as an effort to politicize the judicial process.

Smollett once again pled not guilty and was released on his own recognizance. The City of Chicago is suing Smollett for the expenses incurred investigating his case.

CHAPTER SUMMARY

Crimes against public order and morals have traditionally been viewed as of secondary importance. These misdemeanor offenses are disposed of in summary trials and carry modest punishments. Offenses such as disorderly conduct, however, constitute a significant percentage of arrests and prosecutions, and the treatment of these arrestees helps to shape perceptions of the criminal justice system.

Crimes against public order and morals were historically used to remove the unemployed and political agitators from cities and towns. Today, we are seeing a renewed emphasis on these offenses by municipalities. An increasing number of middle-class individuals are moving into urban areas and find themselves sharing their neighborhood with prostitutes, drug addicts, alcoholics, and gangs. The so-called broken windows theory reasons that the tolerance

of small-scale, quality-of-life crimes leads to neighborhood deterioration and facilitates the growth of crime.

Individual disorderly conduct is directed at a broad range of conduct that (1) risks or causes public inconvenience, annoyance, or alarm and (2) risks causing or does cause a breach of the peace. The Model Penal Code punishes engaging in fighting or threatening violent behavior; creating unreasonable noise, offensive utterances, or gestures; or creating a hazardous or physically offensive condition. A riot is group disorderly conduct. It entails participating with others in tumultuous and violent conduct with the intent of causing a grave risk of public alarm.

Two controversial quality-of-life crimes are vagrancy, defined in the common law as wandering the streets with no apparent means of earning a living, and loitering, a related offense that is defined at common law as standing in public with no apparent purpose. These broad statutes have historically been used against individuals based on their status as “undesirables.” Vagrancy and loitering statutes have been found void for vagueness by the U.S. Supreme Court. Many states have responded by adopting the approach of the Model Penal Code and punishing individuals whose conduct warrants “alarm for the safety of persons or property in the vicinity.” Municipal ordinances directed against the homeless and gangs have been challenged as void for vagueness, and laws against the homeless also have been attacked as punishing individuals based on their economic status. These legal actions have generally proven unsuccessful.

Crimes against public order and decency have been criticized as punishing “victimless crimes,” or consensual offenses that the individuals involved do not view as harmful. Other commentators argue that the law is properly concerned with private morality, and they challenge the notion that these offenses against public order and decency do not result in harm to individuals and to society. A particular object of debate is the criminalization of prostitution, the exchange of sexual acts for money or some other item of value. Obscenity is another offense that is claimed to be a victimless crime, which some claim creates social harm. There is particular controversy concerning efforts to extend obscenity to include depictions and descriptions of violence, particularly when directed to children. Another growing area of concern is the protection of animals.

CHAPTER REVIEW QUESTIONS

1. List specific acts constituting disorderly conduct.
2. What is the difference between disorderly conduct and riot?
3. Distinguish between vagrancy and loitering.
4. What constitutional objections have been raised to vagrancy and loitering statutes?
5. What was the constitutional basis for the Supreme Court’s holding Chicago’s Gang Congregation Ordinance unconstitutional? Explain the reasoning of the Supreme Court.

6. What are the elements of the crime of prostitution?
7. Considering the cases you read on homelessness, does the broken windows theory pose a threat to civil liberties?
8. Why do some commentators argue that the criminal law is overreaching?
9. List the elements of the crime of prostitution. Are prostitution and soliciting for prostitution victimless crimes?
10. How does the Supreme Court define obscenity? What is the legal standard for child pornography?
11. Should individuals be held criminally liable for cruelty to animals?

LEGAL TERMINOLOGY

adultery	loitering
bigamy	masturbation for hire
breach of the peace	obscenity
broken windows theory	pandering
child pornography	pimping
crimes against public order and morality	promoting prostitution
crimes against the quality of life	prostitution
disorderly conduct	public indecencies
fornication)	riot
immorality crime	rout
indecent exposure	solicitation for prostitution
keeping a place of prostitution	unlawful assembly
lewdness	vagrancy
living off prostitution	

TEST YOUR KNOWLEDGE ANSWERS

1. False.
2. True.
3. False.
4. False.
5. False.
6. False.
7. False.

16

CRIMES AGAINST THE STATE

TEST YOUR KNOWLEDGE: TRUE/FALSE

1. Treason is the only crime defined in the U.S. Constitution.
2. Sedition punishes various acts including engaging in any rebellion or insurrection against the authority of the United States or giving “aid and comfort” to such an effort.
3. Sabotage requires a specific intent or purpose to damage the national defense of the United States.
4. Espionage during wartime has the same legal elements as espionage that is committed in peacetime.
5. The major difference in the legal definitions of domestic terrorism and international terrorism is that domestic terrorism takes place within the United States and international terrorism takes place outside the United States.
6. The criminal offenses of material support to terrorists and material support to terrorist organizations punish various acts including supplying military material to terrorists or to terrorist organizations.
7. Terrorists in general meet the specific requirements set forth in the Geneva Convention on the law of war that must be satisfied to be considered prisoners of war.
8. A nation’s courts under no circumstances have jurisdiction over acts committed outside the country’s borders.

Check your answers at the end of the chapter on page 845.

Did the Defendant Commit an Act of Terrorism?

The . . . “crime of terrorism” . . . occurs when a person “commits a specified offense” with the “intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping.” . . .

Around midnight, a fight broke out between the SJB members and Miguel and his companions. During the melee, an SJB member directed defendant to shoot and he fired five bullets from the handgun. Three shots hit one of the rivals and paralyzed him. A 10-year-old girl was shot in the head and died. After the SJB members fled the scene, defendant handed the gun to a female member who later passed the weapon to another SJB member. Another SJB member threw the five spent shell casings into a sewer. (*People v. Morales*, 982 N.E.2d 580 [N.Y. 2012])

INTRODUCTION

A significant percentage of the Europeans who settled in the American colonies were fleeing religious or political persecution and understandably developed a suspicion of government. This distrust was enhanced by the colonists’ unhappy experiences with the often-repressive policies of the British authorities. There was almost uniform agreement to build the new American democracy on a foundation of strong limits on official authority along with a commitment to individual freedom. The colonists were also reluctant to adopt the type of harsh legislation that had been used by English monarchs to stifle dissent and criticism. Nevertheless, there was the reality that the United States confronted a threat from European countries eager to acquire additional territory in North America. A number of Americans and most Canadians also continued to harbor deep loyalties to England. This dictated that the United States put various laws in place to protect the government and people from attack. In this chapter, we examine these **crimes against the state**:

- *Treason*. Involvement in an attack on the United States.
- *Sedition*. A written or verbal communication intended to create disaffection, hatred, or contempt toward the U.S. government.
- *Sabotage*. Destruction of national defense materials.
- *Espionage*. Conveying information to a foreign government with the intent of injuring the United States.

Recent events have also led to the development of various counterterrorist laws, including the punishment of materially assisting terrorism. In reading about these counterterrorism

offenses, you will see that these statutes are a modern and updated version of treason, sedition, sabotage, and espionage.

TREASON

English royalty prosecuted and convicted critics of the monarchy for **treason**. Monarchs intentionally avoided writing down the requirements of treason in a statute in order to permit the crime to be applied against all varieties of critics. Parliament was finally able to mobilize enough power in 1352 to limit the power of the king, and it forced Edward III to agree to a “Declaration what Offences shall be adjudged Treason.”

British officials in the American colonies applied the law on treason against rebellious servants and government critics, who typically were punished by “drawing and hanging.” The drafters of the U.S. Constitution harbored bitter memories of the abusive use of the law on treason against critics of the colonial regime. At the same time, the drafters of the U.S. Constitution were conscious of the need to protect the newly independent American states against the threat posed by individuals whose loyalty remained with England and against European states that desired to expand their territorial presence in North America.

How could these various concerns be balanced against one another? The decision was made for the Constitution to clearly set forth the definition of treason, the proof necessary to establish the offense, and the appropriate punishment. James Madison explained in the *Federalist Papers* that as “new-fangled and artificial treasons have been the great engines by which violent factions . . . have usually wreaked their . . . malignity on each other, the convention have with great judgment opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime.”¹ Article III, Section 3 of the U.S. Constitution provides that treason against the United States “shall consist only in levying War against them, or in adhering to their Enemies giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act or on Confession in open Court.” Congress is also constitutionally prohibited from adopting the policy practiced in England of extending penalties beyond individual offenders to members of their family.

In summary, the United States adopted a law against treason while clearly limiting the definition of the offense in the Constitution.

Criminal Act and Criminal Intent

Treason is the only crime defined in the U.S. Constitution. Treason against the United States is a federal crime and may not be prosecuted by the states. Various states, such as California, prohibit treason against the state government.

The Constitution limits the *actus reus* of treason to individuals engaged in

- armed opposition to the government, or
- providing aid and comfort to the enemy.

Supreme Court justice Robert Jackson, in *Cramer v. United States*, clarified that levying war consists of taking up arms and that giving aid and comfort involves concrete and tangible assistance. Justice Jackson stressed that a citizen may “intellectually or emotionally” favor the enemy or may “harbor sympathies or convictions disloyal” to the United States, but absent the required *actus reus*, there is no treason. He explained that an individual gives aid and comfort to the enemy by such acts as fomenting strikes in defense plants, charging exorbitant prices for essential armaments, providing arms to the enemy, or engaging in countless other acts that “impair our cohesion and diminish our strength.”²

In a treason prosecution of sailors who seized, equipped, and armed a ship with the intent of attacking the federal government, Circuit Justice Stephen J. Field of the federal Circuit Court of the Northern District of California observed that treason may be directed to the overthrow of the U.S. government throughout the country or only in certain states or in selected localities.³ There is also no requirement that the enemy be shown to have benefited by the assistance provided by the accused.

The Constitution requires that treason be clearly established by the prosecution. This protects individuals against convictions based on passion, prejudice, or false testimony.

- Two witnesses must testify that the defendant committed the same overt act of treason, or
- the accused must make a confession in open court.

The *mens rea* of treason is an “intent to betray” the United States. Justice Jackson observed that “if there is no intent to betray there is no treason.” Proof of the defendant’s treasonous intent is not limited to the testimony of two witnesses. The required intent may be established by the testimony of a number of witnesses concerning the defendant’s statements or behavior. Do not confuse motive with intent. An act that clearly assists and is intended to assist the enemy is treason, despite the fact that the defendant may be motivated by profit, anger, or personal opposition to war rather than by a belief in the justice of the enemy’s cause.

In *Cramer*, Justice Jackson cautioned that treason is “one of the most intricate of crimes” and that the U.S. Constitution “gives a superficial appearance of clarity and simplicity which proves illusory when it is put to practical application. . . . The little clause is packed with controversy and difficulty.”

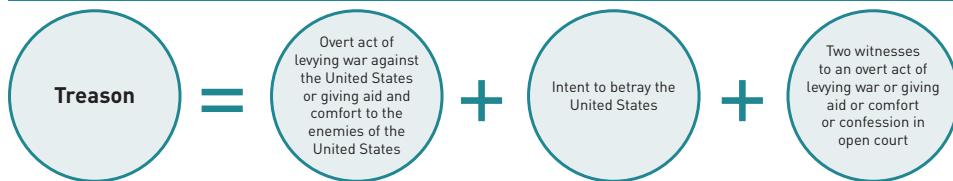
Prosecuting Treason

The United States has brought only a handful of prosecutions for treason, and most offenders have had their death sentences modified or have received full pardons from the president. Courts have also been vigilant in ensuring that the rights of defendants are protected. Justice Jackson observed that the United States has “managed to do without treason prosecutions to a degree that probably would be impossible except [where] a people was singularly confident of external security and internal stability.”

Cramer v. United States, in 1945, is the most important treason case decided by the U.S. Supreme Court. A team of eight German saboteurs was transported across the Atlantic in two submarines and secretly put ashore in New York and Florida with the intent of engaging in acts of sabotage designed to impede the U.S. war effort and to undermine morale. Saboteurs Werner Thiel and Edward Kerling contacted a former friend of Thiel's in New York, Anthony Cramer. Cramer was subsequently charged and convicted of treason. His conviction was based on the testimony of two Federal Bureau of Investigation agents who alleged that the three suspects drank together and engaged in long and intense conversation. The U.S. Supreme Court reversed Cramer's conviction based on the government's failure to establish an overt act that provided aid and comfort to the enemy. There was no indication that Cramer provided aid and comfort to the enemy by providing information; by securing food, shelter, or supplies; or by offering encouragement or advice. In summary, "without the use of some imagination it is difficult to perceive any advantage which this meeting afforded to Thiel and Kerling as enemies or how it strengthened Germany or weakened the United States in any way whatever."

Adam Gadahn, an American convert to Islam and spokesperson for al Qaeda, was the last person indicted in the United States for treason. Gadahn subsequently was killed in a drone strike in 2015. The indictment listed five instances in which Gadahn was accused of giving "aid and comfort to Al Qaeda" by appearing in videos with the intent to "betray the United States."

FIGURE 16.1 ■ The Legal Equation: Treason



SEDITION

Sedition at English common law was any communication intended or likely to bring about hatred, contempt, or disaffection with the king, the constitution, or the government. This agitation could be accomplished by **seditious speech** or **seditious libel** (writing). Sedition was punishable by imprisonment, fine, or pillory. In *The Case of the Seven Bishops* in 1688, English justice Allybone pronounced that "[n]o man can take upon him to write against the actual exercise of the government . . . be what he writes true or false. . . . It is the business of the government to manage . . . the government; it is the business of subjects to mind their own properties and interests." Sedition was gradually expanded to include any and all criticism of the king or the government and the advocacy of reform of the government or church, as well as inciting discontent or promoting hostility between various economic and social classes.

During the debates over the U.S. Constitution, various speakers predicted that the effort to restrict the definition of treason would prove a "tempest in a teapot" because the government would merely resort to other laws to punish critics. This seemed borne out in 1798, when Congress passed the Alien and Sedition Acts. These laws punished any person writing or stating

anything “false, scandalous and malicious” against the government, the president, or Congress with the “intent to defame” or to bring them into “disrepute” or to “excite . . . the hatred of the . . . people of the United States, or to stir up sedition.” The law differed from the common law in that the statute recognized truth as a defense. An individual convicted of sedition under the act was subject to a maximum punishment of two years in prison and by a fine of no more than \$2,000. Although the law was defended as an effort to combat subversives who sought to sow the seeds of revolutionary violence, in fact, it was used to persecute political opponents of the government. For instance, a member of Congress from Vermont was sentenced to four months in prison for writing that President John Adams should be committed to a mental institution.

The modern version of the Alien and Sedition Acts is § 2383 in Title 18 of the U.S. Code. This statute punishes an individual who “incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof or gives aid or comfort thereto.” This is punished by imprisonment for up to 10 years, a fine, or both. An individual convicted of rebellion or insurrection under this law is prohibited from holding any federal office. Note that section 2383 prohibits incitement to sedition or criminal action against the United States or against a particular law.

The U.S. Code, in section 2384, punishes **seditious conspiracy**. This statute is directed at the use of force against the government, the use of force to prevent the execution of any law, or the use of force to interfere with governmental property and has been employed by prosecutors in recent years in terrorist prosecutions.

If two or more persons in any state, territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall be fined . . . or imprisoned not more than twenty years or both.

In 1940, Congress adopted the Smith Act, which declared that it was a crime to conspire to teach or advocate the forcible overthrow of the U.S. government or to be a member of group that advocated the overthrow of the government. In *Dennis v. United States* in 1951, the Supreme Court upheld the constitutionality of this statute and affirmed the convictions of 12 leaders of the Communist Party. In 1957, the Supreme Court reconsidered the wisdom of this ruling in *Yates v. United States*. The Court, in that famous decision, held that individuals were free to advocate the overthrow of the U.S. government, although they may be prosecuted for urging individuals “to do something now or in the future.” Congress was “aware of the distinction between the advocacy or teaching of abstract doctrine and the advocacy or teaching of action and . . . Congress did not intend to disregard this distinction.”⁴

In 1999, the Second Circuit Court of Appeals affirmed the conviction for seditious conspiracy of the late Egyptian Sheikh Omar Ahmad Ali Abdel Rahman and a number of other defendants. The court noted that the “defendants and others joined in a seditious conspiracy to wage a war of urban terrorism against the United States and forcibly to oppose it.” Among other

acts, the conspirators assisted in the first bombing of the World Trade Center in February 1993 and in the attempted bombing of monuments and tunnels in New York City in spring of 1993.⁵

A number of individuals involved in the January 2021 invasion of the U.S. Capitol are facing criminal charges, including seditious conspiracy.⁶

FIGURE 16.2 ■ The Legal Equation: Sedition



SABOTAGE

Sabotage is the willful injury, destruction, contamination, or infection of any war material, war premises, or war utilities with the intent of injuring or interfering or obstructing the United States or an allied country during a war or national emergency. Sabotage is punishable by imprisonment for not more than 30 years, a fine, or both.⁷

Whoever, when the United States is at war, or in times of national emergency as declared by the President or by Congress, with the intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, or with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or defense activities, willfully injures, destroys, contaminates or infects, or attempts to so injure, destroy, contaminate or infect any war material, war premises, or war utilities shall be fined under this title or imprisoned not more than thirty years, or both.

Sabotage may also be committed in peacetime against defense material, premises, or utilities.⁸

Whoever, with intent to injure, interfere with, or obstruct the national defense of the United States, willfully injures, destroys, contaminates or infects, or attempts to so injure, destroy, contaminate or infect any national-defense material, national-defense premises, or national-defense utilities, shall be fined under this title or imprisoned not more than 20 years, or both, and, if death results to any person, shall be imprisoned for any term of years or for life.

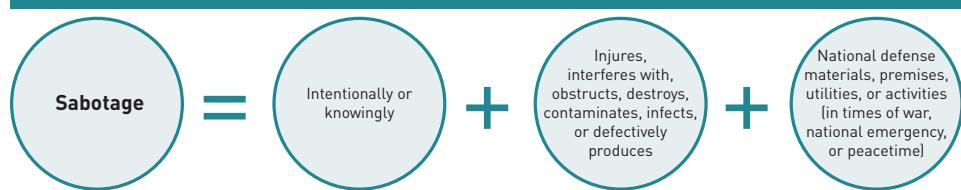
Other provisions punish the injury or destruction of harbors, premises, or utilities (e.g., transportation, water, power, electricity) and the production of defective national defense materials.⁹

Courts have held that sabotage requires a specific intent or purpose to damage the national defense of the United States. Defendants injuring property that they do not realize is part of the military defense may rely on the defense that although they intentionally damaged the property, there was a lack of a specific intent to injure the national defense. Several courts have taken the position that a knowledge standard satisfies the *mens rea* for sabotage. These judges reason that a defendant should be assumed to know that the destruction of defense material is practically certain to interfere with the national defense.

In *United States v. Kabat*, the defendants broke through a fence surrounding a missile silo in Missouri and used a jackhammer to slightly damage cables and chip a 100-ton lid covering the silo. The defendants were motivated by a desire to protest nuclear weapons and to educate the public concerning the mass destruction that would result from nuclear war. They hung banners and spray-painted slogans that called attention to the fact that these weapons made the world less rather than more safe and were contrary to biblical teachings. Did the high-minded defendants who were motivated by a desire to save the planet from nuclear destruction possess a specific intent to injure, interfere with, or damage the national defense? The Eighth Circuit Court of Appeals ruled that the defendants' "intent to injure, interfere with or obstruct the national defense" was clear from their antinuclear statements and travel to Missouri for the specific purpose of damaging the missile silo. The damage to the silo clearly "interfered" with the defense of the United States, and to "allow citizens who thought they could further U.S. security to act on their theories at will could make it impossible for this country to maintain a coherent defense system." The issue remains whether the defendants intended to damage the national defense.¹⁰

In contrast, in *United States v. Walli*, the defendants cut through four layers of fencing surrounding a facility in Oak Ridge, Tennessee, where the government stored enriched uranium for use in nuclear weapons. They spray-painted antiwar slogans, hung banners, splashed blood, sang hymns, and recited an antiwar message. The Sixth Circuit Court of Appeals reversed the defendants' conviction for sabotage. "The defendants' actions . . . had zero effect at the time of their actions or anytime afterwards, on the nation's ability to wage or defend against attack. Those actions were wrongful, to be sure, and the defendants have convictions for destruction of government property as a result of them. But the government did not prove the defendants guilty of sabotage. . . . If a defendant blew up a building used to manufacture components for nuclear weapons . . . and thereby prevented the timely replacement of weapons in the nation's arsenal, the government surely could demonstrate an adverse effect on the nation's ability to attack or defend—and more to the point, that the defendant knew that his actions were practically certain to have that effect."¹¹

FIGURE 16.3 ■ The Legal Equation: Sabotage



ESPIONAGE

The U.S. Code prohibits **espionage** or spying. The statute punishes espionage and espionage during war as separate offenses.¹²

Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government . . . faction or party or military or naval force within a foreign country . . . or to any representative or citizen thereof either directly or indirectly any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life, except that the sentence of death shall not be imposed unless [the jury or judge determines that the offense resulted in] the death of an agent of the United States . . . or directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or element of defense strategy.

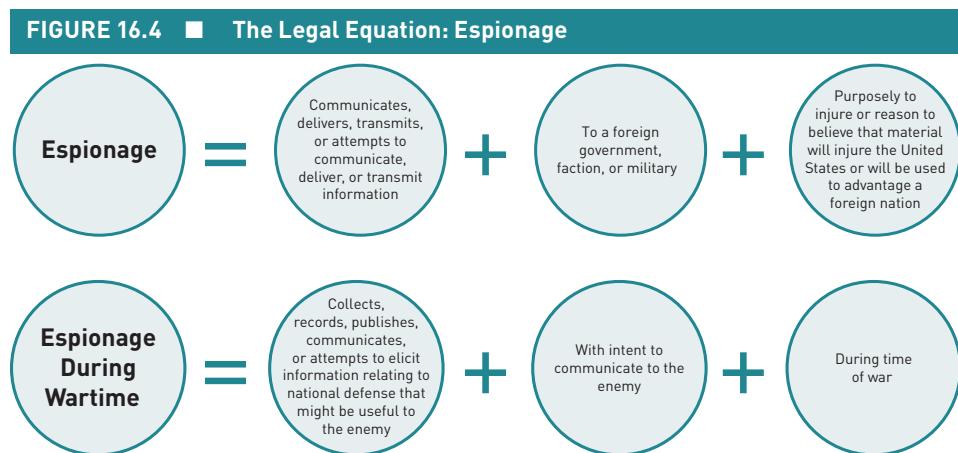
Espionage in wartime is also defined in federal statutes.

Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States, or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for any term of years or for life.

One of the most active areas of criminal activity in the new global economy is the theft by foreign governments of trade secrets from U.S. corporations. This may range from the formula for a new anticancer drug to the code for a computer program. Individuals involved in “industrial espionage” are subject to prosecution under the Economic Espionage Act of 1996.

In *Gorin v. United States*, the U.S. Supreme Court ruled that espionage during peacetime requires that the government establish that an individual acted in “bad faith” with the intent to injure the United States or to advantage a foreign nation. The foreign government that receives the information may be a friend or foe of the United States, because a country allied with the United States today may prove to be America’s enemy tomorrow. The majority in *Gorin* held that “evil which the statute punishes is the obtaining or furnishing of this guarded information, either to our hurt or another’s gain.” Material that is stolen from American military files concerning British troop strength and armed preparedness may not directly harm the United

States but may assist or advantage another country in protecting itself against the British and may constitute espionage.¹³



Note that espionage during wartime is easier for the prosecution to prove and requires the establishment of an intent to communicate information to the enemy along with a clear act toward the accomplishment of this goal.

National defense information that has not yet been officially released to the public but that has been reported by the press or generally referred to in government publications may be the subject of espionage because the government has not made the decision to release the specific details. Stealing plans for the design of a nuclear bomb in American defense files would be espionage even if the broad outlines of the design were available on the internet.

Information subject to espionage is not limited to the specific types of materials listed in the statutes. Under the espionage law, national defense is broadly interpreted to mean any information relating to the military and naval establishments and national preparation for war.

There have been at least 14 major espionage indictments since 2002. Edward Snowden was charged in 2013 with espionage based on his leaking of documents revealing that the National Security Agency since 2006 had been secretly engaged in the bulk collection of domestic and international phone numbers dialed by Americans (see Crime in the News at the end of this chapter). In 2015, 29-year-old Chelsea Manning, a U.S. soldier, was convicted of violating the Espionage Act and other criminal statutes after disclosing nearly three quarters of a million classified or unclassified-but-sensitive military and diplomatic documents to the website WikiLeaks. This was the largest leak of classified records in American history. Manning was granted clemency by President Obama after serving 7 years of a 35-year sentence. In 2017, Reality Leigh Winner pled guilty to “willful retention and transmission of national defense information.” Winner admitted to leaking classified information to the media describing Russian attempts to interfere with the 2016 presidential election and was sentenced to 5 years in prison. In 2019, Julian Assange, the founder of WikiLeaks, was charged with 18 counts of espionage for working with Manning to receive and to release classified information. Great Britain has thus far refused to extradite Assange to the United States to stand trial.

A number of foreign nationals in recent years have been charged with “economic espionage” for attempting to unlawfully obtain corporate trade secrets, including research on the development of a COVID-19 vaccine.¹⁴

TERRORISM

The bombing of the Alfred P. Murrah Federal Building in Oklahoma City on April 19, 1995, and the attack on the United States on September 11, 2001, combined to push Congress to act to prohibit and to punish terrorism. Keep in mind that most acts of terrorism within the United States are prosecuted as ordinary murders, arson, kidnappings, and bombings rather than as acts of terrorism.

The central provisions of the U.S. law on terrorism are found in Title 18 of the U.S. Code, Chapter 113B, “Terrorism.” These statutes have been amended and strengthened by the Antiterrorism and Effective Death Penalty Act (1996) and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (2001), better known as the USA PATRIOT Act.

Definition of Terrorism

Various federal statutes use the term *terrorism* or *terrorist*. For instance, it is a crime to materially aid a terrorist or foreign terrorist organization. What is terrorism? Federal law divides terrorism into **international terrorism** and **domestic terrorism**.

International terrorism is distinguished by the fact that it occurs outside the United States. Both international and domestic terrorism are intended to intimidate or coerce the American population or are intended to influence or affect the public policy of the United States. We have several tragic examples: the August 7, 1998, bombing of the U.S. embassies in Kenya (killing 213 and injuring more than 4,500) and in Tanzania (killing 11 and injuring 85); and the attack on a U.S. Navy warship, the USS *Cole*, in Yemen on October 12, 2000 (killing 17 U.S. sailors). Other clear examples are the acts of violence intended to force the United States to withdraw troops from Iraq. International terrorism is defined as

- violent acts or acts dangerous to human life that
- primarily occur outside the United States,
- would be criminal if committed in the United States, and
- appear to be intended to either
- intimidate or coerce a civilian population; or
- influence the policy of a government by intimidation or coercion; or
- affect the conduct of a government through mass destruction, assassination, or kidnapping.

Domestic terrorism is defined in the same fashion with the exception that it occurs “primarily within the territorial jurisdiction of the United States” rather than “outside the United States.” Note that terrorism is defined in terms of the intent of the offender rather than by the target of the attack.

The U.S. Code defines the **federal crime of terrorism** as an offense “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct” that involves a violation of a long list of violent and dangerous federal offenses.¹⁵ Chapter 113B of the U.S. Code provides for several specific terrorist crimes that are discussed in the following sections.

Terrorism Outside the United States

Section 2332 of the U.S. Code punishes various crimes against nationals of the United States that occur outside the United States. The killing of an American national outside the United States is punishable by imprisonment for a term of years or death as well as a fine. Voluntary manslaughter is subject to 10 years’ imprisonment along with a fine, and involuntary manslaughter is punished by a fine or imprisonment of not more than 3 years, or both. A conspiracy to kill a U.S. national is punished by up to life imprisonment as well as a fine, and a conspiracy leading to an attempt is subject to imprisonment for up to 20 years in prison as well as a fine. Physical violence with the intent to cause serious bodily injury to a U.S. national and physical violence that results in serious bodily injury are both subject to a fine as well as to imprisonment by up to 10 years. The U.S. assertion of the right to prosecute and punish criminal acts that occur outside U.S. territory is termed **extraterritorial jurisdiction**.¹⁶

Terrorism Transcending National Boundaries

U.S. law punishes as a felony acts of terrorism that occur within the United States but that are connected to foreign countries. Offenses involving conduct occurring both outside and within the United States are termed **terrorism transcending national boundaries**. In other words, the fact that conspirators meet in another country and plan to attack a U.S. city would not remove the crime from the jurisdiction of the United States. Prime examples are the September 11, 2001, attacks on the World Trade Center and Pentagon, which were planned, directed, and funded from outside the United States. This statute permits the United States to prosecute individuals living in Afghanistan, England, Germany, Spain, and other countries who were involved in the 9/11 conspiracy. Federal law also provides that criminal attacks against U.S. agencies, embassies, or property abroad or in the air or at sea against property owned by the U.S. government or by a U.S. citizen are considered to have taken place within U.S. territory and are punishable by the United States.

Three crimes of violence are included within the statute on terrorism that transcends national boundaries:

- *Crimes Against the Person.* Killing, kidnapping, maiming, or committing an assault resulting in serious bodily injury or assault with a dangerous weapon against an individual within the United States.

- *Crimes Against Property Harming the Person.* Acts that create a substantial risk of serious bodily injury by destroying or damaging any structure, real estate, or object within the United States.
- *Inchoate Offense.* Threats, attempts, and conspiracies to commit either of these two offenses and accessories after the fact.

The offenses under this provision must meet one of several conditions. These include the following:

- *Federal Official.* The victim or intended victim is the U.S. government, a member of the uniformed services, or any official, officer, employee, or agent of the legislative, executive, or judicial branches or of any department or agency of the United States.
- *Property.* The building, vehicle, real estate, or object is owned or leased by the United States or a U.S. citizen.
- *Territory.* The offense is committed within the territorial sea or U.S. airspace.
- *Interstate Commerce.* The offense makes use of the mail or any facility in interstate or foreign commerce.

Penalties include capital punishment for a crime resulting in death, life imprisonment for the crime of kidnapping, 35 years for maiming, 30 years for aggravated assault, and 25 years for damaging property.¹⁷

Weapons of Mass Destruction

The use, threat, attempt, or conspiracy to use **weapons of mass destruction** is punishable by imprisonment for a term of years or life and, in the event of death, by life imprisonment.

The statute on weapons of mass destruction, 18 U.S.C. § 2332a, declares that it is a crime when such a weapon is used outside the United States against a U.S. resident or citizen, or within the United States against any person so as to affect commerce or against property within or outside the United States that is owned, leased, or used by the federal government. It is also an offense to threaten, attempt to use, or conspire to use a weapon of mass destruction. Weapons of mass destruction are defined as

- toxic or poisonous chemical weapons that are designed or intended to cause death or serious bodily injury (poison gas);
- weapons involving biological agents (smallpox);
- weapons releasing radiation or radioactivity at a level dangerous to human life (nuclear material); and
- explosive bombs, grenades, rockets, missiles, and mines.

Possession of a biological or toxic weapon or delivery system that cannot be justified by a peaceful purpose is subject to imprisonment for up to 10 years or a fine, or both.¹⁸ In April 2005, Zacarias Moussaoui, while denying involvement in the September 11, 2001, attacks against the Pentagon and World Trade Center, pled guilty to conspiring to use on an airplane a “weapon of mass destruction” to attack the White House.

In April 2020, then-Deputy U.S. Attorney General Jeffrey Rosen wrote a memo to federal prosecutors and law enforcement officers across the country instructing them that because COVID-19 arguably fits the statutory definition of a biological agent, the “purposeful exposure and infection of others with COVID-19” could constitute a violation of federal terrorism-related statutes. Rosen did not address whether an individual could be held criminally liable for a negligent or reckless exposure of another to the virus. The Rosen memo noted that Section 2332a defines the term “weapon of mass destruction” to include “any weapon involving a biological agent, toxin, or vector as defined in 18 U.S.C. §178,” which, in turn, defines “biological agents” to include viruses “capable of causing death, disease, or other biological malfunction in a human.”¹⁹

Section 229 of Title 18 of the U.S. Code provides that no person shall develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon. The law was adopted to meet American treaty obligations under the Chemical Weapons Convention. In *Bond v. United States*, the U.S. Supreme Court overturned the conviction of Carol Anne Bond for spreading toxic chemicals on the door knob, car doors, and mailbox of a romantic rival. Bond’s intent was to cause the victim to suffer a severe rash, although the chemicals caused only a minor burn on her thumb. The Court noted that the American law was a response to the use of chemicals in warfare and in terrorist attacks. The spreading of chemicals by Bond were not the “sort an ordinary person would associate with instruments of chemical warfare.”²⁰

Mass Transportation Systems

Subways, buses, and trains are some of the most vulnerable and potentially damaging terrorist targets. In 1995, a chemical gas attack on a subway train in Tokyo resulted in 12 deaths and more than 5,000 injuries. Federal law provides that it is a crime to willfully wreck, derail, set fire to, or disable a mass transportation vehicle or ferry, or to damage or impair the operation of a signal or control system. It is also a crime to cause the death or serious bodily injury of an employee or passenger on a mass transportation vehicle. Other provisions prohibit using a weapon of mass destruction against a mass transportation system. These offenses are punishable by a fine and as many as 20 years in prison. An aggravated offense punishable by up to life in prison results when the mass transportation vehicle or ferry is carrying one or more passengers or the offense results in the death of any person.²¹ The destruction of aircraft and air piracy are subject to punishment under separate provisions of the U.S. Code. Air piracy is defined in Title 49, § 46502, as “seizing or exercising control” over an aircraft by force, violence, threat of force or violence, or any form of intimidation with a wrongful intent.²²

Harboring or Concealing Terrorists

It is a crime to harbor or conceal a person who an individual knows or has reasonable grounds to believe has committed or is about to commit various terrorist offenses or crimes posing a serious and widespread danger. Harboring a terrorist is subject to 10 years in prison and to a fine.²³

Material Support for Terrorism

The offense of providing **material support to a terrorist** is defined in the U.S. Code as providing material support or resources or concealing or disguising the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for or in carrying out various terrorist acts or acts of violence or in the preparation of, concealment of, or escape from such crimes. A violation of this statute is punishable by imprisonment for no more than 15 years, a fine, or both. In the event that death results, the accused is subject to imprisonment for any term of years or capital punishment.

There is a separate offense of knowingly providing **material support to a foreign terrorist organization** or an attempt or conspiracy to do so. This is also subject to imprisonment for up to 15 years, a fine, or both. The death of a victim may result in imprisonment for up to life.

Material support or resources in support of terrorism include money, financial services, housing, training, expert advice or assistance, personnel, safe houses, false documentation, communication equipment, facilities, weapons, lethal substances, explosives, transportation, and other “physical assets.” Medical and religious materials are exempt from the prohibition on material support.²⁴ The U.S. secretary of state is charged with determining whether a group is a foreign terrorist organization.²⁵

These two statutes are the primary laws relied on by prosecutors in terrorist prosecutions in the United States. In 2011, 88% of the prosecution of defendants formally or informally affiliated with an Islamic terrorist group involved alleged material support for terrorism or material support for a terrorist organization.²⁶ Prosecutors explain that the material support statutes are central in combating terrorism because hard-core terrorists rely on the support provided by individuals willing to provide financial resources, passports, expertise in computer technology, weapons, and information. These laws also have been relied on by the government to prosecute individuals for “providing personnel to terrorist organizations” who have traveled abroad to undergo terrorist training. The material support statutes have the advantage of permitting the arrest of individuals before terrorist plots are carried out.

Critics caution that the material support provisions may be used to prosecute individuals who do not pose a threat. For instance, defendants in a New York case who had attended a terrorist training camp abroad and who had not been involved with terrorist activities after returning to the United States pled guilty to providing material support. It is also argued that these statutes are broadly written and that individuals may be criminally prosecuted who have merely donated money to a hospital or school in the Middle East run by a group labeled as terrorist.

In 2010, in *Holder v. Humanitarian Law Project*, the Supreme Court was asked to determine whether Congress may constitutionally criminally punish individuals who assist members of

terrorist organizations to engage in lawful political activity. The U.S. secretary of state designated the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE) as "foreign terrorist organizations." Two U.S. citizens and six domestic organizations claimed that they wished to provide support for the lawful and nonviolent humanitarian and political activities of the PKK and LTTE and that applying the material support law to prevent them from doing so violated their First Amendment rights. The plaintiffs explained that they wanted to provide "training" and "expert advice or assistance" to members of the PKK on how to seek humanitarian financial support from various international institutions such as the United Nations and how to use international law to peacefully resolve disputes. They also wished to engage in political advocacy promoting the cause of Kurds living in Turkey and Tamils living in Sri Lanka. The plaintiffs expressed the fear that "such advocacy might be regarded as 'material support' in the form of providing 'personnel' or 'expert advice or services.'"²⁷

The Supreme Court first held that the intent requirement of the material support statute is satisfied by knowledge of the "organization's connection to terrorism" and that the government is not required to establish that a defendant possessed the "specific intent to further the organization's terrorist activities."

The Court decided that terms like *training, expert advice or assistance, service, and personnel* provided fair notice to a person of ordinary intelligence of "what is prohibited." Further, the Court ruled that those terms are not "so standardless" that they authorize or encourage "seriously discriminatory enforcement." The plaintiffs undoubtedly were aware that activities in which they seek to engage "readily fall within the scope of the terms 'training' and 'expert advice or assistance.'"

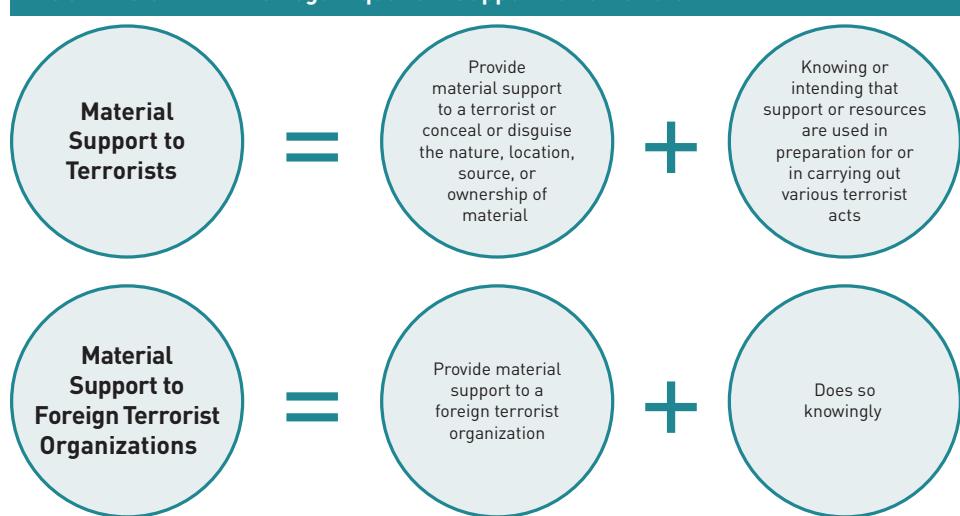
The most significant part of the decision in *Holder* addressed whether the material support statute, as applied to plaintiffs, violates the freedom of speech guaranteed by the First Amendment. The Court clarified that the material support statute does not prohibit "independent advocacy" on behalf of a terrorist organization. Individuals are free to "say anything they wish on any topic." The material support statute is "carefully drawn to cover only a narrow category of speech . . . under the direction of, or in coordination with[,] foreign groups that the speaker knows to be terrorist organizations."

The Court explained that nonviolent or humanitarian material support intended to promote peaceable lawful conduct can further violent terrorists in "multiple ways." Terrorist organizations often conceal their violent activities behind what appears to be lawful activity. Advocacy by outside groups working under the guidance or with the cooperation of a terrorist group may promote the organization's legitimacy as a responsible political organization, which helps the organization to recruit members and raise funds. Money that is raised for medical assistance or refugee support releases the organization's other funds to support terrorism. Terrorist organizations may use the skills they learned in peaceful negotiation for "lulling opponents into complacency and ultimately preparing for renewed attacks." The Supreme Court in *Holder* made the important point that humanitarian assistance to a terrorist organization allowed the organization to devote funds to violent terrorism that formerly were used for humanitarian purposes.

In 2017, the Second Circuit Court of Appeals found "overwhelming" proof that Sulaiman Abu Ghaith, Osama bin Laden's son-in-law, participated in a conspiracy to kill Americans and

that his speeches spreading al Qaeda's message to kill Americans "provided material support" to a terrorist organization. Gaith was with bin Laden immediately following the 9/11 attack on the Pentagon and World Trade Center, and he is the most senior member of al Qaeda to be prosecuted in civilian court in the United States.²⁸ Two members of the Islamic State, Alexandra Kotey and El Shafee Elsheikh, are charged with numerous offenses against American citizens, including the beheading of Western and Japanese hostages. Kotey has pled guilty and will serve a sentence of life in prison, and Elsheikh is expected to plead guilty. The United States in order to obtain their extradition from Great Britain agreed not to seek the death penalty.²⁹

FIGURE 16.5 ■ The Legal Equation: Support to Terrorists



Keep in mind that there is no federal criminal domestic terrorism law and domestic terrorist offenses typically are prosecuted under conspiracy and violent crime statutes. Seven individuals in October 2020 were indicted for a conspiracy under 18 U.S.C. § 1201 to kidnap Governor Gretchen Whitmer of Michigan, and six other individuals were charged under the Michigan counterterrorism law for related state charges.³⁰

Combat Immunity

American John Walker Lindh, the so-called American Taliban, was captured by U.S. forces in Afghanistan and subsequently pled guilty to supplying services to the Taliban (the Islamic fundamentalist ruling party of Afghanistan) and of carrying an explosive during the commission of a felony. Lindh's lawyer made various arguments on his behalf, including **combat immunity**. This is the contention that as a member of the Afghan military, Lindh was entitled to the status of a prisoner of war and was immune from criminal prosecution for acts of lawful combat undertaken in the defense of Afghanistan against the United States. The U.S. government, however, contended that Lindh was not entitled to the status of a legal combatant and that his acts on behalf of the Taliban regime in Afghanistan were unlawful criminal offenses rather than acts of lawful warfare.

The standard for determining whether an individual is a lawful or unlawful combatant is set forth in the [Geneva Convention of 1949](#). The Geneva Convention is an international treaty regulating the law of war that the United States has signed and recognizes as part of U.S. law. The convention provides that “a belligerent in a war cannot prosecute the soldiers of its foes for the soldiers’ lawful acts of war.” Lindh sought to have the charges against him dismissed on the grounds that as an alleged member of the armed forces of the Taliban, he was immune from prosecution by a U.S. court.

On February 7, 2002, President George W. Bush announced that captured combatants affiliated with the Taliban would not be accorded the status of lawful combatants under the Geneva Convention and instead would be considered unlawful combatants. A federal district court upheld the lawfulness of Lindh’s criminal prosecution, reasoning that the Taliban failed to meet the four standards established under the Geneva Convention for lawful combatant status. The court reasoned that the Taliban lack a disciplined command structure, did not wear recognizable military uniforms or symbols, and did not respect the rules of warfare. “It would indeed be absurd for members of a so-called ‘regular armed force’ to enjoy lawful combatant immunity even though the force had no established command structure and its members wore no recognizable symbol or insignia, concealed their weapons, and did not abide by the customary laws of war. Simply put, the label ‘regular armed force’ cannot be used to mask unlawful combatant status.” Lindh was sentenced to 20 years in federal prison.³¹ President Obama, on assuming office, recognized the foreign detainees at Guantánamo as prisoners of war, although they are subject to criminal prosecution for violations of the Geneva Convention.

Since 2002, 780 detainees have been held at the American military prison at Guantánamo Bay, Cuba. As of September 1, 2021, there were 39 detainees at Guantánamo. Two have been criminally convicted, and 10 await trial including the 5 conspirators responsible for the September 11, 2001, attacks on the United States. Seventeen are held in indefinite law-of-war detention and neither face trial nor have been recommended for release. Ten are awaiting transfer to other countries.

STATE TERRORISM STATUTES

Virtually every state has a terrorism statute to cover criminal acts that do not fall within federal jurisdiction. In some instances, both the state and federal governments may claim jurisdiction, and the federal government defers to state prosecutors. Consider *Muhammad v. Commonwealth*, the “beltway sniper” case. In *Muhammad*, the Virginia Supreme Court affirmed the two death sentences imposed on John Allen Muhammad. His conviction arose from 16 shootings, including 10 murders that he carried out along with Lee Boyd Malvo in four states and the District of Columbia over a 47-day period during 2002. The Virginia statute defined terrorism as a specified act of violence committed with the intent to intimidate the civilian population at large or to influence the conduct or activities of the government of the United States, a state, or a locality through intimidation. An act of violence under the statute includes a list of aggravated felonies including murder, voluntary manslaughter, mob-related felonies, malicious assault or bodily wounding, robbery, carjacking, sexual assault, and arson.³²

The Virginia Supreme Court held that the statute provided sufficient notice to ordinary individuals to understand “what conduct they prohibit and do not authorize” and that the law did not impose “arbitrary and discriminatory enforcement.” The court noted that in the past, Virginia courts have interpreted *intimidate* to mean “putting in fear,” and “population at large” requires a “more pervasive intimidation of the community rather than a narrowly defined group of people.” The court concluded that we “do not believe that a person of ordinary intelligence would fail to understand this phrase.” The Virginia Supreme Court also held that the application of the terrorism statutes was not limited to “criminal actors with political motives.”³³

In recent years, prosecutions for crimes related to domestic terrorism have outnumbered prosecutions for international terrorism.³⁴

In *People v. Morales*, a New York appellate court was asked to determine whether a gang member violated the New York terrorism law.

DID THE GANG MEMBER COMMIT AN ACT OF TERRORISM?

PEOPLE V. MORALES, 982 N.E.2D 580 (N.Y. 2011)

Opinion by Graffeo, J.

Issue

Shortly after the horrendous attacks on September 11, 2001, the New York Legislature convened in special session to address the ramifications of these terrorist actions. Confronted with the tragic events of that infamous day, the legislature recognized that “terrorism is a serious and deadly problem that disrupts public order and threatens individual safety both at home and around the world” (L. 2001, ch. 300, § 4). It decided that New York laws needed to be “strengthened” with comprehensive legislation ensuring “that terrorists . . . are prosecuted and punished in state courts with appropriate severity.”

The result was Penal Law article 490 and, among its provisions, was the new “crime of terrorism.” It occurs when a person “commits a specified offense” with the “intent to intimidate or coerce a civilian population, influence the policy of a unit of government by intimidation or coercion, or affect the conduct of a unit of government by murder, assassination or kidnapping.” Specified offenses include many class A and violent felonies, as well as attempts to commit those crimes (see Penal Law § 490.05[3][a], [b]). Article 490 does not, however, contain a statutory definition of “intent to intimidate or coerce a civilian population.” This appeal requires us to consider whether this phrase encompasses the acts perpetrated by defendant.

Facts

Defendant Edgar Morales was a member of a street gang known as the “St. James Boys” or “SJB”—apparently named for the vicinity of the Bronx where the SJB operated (running from Webster Avenue to University Avenue and from 204th Street to 170th Street). The SJB was

originally formed to protect its members from other gangs and its primary objective was to be the most feared Mexican gang in the Bronx. The SJB allegedly targeted and assaulted individuals who belonged to rival confederations, extorted monies from a prostitution business and committed a series of robberies.

On the evening of August 17, 2002, several SJB members, including defendant, went to a christening party in the Bronx. They saw a man named Miguel who they thought belonged to a gang that was responsible for a friend's death. When Miguel refused to comply with their demand to leave the party, they planned to assault him after the festivities ended. Defendant took possession of a revolver from another SJB member, agreeing to shoot Miguel if it appeared that his cohorts were losing the battle.

Around midnight, a fight broke out between the SJB members and Miguel and his companions. During the melee, an SJB member directed defendant to shoot and he fired five bullets from the handgun. Three shots hit one of the rivals and paralyzed him. A 10-year-old girl was shot in the head and died. After the SJB members fled the scene, defendant handed the gun to a female member who later passed the weapon to another SJB member. Another SJB member threw the five spent shell casings into a sewer.

After the incident, the police obtained a videotape of the christening party and using still photographs from the video, they distributed photos of suspects to the media. Subsequently, several SJB members identified defendant as one of the individuals involved in the shooting. When he was questioned by the police, defendant admitted that he attended the party but denied being the shooter, claiming that he was merely the person who carried the weapon away from the scene. Additional evidence was gathered during the investigation, including four shell casings retrieved from a sewer.

The People subsequently secured a 70-count indictment against the SJB members. . . . During the trial, defendant challenged the sufficiency of the evidence supporting the terrorism charges. The defense argued that the activities of the SJB were "directed at rival gangs, almost exclusively" and there was "no real evidence, certainly not evidence sufficient to get to the jury on the element of acting with intent to intimidate or coerce a civilian population." The People maintained that the targeting of other gangs was covered by Penal Law article 490 and, in any event, there was adequate proof that the SJB engaged in acts intended to intimidate or coerce all Mexican-Americans in the pertinent geographical area. . . .

The jury convicted defendant of three crimes of terrorism under Penal Law § 490.25 premised on first-degree manslaughter, attempted second-degree murder and second-degree weapon possession, as well as second-degree conspiracy for agreeing to commit first-degree gang assault as a crime of terrorism. Defendant was sentenced to an aggregate prison term of 40 years to life.

The Appellate Division, First Department, held that there was insufficient evidence to prove an intent to intimidate or coerce a civilian population because the People established that defendant only engaged in gang-related street crimes, not terrorist acts. . . .

Reasoning

The People assert that the term "civilian population" as used in Penal Law article 490 embraces all of the Mexican-Americans who resided within the SJB's designated area, as well as the subset of rival Mexican-American gangs in the same vicinity. The prosecution asks us to reinstate the terrorism convictions, contending that there was sufficient evidence that defendant's actions after the party furthered the SJB's objective to intimidate or coerce other Mexican-American gangs in the Bronx and, as a result of those activities, the SJB intended to intimidate and coerce the entire Mexican-American community during the time

period charged in the indictment. Defendant argues that neither the population of Mexican-Americans in the St. James Park neighborhood, nor the smaller category of rival gangs, can constitute a “civilian population” as a matter of law. . . .

[W]e find it unnecessary to precisely define the contours of the phrase “civilian population” for two reasons. First, even assuming that all of the Mexican-Americans in the St. James Park area may be considered a “civilian population,” the evidence at trial failed to demonstrate that defendant and his fellow gang members committed the acts against Miguel and his companions with the conscious objective of intimidating every Mexican-American in the territory identified at trial. Rather, viewing the proof in the light most favorable to the People, the prosecution demonstrated that defendant and his accomplices arranged the attack because of Miguel’s assumed membership in a rival gang and his refusal to leave the party. We do not believe that this discrete criminal transaction against identified gang enemies was designed to intimidate or coerce the entire Mexican-American community in this Bronx neighborhood.

Second, while there is a valid line of reasoning and permissible inferences from which the jury could have concluded that one of defendant’s possible goals for attacking Miguel was to intimidate or coerce another gang, there is no indication that the legislature enacted article 490 of the Penal Law with the intention of elevating gang-on-gang street violence to the status of terrorism as that concept is commonly understood. Specifically, the statutory language cannot be interpreted so broadly so as to cover individuals or groups who are not normally viewed as “terrorists” and the legislative findings in section 490.00 clearly demonstrate that the legislature was not extending the reach of the new statute to crimes of this nature. This is apparent in the examples of terrorism cited in the legislative findings: (1) the September 11, 2001 attacks on the World Trade Center and the Pentagon; (2) the bombings of American embassies in Kenya and Tanzania in 1998; (3) the destruction of the Oklahoma City federal office building in 1995; (4) the mid-air bombing of Pan Am Flight number 103 in Lockerbie, Scotland in 1988; (5) the 1997 shooting from atop the Empire State Building; (6) the 1994 murder of Ari Halberstam on the Brooklyn Bridge; and (7) the bombing at the World Trade Center in 1993. The offenses committed by defendant and his associates after the christening party obviously are not comparable to these instances of terroristic acts.

We must also consider the sources that the legislature consulted in drafting the new statutes. The definitional provisions of Penal Law article 490 were “drawn from the federal definition of ‘international terrorism.’” . . . [F]ederal antiterrorism statutes were designed to criminalize acts such as “the detonation of bombs in a metropolitan area” or “the deliberate assassination of persons to strike fear into others to deter them from exercising their rights”—conduct that is not akin to the serious offenses charged in this case. Similarly, a statute extending federal jurisdiction to certain crimes committed against Americans abroad with the intent “to coerce, intimidate, or retaliate against . . . a civilian population” was not meant to reach “normal street crime” (“drive-by shootings and other street crime,” and “ordinary violent crimes . . . robberies or personal vendettas” do not satisfy the intent element of “international terrorism”).

If we were to apply a broad definition to “intent to intimidate or coerce a civilian population,” the People could invoke the specter of “terrorism” every time a Blood assaults a Crip or an organized crime family orchestrates the murder of a rival syndicate’s soldier. But the concept of terrorism has a unique meaning and its implications risk being trivialized if the terminology is applied loosely in situations that do not match our collective understanding of what constitutes a terrorist act. History and experience have shown that it is impossible for us to anticipate every conceivable manner in which evil schemes can threaten our society.

Because the legislature was aware of the difficulty in defining or categorizing specific acts of terrorism, it incorporated a general definition of the crime and referenced seven notorious acts of terrorism that serve as guideposts for determining whether a future incident qualifies for this nefarious designation.

Holding

Considered in that context, and subject to possible exceptions that could arise if a criminal organization engages in terrorist activities, we conclude that the legislature did not intend for the crime of terrorism to cover the illegal acts of a gang member committed for the purpose of coercing or intimidating adversaries. Therefore, the evidence in this case was insufficient to establish defendant's guilt beyond a reasonable doubt under Penal Law § 490.25. Defendant's violent, criminal acts as a member of the SJB gang unquestionably resulted in tragic consequences—the needless death of a little girl and the paralysis of a young man—but they were not acts of terrorism within the meaning of Penal Law article 490.

Questions for Discussion

1. Summarize the facts in *Morales*.
2. What type of acts and intent did the court conclude are required to establish guilt under the New York terrorism statute?
3. Why does the appellate court overturn Morales's conviction?
4. Can you speculate on the reason that the prosecutor decided to bring terrorism charges against Morales?
5. Would the New York court have convicted the defendant in *Muhammad v. Commonwealth* (discussed earlier) of terrorism based on its interpretation of the New York statute?

INTERNATIONAL CRIMINAL LAW

The origins of **international criminal law** can be traced to the prosecution of Nazi war criminals at Nuremberg in 1944. The international community subsequently agreed to a number of treaties that addressed crimes that are so serious that they are considered to be the concern of all nations and peoples. These treaties prohibit and punish acts such as genocide, torture, war crimes, and terrorism. A majority of countries in the world have signed these treaties and have incorporated the provisions into their domestic criminal codes.³⁵

International crimes typically are committed by individuals acting on behalf of the government. The exception of course is terrorism, which in most cases is committed by “non-state actors.” Prosecutors in countries in which regimes carry out international crimes are reluctant or frightened to indict government officials for crimes, even after the officials have left office. As a result, the perpetrators of international crimes, in many instances, have not been brought to the bar of justice.

The international community periodically has convened international tribunals to prosecute and to punish government leaders who have carried out international crimes and who otherwise would have gone unpunished. In 1993, the United Nations established criminal

tribunals to hear cases arising from genocide and war crimes in Rwanda and in Yugoslavia. The most significant step occurred in 2001 with the formation of the International Criminal Court (ICC). This court has jurisdiction over serious international crimes and is composed of judges from countries that have joined the court. The United States, although a leading nation in the movement to prosecute and punish international crimes, is not a member of the ICC.

The United States, as part of its international obligation to punish international crimes, has claimed jurisdiction over international offenses committed outside U.S. territorial boundaries and has brought offenders to trial before U.S. domestic courts. The United States, for example, has prosecuted pirates for attacks on European and U.S. ships off the coast of the African country of Somalia.³⁶

An example of extraterritorial jurisdiction is the United States' prosecution and conviction of Charles Emmanuel for acts of torture committed in Liberia between 1999 and 2003.

Various statutes explicitly provide for universal jurisdiction. The U.S. statute on genocide, 18 U.S.C. § 1091(e), provides U.S. courts with jurisdiction over acts of genocide "regardless [of] where the offense is committed" if the "alleged offender" is a U.S. national, an alien lawfully admitted to the United States, or a stateless person present in the United States. Another example is the U.S. statute on torture, 18 U.S.C. § 2340A, which provides that "[w]hoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life." The statute provides for jurisdiction over U.S. nationals and over offenders present in the United States irrespective of the nationality of the victim or alleged offender. Note that other countries may have similar laws, which means that a U.S. national potentially is subject to criminal prosecution if detained abroad.

CRIME IN THE NEWS

On June 5 and June 6, 2014, *The Guardian* and the *Washington Post* disclosed that an anonymous source had leaked classified information that the U.S. government was requiring large telecommunications providers to turn the telephone numbers dialed by Americans over to the National Security Agency (NSA), the American agency charged with gathering foreign electronic intelligence. On June 9, *The Guardian* released a video interview with Edward Snowden, the individual responsible for leaking the information. The 33-year-old Snowden was a former Central Intelligence Agency (CIA) and NSA contractor. After fleeing the United States and being denied asylum in Hong Kong and unsuccessfully seeking asylum in several other countries, Snowden received temporary asylum for three years in Russia.

Little is known about Snowden's background. He reportedly never received a high school diploma and briefly attended a community college. There is little doubt that he had a strong interest and aptitude for computers and maintained an active online presence. In 2004, Snowden, whose father was a veteran of the Coast Guard, joined the military in the aftermath of 9/11 and enlisted in a program that fast-tracked him into the Special Forces.

Snowden's slight build and various physical limitations made him an unlikely candidate for the Special Forces. In the summer of 2005, he was discharged from the Army after allegedly breaking both his legs. Snowden spent the next several months as an IT security

specialist at the University of Maryland Center for Advanced Study of Languages, a joint enterprise with the U.S. government.

In 2007–2008, Snowden worked in Geneva, Switzerland, as a contractor for the CIA, maintaining network security. He later claimed that he grew disillusioned with the agency, and in 2009, Snowden terminated his relationship with the CIA, perhaps in response to an investigation into his attempt to access classified files.

Snowden was next employed at Dell Computers as a contractor engaged in computer analysis for NSA. He was sent to Japan, which fulfilled a long-time interest in Japanese culture and language. At some point, Snowden was certified as an “Ethical Hacker” employed by NSA to counteract efforts to penetrate the agency’s computer system. Subsequently, he was transferred to Hawaii to work at NSA’s regional cryptological center.

A central event in shaping Snowden’s attitudes toward U.S. security services was his inadvertent discovery of a report that provided a detailed account of the Bush administration’s warrantless wiretapping of both Americans and foreigners following 9/11. His sense of alienation was heightened in March 2013, when James Clapper, the director of national intelligence, denied before a congressional committee that NSA had been collecting data on American citizens, a claim that Snowden knew to be untrue.

Snowden next took a job with the technology consulting firm Booz, Allen, Hamilton (BAH), which, like Dell, contracted to work with NSA. Snowden was employed as a professional hacker charged with detecting vulnerabilities in American technology that could be exploited by foreign countries. His responsibilities allowed him access to top secret internet programs and provided him with the opportunity to illicitly transfer data onto a thumb drive that he transmitted to journalists whom he trusted at *The Guardian* and at the *Washington Post*.

The information leaked by Snowden to journalists revealed that since 2006, NSA had approved the bulk collection of the domestic and foreign telephone numbers dialed by Americans. This secret metadata program called PRISM was based on bulk search warrants issued every three months by the Foreign Intelligence Security Court (FISC), charged with legal supervision of intelligence agencies, that directed nine internet providers to turn records of the phone numbers dialed by every American over to the government. Once an individual was specifically singled out for additional investigation, NSA followed a “three hops rule,” analyzing all phone calls made by the target, and all the phone calls made by individuals called by the target, as well as all phone calls made by these individuals. This might be followed by a search warrant allowing the government to monitor the content of an individual’s phone calls and emails. Snowden believed that the government’s bulk collection and storage for five years of all the numbers dialed by Americans without any basis to suspect that American citizens or residents were agents of a foreign power or were engaged in criminal activity violated the Fourth Amendment prohibition on unreasonable searches and seizures and violated the privacy of American citizens. Studies concluded that the collection of the numbers dialed by an individual could reveal virtually every aspect of an individual’s life. Snowden argued that the American public was entitled to be informed that the phone numbers they dialed were being monitored, and he explained that his goal in revealing large amounts of information to selected journalists was to spark a worldwide discussion on privacy and on the state surveillance of individuals across the globe.

A special review committee appointed by President Barack Obama concluded that the metadata program had not been essential in detecting terrorist plots, and that there was no indication that the information obtained through the metadata program could not have been obtained through reliance on court-approved search warrants.

The disclosure of the PRISM program led President Obama to propose reforms in the program. Congress, after an extended debate, adopted the USA Freedom Act, which provided

that phone providers retain metadata rather than turning the data over to the government. NSA may obtain access to these records only by obtaining a warrant from the FISC.

The American government has charged Snowden with espionage, and government officials and members of Congress labeled him a coward for fleeing rather than remaining in the United States and assuming responsibility for his actions. Critics asked how Snowden could portray himself as a defender of liberty and human rights and yet seek asylum in a repressive regime like Russia. Some high-ranking intelligence officials claim that Snowden's disclosures have made the United States less safe and have placed Americans at risk. The Russian government in 2020 granted Snowden permanent residence and Snowden who now has a young son plans to seek Russian citizenship.

Polls indicated that the majority of Americans view Snowden as a whistle-blower rather than a traitor. Absent his unlawful leaking of information, the metadata program would not have been revealed. Snowden's revelations led to the disclosure of other surveillance programs, such as the post office's extensive monitoring of the mail sent and received by Americans. The journalistic community recognized Snowden's contribution to public awareness of government surveillance by awarding him the Rindenhour Award for "truth telling," and the journalists who worked with him also were the recipients of prestigious awards for their reporting. Should Edward Snowden be permitted to return to the United States and be prosecuted for espionage or for other serious criminal offenses, or should he be permitted to plead guilty to a minor criminal violation?

CHAPTER SUMMARY

The founding figures of the United States were fearful of a strong centralized government and provided protections for individual freedom and liberty. Nevertheless, they appreciated that there was a need to protect the government from foreign and domestic attack and accordingly incorporated a provision on treason into the Constitution. This was augmented by congressional enactments punishing sedition, sabotage, and espionage. In recent years, the United States has adopted laws intended to combat global terrorism.

Treason is defined in Article III, Section 3 of the U.S. Constitution. Treason requires an overt act of either levying war against the United States or providing aid and comfort to an enemy of the United States. The accused must be shown to have possessed the intent to betray the United States. The Constitution requires two witnesses or a confession in open court to an act of treason.

Sedition at English common law constituted a communication intended or likely to bring about hatred, contempt, or disaffection with the king, the constitution, or the government. This was broadly defined to include any criticism of the king and of English royalty. U.S. courts have ruled that the punishment of seditious speech and libel may conflict with the First Amendment right to freedom of expression. As a result, judges have limited the punishment of seditious expression to the urging of the necessity or duty of taking action to forcibly

overthrow the government. A seditious conspiracy requires an agreement to take immediate action.

Sabotage is the willful injury, destruction, contamination, or infection of war materials, premises, or utilities with the intent to injure, interfere with, or obstruct the United States or an allied nation in preparing for or carrying on war. Sabotage may also be committed in peacetime and requires that the damage to property is carried out with the intent to injure, interfere with, or obstruct the national defense of the United States.

An individual is guilty of espionage who communicates, delivers, or transmits information relating to the national defense to a foreign nation or force within a foreign nation with the purpose of injuring the United States or with reason to believe that it will injure the United States or advantage a foreign nation. Espionage in wartime involves collecting, recording, publishing, communicating, or attempting to elicit such information with the intent of communicating this information to the enemy.

The U.S. Code, Chapter 113B, punishes various terrorist crimes. This has been strengthened by the Antiterrorism and Effective Death Penalty Act (1996) and by the USA PATRIOT Act (2001). Terrorism is divided into international and domestic terrorism. International terrorism is defined as violent acts or acts dangerous to human life that occur outside the United States; domestic terrorism is defined as violent acts or acts dangerous to human life that occur inside the United States. Terrorist acts transcending national boundaries are coordinated across national boundaries.

Terrorist acts are required to be intended to either intimidate or coerce a civilian population, to influence the policy of a government by intimidation or coercion, or to affect the conduct of a government by mass destruction, assassination, or kidnapping. The U.S. government has primarily relied on the prohibition against material assistance to terrorists and to terrorist organizations in order to prevent and punish terrorist designs before they are executed. This law has proven to be a powerful tool to deny terrorists the resources they require to carry out attacks. Federal law also punishes terrorist crimes involving attacks on mass transit systems and the use of weapons of mass destruction and prohibits the harboring or concealing of terrorists. The United States does not consider acts of terrorism to be lawful acts of war under the Geneva Convention.

Virtually every state has adopted a terrorism statute. Most terrorist offenses are based on the foundation offenses of treason, sedition, sabotage, and espionage. Terrorism is considered to be an international crime along with torture, genocide, war crimes, and other crimes that have been condemned by virtually all countries in the world.

CHAPTER REVIEW QUESTIONS

1. Treason is the only crime defined in the U.S. Constitution. What is treason? What type of evidence is required to establish treason?

2. Define sedition. Distinguish seditious speech from seditious libel. What constitutes a seditious conspiracy?
3. What is sabotage? Distinguish between sabotage and sabotage during wartime.
4. Explain the difference between espionage and espionage during wartime.
5. How do the definitions of international and domestic terrorism differ?
6. List some of the terrorist crimes set forth in the U.S. Code.
7. What are the elements of material support for terrorism? What are the arguments for and against prosecuting individuals for providing material support to terrorists or to foreign terrorist organizations?
8. Define and discuss combat immunity.
9. What factor is important in determining whether the federal government may assert jurisdiction over a terrorist act?
10. Discuss international crimes and extraterritorial jurisdiction.
11. Write a brief essay summarizing crimes against the state.

LEGAL TERMINOLOGY

combat immunity	material support to a terrorist
crimes against the state	sabotage
domestic terrorism	sedition
espionage	sedition conspiracy
extraterritorial jurisdiction	sedition libel
federal crime of terrorism	sedition speech
Geneva Convention of 1949	terrorism transcending national boundaries
international criminal law	treason
international terrorism	weapons of mass destruction
material support to a foreign terrorist organization	

TEST YOUR KNOWLEDGE ANSWERS

1. True.
2. True.
3. True.

- 4. True.
- 5. True.
- 6. True.
- 7. False.
- 8. False.

NOTES

CHAPTER 1

1. Ala. Code § 13-12-5.
2. Fla. Stat. § 823.12.
3. R.I. Gen. Laws §§ 11-12-1-3.
4. Wyo. Stat. § 6-9-301(a).
5. Wyo. Stat. § 6-9-202.
6. *Idiot Laws*. n.d. <http://www.idiotlaws.com>.
7. La. Rev. Stat. § 14:67.13.
8. Henry M. Hart Jr., "The Aims of the Criminal Law," *Law and Contemporary Problems* 23, no. 3 (1958): 401-441.
9. *In re Winship*, 397 U.S. 358 (1972).
10. William Blackstone, *Commentaries on the Laws of England*, vol. 4 (Chicago: University of Chicago Press, 1979), 5.
11. *Kansas v. Hendricks*, 521 U.S. 346 (1997).
12. Tex. Penal Code Ann. § 1.02.
13. N.Y. Penal Law § 1.05.
14. Jerome Hall, *General Principles of Criminal Law*, 2nd ed. (Indianapolis, IN: Bobbs-Merrill, 1960), 18.
15. Wayne R. LaFave, *Criminal Law*, 3rd ed. (St. Paul, MN: West Publishing, 2000), 8.
16. Fla. Stat. §§ 796.04–796.045.
17. *Koon v. United States*, 518 U.S. 81 (1996).
18. LaFave, *Criminal Law*, 70–71.
19. *Commonwealth v. Mochan*, 110 A.2d 788 (Pa. Super. Ct. 1955).
20. Lawrence M. Friedman, *Crime and Punishment in American History* (New York: Basic Books, 1993), 64–65.
21. Fla. Stat. §§ 775.01–775.02.
22. Cal. Penal Code § 2-24-6.
23. Utah Code Ann. §76-1-105.
24. LaFave, *Criminal Law*, 72–73.
25. *Keeler v. Superior Court*, 470 P.2d 617 (Cal. 1970).
26. *Kovacs v. Cooper*, 336 U.S. 77 (1949).
27. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).
28. Joshua Dressler, *Understanding Criminal Law*, 3rd ed. (New York: Lexis, 2001), 31.
29. *United States v. Lopez*, 514 U.S. 549 (1995).
30. *United States v. Jones*, 529 U.S. 848 (2000).
31. *Gonzales v. Oregon*, 546 U.S. 243 (2006).
32. *Gamble v. United States*, 587 U.S. __ (2019).
33. *Texas v. Johnson*, 491 U.S. 397 (1989).
34. *Koon v. United States*, 518 U.S. 81 (1996).
35. *Gonzales v. Raich*, 545 U.S. 1 (2005).

CHAPTER 2

1. Joshua Dressler, *Understanding Criminal Law*, 7th ed. (New York: Lexis, 2015), 39.
2. American Law Institute, *Model Penal Code and Commentaries*, vol. 1, pt. 1 (Philadelphia: American Law Institute, 1985), § 1.05(1).
3. James Madison, "Federalist No. 44," in *The Federalist Papers*, ed. A. Hamilton, J. Madison, and J. Jay (New York: New American Library, 1961), 282.
4. *United States v. Brown*, 381 U.S. 437, 442 (1965).
5. *United States v. Lovett*, 328 U.S. 303 (1946).

6. Alexander Hamilton, "Federalist No. 84," in *The Federalist Papers*, ed. A. Hamilton, J. Madison, and J. Jay (New York: New American Library, 1961), 512.
7. *Calder v. Bull*, 3 U.S. 386 (1798).
8. *Carmell v. Texas*, 529 U.S. 513 (2000).
9. *Stogner v. California*, 539 U.S. 607 (2003).
10. *Grayned v. Rockford*, 408 U.S. 104 (1972).
11. *Coates v. Cincinnati*, 402 U.S. 611 (1971).
12. *Kolender v. Lawson*, 461 U.S. 352 (1983).
13. *Gregory v. Chicago*, 394 U.S. 111 (1969).
14. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1971).
15. *Id.*
16. *Coates v. Cincinnati*, 402 U.S. at 611.
17. *Horn v. State*, 273 So. 2d 249 (Ala. Crim. App. 1973).
18. *State v. Metzger*, 319 N.W. 2d 459 (Neb. 1982).
19. Erwin Chemerinsky, *Constitutional Law Principles and Politics*, 2nd ed. (New York: Aspen, 2002), 642.
20. *Bolling v. Sharpe*, 347 U.S. 497 (1954).
21. *Buck v. Bell*, 274 U.S. 200, 208 (1927).
22. *Brown v. Board of Education*, 347 U.S. 483 (1954).
23. *McGowan v. Maryland*, 366 U.S. 420, 425–426 (1961).
24. *Westbrook v. State*, 2003 WL 1732398 (Alaska Ct. App. 2003).
25. *Strauder v. West Virginia*, 100 U.S. 303 (1879).
26. *McLaughlin v. Florida*, 379 U.S. 184 (1964).
27. *Loving v. Virginia*, 388 U.S. 1 (1967).
28. *United States v. Virginia*, 518 U.S. 515 (1996).
29. *Michael M. v. Superior Court*, 450 U.S. 464 (1981).
30. *Id.*
31. *Gitlow v. New York*, 268 U.S. 652 (1925).
32. Thomas L. Emerson, *The System of Freedom of Expression* (New York: Vintage Books, 1970), 6–7.
33. *Terminiello v. Chicago*, 337 U.S. 1 (1949).
34. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
35. *Feiner v. New York*, 340 U.S. 315 (1951).
36. *Terminiello v. Chicago*, 337 U.S. at 1.
37. *Watts v. United States*, 394 U.S. 705 (1969).
38. *Jacobellis v. Ohio*, 378 U.S. 184 (1974).
39. *Miller v. California*, 413 U.S. 15 (1973).
40. *New York v. Ferber*, 458 U.S. 747, 778 (1982).
41. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
42. *Gertz v. Welch*, 418 U.S. 323 (1974).
43. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).
44. *New York v. Ferber*, 458 U.S. at 773.
45. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).
46. *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).
47. *Virginia v. Black*, 538 U.S. 343 (2003).
48. Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4, no. 5 (1890): 1–23.
49. *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).
50. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
51. Arthur R. Miller, *The Assault on Privacy* (Ann Arbor: University of Michigan Press, 1971).
52. *Olmstead v. United States*, 277 U.S. 438 (1928).
53. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
54. *Carey v. Population Services International*, 431 U.S. 678 (1977).
55. *Roe v. Wade*, 410 U.S. 113 (1973).
56. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

57. *Stanley v. Georgia*, 394 U.S. 557 (1969).
58. *Bowers v. Hardwick*, 478 U.S. 186 (1986).
59. *Lawrence v. Texas*, 529 U.S. 558 (2003).
60. *United States v. Miller*, 307 U.S. 174 (1939).
61. *District of Columbia v. Heller*, 554 U.S. 570 (2008).
62. *McDonald v. Chicago*, 561 U.S. 742 (2010).
63. *Caetano v. Massachusetts*, 577 U.S. ___, 136 S.Ct. 1027 (2016).
64. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2013).
65. *Kachalsky v. County of Westchester*, 701 F.3d 81 (2nd Cir. 2012).
66. *New York State Rifle and Pistol Association v. New York City*, 590 U.S. ___ (2020).
67. *Wrenn v. District of Columbia*, 808 F.3d 81 (D.C. Cir. 2015).
68. *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018)
69. Giffords Law Center, <https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/open-carry/>.
7. 42 U.S.C. § 14071.
8. *Smith v. Doe*, 538 U.S. 84 (2003).
9. *United States v. Bergman*, 416 F. Supp. 496 (S.D.N.Y. 1976).
10. *United States v. Ursery*, 518 U.S. 267 (1996).
11. *Timbs v. Indiana*, 586 U.S. ___ (2019).
12. 18 U.S.C. §§ 3531–3626; 28 U.S.C. §§ 991–998.
13. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
14. *Blakely v. Washington*, 542 U.S. 296 (2004).
15. *Cunningham v. California*, 549 U.S. 270 (2007).
16. *Beckles v. United States*, 580 U.S. ___, 137 S.Ct. 886 (2017).
17. *United States v. Booker*, 543 U.S. 220 (2005).
18. *Rita v. United States*, 551 U.S. 338 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007).
19. *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151 (2013).
20. *Peugh v. United States*, 569 U.S. 530, 133 S.Ct. 2072 (2013).
21. *Molina-Martinez v. United States*, 578 U.S. ___, 136 S.Ct. 1338 (2016).
22. *Rosales-Mireles v. United States*, 585 U.S. ___ (2018).
23. *Hughes v. United States*, 584 U.S. ___ (2018).
24. *Chavez-Meza v. United States*, 585 U.S. ___ (2018).
25. *Betterman v. Montana*, 578 U.S. ___, 136 S.Ct. 1609 (2016).
26. *Brady v. United States*, 397 U.S. 742 (1970).
27. *Santobello v. New York*, 404 U.S. 257 (1971).
28. *Lafler v. Cooper*, 566 U.S. 156, 132 S.Ct. 1376 (2012).
29. *Missouri v. Frye*, 566 U.S. 134, 132 S.Ct. 1399 (2012).

CHAPTER 3

1. Lawrence M. Friedman, *Crime and Punishment in American History* (New York: Basic Books, 1993), 40–50.
2. Nicholas N. Kittrie, Elyce H. Zenoff, and Vincent A. Eng, *Sentencing, Sanctions, and Corrections: Federal and State Law, Policy, and Practice* (New York: Foundation Press, 2002), 736.
3. *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968).
4. Kittrie, Elyce, and Eng, *Sentencing, Sanctions, and Corrections*, 722.
5. George P. Fletcher, *Rethinking Criminal Law* (New York: Oxford University Press, 2000), 408–410.
6. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

30. *United States v. Davila*, 569 U.S. 597, 134 S.Ct. 2488 (2012).
31. *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 502 U.S. 105 (1992).
32. *Payne v. Tennessee*, 501 U.S. 808 (1991).
33. *Bosse v. Oklahoma*, 580 U.S. ____ (2016).
34. *Harmelin v. Michigan*, 501 U.S. 957 (1991).
35. Wayne R. LaFave, *Criminal Law*, 3rd ed. [St. Paul, MN: West Publishing, 2000], 189.
36. *Weems v. United States*, 217 U.S. 349, 369 (1910).
37. LaFave, *Criminal Law*, 187.
38. *In re Kemmler*, 136 U.S. 436 (1890).
39. *State v. Cannon*, 190 A.2d 514 (Del. 1963).
40. *Trop v. Dulles*, 356 U.S. 86 (1958).
41. *Furman v. Georgia*, 408 U.S. 238 (1972).
42. *In re Kemmler*, 136 U.S. at 436.
43. *Wilkerson v. Utah*, 99 U.S. 130 (1878).
44. *In re Kemmler*, 136 U.S. at 436.
45. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).
46. *Hope v. Pelzer*, 536 U.S. 730 (2002).
47. *Brown v. Plata*, 563 U.S. 493 (2011).
48. *In the Matter of R.B.*, 765 A.2d 396 (Pa. Super. Ct. 2000).
49. *Furman v. Georgia*, 408 U.S. at 238.
50. *Id.*
51. *Woodson v. North Carolina*, 428 U.S. 280 (1976).
52. *Gregg v. Georgia*, 428 U.S. 153 (1976).
53. *Coker v. Georgia*, 433 U.S. 584 (1977).
54. *Kennedy v. Louisiana*, 554 U.S. 407 (2008).
55. *Baze v. Rees*, 533 U.S. 35 (2008).
56. *Glossip v. Gross*, 576 U.S. 863 (2015).
57. *Arthur v. Dunn*, 581 U.S. ____ (2017).
58. Death Penalty Information Center, <https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf>.
59. *Kent v. United States*, 383 U.S. 541 (1966).
60. *Eddings v. Oklahoma*, 455 U.S. 104 (1982).
61. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).
62. *Stanford v. Kentucky*, 492 U.S. 361 (1989).
63. *Lockyer v. Andrade*, 538 U.S. 63 (2003).
64. Cal. Penal Code, § 667.
65. *Ewing v. California*, 538 U.S. 11 (2003).
66. *Weems v. United States*, 217 U.S. at 349.
67. *Humphrey v. Wilson*, 652 S.E.2d 501 (Ga. 2007).
68. *Dorsey v. United States*, 567 U.S. 260, 132 S.Ct. 2321 (2012).
69. *Hutto v. Davis*, 454 U.S. 370 (1982).
70. *United States v. Angelos*, 433 F.3d 738 (10th Cir. 2006).
71. *United States v. Dossie*, 851 F.Supp.2d 478 (E.D.N.Y. 2012).
72. Charlie Savage, "Obama Curbs Sentences of 8 in Crack Cases," *New York Times*, December 20, 2013.
73. Sentencing Project, "The State of Sentencing 2015: Developments in Policy and Practices," <http://www.sentencingproject.org/publications/the-state-of-sentencing-2015-developments-in-policy-and-practice/>.
74. Charlie Savage, "Dept. of Justice Seeks to Curtail Stiff Drug Terms," *New York Times*, August 12, 2013.
75. Rebecca R. Ruiz, "Attorney General Orders Tougher Sentences Rolling Back Obama Policy," *New York Times*, May 12, 2017.
76. Congressional Research Service, *The First Step Act: An Overview* (Washington, DC: Congressional Research Service, 2019).
77. Paul Butler, "Racially Based Jury Nullification: Black Power in the Criminal Justice System," *Yale Law Journal* 105 (1995): 677–725.
78. *Robinson v. California*, 370 U.S. 660 (1962).

79. *United States v. Edwardo-Franco*, 885 F.2d 1002 (2nd Cir. 1989).
80. *State v. Chambers*, 307 A.2d 78 (N.J. 1973).
81. *McCleskey v. Kemp*, 481 U.S. 279 (1987).
20. *People v. Nelson*, 2 N.E.3d 613 (Ill. App. Ct. 2013).
21. *People v. Wesley*, 2019 Ill. App. 4th 160881 (Ill. App. Ct. 2019).
22. *People v. Chmilenko*, 14 Ill. App. 3d 270 (1973).

CHAPTER 4

1. Joshua Dressler, *Understanding Criminal Law*, 3rd ed. (New York: Lexis, 2001), 197.
2. *Id.*
3. Cal. Penal Code § 20 (1999).
4. Dressler, *Understanding Criminal Law*, 81.
5. Ind. Code § 35-41-2-1 (1993).
6. Wayne R. LaFave, *Criminal Law*, 3rd ed. (St. Paul, MN: West Publishing, 2000), 206.
7. *United States v. Valle*, 807 F.3d 508 (2nd Cir. 2015)
8. *McClain v. State*, 678 N.E.2d 104 (Ind. 1997).
9. Markus D. Dubber, *Criminal Law: Model Penal Code* (New York: Foundation Press, 2002), 33.
10. Dressler, *Understanding Criminal Law*, 86.
11. LaFave, *Criminal Law*, 208.
12. *State v. Connell*, 493 S.E.2d 292 (N.C. Ct. App. 1997).
13. *Fain v. Commonwealth*, 78 Ky. 183 (1879).
14. *People v. Decina*, 138 N.E.2d 799 (N.Y. 1956).
15. *People v. Newton*, 87 Cal. Rptr. 394 (Cal. Ct. App. 1970).
16. *Martin v. State*, 17 So. 2d 427 (Ala. App. 1944).
17. Beth E. Teacher, "Sleepwalking Uses as a Defense in Criminal Cases and the Evolution of the Ambien Defense," *Duquesne Criminal Law Journal* 1 (2011): 124–138.
18. *People v. Stowell*, 2002 WL 1068259 (Cal. Ct. App. 2002).
19. *State v. Newman*, 302 P.3d 435 (Or. 2013).
20. *People v. Nelson*, 2 N.E.3d 613 (Ill. App. Ct. 2013).
21. *People v. Wesley*, 2019 Ill. App. 4th 160881 (Ill. App. Ct. 2019).
22. *People v. Chmilenko*, 14 Ill. App. 3d 270 (1973).
23. *State v. Sanders* (Summary Disposition, No. 28304) (Haw. Ct. App. 2008).
24. *State v. Eaton*, 229 P.3d 704 (Wash. 2010).
25. *State v. Alvarado*, 200 P.3d 1037 (Ariz. Ct. App. 2008).
26. *State v. Grimsley*, 444 N.E.2d 1071 (Ohio Ct. App. 1982).
27. *Robinson v. California*, 370 U.S. 660, 661 (1962).
28. *Powell v. Texas*, 392 U.S. 514 (1968).
29. *Wheeler v. Goodman*, 306 F. Supp. 58 (W.D.N.C. 1969).
30. *State v. Adams*, 91 So.3d 724 (Ala. 2010).
31. *People v. Beardsley*, 113 N.W. 1128 (Mich. 1907).
32. *People v. Beardsley*, 113 N.W. at 1132.
33. *Buch v. Amory Manufacturing*, 44 A. 809, 810 (N.H. 1897).
34. *Kuntz v. Montana Thirteenth Judicial District*, 995 P.2d 951 (Mont. 1999).
35. Dressler, *Understanding Criminal Law*, 96–99.
36. *Hughes v. State*, 719 S.W.2d 560 (Tex. Crim. App. 1986).
37. 18 Pa. Cons. Stat. § 301(b).
38. *State v. Mally*, 366 P.2d 868 (Mont. 1961).
39. *Staples v Commonwealth*, 454 S.W.3d 803 (Ky. 2014).
40. *State v. Miranda*, 878 A.2d 1118 (Conn. 2005).
41. *Craig v. State*, 155 A.2d 684 (Md. 1959).
42. *State v. Lenihan*, 219 N.J. 251 (2014).
43. *Commonwealth v. Pestinikas*, 617 A.2d 1339 (Pa. Super. 1992).

44. *People v. Oliver*, 258 Cal. Rptr. 138 [Cal. Ct. App. 1989].
45. *State v. Gargus*, No. ED 99233 [Mo. Ct. App. 2013].
46. *State v. Saintil-Brown*, 210 A.3d 213 [N.H. 2019].
47. *Jones v. State*, 43 N.E.2d 1017 [Ind. 1942].
48. *State v. Voss*, 488 S.W.3d 97 [Mo. Ct. App. 2016].
49. Cal. Penal Code § 272.
50. *Williams v. Garcetti*, 853 P.2d 507 [Cal. 1993].
51. *Commonwealth v. Karetny*, 880 A.2d 505 [Pa. 2005].
52. *People v. Burton*, 788 N.E.2d 220 [Ill. App. 2003].
53. LaFave, *Criminal Law*, 224–225.
54. *People v. Burton*, 788 N.E.2d at 220.
55. *Craig v. State*, 155 A.2d at 684.
56. *Id.*
57. *State v. Walden*, 293 S.E.2d 780 [N.C. 1982].
58. *People v. Burton*, 788 N.E.2d at 220.
59. Richard A. Oppel Jr. and Shreeya Sinha, “What Officials Say Scot Peterson Did Not Do During the Parkland School Shooting,” *New York Times*, June 4, 2019.
60. *Pope v. State*, 396 A.2d 1054 [Md. App. 1979].
61. Arnold H. Lowey, *Criminal Law*, 4th ed. [St. Paul, MN: West, 2003], 235–236.
62. Dressler, *Understanding Criminal Law*, 92–93.
63. LaFave, *Criminal Law*, 211–213.
64. *Hawkins v. State*, 89 S.W.3d 674 [Tex. App.–Houston 2002].
65. *People v. Mijares*, 491 P.2d 1115 [Cal. 1971].
66. *United States v. Byfield*, 928 F.2d 1163 [D.C. Cir. 1991].
67. *State v. Webb*, 648 N.W.2d 72 [Iowa 2002].
68. *State v. Rippley*, 319 N.W.2d 129 [N.D. 1982].
69. *Dawkins v. State*, 547 A.2d 1041 [Md. 1988].
70. *State v. Cashen*, 666 N.W.2d 566 [Iowa 2003].

CHAPTER 5

1. *Morissette v. United States*, 342 U.S. 246 [1952].
2. Oliver Wendell Holmes Jr., “All Offenses Defined by Statute: Application of General Provisions of the Code,” in *The Common Law*, ed. Mark Howe [Boston: Little, Brown, 1963], 7.
3. *Dennis v. United States*, 341 U.S. 494 [1951].
4. *Morissette v. United States*, 342 U.S. at 246.
5. Jerome Hall, *General Principles of Criminal Law*, 2nd ed. [Indianapolis, IN: Bobbs-Merrill, 1960], 106–107.
6. *People v. Conley*, 543 N.E.2d 138 [Ill. App. Ct. 1989].
7. *Alvarado v. State*, 704 S.W.2d 36 [Tex. Crim. App. 1986].
8. *United States v. Bailey*, 444 U.S. 394 [1980].
9. *State v. Sanborn*, 2012 N.J. Super. Unpub. LEXIS 993, No. A-1418-10T1 [N.J. Super. Ct. App. Div. 2012].
10. *Regina v. Saunders & Archer*, 75 Eng. Rep. 706 [1575].
11. *People v. Scott*, 927 P.2d 288 [Cal. 1996].
12. *Haupt v. United States*, 330 U.S. 631 [1947].
13. *State v. Fuelling*, 145 S.W.3d 464 [Mo. App. 2004].
14. *United States v. Jewell*, 532 F.2d 697 [9th Cir. 1976].
15. *Durkowitz v. State*, 771 S.W.2d 12 [Tex. App. 1989].
16. *Williams v. State*, 235 S.W.3d 742 [Tex. Crim. App. 2007].
17. *Tello v. State*, 138 S.W.3d 487 [Tex. 2004].
18. *People v. Stanfield*, 44 A.D.2d 780 [N.Y. App. Div. 1974].

19. *United States v. Flum*, 518 F.2d 39 (8th Cir. 1975).
20. *Morissette v. United States*, 342 U.S. at 246.
21. *State v. York*, 2003-Ohio-7249, 2003 Ohio Ct. App. LEXIS 6532.
22. *Staples v. United States*, 511 U.S. 600 (1994).
23. *People v. Janes*, 836 N.W.2d 883 (Mich. App. 2013).
24. *State v. Pinkham*, 409 P.3d 1103 (Wash. App. 2018).
25. Joshua Dressler, *Understanding Criminal Law*, 7th ed. (New York: Lexis, 2001), 181–90.
26. *United States v. Main*, 113 F.3d 1046 (9th Cir. 1997).
27. Dressler, *Understanding Criminal Law*, 193.
28. *Kibbe v. Henderson*, 534 F.2d 493 (2nd Cir. 1976).
29. *People v. Armitage*, 239 Cal. Rptr. 515 (Cal. Ct. App. 1987).
30. *People v. Schmies*, 51 Cal. Rptr. 2d 185 (Cal. Ct. App. 1996).
31. *People v. Saavedra-Rodriguez*, 971 P.2d 223 (Colo. 1998).
32. *United States v. Hamilton*, 182 F. Supp. 548 (D.D.C. 1960).
33. *State v. Pelham*, 824 A.2d 1082 (N.J. 2003).
34. American Law Institute, *Model Penal Code and Commentaries*, vol. 1, pt. 1 (Philadelphia: American Law Institute, 1985), § 2.03.
4. *Wilcox v. Jeffery* [1951] 1 All E.R. 464.
5. Dressler, *Understanding Criminal Law*, 469.
6. *Brown v. State*, 864 So. 2d 1058 (Miss. Ct. App. 2004).
7. *State v. Mendez*, No. E2002-01826-CCA-R3-CD (Tenn. Crim. App. Sep. 12, 2003).
8. *Alejandres v. Texas*, No. 01-02-01029-CR (Tex. Crim. App. 2004).
9. *State v. Jones*, 2004-Ohio-7280, Ohio Ct. App. LEXIS 1435.
10. *State v. Phillips*, 76 S.W.3d 1 (Tenn. Crim. App. 2001).
11. *State v. Anderson*, 707 So. 2d 1223 (La. 1998).
12. *State v. Doody*, 434 A.2d 523 (Me. 1981).
13. *State v. Noriega*, 928 P.2d 706 (Ariz. Ct. App. 1996).
14. *People v. Mullen*, 730 N.E.2d 545 (Ill. App. Ct. 2000).
15. *Bailey v. United States*, 416 F.2d 1110 (D.C. Cir. 1969).
16. *State v. Walden*, 293 S.E.2d 780 (N.C. 1982).
17. *People v. Perez*, 725 N.E.2d 1258 (Ill. 2000).
18. Dressler, *Understanding Criminal Law*, 472.
19. *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938).
20. *State v. Case*, 140 S.W.3d 80 (Mo. App. W.D. 2004).
21. *Backun v. United States*, 112 F.2d 635 (4th Cir. 1940).
22. *State v. Linscott*, 520 A.2d 1067 (Me. 1987).
23. *Sharma v. State*, 56 P.3d 868 (Nev. 2002); see also *Commonwealth v. Knox*, 105 A.3d. 1194 (Pa. 2014).
24. *People v. Chiu*, 325 P.3d 972 (Cal. 2014).
25. *Wilson v. State*, 824 So. 2d 963 (Fla. Dist. Ct. App. 2002).
26. *Clark v. United States*, 418 A.2d 1059 (D.C. 1980).

CHAPTER 6

1. Rollin M. Perkins and Ronald N. Boyce, *Criminal Law*, 3rd ed. (Mineola, NY: Foundation Press, 1982), 730–732.
2. Joshua Dressler, *Understanding Criminal Law*, 3rd ed. (New York: Lexis, 2001), 461.
3. *Pinkerton v. United States*, 328 U.S. 640 (1946).

27. *Melahn v. State*, No. 5D01-3081 (Fla. Dist. Ct. App. 2003).
28. *State v. Jordan*, 590 S.E.2d 424 (N.C. Ct. App. 2004).
29. Richard G. Singer and John Q. La Fond, *Criminal Law Examples and Explanations*, 2nd ed. (New York: Aspen, 2001), 108.
30. *People v. Travers*, 8 52 Cal. App. 3d 111 (1975).
31. Wayne R. LaFave, *Criminal Law*, 3rd ed. (St. Paul, MN: West Publishing, 2000), 264.
32. Perkins and Boyce, *Criminal Law*, 718–720.
33. *New York Central R. Co. v. United States*, 212 U.S. 481 (1909).
34. *United States v. Dotterweich*, 320 U.S. 277 (1943).
35. *United States v. Park*, 421 U.S. 658 (1975).
36. *United States v. Dotterweich*, 320 U.S. at 281.
37. LaFave, *Criminal Law*, 275.
38. *Id.*, 275–276.
39. *United States v. Allegheny Bottling Co.*, 695 F. Supp. 856 (E.D. Va. 1988), aff'd 870 F.2d 655 (4th Cir. 1989).
40. *Commonwealth v. Penn Valley Resorts, Inc.*, 494 A.2d 1139 (Pa. Super. Ct. 1985).
41. Brandon L. Garrett, *Too Big to Jail: How Prosecutors Compromise With Corporations* (Cambridge, MA: Belknap Press, 2014), 145.
42. National Governors Association, *Juvenile Justice Reform Initiatives in the States 1940–1996* (Washington, DC: Office of Juvenile Justice and Delinquency Prevention, 1997).
43. See Ala. Code § 12-15-13 (1975).
44. *State v. Akers*, 400 A.2d 38 (N.H. 1979).
45. N.Y. Penal Law § 260.10.
46. See *Allen v. Bordentown*, 524 A.2d 478 (N.J. Super. Ct. Law Div. 1987).
47. *Williams v. Garcetti*, 853 P.2d 507 (Cal. 1993).
48. See *State v. Akers*, 400 A.2d at 38.

CHAPTER 7

1. Joshua Dressler, *Understanding Criminal Law*, 7th ed. (New York: Lexis, 2001), 375–377.
2. *People v. Miller*, 2 Cal. 2d 527, 42 P.2d 308 (1935).
3. Jerome Hall, *General Principles of Criminal Law*, 2nd ed. (Indianapolis, IN: Bobbs-Merrill, 1960), 559.
4. *Id.*, 560.
5. *Rex v. Scofield* (1784) Caldecott 397.
6. *Rex v. Higgins*, 102 Eng. Rept. 269 (1801).
7. Dressler, *Understanding Criminal Law*, 386–391.
8. *People v. Gentry*, 510 N.E.2d 963 (Ill. App. Ct. 1987).
9. American Law Institute, *Model Penal Code and Commentaries*, vol. 11, pt. 1 (Philadelphia: American Law Institute, 1985), 305.
10. *State v. Reeves*, 916 S.W.2d 909 (Tenn. 1996).
11. *People v. Rizzo*, 158 N.E. 888 (N.Y. 1927).
12. *Commonwealth v. Gilliam*, 417 A.2d 1203 (Pa. Super. Ct. 1980).
13. *Bolton v. State*, 07-02-035-CR (Tex. Crim. App. 2003).
14. Hall, *General Principles of Criminal Law*, 595.
15. *Attorney General v. Sillem* (1863) 159 Eng. Rep. 178.
16. Colo. Rev. Stat. § 18-1-201.
17. *People v. Dlugash*, 363 N.E.2d 1155 (N.Y. 1977).
18. *State v. Curtis*, 603 A.2d 356 (Vt. 1991).
19. *People v. Staples*, 85 Cal. Rptr. 589 (Cal. Ct. App. 1970).

20. Wayne R. LaFave, *Criminal Law*, 3rd ed. (St. Paul, MN: West Publishing, 2000), 563–564.
21. American Law Institute, *Model Penal Code and Commentaries*, 358–362.
22. *Watkins v. Commonwealth*, 62 Va. Ct. App. 263, 746 S.E.2d 77 (2013).
23. LaFave, *Criminal Law*, 612–614.
24. *Krulewitch v. United States*, 336 U.S. 440 (1949).
25. *Commonwealth v. Azim*, 459 A.2d 1244 (Pa. Super. Ct. 1983).
26. *United States v. Brown*, 776 F.2d 397 (2d Cir. 1985).
27. Jason Epstein, *The Great Conspiracy Trial* (New York: Vintage Books, 1971).
28. *Hyde v. United States*, 225 U.S. 347 (1912).
29. *Yates v. United States*, 354 U.S. 298 (1957).
30. *Cline v. State*, 319 S.W.2d 227 (Tenn. 1958).
31. Rollin M. Perkins and Ronald N. Boyce, *Criminal Law*, 3rd ed. (Mineola, NY: Foundation Press, 1982), 685–687.
32. LaFave, *Criminal Law*, 592–593.
33. *United States v. Falcone*, 311 U.S. 205 (1940).
34. *People v. Lauria*, 59 Cal. Rptr. 628 (Cal. Ct. App. 1967).
35. *Morrison v. California*, 291 U.S. 82 (1934).
36. Dressler, *Understanding Criminal Law*, 442–443.
37. *Id.*, 443–444.
38. American Law Institute, *Model Penal Code and Commentaries*, 399.
39. *State v. Pacheco*, 882 P.2d 183 (Wash. 1994).
40. Richard G. Singer and John Q. La Fond, *Criminal Law Examples and Explanations*, 2nd ed. (New York: Aspen, 2001), 287.
41. *United States v. Bruno*, 105 F.2d 921 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287 (1939).
42. *Kotteakos v. United States*, 328 U.S. 750 (1946).
43. *State v. McLaughlin*, 44 A.2d 116 (Conn. 1945).
44. *Rex v. Jones* (1832) 110 Eng. Rep. 485.
45. *State v. Burnham*, 15 N.H. 396 (1844).
46. *Musserv v. Utah*, 333 U.S. 95 (1948).
47. *People v. Fisher*, 14 Wend. 2 (N.Y. 1835).
48. *Shaw v. Director of Public Prosecutions* (1962) A.C. 220.
49. *Musserv v. Utah*, 333 U.S. at 95.
50. 18 U.S.C. § 371.
51. *Pinkerton v. United States*, 328 U.S. 640 (1946).
52. Dressler, *Understanding Criminal Law*, 457–458.
53. *Gebardi v. United States*, 287 U.S. 112 (1932).
54. *Harrison v. United States*, 7 F.2d 259 (2d Cir. 1925).
55. LaFave, *Criminal Law*, 569–573.
56. *Rex v. Higgins*, 102 Eng. Rept. 269 (1801).
57. *Commonwealth v. Barsell*, 678 N.E.2d 143 (Mass. 1997).
58. *State v. Butler*, 35 P. 1093 (Wash. 1894).
59. *People v. Smith*, 806 N.E.2d 1262 (Ill. App. Ct. 2004).

CHAPTER 8

1. *In re Winship*, 397 U.S. 358 (1970).
2. *Victor v. Nebraska*, 511 U.S. 1 (1994).
3. *Jackson v. Virginia*, 443 U.S. 307 (1979).
4. *Commonwealth v. Webster*, 59 Mass. 295, 320 (1850).
5. *Wardius v. Oregon*, 412 U.S. 470 (1973).
6. Joshua Dressler, *Understanding Criminal Law*, 7th ed. (New York: Lexis, 2001), 68–9.
7. Wayne R. LaFave, *Criminal Law*, 3rd ed. (St. Paul, MN: West Publishing, 2000), 54.

8. Richard G. Singer and John Q. La Fond, *Criminal Law Examples and Explanations*, 2nd ed. (New York: Aspen, 2001), 374.
9. George P. Fletcher, *Rethinking Criminal Law* (New York: Oxford University Press, 2000), 759.
10. Dressler, *Understanding Criminal Law*, 207–208.
11. *Id.*, 218–219.
12. *Id.*, 219–220.
13. *Id.*, 208–211.
14. Singer and La Fond, *Criminal Law*, 386–388.
15. *State v. Moore*, 689 N.E.2d 1 (Ohio 1998).
16. *United States v. Berrigan*, 417 F.2d 1002 (4th Cir. 1969).
17. *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972).
18. William Blackstone, *Commentaries on the Laws of England*, vol. 4 (Chicago: University of Chicago Press, 1979), 183–187.
19. *Brown v. United States*, 256 U.S. 335 (1921).
20. *Vigil v. People*, 353 P.2d 82 (Colo. 1960).
21. Dressler, *Understanding Criminal Law*, 225.
22. *Harshaw v. State*, 39 S.W.3d 753 (Ark. 2001).
23. *State v. Schroeder*, 261 N.W.2d 759 (Neb. 1978).
24. *People v. Williams*, 205 N.E.2d 749 (Ill. 1965).
25. See WHO Multi-country Study on Women's Health and Domestic Violence against Women, https://www.who.int/gender/violence/who_multicountry_study/summary_report/summary_report_English2.pdf.
26. *State v. DeJesus*, 481 A.2d 127 (Conn. 1984).
27. *State v. Pranckus*, 815 A.2d 678 (Conn. App. Ct. 2003).
28. Fletcher, *Rethinking Criminal Law*, 870–875.
29. Dressler, *Understanding Criminal Law*, 226–227.
30. *Id.*, 229–230.
31. *State v. Chiarello*, 174 A.2d 506 (N.J. App. 1961).
32. *People v. Young*, 183 N.E.2d 319 (N.Y. 1962).
33. N.Y. Penal Law § 35.15.
34. Fletcher, *Rethinking Criminal Law*, 869.
35. *State v. Fair*, 211 A.2d 359 (N.J. 1965) (discussing the objective test).
36. *People v. Eatman*, 91 N.E.2d 387 (Ill. 1950).
37. Dressler, *Understanding Criminal Law*, 266–267.
38. *State v. Anderson*, 972 P.2d 32 (Okla. Crim. App. 1998).
39. Dressler, *Understanding Criminal Law*, 207.
40. *Id.*, 262–263.
41. *Id.*, 267.
42. *Id.*, 279.
43. *Durham v. State*, 159 N.E. 145 (Ind. 1927).
44. Dressler, *Understanding Criminal Law*, 278.
45. Paul Chevigny, *Edge of the Knife: Police Violence in the Americas* (New York: The New Press, 1995), 128.
46. American Law Institute, *Model Penal Code and Commentaries*, vol. 1, pt. 1 (Philadelphia: American Law Institute, 1985), 114.
47. Dressler, *Understanding Criminal Law*, 279.
48. *Commonwealth v. Chermansky*, 242 A.2d 237 (Pa. 1968).
49. Shaun Raviv and John Sullivan, "Deadly Force Behind the Wheel," *Washington Post*, August 24, 2020, <https://www.washingtonpost.com/graphics/2020/investigations/pit-maneuver-police-deaths/>.
50. *Queen v. Tooley* (1909) 92 Eng. Rep. 349 (K.B.).

51. *John Bad Elk v. United States*, 177 U.S. 529 (1900).
52. *United States v. Di Re*, 332 U.S. 581 (1948).
53. Craig Hemmens, "Unlawful Arrest in Mississippi: Resisting the Modern Trend," *California Criminal Law Review* 2 (2000): 1-33.
54. Arnold H. Lowey, *Criminal Law in a Nutshell*, 4th ed. (St. Paul, MN: West Publishing, 2003), 82-3.
55. *Commonwealth v. French*, 611 A.2d 175 (Pa. 1992).
56. *King v. State*, 149 So. 2d 482 (Miss. 1963).
57. *State v. Valentine*, 935 P.2d 1294, 1312 (Wash. 1997).
58. *State v. Wiegmann*, 714 A.2d 841 (Md. 1998).
59. *Watkins v. State*, 350 So.2d 1348 (Miss. 1977).
60. LaFave, *Criminal Law*, 476-479.
61. Fletcher, *Rethinking Criminal Law*, 822.
62. *The Queen v. Dudley and Stephens* (1884) 14 Q.B.D. 273.
63. Dressler, *Understanding Criminal Law*, 273.
64. *State v. Salin*, No. 0302016999, 2003 Del. Ct. C. P. LEXIS 39 (Kent County Ct. Common Pleas, June 13, 2003).
65. Herbert L. Packer, *The Limits of the Criminal Sanction* (Palo Alto, CA: Stanford University Press, 1968), 113-117.
66. *Id.*, 119-121.
67. Dressler, *Understanding Criminal Law*, 287.
68. *State v. Green*, 470 S.W.2d 565 (Mo. 1971).
69. *Humphrey v. Commonwealth*, 553 S.E.2d 546 (Va. Ct. App. 2001).
70. *State v. Squires*, 519 A.2d 1164 (Vt. 1986).
71. *Nelson v. State*, 597 P.2d 977 (Alaska 1979).
72. *Commonwealth v. Livingston*, 877 N.E. 255 (Mass. App. 2007).
73. *State v. Cole*, 403 N.E.2d 117 (S.C. 1991).
74. *United States v. Maxwell*, 254 F.3d 21 (1st Cir. 2001).
75. *Emry v. United States*, 829 A.2d 970 (D.C. 2003).
76. *People v. Brandyberry*, 812 P.2d 674 (Colo. App. 1991).
77. *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001).
78. *Commonwealth v. Leno*, 616 N.E.2d 453 (Mass. 1993).
79. *State v. Romano*, 809 A.2d 158 (N.J. Super. Ct. App. Div. 2002).
80. Natasha Geiling, "Judge Rules Civil Disobedience 'Necessary' to Prevent Climate Change," *ThinkProgress*, March 28, 2018, <https://archive.thinkprogress.org/roxbury-pipeline-protest-necessity-defense-36de64c83ffd/>.
81. *Commonwealth v. Appleby*, 402 N.E. 2d 1051 (Mass. 1980).
82. Fletcher, *Rethinking Criminal Law*, 770-771.
83. Blackstone, *Commentaries on the Laws of England*, vol. iv, 5.
84. *State v. Brown*, 364 A.2d 27 (N.J. Super. Ct. Law Div. 1976).
85. *People v. Lenti*, 253 N.Y.S.2d 9 (N.Y. Co. Ct. 1964).

CHAPTER 9

1. Rollin M. Perkins and Ronald N. Boyce, *Criminal Law*, 3rd ed. (Mineola, NY: Foundation Press, 1982), 950-951.
2. Jerome Hall, *General Principles of Criminal Law*, 2nd ed. (Indianapolis, IN: Bobbs-Merrill, 1960), 475.
3. Julie Turkewitz, "James Holmes Gets 12 Life Sentences in Aurora Shootings," *New York Times*, August 27, 2015.
4. *Kahler v. Kansas*, 589 U.S. ____ (2020).
5. Perkins and Boyce, *Criminal Law*, 958-959.

6. Wayne R. LaFave, *Criminal Law*, 3rd ed. [St. Paul, MN: West Publishing, 2000], 331.
7. *Serritt v. State*, 582 S.E.2d 507 (Ga. Ct. App. 2003).
8. American Law Institute, *Model Penal Code and Commentaries*, vol. 2, pt. 1 [Philadelphia: American Law Institute, 1985], 166.
9. Arnold H. Loewy, *Criminal Law in a Nutshell*, 4th ed. [St. Paul, MN: West Publishing, 2003], 165.
10. *State v. Crenshaw*, 659 P.2d 488 (Wash. 1983).
11. *Clark v. Arizona*, 548 U.S. 735 (2006).
12. *Kahler v. Kansas*, 589 U.S. ____ (2020).
13. *Dunn v. Madison*, 583 U.S. ____, 236 S.Ct. 184 (2017); *Madison v. Alabama*, 586 U.S. ____ 139, S.Ct. 718 (2019).
14. Joshua Dressler, *Understanding Criminal Law*, 7th ed. (New York: Lexis, 2015), 349.
15. *Parsons v. State*, 2 So. 854 (Ala. 1887).
16. *United States v. Lyons*, 731 F.2d 243 (5th Cir. 1984).
17. *State v. Quinet*, 752 A.2d 490 (Conn. 2000).
18. 18 U.S.C. § 17.
19. *State v. Pike*, 49 N.H. 399 (1869).
20. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).
21. *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).
22. *Blocker v. United States*, 288 F.2d 853 (D.C. Cir. 1961).
23. LaFave, *Criminal Law*, 374–377.
24. Dressler, *Understanding Criminal Law*, 356.
25. Idaho Code Ann. § 18-207(1)(2).
26. *State v. Bethel*, 66 P.3d 840 (Kan. 2003).
27. *Delling v. Idaho*, 568 U.S. (2012).
28. Dressler, *Understanding Criminal Law*, 360.
29. *United States v. Lyons*, 731 F.2d 243 (5th Cir. 1984).
30. *People v. Wells*, 202 P.2d 53 (Cal. 1949); *People v. Gorshen*, 336 P.2d 492 (Cal. 1959).
31. *People v. Gorshen*, 336 P.2d at 495–496, 504.
32. *State v. Skora*, 210 A.2d 193 (N.J. 1965).
33. Cal. Penal Code §§ 25–29.
34. American Law Institute, *Model Penal Code and Commentaries*, § 4.02.
35. *People v. Hood*, 462 P.2d 370 (Cal. 1969).
36. *Montana v. Egelhoff*, 518 U.S. 37, 44 (1996).
37. *Montana v. Egelhoff*, 518 U.S. at 44.
38. *People v. Hood*, 462 P.2d 370 (Cal. 1969).
39. Markus D. Dubber, *Criminal Law: Model Penal Code* (New York: Foundation Press, 2002), 84–90.
40. Hall, *General Principles of Criminal Law*, 545.
41. *State v. Cameron*, 514 A.2d 1302 (N.J. 1986).
42. *Montana v. Egelhoff*, 518 U.S. at 44.
43. *City of Minneapolis v. Altimus*, 238 N.W.2d 851, 856 (Minn. 1976).
44. Perkins and Boyce, *Criminal Law*, 936–938.
45. LaFave, *Criminal Law*, 426–427.
46. Ibid., 427–429.
47. Ibid., 429–430.
48. *Kent v. United States*, 383 U.S. 541 (1966).
49. Hall, *General Principles of Criminal Law*, 438.
50. *Lynch v. D.P.P.* (1975) A.C. 653.
51. *State v. Van Dyke*, 825 A.2d 1163 (N.J. Super. Ct. App. Div. 2003).
52. *People v. Anderson*, 50 P.3d 368 (Cal. 2000).
53. *Commonwealth v. Perl*, 737 N.E.2d 937 (Mass. App. Ct. 2000).
54. *State v. Keeran*, 674 N.W.2d 570 (Wis. Ct. App. 2003).

55. *United States v. Castro-Gomez*, 360 F.3d 216 (1st Cir. 2004).
56. *State v. Unger*, 338 N.E.2d 442 (Ill. App. Ct. 1975).
57. Wayne R. LaFave, *Principles of Criminal Law* (St. Paul, MN: West Publishing, 2003), 432.
58. Richard G. Singer and John Q. La Fond, *Criminal Law Examples and Explanations*, 2nd ed. (New York: Aspen, 2001), 79.
59. LaFave, *Criminal Law*, 441–443.
60. Ibid., 442–443.
61. *United States v. Hutzell*, 217 F.3d 966 (8th Cir. 2000).
62. *State v. Marrero*, 567 N.E.2d 1068 (N.Y. 1987).
63. Singer and La Fond, *Criminal Law Examples and Explanations*, 83.
64. *Lambert v. California*, 355 U.S. 225 (1957).
65. *Cheek v. United States*, 498 U.S. 192 (1991).
66. *Miller v. Commonwealth*, 492 S.E.2d 482 (Va. Ct. App. 1997).
67. *Cox v. Louisiana*, 379 U.S. 536 (1965).
68. LaFave, *Principles of Criminal Law*, 433–434.
69. Ibid., 434.
70. *Commonwealth v. Liebenow*, 84 Mass. App. Ct. 387 (2013).
71. *People v. Atheron*, 583 N.E.2d 94 (Ill. App. 1994).
72. *Regina v. Morgan* (1976) A.C. 182.
73. *Sorrells v. United States*, 287 U.S. 435 (1932).
74. *Sherman v. United States*, 356 U.S. 369, 372 (1958).
75. *Sherman v. United States*, 356 U.S. at 369.
76. LaFave, *Criminal Law*, 463–464.
77. *United States v. Fusko*, 869 F.2d 1048 (7th Cir. 1989).
78. LaFave, *Criminal Law*, 458.
79. *Sherman v. United States*, 356 U.S. at 382–383.
80. *United States v. Russell*, 411 U.S. 423 (1973).
81. Alan M. Dershowitz, *The Abuse Excuse: And Other Cop-Outs, Sob Stories, and Evasions of Responsibility* (Boston: Little, Brown, 1994), 3.
82. George P. Fletcher, *Rethinking Criminal Law* (New York: Oxford University Press, 2000), 801–802.
83. *Millard v. State*, 261 A.2d 227 (Md. Ct. Spec. App. 1970).
84. Dershowitz, *Abuse Excuse*, 54–55.
85. *People v. Molina*, 202 Cal. App.3d 1168 (3 Cal. Ct. App. 1988).
86. *Commonwealth v. Garabedian*, 503 N.E.2d 1290 (Mass. 1987).
87. Singer and La Fond, *Criminal Law Examples and Explanations*, 486.
88. *State v. Phipps*, 883 S.W.2d 138 (Tenn. Ct. App. 1994).
89. Deborah Goldklang, “Post Traumatic Stress Disorder and Black Rage: Clinical Validity, Criminal Responsibility,” *Virginia Journal of Social Policy & Law* 5 (1997): 213–243.
90. Wally Owens, “*State v. Osby*, the Urban Survival Defense,” *American Journal of Criminal Law* 22 (1995): 821.
91. Patricia J. Falk, “Novel Theories of Criminal Defense Based Upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage,” *North Carolina Law Review* 74 (1996): 731.
92. *United States v. Alexander*, 471 F.2d 923 (D.C. Cir. 1972).
93. *State v. Jerrett*, 307 S.E.2d 339 (N.C. 1983).
94. Doriane Lambelet Coleman, “Individualizing Justice Through Multiculturalism: The Liberals’ Dilemma,” *Columbia Law Review* 96 (1996): 1093, 1150.
95. *State v. Kargar*, 679 A.2d 81 (Me. 1996).

96. Lisa Miller, "Slender Man Is Watching," *New York Magazine*, August 24, 2015, <http://nymag.com/daily/intelligencer/2015/08/slender-man-stabbing.html>.
22. *People v. Morrin*, 31 Mich. App. 301, 330; 187 N.W.2d 434, 449 (Mich. Ct. App. 1971).
23. *State v. Bingham*, 719 P.2d 109 (Wash. 1986).

CHAPTER 10

1. *Furman v. Georgia*, 408 U.S. 238 (1972).
2. *Coker v. Georgia*, 433 U.S. 584 (1977).
3. George P. Fletcher, *Rethinking Criminal Law* (New York: Oxford University Press, 2000), 236.
4. *State v. Jensen*, 417 P.2d 273 (Kan. 1966).
5. *Report of the Royal Commission on Capital Punishment* (London: HMSO, 1953), 26–28.
6. Nev. Rev. Stat. § 200.010.
7. Nev. Rev. Stat. § 200.020.
8. Pa. Laws of 1794, ch. 257, §§ 1, 2 (1794).
9. American Law Institute, *Model Penal Code and Commentaries*, vol. 1, pt. 11 (Philadelphia: American Law Institute, 1985), 14–15, 44–48.
10. William Blackstone, *Commentaries on the Laws of England*, vol. 4 (Chicago: University of Chicago Press, 1979), 196.
11. *Vesey v. Vesey*, 54 N.W.2d 385 (Minn. 1952).
12. *State v. Myers*, 81 A.2d 710 (N.J. 1951).
13. *State v. Lamy*, 158 N.H. 411 (2009).
14. *Commonwealth v. Cass*, 467 N.E.2d 1324 (Mass. 1984).
15. *Roe v. Wade*, 410 U.S. 113 (1973).
16. Kans. Stat. Ann. § 77-202.
17. *State v. Fierro*, 603 P.2d 74 (Ariz. 1979).
18. Utah Code Ann. § 76-5-291.
19. *State v. Schrader*, 302 S.E.2d 70 (W. Va. 1982).
20. *Young v. State*, 428 So. 2d 155 (Ala. Crim. App. 1982).
21. *State v. Guthrie*, 461 S.E.2d 163, 181 (W. Va. 1995).
22. *People v. Morrin*, 31 Mich. App. 301, 330; 187 N.W.2d 434, 449 (Mich. Ct. App. 1971).
23. *State v. Bingham*, 719 P.2d 109 (Wash. 1986).
24. *State v. Moua*, 678 N.W.2d 29 (Minn. 2004).
25. Va. Code Ann. § 18.2-31.
26. Fla. Stat. § 921.141.
27. Wash. Rev. Code § 9A.32.050.
28. Idaho Code Ann. § 18-4003.
29. La. Rev. Stat. Ann. § 14.30.1.
30. Ark. Code Ann. § 5-10-103.
31. *Alston v. State*, 643 A.2d 468 (Md. Ct. Spec. App. 1994).
32. *Commonwealth v. Malone*, 47 A.2d 445 (Pa. 1946).
33. *People v. Suarez*, 844 N.E.2d 721 (N.Y. 2005).
34. Cal. Penal Code § 188.
35. *Commonwealth v. Malone*, 47 A.2d at 445.
36. *Banks v. State*, 211 S.W. 217 (Tex. 1919).
37. *Alston v. State*, 643 A.2d at 468.
38. *Hyam v. Director of Public Prosecutions* [1975] A.C. 55.
39. Kan. Stat. Ann. § 21-3402.
40. *People v. Stamp*, 82 Cal. Rptr. 598 (Cal. Ct. App. 1969).
41. *People v. Fuller*, 86 Cal.App.3d 618 (1978).
42. *Regina v. Serne*, 16 Cox C.C. 311 (1887).
43. *Enmund v. Florida*, 458 U.S. 782 (1982).
44. Va. Code Ann. § 18.2-32.
45. Mo. Rev. Stat. § 565.021.
46. 18 Pa. Cons. Stat. § 1102(d).
47. *People v. Burroughs*, 678 P.2d 894 (Cal. 1984).
48. *King v. Commonwealth*, 368 S.E.2d 704 (Va. Ct. App. 1988).
49. *Lester v. State*, 737 So.2d 1149 (Fla. 2nd Dist. App. 1999).

50. *Campbell v. State*, 444 A.2d 1034 (Md. 1982).
51. *Commonwealth v. Campbell*, 89 Mass. 541, 543–546 (1863).
52. *State v. Myers*, 60 So. 2d 310 (La. 2000).
53. *Kinchion v. State*, 81 P.3d 681 (Okla. Crim. App. 2003).
54. Oliver Wendell Holmes Jr., *The Common Law* (New York: Dover Press, 1991), 57–58.
55. *People v. Aaron*, 299 N.W.2d 304 (Mich. 1980).
56. Francis T. Cullen and William J. Maakestad, *Corporate Crime Under Attack: The Ford Pinto Case and Beyond* (Cincinnati, OH: Anderson, 1987), 145–308.
57. Brandon L. Garrett, *Too Big to Jail: How Prosecutors Compromise With Corporations* (Cambridge, MA: Belknap Press, 2014), 129–130.
58. Ivan Penn and Peter Eavis, “PG&E Pleads Guilty to 84 Counts in Camp Fire Case,” *New York Times*, June 16, 2020, updated June 18, 2020, <https://www.nytimes.com/2020/06/16/business/energy-environment/pge-camp-fire-california-wildfires.html>.
59. Wayne R. LaFave, *Criminal Law*, 3rd ed. (St. Paul, MN: West Publishing, 2000), 272–278.
60. LaFave, *Criminal Law*, 717.
61. Joshua Dressler, *Understanding Criminal Law*, 7th ed. (New York: Lexis, 2015), 534–535.
62. Dressler, *Understanding Criminal Law*, 535–536.
63. *Bedder v. Director of Public Prosecutions* [1954] 1 W.L.R. 1119.
64. *Commonwealth v. Carr*, 580 A.2d 1362 (Pa. Super. Ct. 1990).
65. Dressler, *Understanding Criminal Law*, 536.
66. *State v. Flory*, 276 P. 458 (Wyo. 1929).
67. *State v. Gounagias*, 153 P. 9 (Wash. 1901).
68. *People v. Bridgehouse*, 303 P.2d 1018 (Cal. 1956).
69. LaFave, *Criminal Law*, 705.
70. *State v. Flory*, 276 P. at 458.
71. *People v. Ogg*, 182 N.W.2d 570 (Mich. App. 1970).
72. *Commonwealth v. Mink*, 123 Mass. 422 (Mass. 1877).
73. Cal. Penal Code § 192(b).
74. *People v. Datema*, 533 N.W.2d 272 (Mich. 1995).
75. *Todd v. State*, 594 So. 2d 802 (Fla. Dist. Ct. App. 1992).
76. *People v. Penny*, 285 P.2d 926 (Cal. 1955).
77. Cal. Penal Code §§ 191.5, 192.5.
78. Fla. Stat. § 782.07.

CHAPTER 11

1. Wayne R. LaFave, *Criminal Law*, 3rd ed. (St. Paul, MN: West Publishing, 2000), 787–788.
2. *Coker v. Georgia*, 433 U.S. 584 (1977).
3. *People v. Liberta*, 474 N.E.2d 567 (N.Y. 1984).
4. *State v. Smith*, 426 A.2d 38 (N.J. 1981).
5. Joanne Belknap, *The Invisible Woman: Gender, Crime, and Justice*, 3rd ed. (Belmont, CA: Thomson/Wadsworth, 2007), 298–308.
6. Susan Estrich, *Real Rape* (Cambridge, MA: Harvard University Press, 1987).
7. National Center for Victims of Crime, *Male Rape*, 1997, <http://www.ncvc.org/ncvc/main.aspx?db Name=DocumentViewer&DocumentID=32361>.
8. LaFave, *Criminal Law*, 762.
9. *State of New Jersey in the Interest of M.T.S.*, 609 A.2d 1266 (N.J. 1992).
10. William Blackstone, *Commentaries on the Laws of England*, vol. 4 (Chicago: University of Chicago Press, 1979), 215.

11. LaFave, *Criminal Law*, 755.
12. Blackstone, *Commentaries on the Laws of England*, 213.
13. *State v. Rusk*, 424 A.2d 720 [Md. 1981].
14. *Brown v. State*, 106 N.W. 536 [Wis. 1906].
15. *State v. Schuster*, 282 S.W.2d 553 [Mo. 1955].
16. LaFave, *Criminal Law*, 773–774.
17. *Ibid.*, 775–777.
18. *People v. Minkowski*, 23 Cal. Rptr. 92 [Cal. Ct. App. 1962].
19. *Boro v. Superior Court*, 210 Cal. Rptr. 122 [Cal. Ct. App. 1985].
20. *People v. Morales*, 150 Cal. Rptr. 3d 920 [Cal. Ct. App. 2013].
21. Cal. Penal Code § 261 [a] {5}, {6}.
22. American Law Institute, *Model Penal Code and Commentaries*, vol. 1, pt. 2 [Philadelphia: American Law Institute, 1985], 305–306.
23. LaFave, *Criminal Law*, 755–756.
24. *Ibid.*, 780–781.
25. Joshua Dressler, *Understanding Criminal Law*, 3rd ed. (New York: Lexis, 2001), 574–576.
26. *Taylor v. State*, 12 N.E. 400 [Ind. 1887]; *People v. Banks*, 552 N.E.2d 131 [N.Y. 1996].
27. Vt. Stat. Ann. tit. 13, §§ 3252, 3253, 3253a.
28. Ind. Code Ann. §35-42-4-1.
29. American Law Institute, *Model Penal Code and Commentaries*, 346; LaFave, *Criminal Law*, 758–759.
30. U.S. Department of Justice, "An Updated Definition of Rape," January 6, 2012, <https://www.justice.gov/archives/opa/blog/updated-definition-rape>.
31. Joshua Dressler, *Understanding Criminal Law*, 7th ed. (San Francisco: LexisNexis, 2015), 574.
32. Cal. Penal Code § 263.
33. *State v. Kidwell*, 556 P.2d 20 [Ariz. Ct. App. 1976].
34. Cal. Penal Code § 261.
35. Mich. Comp. Laws § 750.520(b)(1){e}.
36. Tex. Penal Code Ann. § 22011(10).
37. 18 Pa. Cons. Stat. § 3101.
38. *Commonwealth v. Milnarich*, 542 A.2d 1355 [Pa. 1988].
39. Cal. Penal Code § 261.
40. *People v. Mayberry*, 542 P.2d. 1337 [Cal. 1997].
41. *Director of Public Prosecutions v. Morgan* [1976] A.C. 182, (1975) 2 All E.R. 347, (1975) 2 W.L.R. 913 [H.L.].
42. *State v. Williams*, 439 A.2d 765 [Pa. Super. 1982].
43. *State v. Plunkett*, 934 P.2d 113 [Kan. 1997].
44. *Tyson v. State*, 619 N.E.2d 276 [Ind. Ct. App. 1993].
45. LaFave, *Criminal Law*, 778.
46. *People v. Shreck*, 22 P.3d 282 [Minn. 2011].
47. LaFave, *Criminal Law*, 778–779.
48. Sanford H. Kadish, Stephen J. Schulhofer, and Rachel E. Barkow, *Criminal Law and Its Processes: Cases and Materials*, 10th ed. (Frederick, MD: Wolters Kluwer, 2016), 303–304.
49. American Law Institute, *Model Penal Code and Commentaries*, 329.
50. *People v. Abbot*, 19 Wend. 192 [N.Y. 1838].
51. *State v. Colbath*, 540 A.2d 1212 [N.H. 1988].
52. *State v. DeJesus*, 856 A.2d 345 [Conn. 2004].
53. *Neeley v. Commonwealth*, 437 S.E.2d 721 [Va. Ct. App. 1993].
54. *People v. Wilhelm*, 476 N.W.2d 753 [Mich. Ct. App. 1991].
55. *Luckett v. Commonwealth*, 2006 WL 564178 [Ky. Ct. App.].
56. *Fells v. State*, 207 S.W.3d 498 [Ark. 2005].
57. Ga. Code Ann. § 16-5-22.
58. American Law Institute, *Model Penal Code and Commentaries*, § 211.1{1}{a}{b}.

59. Tex. Penal Code § 22.01.
60. 720 Ill. Comp. Stat. 5/12-3.
61. Ga. Code Ann. § 16-5-23.1.
62. Minn. Stat. § 609.226.
63. *State v. Sherer*, 60 P.3d 1010 (Mont. 2012).
64. *State v. Humphries*, 586 P.2d 130 (Wash. Ct. App. 1978).
65. Ga. Code Ann. § 16-5-23.1.
66. Ga. Code Ann. § 16-5-24.
67. Cal. Penal Code §§ 244–245.
68. 720 Ill. Comp. Stat. 5/12-4-4.5.
69. S.D. Codified Laws § 22-18-1-3.
70. Fla. Stat. § 784.045(2)(b).
71. Minn. Stat. § 609.228.
72. Mass. Gen. Laws, ch. 265, § 15A.
73. *State v. Davis*, 540 N.W. 88 (Minn. Ct. App. 1995).
74. *State v. Coauette*, 601 N.W.2d 443 (Minn. App. 1999).
75. 18 U.S.C. § 116.
76. Cal. Penal Code § 203.
77. Cal. Penal Code § 206.
78. 720 Ill. Comp. Stat. 5/12-21.
79. Ind. Code § 35-42-2-1.3.
80. *People v. Irvine*, 882 N.E.2d 1124 (Ill. App. Ct. 2008).
81. Ga. Code Ann. § 16-5-20.
82. Cal. Penal Code § 240.
83. 720 Ill. Comp. Stat. 5/12-1.
84. Cal. Penal Code § 241.3.
85. Ohio Rev. Code Ann. § 2903.22.
86. LaFave, *Criminal Law*, 376–377.
87. *Wilson v. State*, 53 Ga. 205 (1874).
88. Ga. Code Ann. § 16-5-21.
89. 720 Ill. Comp. Stat. 5/12-2.
90. 720 Ill. Comp. Stat. 5/12-2.5.
91. 720 Ill. Comp. Stat. 5/12-7.3.
92. 720 Ill. Comp. Stat. 5/12-7.4.
93. 720 Ill. Comp. Stat. 5/12-7.5.
94. *State v. Hoying*, WL 678989 (Ohio Ct. App. 2005).
95. S.D. Codified Laws § 22-18-1[4].
96. Rollin M. Perkins and Ronald N. Boyce, *Criminal Law*, 3rd ed. (Mineola, NY: Foundation Press, 1982), 282.
97. Mass. Gen. Laws, ch. 265, § 26A.
98. Fla. Stat. § 787.01.
99. Tex. Penal Code Ann. § 20.04.
100. N.C. Gen. Stat. § 14-39.
101. *People v. Chessman*, 238 P.2d 1001 (Cal. 1951).
102. *People v. Daniels*, 71 Cal.2d 1119 (1969).
103. *People v. Lombardi*, 229 N.E.2d 206 (N.Y. 1967).
104. *State v. Goodhue*, 833 A.2d 861 (Vt. 2003).
105. Wis. Stat. § 940.31.
106. *Marbley v. State*, 100 S.W.3d 48 (Ark. Ct. App. 2003).
107. *People v. Dominguez*, 41 P.2d 866 (Cal. 2006).
108. *People v. Majors*, 92 P.3d 360 (Cal. 2004).
109. Tex. Penal Code Ann. § 20.04.
110. *People v. Aguilar*, 16 Cal. Rptr. 3d 231 (Cal. Ct. App. 2004).
111. Idaho Code Ann. § 18-2901.
112. Idaho Code Ann. § 18-2902.
113. Ark. Code Ann. § 5-11-104.
114. *People v. Cohoon*, 42 N.E.2d 969 (Ill. App. Ct. 1942).
115. *McKendree v. Christy*, 172 N.E.2d 380 (Ill. App. Ct. 1961).
116. Perkins and Boyce, *Criminal Law*, 224.
117. Wis. Stat. § 940.31.
118. Ala. Code § 13A-6-41.
119. *Shue v. State*, 553 S.E.2d 348 (Ga. Ct. App. 2001).

120. *State v. Overton*, 170 N.C. App. 198 (N.C. Ct. App. 2005).
121. *People v. Islas*, 210 Cal. App. 4th 116 (2012).
122. *United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).
21. *State v. Stinton*, 89 P.3d 717 (Wash. Ct. App. 2004).
22. Tex. Penal Code Ann. § 30.05.
23. Tex. Penal Code Ann. §§ 30.05–30.06.
24. N.Y. Penal Law § 156.10.
25. Colo. Rev. Stat. § 18-5.5-102.
26. *Fugarino v. State*, 531 S.E.2d 187 (Ga. Ct. App. 2000).
27. *Adderley v. Florida*, 85 U.S. 39 (1966)
28. Mario Fazio, "Notable Arrests After the Riot at the Capitol," *New York Times*, January 10, 2021.
29. Blackstone, *Commentaries on the Laws of England*, p. 220.
30. *State v. Braathen*, 43 N.W.2d 202 (N.D. 1950).
31. *State v. Spiegel*, 83 N.W. 722 (Iowa 1900); Rollin M. Perkins and Ronald N. Boyce, *Criminal Law*, 3rd ed. (Mineola, NY: The Foundation Press Inc., 1982), p. 278.
32. *State v. Wyatt*, 269 S.E.2d 717 (N.C. 1980).
33. *Williams v. State*, 600 N.E.2d 962 (Ind. Ct. App. 1993).
34. N.J. Stat. Ann. § 2C:17-lb.
35. Fla. Stat. § 806.01(1).
36. 720 Ill. Comp. Stat. 5/201.1.
37. Fla. Stat. § 806.01(2).
38. Wash. Rev. Code § 9A.48.030.
39. Wash. Rev. Code § 9A.20.021.
40. Cal. Penal Code §§ 451–452.
41. E. Perot Bissell V, "Monuments to the Confederacy and the Right to Destroy in Cultural-Property Law," *Yale Law Journal* 128 (2019): 1130–1172.

CHAPTER 12

1. American Law Institute, *Model Penal Code and Commentaries*, vol. 1, pt. 11 (Philadelphia: American Law Institute, 1985), p. 67.
2. William Blackstone, *Commentaries on the Laws of England*, vol. 4 (Chicago: University of Chicago Press, 1979), p. 223.
3. *Taylor v. United States*, 495 U.S. 575 (1990).
4. *State v. Miller*, 954 P.2d 925 (Wash. Ct. App. 1998).
5. *Taylor v. United States*, 495 U.S. at 575.
6. *State v. Roberts*, 120 Wn. App. 1024 (Wash. Ct. App. 2004).
7. *Sears v. State*, 713 P.2d 1218 (Alaska Ct. App. 1986).
8. *Dixon v. State*, 855 So. 2d 1245 (Fla. Dist. Ct. App. 2003).
9. *Stowell v. People*, 90 P.2d 520 (Colo. 1939).
10. 720 Ill. Comp. Stat. 5/19-1(a).
11. *State v. Wentz*, 68 P.3d 282 (Wash. 2003).
12. Cal. Penal Code § 459.
13. 18 Pa. Cons. Stat. § 3502(d).
14. *Ellyson v. State*, 603 N.E.2d 1369 (Ind. Ct. App. 1992).
15. Wayne R. LaFave, *Criminal Law*, 3rd ed. (St. Paul, MN: West Publishing, 2000), p. 890.
16. 18 Pa. Cons. Stat. § 3502(d).
17. Cal. Penal Code § 464.
18. Ariz. Rev. Stat. Ann. § 13-1506–1508.
19. Idaho Code Ann. § 18-1406.
20. 18 Pa. Cons. Stat. § 3502.
21. *State v. Stinton*, 89 P.3d 717 (Wash. Ct. App. 2004).
22. Tex. Penal Code Ann. § 30.05.
23. Tex. Penal Code Ann. §§ 30.05–30.06.
24. N.Y. Penal Law § 156.10.
25. Colo. Rev. Stat. § 18-5.5-102.
26. *Fugarino v. State*, 531 S.E.2d 187 (Ga. Ct. App. 2000).
27. *Adderley v. Florida*, 85 U.S. 39 (1966)
28. Mario Fazio, "Notable Arrests After the Riot at the Capitol," *New York Times*, January 10, 2021.
29. Blackstone, *Commentaries on the Laws of England*, p. 220.
30. *State v. Braathen*, 43 N.W.2d 202 (N.D. 1950).
31. *State v. Spiegel*, 83 N.W. 722 (Iowa 1900); Rollin M. Perkins and Ronald N. Boyce, *Criminal Law*, 3rd ed. (Mineola, NY: The Foundation Press Inc., 1982), p. 278.
32. *State v. Wyatt*, 269 S.E.2d 717 (N.C. 1980).
33. *Williams v. State*, 600 N.E.2d 962 (Ind. Ct. App. 1993).
34. N.J. Stat. Ann. § 2C:17-lb.
35. Fla. Stat. § 806.01(1).
36. 720 Ill. Comp. Stat. 5/201.1.
37. Fla. Stat. § 806.01(2).
38. Wash. Rev. Code § 9A.48.030.
39. Wash. Rev. Code § 9A.20.021.
40. Cal. Penal Code §§ 451–452.
41. E. Perot Bissell V, "Monuments to the Confederacy and the Right to Destroy in Cultural-Property Law," *Yale Law Journal* 128 (2019): 1130–1172.

CHAPTER 13

1. *People v. Hoban*, 88 N.E. 806, 807 (Ill. 1909).
2. *Anon. v. The Sheriff of London* (1473) Year Book 13 Edw. IV, fol. 9, p1. 5.

3. Joshua Dressler, *Understanding Criminal Law*, 3rd ed. (New York: Lexis, 2001), 550–551.
4. Rollin M. Perkins and Ronald N. Boyce, *Criminal Law*, 3rd ed. (Mineola, NY: Foundation Press, 1982), 298.
5. Dressler, *Understanding Criminal Law*, 550.
6. Perkins and Boyce, *Criminal Law*, 300.
7. Dressler, *Understanding Criminal Law*, 553.
8. *Ibid.*, 554.
9. *Wilkinson v. State*, 60 So. 2d 786 (Miss. 1952).
10. *Smith v. State*, 74 S.E. 1093 (Ga. 1912).
11. *State v. Jones*, 65 N.C. 395 (1871).
12. Tex. Penal Code Ann. § 31.03.
13. Cal. Penal Code §§ 484–502.9.
14. Wayne R. LaFave, *Criminal Law*, 3rd ed. (St. Paul, MN: West Publishing, 2000), 810–814.
15. S.C. Code Ann. § 16-3-30.
16. Tex. Penal Code Ann. § 31.03(3).
17. 18 Pa. Cons. Stat. § 3903(c)(1).
18. 18 Pa. Cons. Stat. § 3903(c)(3).
19. Cal. Penal Code § 487[A].
20. Cal. Penal Code §§ 487[3], 489.
21. Tex. Penal Code Ann. § 31.03 [E](7).
22. Dressler, *Understanding Criminal Law*, 562.
23. *People v. Abbott*, 967 N.Y.S.2d 227 (N.Y. App. Div. 2013).
24. American Law Institute, *Model Penal Code and Commentaries*, vol. 2, pt. 2 (Philadelphia: American Law Institute, 1985), 128.
25. LaFave, *Criminal Law*, 850.
26. *Norton v. United States*, 92 F.2d 753 (9th Cir. 1937).
27. 18 U.S.C. § 1028(a)(7).
28. Utah Code Ann. §§ 76-6-1101–1104.
29. *State v. Green*, 172 P.3d 1213 (Kan. Ct. App. 2007).
30. *Lund v. Commonwealth*, 232 S.E.2d 745 (Va. 1977).
31. *People v. Puesan*, 973 N.Y.S.2d 121 (2013).
32. *Dawson's Case* (1602) 80 Eng. Rep. 4.
33. *United States v. Monasterski*, 567 F.2d 677 (6th Cir. 1977).
34. *State v. Belt*, 780 P.2d 1271 (Utah App. 1989).
35. Perkins and Boyce, *Criminal Law*, 343–344.
36. Cal. Penal Code § 211.
37. *People v. Braverman*, 173 N.E. 55 (Ill. 1930).
38. LaFave, *Criminal Law*, 869–870.
39. Fla. Stat. § 812.13.
40. American Law Institute, *Model Penal Code and Commentaries*, 104.
41. Fla. Stat. § 812.13.
42. Cal. Penal Code § 215.
43. N.J. Stat. Ann. § 2C:15-1.
44. Va. Code Ann. § 18.2-58.1.
45. Fla. Stat. § 812.133.
46. William Blackstone, *Commentaries on the Laws of England*, vol. 4 (Chicago: University of Chicago Press, 1979), 141.
47. Mich. Comp. Laws §§ 750.213–214.
48. N.Y. Penal Law § 155.05.
49. *State v. Crone*, 545 N.W.2d 267 (Iowa 1996).
50. *State v. Harrington*, 260 A.2d 692 (Vt. 1969).

CHAPTER 14

1. Edwin H. Sutherland, *White Collar Crime* (New Haven, CT: Yale University Press, 1983), 7.

2. Mitch Smith, "Flint Water Prosecutors Drop Criminal Charges With Plans to Keep Investigating," *New York Times*, July 13, 2019.
3. Julie Bosman, "Ex-Governor of Michigan Charged With Neglect in Flint Water Crisis," *New York Times*, January 13, 2021.
4. Transactional Records Access Clearinghouse, <https://trac.syr.edu/tracreports/crim/581/>.
5. Ellen S. Podgor and Jerold H. Israel, *White Collar Crime in a Nutshell*, 3rd ed. (St. Paul, MN: West Publishing, 1997), 205–216.
6. Brandon L. Garrett, *Too Big to Jail: How Prosecutors Compromise With Corporations* (Cambridge, MA: Belknap Press, 2014), 128.
7. 29 U.S.C. § 651.
8. 29 U.S.C. § 666.
9. 18 U.S.C. §§ 3574(b)(4), 574(c)(4).
10. Bureau of Labor Statistics, "Workplace Injury Statistics: 2019 Year-End Data for Workplace Accidents, Injuries and Death," <https://workinjurysource.com/workplace-injury-statistics-2019/>.
11. Bureau of Labor Statistics, "National Census of Fatal Occupational Injuries in 2018," <https://www.bls.gov/news.release/pdf/cfoi.pdf>.
12. Noam Scheiber, "Protect Workers From Coronavirus: OSHA Leaves It to Employers," *New York Times*, April 22, 2020.
13. Lauren Hirsch, "Biden Asks OSHA to Order Vaccine Mandates at Large Employers," *New York Times*, September 9, 2021.
14. David Barstow, "U.S. Rarely Seeks Charges for Deaths in Workplace," *New York Times*, December 22, 2003.
15. Kate M. McMahon, "OSHA Criminal Cases on the Rise," *OSHA Defense Report*, January 22, 2016, <https://oshadefensereport.com/author/mcmahonkate/>.
16. "Atlantic Drain Owner Convicted in Boston Trench Collapse That Killed Two Workers," NBC Boston, October 31, 2019, <https://www.nbcBoston.com/news/local/atlantic-drain-owner-convicted-for-trench-collapse-that-killed-2/1959421/>.
17. *People v. O'Neil*, 550 N.E.2d 1090 (Ill. App. 1990).
18. *People v. Pymm*, 563 N.E.2d 1 (N.Y. 1990).
19. Alan Blinder, "Don Blankenship Sentenced to a Year in Prison in Mine Safety Case," *New York Times*, April 6, 2016.
20. 18 U.S.C. §§ 1348–1350.
21. *Diamond v. Oreamuno*, 248 N.E.2d 910 (N.Y. 1969).
22. *United States v. O'Hagan*, 521 U.S. 642 (1998).
23. *United States v. Carpenter*, 791 F.2d 1024 (2d Cir. 1986).
24. *Salman v. United States*, 580 U.S. ___ (2016).
25. U.S. Sentencing Commission, "Quick Facts on Securities and Investment Fraud Offenses: Fiscal Year 2018," https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Securities_Fraud_FY18.pdf.
26. 18 U.S.C. § 1341.
27. 18 U.S.C. § 1343.
28. 18 U.S.C. § 371.
29. *United States v. Duff*, 336 F. Supp. 2d 852 (N.D. Ill. 2004).
30. Katie Benner, "Justice Department Announces Dozens of Fraud Charges in Small-Business Aid Program," *New York Times*, September 10, 2020.
31. Niraj Chokshi and Michael C. Schmidt, "Boeing Reaches \$2.5 Billion Settlement With U.S. Over 737 Max," *New York Times*, January 7, 2021.
32. *United States v. Jenkins*, 943 F.2d 167 (2d Cir. 1991).

33. *United States v. Goodman*, 945 F.2d 125 (6th Cir. 1991).
34. 18 U.S.C. § 1347.
35. *United States v. Baldwin*, 277 F. Supp. 2d 67 (D.D.C. 2003).
36. *United States v. Lucien*, 347 F.3d 45 (2d Cir. 2003).
37. *United States v. Miles*, 360 F.3d 472 (5th Cir. 2004).
38. Rebecca Ruiz, "U.S. Charges 412, Including Doctors, in \$1.3 Billion Health Fraud," *New York Times*, July 13, 2017.
39. U.S. Department of Justice, "Federal Indictments and Law Enforcement Actions in One of the Largest Health Care Fraud Schemes Involving Telemedicine and Durable Medical Equipment Marketing Executives Results in Charges Against 24 Individuals Responsible for Over \$1.2 Billion in Losses," April 9, 2019, <https://www.justice.gov/opa/pr/federal-indictments-and-law-enforcement-actions-one-largest-health-care-fraud-schemes>.
40. Thomas Sullivan, "DOJ Charges Numerous Medical Professionals in Latest Round of Healthcare Fraud Enforcement Actions," *Health & Medicine*, December 2019, <https://www.policymed.com/2019/12/doj-charges-numerous-medical-professionals-in-latest-round-of-healthcare-fraud-enforcement-actions.html>.
41. Katie Benner, "Purdie Pharma Pleads Guilty to Role in Opioid Crisis as Part of Deal With Justice Department," *New York Times*, November 24, 2020, <https://www.nytimes.com/2020/11/24/us/politics/purdue-pharma-opioids-guilty-settlement.html>.
42. Sharon LaFraniere and Chris Hamby, "Another Thing to Fear Out There: Coronavirus Scams," *New York Times*, April 5, 2020.
43. *Cuellar v. United States*, 553 U.S. 550 (2008); *United States v. Santos*, 553 U.S. 507 (2008).
44. *United States v. Johnson*, 971 F.2d 562 (10th Cir. 1992).
45. *United States v. Carucci*, 364 F.3d 339 (1st Cir. 2004).
46. *Northern Pacific Railroad Co. v. United States*, 356 U.S. 1 (1958).
47. 15 U.S.C. § 1.
48. *United States v. Azzarelli Construction Co. and John F. Azzarelli*, 612 F.2d 292 (7th Cir. 1979).
49. *United States v. Allegheny Bottling Co.*, 695 F. Supp. 856 (E.D. Va. 1988).
50. Rollin M. Perkins and Ronald N. Boyce, *Criminal Law*, 3rd ed. (Mineola, NY: Foundation Press, 1982), 528–530.
51. Dick Simpson, Thomas J. Gradel, Michael Dirksen, and Marco Rosaire Rossi, *Chicago: Still the Corruption Capital of America: Anti-Corruption Report No. 8* (Chicago: Department of Political Science, University of Illinois at Chicago, May 2015).
52. *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999).
53. *McDonnell v. United States*, 579 U.S. ____ (2016).
54. *Kelly v. United States*, 590 U.S. ____ (2020).
55. Richard L. Cassin, "2017 FCPA Enforcement Index," *The FCPA Blog*, January 3, 2017, <http://www.fcpablog.com/blog/2017/1/3/the-2016-fcpa-enforcement-index.html>.
56. Richard L. Cassin, "2018 FCPA Enforcement Index," *The FCPA Blog*, January 2, 2019, <https://fcpablog.com/2019/1/2/2018-fcpa-enforcement-index/>.

CHAPTER 15

1. William Blackstone, *Commentaries on the Laws of England*, vol. 4 (Chicago: University of Chicago Press, 1979), 142–152.
2. Wis. Stat. § 947.01.

3. 720 Ill. Comp. Stat. 5/26-1.
4. Ariz. Rev. Stat. Ann. §13-2904.
5. *State v. McCarthy*, 659 N.W.2d 808 (Minn. Ct. App. 2003).
6. *People v. Barron*, 808 N.E.2d 1051 (Ill. App. Ct. 2004).
7. *State v. A.S.*, 626 N.W.2d 712 (Wis. 2001).
8. American Law Institute, *Model Penal Code and Commentaries*, vol. 3, pt. 2 (Philadelphia: American Law Institute, 1985), 313–314.
9. *Cole v. Arkansas*, 338 U.S. 345 (1949).
10. N.Y. Penal Law §§ 240.05, 240.06.
11. N.Y. Penal Law §§ 240.10, 240.15.
12. Ohio Rev. Code Ann. § 2917.04.
13. *J.B.A. v. State*, 2004 UT App 450 (Utah Ct. App. 2004).
14. George L. Kelling and James Q. Wilson, "Broken Windows," *The Atlantic*, March 1982, <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>.
15. Civil Rights Division, *Investigation of the Ferguson Police Department* (Washington, DC: U.S. Department of Justice, March 4, 2015).
16. American Law Institute, *Model Penal Code and Commentaries*, 385.
17. *Ibid.*, 385–386.
18. *Mayor of the City of New York v. Miln*, 36 U.S. 102 (1837).
19. *Edwards v. California*, 314 U.S. 160 (1941).
20. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).
21. *Kolender v. Lawson*, 461 U.S. 352 (1983).
22. National Center on Homelessness and Poverty, *Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities* (Washington, DC: National Center on Homelessness and Poverty, December 2019), <https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf>.
23. *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992).
24. *Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997).
25. Norval Morris and Gordon Hawkins, *The Honest Politician's Guide to Crime Control* (Chicago: University of Chicago Press, 1969).
26. Patrick Devlin, *The Enforcement of Morals* (New York: Oxford University Press, 1965).
27. Vera Foundation, "Every Three Seconds," <https://www.vera.org/publications/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds/findings>.
28. Ga. Code Ann. § 16-6-9.
29. 18 Pa. Cons. Stat. § 5902(a).
30. Cal. Penal Code § 653.22.
31. 18 Pa. Cons. Stat. § 5902(e), (e.2).
32. Ga. Code Ann. §§ 16-6-11, 16-6-14.
33. 18 Pa. Cons. Stat. § 5902(d).
34. Ga. Code Ann. § 16-6-10.
35. N.C. Gen. Stat. § 14-204(7).
36. Ga. Code Ann. § 16-6-16.
37. Ga. Code Ann. § 16-6-13(b).
38. *City of Milwaukee v. Burnette*, 637 N.W.3d 447 (Wis. Ct. App. 2001).
39. *Rex v. Curl*, 93 Eng. Rep. 849 (K.B. 1727).
40. *Roth v. United States*, 354 U.S. 476 (1957).
41. *Miller v. California*, 413 U.S. 15 (1973).
42. *New York v. Ferber*, 458 U.S. 747 (1982).
43. *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).
44. *People v. Youngblood*, 109 Cal. Rptr. 2d 776 (Cal. Ct. App. 2001).
45. *United States v. Stevens*, 559 U.S. 460, 130 S. Ct. 1577 (2010).
46. *Brown v. Battle Creek Police Department*, 844 F.3d 556 (6th Cir. 2016).

CHAPTER 16

1. James Madison, "The Federalist No. 43," In A. Hamilton, J. Madison, and J. Jay, *The Federalist Papers* (New York: New American Library, 1961).
2. *Cramer v. United States*, 325 U.S. 1 (1945).
3. *United States v. Greathouse*, 26 F. Cas. 18, 21 (C.C.N.D. Cal. 1863) (No. 15,254).
4. *Dennis v. United States*, 341 U.S. 494 (1951); *Yates v. United States*, 354 U.S. 298 (1957).
5. *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999).
6. Katie Benner and Adam Goodman, "Justice Dept. Pursues at Least 150 Suspects in Capitol Riot," *New York Times*, January 11, 2021.
7. 18 U.S.C. § 2153.
8. 18 U.S.C. § 2155.
9. 18 U.S.C. §§ 2152, 2156.
10. *United States v. Kabat*, 797 F.2d 580 (8th Cir. 1986).
11. *United States v. Walli*, 785 F.3d 1986 (6th Cir. 2015).
12. 18 U.S.C. § 794.
13. *Gorin v. United States*, 312 U.S. 19 (1941).
14. Ellen Nakashima and Devlin Barrett, "U.S. Accuses China of Sponsoring Criminal Hackers Targeting Coronavirus Vaccine Research," *Washington Post*, July 21, 2020, https://www.washingtonpost.com/national-security/us-china-covid-19-vaccine-research/2020/07/21/8b6ca0c0-cb58-11ea-91f1-28aca4d833a0_story.html.
15. 18 U.S.C. § 2332(b)(g)(3)5.
16. 18 U.S.C. § 2332.
17. 18 U.S.C. § 2332b.
18. 18 U.S.C. § 175.
19. "Memorandum for All Heads of Law Enforcement Components, Heads of Litigation Divisions, and United States Attorneys," March 24, 2020, <https://www.justice.gov/file/1262771/download>.
20. *Bond v. United States*, 572 U.S. 844 (2014).
21. 18 U.S.C. § 1992.
22. 49 U.S.C. § 46502.
23. 18 U.S.C. § 2339.
24. 18 U.S.C. § 2339A, 18 U.S.C. § 2339B.
25. 8 U.S.C. § 1189(a)(1).
26. Erik Luna and Wayne McCormack, *Understanding the Law of Terrorism*, 2nd ed. (Durham, NC: Carolina Academic Press, 2015), p. 82.
27. *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).
28. Carol Rosenberg, "Military Names Air Force Judge for Guantanamo Bay 9/11 Trial. But There's a Snag," *New York Times*, October 16, 2020.
29. Adam Goldman and Charlie Savage, "Islamic State 'Beatles' Jailers Charged in Abuse of Murdered Hostages," *New York Times*, October 7, 2020.
30. Nicholas Bogel-Burroughs, Sahila Dewan, and Kathleen Gray, "F.B.I. Says Michigan Anti-Government Group Plotted to Kidnap Gov. Gretchen Whitmer," *New York Times*, October 8, 2020.
31. *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002).
32. Va. Code § 18.2-31 (13); Va. Code § 18.2-46.4.
33. *Muhammad v. Commonwealth*, 619 S.E.2d 16 (Va. 2005).
34. Transactional Records Access Clearinghouse, <https://trac.syr.edu/>.
35. Antonio Cassese, Guido Acquaviva, Mary Fan, and Alex Whiting, *International Criminal Law: Cases and Commentary* (New York: Oxford University Press, 2009).
36. *United States v. Dire*, 680 F.2d 446 (4th Cir. 2012).

GLOSSARY

abandonment: individuals who completely and voluntarily renounce their criminal purpose are not liable for an attempt. Abandonment as a result of outside or extraneous factors does not constitute a defense.

abuse excuse: a criminal defense that claims a lack of criminal responsibility based on past abuse or experiences.

accessories after the fact: individuals liable for assisting an offender to avoid arrest, prosecution, or punishment.

accessories before the fact: individuals under the common law who assist an individual prior to the commission of a crime and who are not present at the scene of the crime.

accessories: parties responsible for the separate and lesser offense of assisting a criminal offender to avoid apprehension, prosecution, or conviction.

accomplice liability: Individuals who are involved before or during a crime in assisting an offender are criminally liable.

acquaintance rape: rape committed by a perpetrator who is known to the victim.

actual possession: an object within an individual's physical possession or immediate reach.

actus reus: a criminal act, the physical or external component of a crime.

adequate provocation: conduct that is sufficient to excite an intense passion that causes a reasonable person to lose control and kill and that actually provokes the individual to kill.

adultery: consensual sexual intercourse between two people, at least one of whom is married to someone else.

affirmative defenses: the burden of production, and in most cases the burden of persuasion, is on the defendant.

agency theory of felony murder: a felon is liable for a murder committed by a co-felon.

aggravated murder: murder punishable by death or life imprisonment.

aggravated rape: a rape that is more harshly punished based on the use of force, injury to the victim, the fact that the perpetrator is a stranger, or other factors.

aggravated sexual assault: a sexual assault committed under circumstances deserving of a more severe punishment.

aggravating factors: factors that permit enhancement of an offender's punishment, including an offender's prior record, nature of the offense, and identity of the victim.

aggressor: an individual initiating a physical confrontation is not entitled to self-defense unless the individual retreats.

alibi: defendants present evidence at trial that they did not commit the crime because they were not at the crime scene.

alter ego rule: individuals intervening in defense of others possess the rights of the person they are assisting.

American bystander rule: no legal duty to assist or to rescue an individual in danger.

American rule for resistance to an unlawful arrest: an individual may resort to reasonable force to resist an unlawful arrest. Followed in 12 U.S. states.

arson: willful and malicious burning of the dwelling of another. Modified by statute to encompass any building or structure.

assault and battery: battery is the application of force to another person. An assault may be committed either by attempting to commit a battery or by intentionally placing another in fear of a battery.

assets forfeiture: seizure pursuant to a court order of the “fruits” of illegal narcotics transactions (along with certain other crimes) or of material that was used to engage in such activity.

attempt: an intent or purpose to commit a crime, an act or acts toward the commission of the crime, and a failure to commit the crime.

attendant circumstances: the conditions or context required for a crime.

benefit of clergy: clergy were outside the jurisdiction of royal courts and were tried in ecclesiastical courts under canon law. This evolved into a practice in which first-time offenders could receive a lenient sentence for specified crimes.

beyond a reasonable doubt: the standard of proof applied in a criminal case; requires that a judge or juror is convinced beyond a moral certainty.

bigamy: marrying another while already having a living spouse.

bilateral: there must be an agreement between at least two persons with the intent to achieve a common criminal objective.

Bill of Rights: first 10 amendments to the U.S. Constitution.

bills of attainder: legislative acts directed against an individual or group of individuals imposing punishment without trial.

biological defense: a defense to criminal liability based on a claim that a defendant's crime resulted from a neurological, genetic, or physical condition.

blackmail: taking property through the threat to disclose secret or embarrassing information.

brain death test: the irreversible function of all brain functions is the point at which an individual is legally dead.

brainwashing: a legal defense based on a biological characteristic that allegedly caused a defendant to commit a crime.

breach of the peace: an act that disturbs or tends to disturb the tranquility of citizens.

bribery of a public official: offering an item of value to an individual occupying an official position to influence a decision or action.

broken windows theory: failing to prevent and punish misdemeanor offenses causes major crimes.

burden of persuasion: responsibility to convince the fact finder, usually beyond a reasonable doubt.

burden of production: responsibility to produce sufficient evidence for the fact finder to consider the merits of a claim.

burglary: breaking and entry of the dwelling house of another at night with the intention to commit a felony therein. Modified by statute to cover an illegal entry into any structure at any time, day or night, with a criminal intent.

capital felony: punishable by the death penalty or by life imprisonment in states without the death penalty.

capital murder: punishable by the death penalty or life imprisonment and, in non-capital punishment states, by life imprisonment. Also referred to in some states as aggravated murder.

carjacking: taking a motor vehicle in the possession of another, from the person or the person's immediate presence, by force, and against the person's will.

case-in-chief: the prosecution's phase of the trial.

castle doctrine: individuals have no obligation to retreat inside their home.

causation: there must be a connection between an act and the resulting prohibited harm.

cause in fact: the defendant must be shown to be the “but for” cause of the harm or injury.

chain conspiracy: a conspiracy in which individuals are linked in a vertical chain to achieve a criminal objective.

child pornography: a juvenile engaged in actual or simulated sexual activity or in the lewd display of genitals.

choice of evils: the defense of necessity in which an individual commits a crime to avoid an imminent and greater social harm or evil.

circumstantial evidence: evidence that indirectly establishes that the defendant possessed a criminal intent or committed a criminal act.

civil commitment: a procedure for detaining psychologically troubled individuals who pose a danger to society.

civil law: protects the individual rather than societal interest.

clemency: an executive governmental official reduces a criminal sentence.

code jurisdiction: the only punishable acts or omissions are those that are contained in the state criminal code.

coincidental intervening acts: a defendant's criminal act results in the victim being at a particular place at a particular time and being impacted by an independent intervening act. The defendant is responsible for foreseeable coincidental intervening acts.

combat immunity: individuals meeting standards set forth in the Geneva Convention are to be treated as prisoners of war when apprehended.

common law: law derived from judicial decisions instead of from legislative statutes.

common law crimes: crimes developed by the common law judges in England and supplemented by acts of Parliament and decrees issued by the king.

common law states: the common law may be applied where the legislature has not acted.

competence to stand trial: defendants are competent to stand trial if they are able to intelligently assist their attorney and to follow and understand the trial.

complete attempt: an individual takes every act required to commit a crime and fails to succeed.

computer crime: crimes involving the computer, including unauthorized access to computers, computer programs, and networks; the modification or destruction of data and programs; and the sending of mass unsolicited messages and messages intended to trick and deceive.

computer trespassing: a lack of authorization to access a computer or computer system.

concurrence: a criminal intent must trigger and coincide with a criminal act.

concurrent sentences: sentences for each criminal act are served at the same time.

consecutive sentences: sentences for each criminal act are served one after another.

conspiracy: an agreement to commit a crime. Various state statutes require an overt act in furtherance of this purpose.

constitutional democracy: a constitutional system that limits the powers of the government.

constructive intent: individuals who act in a gross and wantonly reckless fashion are considered to intend the natural consequences of their actions and are guilty of willful and intentional battery or homicide.

constructive possession: individuals who retain legal possession over property that is not within their actual control.

cooling of blood: the point at which an individual who has been provoked no longer is acting in response to an act of provocation.

corporate liability: the imposition of vicarious liability on a corporate officer or corporation.

corporate murder: a killing for which a business enterprise is held criminally liable.

corroboration: additional facts that support and lend credibility to the elements of a criminal charge or defense.

crime: conduct that, if shown to have taken place, will result in a formal and solemn pronouncement of the moral condemnation of the community.

crimes against public order and morality: offenses that threaten public peace, quiet, and tranquility.

crimes against the quality of life: misdemeanor offenses that diminish the sense of safety and security in a neighborhood.

crimes against the state: treason, sedition, sabotage, espionage, terrorism, and other offenses intended to harm the government.

crimes of cause and result: the intent to achieve a specific result.

crimes of official misconduct: knowingly corrupt behavior by public officials in the exercise of their official responsibility.

criminal attempt: an intent or purpose to commit a crime, an act or acts toward the commission of the crime, and a failure to complete the crime.

criminal homicide: all homicides that are neither justified nor excused.

criminal mischief: damage or destruction of tangible property.

criminal procedure: investigation and detection of crime by the police and the procedures used at trial.

criminal trespass: the unauthorized entry or remaining on the land or premises of another.

curtilage: the area immediately surrounding a dwelling that is considered part of the habitation.

custody: temporary and limited right to control property.

cyberstalking: transmitting a threat through an electronic device.

deadly force: use of physical force or a weapon likely to cause death or serious bodily harm.

defendant: individual formally charged with a crime who is facing trial.

defiant trespass: entering or remaining on the property of another after receiving notice that an individual's presence is without the consent of the owner.

depraved heart murder: killing as a result of extreme recklessness, wanton unconcern, and indifference to human life with malice aforethought.

derivative liability: the guilt of a party to a crime based on the criminal acts of the primary party.

determinate sentence: a sentence fixed by the state legislature.

diminished capacity: mental disease or defect admissible to demonstrate defendant's inability to form a criminal intent; typically limited to murder.

disclose or abstain doctrine: the obligation to either make corporate information public or refrain from trading in the corporation's stock.

disorderly conduct: intentionally or knowingly causing or risking public inconvenience, annoyance, or alarm.

disparity: sentences for a particular offense are not uniform and vary from one another.

domestic battery: battery against a family member or member of the household.

domestic terrorism: a violent or dangerous act occurring within the United States intended to intimidate or coerce the civilian population, to influence government policy by intimidation or coercion, or to affect the conduct of a government by mass destruction, assassination, or kidnapping.

double jeopardy: being prosecuted more than once for the same offense.

dual sovereignty: sharing of power between federal and state governments. Each has different interests that permit both a state and a federal prosecution for the same crime.

duress: a crime is excused when committed to avoid what is reasonably believed to be the imminent infliction of serious physical harm or death.

Durham product test: a defendant's unlawful act is the product of a mental disease or defect.

duty to intervene: the legal obligation to act.

earnest resistance: a standard of resistance to rape under the common law.

Eighth Amendment: prohibits cruel and unusual punishment.

embezzlement: the fraudulent conversion of the property of another by an individual in lawful possession of the property.

English rule for resistance to an unlawful arrest: an individual may use reasonable force to resist an illegal arrest.

entrapment: defense either based on governmental inducement of an otherwise innocent defendant to commit a crime (subjective test) or based on governmental conduct that falls below accepted standards and would cause an innocent individual to commit a criminal offense (objective test).

environmental crimes: crimes that threaten the natural environment, including harm to the air, water, land, and natural resources.

equal protection: the Fifth and Fourteenth Amendments to the U.S. Constitution guarantee individuals equal protection of the law.

equivocal conduct: a defense to rape in which the victim's nonconsensual reactions were capable of being reasonably, but mistakenly, interpreted by an assailant as indicating consent to sexual relations.

espionage: deliver information to a foreign government with the intent or reason to believe that it is to be used to injure the United States or to advantage a foreign government.

European bystander rule: a rule in Europe imposing a legal duty on individuals to assist those in peril.

ex post facto laws: laws declaring an act criminal following the commission of the act.

excusable homicide: individuals are relieved of criminal liability based on lack of criminal intent. This includes insanity, infancy, and intoxication.

excuses: defenses in which defendants admit wrongful conduct while claiming a lack of legal responsibility based on a lack of a criminal intent or the involuntary nature of their acts.

express malice: a killing committed with the intent to cause death or severe bodily harm.

extortion: taking property from another by threat of future violence or action, such as circulating secret or embarrassing information; by threat of a criminal charge; or by threat of inflicting economic harm.

extraneous factor: a circumstance that is not created by a defendant that prevents the completion of a criminal act.

extraterritorial jurisdiction: criminal jurisdiction outside the United States.

extreme emotional disturbance (EED): an approach to voluntary manslaughter that asks whether an ordinary person would be provoked "in the actor's situation."

extrinsic force: an act of force beyond the effort required to accomplish penetration.

factual impossibility: a criminal act is prevented from being completed because of an extraneous factor.

false imprisonment: intentional and unlawful confinement or restraint of another person.

false pretenses: obtaining title and possession of property of another by a knowingly false representation of a present or past material fact with an intent to defraud that causes individuals to pass title to their property.

federal crime of terrorism: one or more violent federal offenses calculated to influence or affect the conduct of government by intimidation or coercion or to retaliate against government conduct.

federal criminal code: federal criminal statutes.

felony: crime punishable by death or by imprisonment for more than one year.

felony murder: a killing committed during the commission of a felony.

fiduciary relationship: a duty of care owed by a corporate official to the stockholders in a corporation.

fighting words: insulting words causing a breach of the peace.

First Amendment: protects freedom of expression, assembly, and the exercise of religion and prohibits the establishment of a religion.

first-degree murder: intentional and premeditated murder with malice aforethought.

fleeing felon rule: the common law rule permitting deadly force against a felon fleeing the police.

fleeting possession: temporary dominion and control over an object; typically not considered possession for purposes of criminal liability.

Foreign Corrupt Practices Act (FCPA): makes it illegal for an individual or company to bribe a foreign official in order to gain assistance in obtaining or retaining business.

forgery: creating a false legal document or the material modification of an existing legal document with the intent to deceive or to defraud others.

fornication: name of the act when an unmarried person has voluntary sexual intercourse with another individual.

fraud: an intentional misrepresentation of a material existing fact with knowledge of its falsity, intended to induce another person to part with money, property, or a legal right.

fraud in inducement: misrepresentation in regard to the purpose or benefits of a sexual relationship does not constitute rape.

fraud in the factum: misrepresentation in regard to the act to which an individual consents constitutes rape.

fraudulent representation of identity: a false representation of identity to obtain deceitful consent to sexual relations.

Gebardi rule: an individual who is excluded from liability under a criminal statute may not be held legally liable as a conspirator to violate the law.

general deterrence: punishment intended to deter individuals other than the offender from committing a crime.

general intent: an intent to commit an *actus reus*.

Geneva Convention of 1949: international treaty on the law of war providing standards for lawful combatant status.

good motive defense: the fact that a defendant committed a crime for what the defendant views as a good reason is not recognized as a defense.

Good Samaritan statute: legislation that exempts individuals from civil liability who assist individuals in peril.

grading: the categorization of homicide in accordance with the "moral blameworthiness" of the perpetrator.

graft: asking, accepting, receiving, or giving a thing of value as compensation or a reward for making an official decision.

grand larceny: a serious larceny, determined by the value of the property that is taken.

gross misdemeanor: punishable by between 6 and 12 months' incarceration.

guilty but mentally ill (GBMI): the defendant found to be guilty and mentally ill at the time of the criminal offense. The defendant is provided with psychiatric care while incarcerated. This is distinguished from a verdict of not guilty by reason of insanity (NGRI).

hate speech: speech that denigrates, humiliates, and attacks individuals on account of race, religion, ethnicity, nationality, gender, sexual preference, or other personal characteristics and preferences.

heat of passion: acting in response to adequate provocation.

identity theft: stealing of an individual's personal identifying information.

ignorantia legis non excusat. ignorance of the law is no excuse.

immorality crime: prostitution, obscenity, bigamy, and other offenses against the moral order.

imperfect self-defense: an honest but unreasonable belief in the justifiability of self-defense that results in a conviction for manslaughter rather than murder.

implied malice: a homicide willfully committed with a conscious disregard for human life.

Impossible attempt: the perpetrator does not realize that they cannot commit the crime.

in utero: within the uterus or womb.

incapacitation: a theory of punishment that protects the public by incarcerating offenders.

inchoate crimes: attempts, conspiracy, and solicitation. Each requires a specific purpose to accomplish a criminal objective and an act in furtherance of the intent. These offenses are punished to the same extent or to a lesser extent than the target crime.

incitement to violent action: words provoking individuals to breach the peace.

incomplete attempt: an individual abandons or is prevented from completing an attempt due to an extraneous or intervening factor.

incorporation theory: the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution is interpreted to include most of the rights contained in the Bill of Rights and extends these protections to the states.

indecent exposure: an act of public indecency.

indeterminate sentence: the state legislature provides judges with the ability within certain limits to set a minimum and maximum sentence. While imprisoned, the offender is evaluated by a parole board.

infamous crimes: deserving of shame or disgrace.

infancy: at common law there was an irrebuttable presumption that children younger than 7 lack criminal intent. In the case of children older than 7 and younger than 14, there was a rebuttable presumption of a lack of capacity to form a criminal intent. Individuals older than 14 were considered to possess the same capacity as an adult.

infractions: offenses punishable by a fine.

inherent impossibility: an act that is incapable of achieving the desired result.

insanity defense: a legal excuse based on a mental disease or defect.

insider trading: use of confidential corporate information to buy or sell stocks.

intermediate level of scrutiny: classifications based on gender must be factually related to differences based on gender and must be substantially related to the achievement of a valid state objective.

international criminal law: criminal acts that violate international law.

international terrorism: a violent or dangerous act occurring outside the United States intended to intimidate or coerce the civilian population, to influence government policy by intimidation or coercion, or to affect the conduct of a government by mass destruction, assassination, or kidnapping.

Interstate Commerce Clause: constitutional power of U.S. Congress to regulate commerce among the states.

intervening cause: a cause that occurs between the defendant's criminal act and a social harm.

intervention in defense of others: the privilege to exercise self-defense on behalf of an individual in peril.

intrinsic force: the amount of force required to achieve penetration.

involuntary act: unconscious act or automatism.

involuntary intoxication: a defense to criminal offenses where the defendant meets the standard for mental illness in the state.

involuntary manslaughter: killing of another as a result of gross negligence or recklessness, or during the commission of an unlawful act.

irresistible impulse test: mental disease that causes the defendant to lose the ability to choose between right and wrong and avoid engaging in criminal acts.

joint possession: several individuals exercise dominion and control over an object.

jury nullification: right of a jury to disregard the law and to acquit a defendant.

just deserts: offenders receive the sentence that they deserve.

justifiable homicide: killing is justified under the circumstances; this includes self-defense, police use of deadly force, and the death penalty.

justifications: defenses based on the circumstances of a criminal act.

keeping a place of prostitution: the crime of using a building for prostitution.

kidnapping: the unlawful, nonconsensual, and forcible asportation of an individual.

knowing possession: individual awareness of criminal possession.

knowingly: awareness that conduct is practically certain to cause a result.

larceny: trespassory taking and carrying away of the personal property of another with the intent to permanently deprive the individual of possession of the property.

larceny by trick: obtaining possession by misrepresentation or deceit.

last step approach: common law approach to attempt that requires the last step to the completion of a crime.

legal impossibility: the defense that an individual's act does not constitute a crime as a matter of law.

lewdness: willful exposing of the genitals of one person to another in a public place for purposes of sexual arousal or gratification.

libel: a civil action for words that harm an individual's reputation.

living off prostitution: being knowingly supported in whole or in substantial part by the proceeds of prostitution.

loitering: standing in public with no apparent purpose.

mail fraud: knowing and intentional participation in a scheme or artifice intended to obtain money or property through the use of the mails to execute the scheme.

make my day laws: statutes that authorize any degree of force against a trespasser who uses or threatens to use even slight force against the occupant of a home.

mala in se: crimes that are inherently evil.

mala prohibita: crimes that are not inherently evil.

malice aforethought: an intent to kill with ill will and hatred.

mandatory minimum sentence: the legislature requires judges to sentence an offender to a minimum sentence, regardless of mitigating factors. Prison sentences may be reduced by good-time credits while incarcerated.

manslaughter: killing of another without malice aforethought and without excuse or justification.

marital exemption: a male was not guilty of raping his wife at common law.

masturbation for hire: crime of stimulating the genitals of another.

material support to a foreign terrorist organization: providing material support or resources to a foreign terrorist organization or an attempt or conspiracy to do so.¹⁶

material support to a terrorist: providing support or resources or concealing the nature, location, source, or ownership of material support or resources, knowing or intending that the material is to be used in terrorist acts.

mayhem: depriving another individual of a member of the body or disfiguring or rendering it useless.

Megan's Law: sexually violent offender registration laws are named in memory and honor of Megan Kanka, a 7-year-old New Jersey child who was sexually assaulted and murdered by a neighbor in 1994.

mens rea: the mental element of a crime.

mere possession: unknowing possession.

mere presence rule: an individual's presence at the scene of a crime generally does not satisfy the *actus reus* requirement for accomplice liability.

minimum level of scrutiny test: law presumed constitutional so long as reasonably related to a valid state purpose.

misappropriation doctrine: an individual is prohibited from using inside information obtained from a firm or corporation to trade in another corporation's stock.

misdemeanant: individual charged with a misdemeanor.

misdemeanor: punishable by less than a year of incarceration.

misdemeanor manslaughter: the unintentional killing of another during the commission of a criminal act that does not amount to a felony.

mistake of fact: defense based on mistake of fact that negates a specific criminal intent, knowledge, or purpose.

mistake of law: an error of law, with isolated exceptions, is not a defense.

mitigating circumstances: factors that may reduce or moderate the sentence of a defendant convicted at trial.

Model Penal Code: an influential criminal code drafted by prominent academics, practitioners, and judges affiliated with the American Law Institute to encourage state legislatures to adopt a uniform approach to the criminal law.

money laundering: financial transaction involving proceeds or property derived from unlawful activity.

murder: killing of another with malice aforethought and without excuse or justification.

M'Naghten test: a disease or defect of the mind that results in individuals' either not knowing that what they were doing was right or wrong or not knowing what they were doing.

natural and probable consequences doctrine: a person encouraging or facilitating the commission of a crime will be held liable as an accomplice for the crime the person aided and abetted as well as for crimes that are the natural and probable outcome of the criminal conduct.

necessity defense: a criminal act is justified when undertaken to prevent an imminent, immediate, and greater harm.

negligent manslaughter: arises when individuals commit an act that they are unaware creates a high degree of risk of human injury or death under circumstances in which a reasonable person would have been aware of the threat.

negligently: a failure to be aware of a substantial and unjustifiable risk that constitutes a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

nolo contendere: a plea that has the legal effect of a plea of guilty, but does not constitute an admission of guilt in proceedings outside of the immediate trial.

nondeadly force: use of physical force or weapon that is not likely to cause death or serious injury.

nullum crimen sine lege, nulla poena sine lege: no crime without law, no punishment without law.

objective approach to criminal attempt: requires an act that is very close to the completion of the crime.

objective test for intervention in defense of others: a person intervening in defense of others may intervene where a reasonable person would believe a person is in need of assistance.

obscenity: description or representation of sexual conduct that, taken as a whole by the average person applying contemporary community standards, appeals to the prurient interest in sex. Sex is portrayed in a patently offensive way and lacks serious literary, artistic, political, or scientific value when taken as a whole.

Occupational Safety and Health Act: a federal law protecting workplace safety.

omission: failure to act or to intervene to assist another.

overbreadth: a statute that is unconstitutionally broad and punishes both unprotected speech or conduct and protected speech or conduct.

overt act: an overt act in furtherance of an agreement is required under most modern conspiracy statutes.

pandering: encouraging and inducing another to remain a prostitute.

pardon: exempts an individual from additional punishment.

parental responsibility laws: statutory rule that parents are responsible for the criminal acts of their children.

parties to a crime: individuals liable for assisting another to commit a crime.

per curiam: an opinion issued by the court as an "institution" as opposed to a decision issued by a single judge.

perfect self-defense: an honest and reasonable belief that constitutes a complete defense to a criminal charge.

petit larceny: a minor larceny, typically involving the taking of property valued at less than a designated monetary amount.

petty misdemeanors: punishable by less than six months' incarceration.

physical proximity test: an act constituting an attempt must be physically proximate to the completion of the crime.

pimping: procuring a prostitute for another.

Pinkerton rule: a conspirator is liable for all criminal acts taken in furtherance of the conspiracy.

plea bargain: negotiated agreements between the defense attorney and prosecutor and often approved by a judge.

plurality requirement: a conspiracy requires an agreement between two or more parties.

police power: duty to protect the well-being and tranquility of the community.

possession: physical control over property with the ability to freely use and enjoy the property.

post-traumatic stress disorder (PTSD): may constitute an excuse defense. PTSD is a traumatic event that is psychologically imprinted on an individual's mind and when activated to an event allegedly can cause an individual to commit a crime.

precedent: a judicial opinion that controls the decision of a court presented with the same issue. A court may conclude that a precedent does not fully fit the case it is adjudicating and distinguish the case before it from the existing precedent.

preemption doctrine: federal law is superior to state law in areas reserved to the national government.

premeditation and deliberation: the standard for first-degree murder involving planning and reflecting on a killing. Premeditation may occur instantaneously.

preparation: acts taken to prepare for committing a crime.

preparatory offense: a crime that is a step toward an even more serious offense.

preponderance of the evidence: the standard of proof in a civil case. The facts are probably more in favor of one side than the other.

presumption of innocence: an individual is presumed to be not guilty and the burden is on the government to establish guilt.

presumptive sentencing guidelines: a legislatively established commission establishes a sentencing formula based on various factors, including the nature of the crime and offender's criminal history. Judges may be strictly limited in terms of discretion or may be provided with some flexibility within established limits to depart from the presumptive sentence.

principals in the first degree: common law term for the actual perpetrators of a crime.

principals in the second degree: common law term for individuals who are present at the crime scene and assist in the crime.

privacy: the constitutional right to be free from unjustified governmental intrusion into the sphere of personal autonomy.

promoting prostitution: aiding or abetting prostitution.

prompt complaint: a rape victim at common law was required to lodge an immediate report of a rape.

proportionality: a sentence should "fit the crime."

prosecutrix: a victim or complainant in a rape prosecution.

prostitution: soliciting or engaging in sexual activity in exchange for money or other consideration.

proximate cause: the legally responsible cause of a criminal harm; may involve policy considerations.

proximate cause theory of felony murder: a felon is liable for all foreseeable results of the felony.

psychological defense: an excuse defense based on a defendant's psychological condition.

public indecencies: public drunkenness, vagrancy, loitering, panhandling, graffiti, and urinating and sleeping in public.

public welfare offenses: regulatory offenses carrying fines that typically do not require a criminal intent.

pump and dump: spreading false information to drive up the price of a stock.

purposely: a conscious intent to cause a particular result.

rape shield laws: the prosecution may not introduce evidence relating to the victim's sexual relations with individuals other than the accused and may not introduce evidence pertaining to the victim's reputation for chastity.

rape trauma syndrome: a psychological and medical condition common among victims of rape.

rational basis test: a law is presumed valid so long as it is reasonably related to a valid state purpose.

reasonable person: the ideal type of the balanced and fair individual.

reasonable resistance: resistance to rape that is objectively reasonable under the circumstances.

rebuttal: the defense case at trial.

receiving stolen property: accepting stolen property knowing it to be stolen with the intent to permanently deprive the owner of the property.

reception statutes: a state receives the common law as an unwritten part of a state's criminal law.

recklessly: conscious disregard of a substantial and unjustifiable risk that constitutes a gross deviation from the standard of conduct that a law-abiding person would observe in the defendant's situation.

recklessness: individuals are personally aware that their conduct creates a substantial risk of death or serious bodily harm.

rehabilitation: punishment intended to reform offenders and to transform them into law-abiding members of society.

res ipsa loquitur: "the thing speaks for itself." A test for attempt that asks whether an ordinary individual observing the acts of another would conclude that the individual intends to commit a crime.

resist to the utmost: at common law, a rape victim was required to demonstrate a determined resistance to the rape.

responsive intervening act: a defendant's criminal act leads to an act undertaken by the victim in reaction to the threat. An unforeseeable and abnormal responsive act limits the defendant's criminal liability.

restoration: stresses the harm caused by crime to victims and requires offenders to engage in financial restitution and community service to compensate the victim and the community and to "make them whole once again."

result crime: requires that the act cause a very specific harm and requires a specific intent.

retreat: withdrawal from a conflict while indicating a desire to avoid a confrontation.

retreat to the wall: obligation to withdraw as fully as possible before resorting to self-defense.

retribution: offenders receive the punishment that they deserve.

riot: group disorderly conduct by three or more persons.

robbery: taking personal property from an individual's person or presence by violence or intimidation.

rout: three or more persons taking steps toward the creation of a riot.

rule of legality: individual may not be punished for an act that was not criminally condemned in a statute prior to the commission of the act.

sabotage: during a time of war or national emergency, the willful injury to war material, premises, or utilities with the intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying out the war or defense activities. During peacetime, sabotage requires an intent to injure, interfere with, or obstruct the national defense of the United States.

Sarbanes-Oxley Act: a securities fraud statute that requires corporate executive officers to certify that corporate financial statements are accurate.

scienter: guilty knowledge.

second-degree murder: intentional killing of another with malice aforethought.

sedition: any communication intended or likely to bring about hatred, contempt, or disaffection with the Constitution or the government.

sedition conspiracy: an agreement to overthrow or destroy a government by force.

sedition libel: writing intended or likely to bring about hatred, contempt, or dissatisfaction with the Constitution or the government.

sedition speech: verbal communications intended or likely to bring about hatred, contempt, or disaffection with the Constitution or the government.

selective incapacitation: singles out repeat offenders and other dangerous individuals for lengthy detention.

self-defense: a justification defense that recognizes the right of individuals to defend themselves against an armed attack.

sexual assault: assault that involves compelling another person to participate in a sexual act without consent, by threatening or coercing the other person, by placing the other person in fear of imminent bodily injury, by substantially impairing the ability of the other person through drugs or intoxicants without the person's knowledge or against the person's will, or when the victim is below a statutorily designed age and the perpetrator is above a statutorily designated age.

Sherman Antitrust Act of 1890: criminal punishment of contracts, combinations, and conspiracies in restraint of interstate commerce.

simulation: punishes the creation of false objects with the purpose to defraud, such as antique furniture, paintings, and jewelry. Simulation requires proof of a purpose to defraud or proof that individuals know that they are "facilitating a fraud."

social host liability laws: liability for serving or providing alcohol to minors in the event of an accident or injury.

sociological defense: an excuse defense based on a defendant's social or economic environment.

solicitation: a written or spoken statement in which an individual intentionally advises, requests, counsels, commands, hires, encourages, or incites another person to commit a crime with the purpose that the other individual commit the crime.

solicitation for prostitution: requesting another person to engage in an act of prostitution.

Son of Sam laws: prohibit offenders from profiting from their crime.

specific deterrence: punishment intended to deter or discourage an offender from committing another crime.

specific intent: a mental determination to accomplish a specific result.

stalking: following another person or placing another person under surveillance.

stand your ground law: no requirement to retreat.

status offense: offense based on personal characteristics or condition rather than conduct; cruel and unusual punishment to impose criminal penalty.

statutory rape: strict liability offense of intercourse with an underage individual.

strict liability: a crime that does not require a criminal intent.

strict scrutiny test: the state has the burden of demonstrating that a law employing a racial or ethnic classification is strictly necessary to accomplish a valid objective.

subjective approach to criminal attempt: requires an act toward the commission of a crime that is sufficient to establish a criminal intent. The act is not required to be proximate to the completion of the crime.

substantial capacity test: a person is not responsible for criminal conduct if, at the time of such conduct, as a result of mental disease or defect, the person lacks substantial capacity either to appreciate the criminality (wrongfulness) of the conduct or to conform the conduct to the requirements of law.

substantial step test: the Model Penal Code approach to determining attempt. There must be a clear step toward the commission of a crime that is not required to be immediately proximate to the crime itself. The act must be committed under circumstances strongly corroborative of an intent to commit a crime.

substantive criminal law: specific crimes, defenses, and general principles.

Supremacy Clause: the clause in the U.S. Constitution that provides that federal laws take precedence over state laws.

tactical retreat: an individual withdraws from a conflict while intending to continue the physical conflict.

tangible property: physical property, including personal property and real property. Distinguished from intangible property.

teen party ordinances: ordinances that make it an offense to hold a party at which minors are served alcohol.

terrorism transcending national boundaries: terrorism occurring partly within and partly outside the United States.

theft statute: consolidated state law punishing larceny, embezzlement, and false pretenses.

Three Strikes and You're Out law: provides mandatory sentences for individuals who commit a third felony after being previously convicted for two serious or violent felonies. Also, stringent penalties are typically provided for a second felony.

tippees: individuals who receive insider information.

tipplers: individuals who provide insider information.

tort: civil action for injury to an individual or to the individual's property.

torture: the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose and an act that inflicts great bodily injury on the person of another.

transferred intent: what occurs when the intent to harm one individual is transferred to another.

Travel Act: interstate or foreign travel or use of the mails or of a facility in interstate or international commerce with the intent to distribute the proceeds of any specified unlawful activity or violence or to promote a specified unlawful activity and thereafter to commit or attempt to commit a crime.

treason: levying war or giving aid and comfort to the enemy.

true man: an individual without fault who is able to rely on self-defense.

true threat: a threat of bodily harm directed against an individual or a group of individuals.

truth in sentencing laws: laws that provide that offenders must serve a significant portion of their criminal sentences.

unequivocality test: a test for attempt that asks whether an ordinary individual observing a person's acts would determine that the person intends to commit a crime.

unilateral: an individual with the intent to enter into a conspiratorial agreement is guilty regardless of the intent of the other party.

unlawful assembly: a gathering of at least three individuals for the purpose of engaging or preparing to engage in conduct likely to cause public alarm.

uttering: circulating or using a forged document.

vagrancy: wandering the street with no apparent means of earning a living.

vehicular homicide: a separate category of homicide caused by motorists. States also categorize this as *vehicular manslaughter* and *homicide by vehicle*.

vehicular manslaughter: killing resulting from the grossly negligent operation of a motor vehicle or resulting from driving while intoxicated; States also characterize this as *vehicular homicide* and *homicide by vehicle*.

vicarious liability: holding an individual or corporation liable for a crime committed by another based on the nature of the relationship between the parties.

victim impact statements: victim or victim's family may address the court at sentencing.

violations: minor crimes punishable by fines and not subject to imprisonment. Also called infractions.

void for vagueness: a law violates due process that fails to clearly inform individuals of what acts are prohibited and/or fails to establish clear standards for the police.

voluntary act: the individual is aware and fully conscious of acting. This is distinguished from an involuntary act, unconscious act, or automatism.

voluntary intoxication: defendant is not held liable for an offense involving "knowledge or purpose." Increasingly not recognized as a defense.

voluntary manslaughter: instantaneous killing of another in the heat of passion in response to adequate provocation without a "cooling of blood."

weapons of mass destruction: toxic or poisonous chemical weapons, weapons involving biological agents, explosive bombs, or weapons releasing radiation or radioactivity at a level dangerous to human life.

Wharton's rule: an agreement by two persons to engage in a criminal act that requires the involvement of two persons cannot constitute a conspiracy.

wheel conspiracy: a conspiracy in which a single individual or individuals serve as a hub that is connected to various individuals or spokes.

white-collar crime: crimes committed by individuals of high status in the course of their occupation. The U.S. Justice Department defines white-collar crime as an illegal act that employs deceit and concealment rather than the application of force to obtain money, property, or service; to avoid the payment or loss of money; or to secure a business or professional advantage.

willful blindness: knowledge is imputed to individuals who consciously avoid awareness in order to avoid criminal responsibility.

wire fraud: knowing and intentional participation in a scheme or artifice intended to obtain money or property through the use of interstate wire communication.

withdrawal in good faith: individuals involved in a fight may gain the right of self-defense by clearly communicating that they are retreating from the struggle.

withdrawal of consent: individuals who initially consent to sexual penetration may change their mind.

year-and-a-day rule: common law requirement, being abandoned by many states, that prevents a defendant from being held liable for murder when the victim dies a year and a day or more after the event that caused the injury.

CASE INDEX

- Abbott, People v., 677
Acuna, Gallo v., 784, 785
Adams, State v., 130
Adderley v. Florida, 641
Aguilar, People v., 610–613
Aiwohi, State v., 481
Alabama, Madison v., 97
Alabama, Miller v., 96
Alexander, United States v., 457
Allen v. Bordentown, 252
Alleyne v. United States, 76
Alston, State v., 581
Alvarado v. State, 164
Alvarez, United States v., 681, 682
Anderson, People v., 434
Anderson, State v., 242, 348
Andrade, Lockyer v., 98
Angel G., People v., 301
Appellate Division, Tecklenburg v., 157
Apprendi v. New Jersey, 74
Arizona, Clark v., 400
Arizona, Tison v., 255
Arkansas, Wilson v., 364
Armitage, People v., 198
Armstrong, State v., 414
A.R., State v., 424, 428–432
Arthur v. Dunn, 87
Atherton, People v., 445
Atkins v. Virginia, 90, 97
Azim, Commonwealth v., 289
Azzarelli Construction Co. and John F. Azzarelli, United States v., 747
- Backun v. United States*, 224
Bailey v. United States, 218
Baird, Eisenstadt v., 55
Baker, People v., 181–184
Baldwin, United States v., 741
Banks v. State, 803
Barany v. State, 410
- Barnette, West Virginia State Board of Education v., 42
Bash, State v., 157
Batin v. State, 671
Bauer, State v., 205
Baxter v. State, 488
Bazeley, Rex v., 670
Baze v. Rees, 85
Beardsley, People v., 136, 145
Bei Bei Shuai v. State, 481
Belk v. The People, 202
Bell, State v., 153
Bell, United States v., 378
Bellamy, State v., 232
Belleville, State v., 180
Belt, State v., 701
Berkowitz, Commonwealth v., 550, 557–561
Berry v. State, 189
Berry v. Superior Court, 507
Bingham, State v., 484
Black, United States v., 136
Black, Virginia v., 44
Blakely v. Washington, 74
Blocker v. United States, 404
Board of Education, Brown v., 32
Boise, City of, v. Martin, 774–781
Bolton v. State, 271
Bond v. United States, 832
Booker, United States v., 75
Bordenkircher v. Hayes, 79
Bordentown, Allen v., 252
Bosse v. Oklahoma, 80
Boutin, State v., 274
Bowers v. Hardwick, 56
Bradley, United States v., 615
Bradovich v. United States, 668
Brandenburg, Morris v., 488
Brazill v. State, 424, 425–428
Bridgehouse, People v., 524
Britto, People v., 667
Brooks, State v., 569

- Brown, State v., 379
Brown, United States v., 289
Brown v. Board of Education, 32
Brown v. Entertainment Merchants Association, 808–812
Brown v. Plata, 84
Brown v. State, 128, 553
Bruce v. Commonwealth, 631, 633–635
Bruno, United States v., 291
Bryan, State v., 32
Buckley v. State, 649
Bull, Calder v., 23
Burroughs, People v., 509
Burton, People v., 141
Butler, Commonwealth v., 603–604
Byfield, United States v., 149
- Caetano v. Massachusetts*, 59
Calder v. Bull, 23
California, Cunningham v., 75
California, Ewing v., 98
California, Lambert v., 444
California, Miller v., 42, 807
California, Robinson v., 103, 128, 132, 779
California, Stogner v., 24
Calvert v. State, 263
Campbell, Commonwealth v., 510
Campbell v. State, 509
Carey v. Population Services International, 55
Carpenter, United States v., 737, 738
Carpenter v. United States, 57
Carradine, State v., 441
Carter, Commonwealth v., 488
Carter v. Commonwealth, 591, 593–596, 670
Carucci, United States v., 743–747
Casanova, Commonwealth v., 206
Casas, People v., 671–674
Casassa, State v., 529
Case, State v., 223
Cashen, State v., 155
Cass, Commonwealth v., 474
Ceballos, People v., 349–351
Celli, State v., 376, 377
Cervantes, People v., 200–203
Cesar V., In re, 758, 760, 762–765
Chambers, Commonwealth v., 500
Chambers, State v., 105
Chance, People v., 592
Chaplinsky v. New Hampshire, 41
Cheek v. United States, 444
Chicago, City of, v. Morales, 785–793
Chicago, McDonald v., 58, 59
Chicago, Terminiello v., 40, 41
Child v. State, 642
Chism, State v., 242
Cincinnati, City of, v. Summers, 765
Cincinnati, Coates v., 25, 26
City of Chicago v. Morales, 785–793
City of Cincinnati v. Summers, 765
City of Helena v. Parsons, 364
Clark v. Arizona, 400
Clark v. United States, 234
Coates v. Cincinnati, 25, 26
Coker v. Georgia, 85, 470
Colbath, State v., 582
Cole, State v., 369
Collier v. State, 276
Commonwealth, Bruce v., 631, 633–635
Commonwealth, Carter v., 591, 593–596, 670
Commonwealth, Cunningham v., 676, 678–680
Commonwealth, Fain v., 126
Commonwealth, Giles v., 637
Commonwealth, Hitt v., 637
Commonwealth, Humphrey v., 368
Commonwealth, Jackson v., 194
Commonwealth, Lacey v., 635–638
Commonwealth, Luckett v., 583
Commonwealth, Lund v., 691
Commonwealth, Miller v., 444
Commonwealth, Muhammad v., 836
Commonwealth, Neely v., 583
Commonwealth, Suter v., 242
Commonwealth, Watkins v., 284
Commonwealth v. Azim, 289
Commonwealth v. Berkowitz, 550, 557–561
Commonwealth v. Butler, 603–604
Commonwealth v. Campbell, 510
Commonwealth v. Carter, 488
Commonwealth v. Casanova, 206
Commonwealth v. Cass, 474
Commonwealth v. Chambers, 500
Commonwealth v. Cordeiro, 222
Commonwealth v. Gilliam, 270
Commonwealth v. Heidnik, 495
Commonwealth v. Karetny, 140
Commonwealth v. Kendall, 370, 371–375
Commonwealth v. Kerry Vann Bell, 277, 278–281
Commonwealth v. Koczwara, 247–250
Commonwealth v. Liebenow, 445
Commonwealth v. Livingston, 368
Commonwealth v. Magadini, 783, 784
Commonwealth v. McCloskey, 287
Commonwealth v. Penn Valley Resorts, Inc., 246

- Commonwealth v. Perl*, 434
Commonwealth v. Pestinikas, 139
Commonwealth v. Rink, 167–169
Commonwealth v. Schnopps, 531
Commonwealth v. Shaffer, 323
Commonwealth v. Vieira, 222
Commonwealth v. Williams, 719
Conley, People v., 163, 164
Connecticut, Griswold v., 54
Connor, Graham v., 359, 360
Conroy, People v., 805
Contento-Pachon, United States v., 436–439
Cordeiro, Commonwealth v., 222
Cotton, State v., 303, 304–307
County of Los Angeles, California, v. Mendez, 363
Cox v. Louisiana, 445
Craig, State v., 596–604
Craig v. State, 138, 141
Cramer v. United States, 822, 823
Crenshaw, State v., 400
Crocker v. State, 189
C.T. v. State, 39
Cunningham, People V., 709–711
Cunningham v. California, 75
Cunningham v. Commonwealth, 676, 678–680
Curtis, State v., 277
- Damms*, State v., 282
Daniels, People v., 609
Datema, People v., 542
Davidson, State v., 501–505
Davis, Hutto v., 101
Davis, People v., 475–479
Davis, State v., 587
Dawkins v. State, 150
Deborah, State v., 481
Decina, People v., 120
DeJarlais, State v., 380, 382–385
DeJesus, State v., 338, 582
Dennis v. United States, 824
DePasquale v. State, 453
Destrain v. City of Los Angeles, 784
Diamond v. Dreamuno, 737
DiGiacinto v. Rector and Visitors of George Mason University, 62
Director of Public Prosecutions v. Morgan, 445, 570
District of Columbia v. Heller, 58
Dixon v. State, 628
Dlugash, People v., 277
Doe, Mahoney v., 654
Doe, Smith v., 68, 69
Doe v. State, 39
Doe v. Trenton, 253
Dominguez, People v., 609
Donner, State v., 417, 418–422
Dossie, United States v., 101
Dotterweich, United States v., 244, 245
Doub, State v., 506
Drew, United States v., 700
Ducheneaux, State v., 376
Dudley and Stephens, The Queen v., 367
Duff, United States v., 739
Dulles, Trop v., 83
Dumlaو, State v., 529
Dunn, Arthur v., 87
Duran, United States v., 282
Durham v. United States, 404
Durkovitz v. State, 174
- Eddings v. Oklahoma*, 87
Egelhoff, Montana v., 417
Eichman, United States v., 51
Eisenstadt v. Baird, 55
Elliot, State v., 530
Ellis, State v., 609
Ellyson v. State, 629
Elonis v. United States, 50, 51
Enmund v. Florida, 255
Entertainment Merchants Association, Brown v., 808–812
Erotic Service Provider Legal Education and Research Project v. Gascon, 805
Ewing v. California, 98
Ewish v. State, 648
- Fain v. Commonwealth*, 126
Fair, State v., 347
Falcone, United States v., 290
Far West water & Sewer Inc., State v., 518–521
Feiner v. New York, 41
Fells v. State, 583
Ferber, New York v., 43, 807
Ferguson, Rios v., 602
Fields, State v., 121, 122–125
Fierro, State v., 482
Fitch, State v., 625, 651–653
Flores-Figueroa v. United States, 688–690
Florida, Adderley v., 641
Florida, Enmund v., 255
Florida, Graham v., 94, 95

- Florida, Hall v., 97
Flory, State v., 525
Fontes, People v., 377
Forrest, State v., 484–487
Fountain, United States v., 213, 224, 225–228
Frahm, State v., 204
Fransua, State v., 387
Fuelling, State v., 170
Fugarino v. State, 640
Furman v. Georgia, 84
- Gallo v. Acuna*, 784, 785
Galloway v. State, 412
Gall v. United States, 75
Gamble v. United States, 14
Garcetti, Williams v., 253
Garcia, United States v., 295, 296–300
Gargus, State v., 139
Garner, Tennessee v., 354, 355–359, 360
Garnett v. State, 572–575
Gartland, State v., 345
Gascon, Erotic Service Provider Legal Education and Research Project v., 805
Gebardi v. United States, 294
Gementera, United States v., 77
George T., In re, 44, 45–50
Georgia, Coker v., 85, 470
Georgia, Furman v., 84
Georgia, Gregg v., 85
Georgia, Stanley v., 55
Gilbert, People v., 201
Giles v. Commonwealth, 637
Gilliam, Commonwealth v., 270
Gillum, Picou v., 55
Girouard v. State, 470, 524, 525–528
Glas, State v., 57
Glossip v. Gross, 85
Glucksberg, Washington v., 488
Goetz, People v., 325–329
Gonzales v. Oregon, 14
Gonzales v. Raich, 16
Goodman, United States v., 740
Goodman, Wheeler v., 129
Gorin v. United States, 827
Graham v. Connor, 359, 360
Graham v. Florida, 94, 95
Grant, State v., 668
Grayned v. Rockford, 25
Green, State v., 368, 685
Gregg v. Georgia, 85
- Gresham v. Peterson*, 783
Griswold v. Connecticut, 54
Groomes v. United States, 667
Gross, Glossip v., 85
Gupta, United States v., 751
Guthrie, State v., 483
- Haines, State v., 266
Hall v. Florida, 97
Hamilton, United States v., 198
Harden, State v., 345, 346
Hardwick, Bowers v., 56
Harris, Scott v., 360, 361
Harris, State v., 153
Harshaw v. State, 324
Haupt v. United States, 170
Hawaii, Trump v., 39
Hawkins v. State, 149
Hayes, Bordenkircher v., 79
Heidnik, Commonwealth v., 495
Helena, City of v. Parsons, 364
Heller, District of Columbia v., 58
Henderson, Kibbe v., 197
Henderson, State v., 804
Hennings, State v., 170
Hernandez, People v., 574
Hernandez, United States v., 441
Hernandez v. State, 378
Higgins, Rex v., 262, 301
Hines, State v., 82
Hiott, State v., 386
Hitt v. Commonwealth, 637
Holder v. Humanitarian Law Project, 833
Holt, State v., 639
Hope v. Pelzer, 83
Horn v. State, 27
Houston, State v., 37
Hoying, State v., 590
Hranicky v. State, 162, 175–179
Humanitarian Law Project, Holder v., 833
Humphrey v. Commonwealth, 368
Humphrey v. Wilson, 98, 99
Hurley, State v., 273
Hurston v. State, 702–705
Hutto v. Davis, 101
Hutzell, United States v., 443
- Indiana, Timbs v., 72
In re Cesar V., 758, 760, 762–765

- In re George T.*, 44, 45–50
In re Ryan D., 53
In the Interest of M.T.S., 557, 562–567
Irvine, People v., 589
Islas, People v., 615
Ives, State v., 185
- Jackson*, State v., 153
Jackson, United States v., 728, 747
Jackson v. Commonwealth, 194
Jacksonville, City of, Papachristou v., 26
Jacksonville, City of, v. Papachristou, 772
Jama, State v., 421
James, People v., 804
Janes, State v., 337
J.B.A. v. State, 766
Jenkins, United States v., 740
Jewell, United States v., 174
Jimenez-Calderon, United States v., 806
John Bad Elk v. United States, 364
Johnson, People v., 267, 719
Johnson, Texas v., 51
Johnson, United States v., 743
John Z, People v., 576–580
Jones, State v., 541
Jones v. City of Los Angeles, 778, 783
Jones v. Mississippi, 96
Jones v. State, 140
Jones v. United States, 117, 142, 143–146
Jordan, State v., 234
- Kabat*, United States v., 826
Kahler v. Kansas, 398, 401
Kalathakis, State v., 516
Kansas, Kahler v., 398, 401
Karetny, Commonwealth v., 140
Kargar, State v., 463
Keeler v. Superior Court, 12, 476
Kellogg, People v., 130–135
Kelly v. United States, 749–750
Kemp, McCleskey v., 105, 113
Kendall, Commonwealth v., 370, 371–375
Kennedy v. Louisiana, 85
Kentucky, Stanford v., 88, 91
Kent v. United States, 87, 424, 427
Kerry Vann Bell, Commonwealth v., 277, 278–281
Kevorkian, People v., 488
Kibbe v. Henderson, 197
- Killingsworth*, State v., 688
Kilmon v. State, 481
Kimbrough v. United States, 75
Kinchion v. State, 510
King v. State, 365
Koczwara, Commonwealth v., 247–250
Kolender v. Lawson, 26, 773
Koon v. United States, 9
Korematsu v. United States, 38, 39
Kotteakos v. United States, 292
K.R.L., State v., 433
Kurr, People v., 481
- Lacey v. Commonwealth*, 635–638
Lai Lee, People v., 669–670
Lake, People of the Virgin Islands v., 37
Lambert v. California, 444
Lamy, State v., 474
Laney v. United States, 342
Lauria, People v., 226, 290
Lawrence v. Texas, 56
Lawson, Kolender v., 26, 773
Law v. State, 352
Lee v. State, 659, 665–670
Lenihan, State v., 139
Lester v. State, 509
Levitian, People v., 709
Liebenow, Commonwealth v., 445
Linscott, State v., 228
Livington, Commonwealth v., 368
Lockhart v. State, 637
Lockyer v. Andrade, 98
Loper v. New York City Police Department, 781–782
Lopez, United States v., 14
Los Angeles, City of, v. *Destrain*, 784
Los Angeles, City of, v. *Jones*, 778, 783
Losey, State v., 205
Louisiana, Cox v., 445
Louisiana, Kennedy v., 85
Louisiana, Montgomery v., 96
Louisiana ex rel. Francis v. Resweber, 83
Loving v. Virginia, 33
Low, People v., 128, 423
Lower, People v., 511–515
Lucien, United States v., 741
Luckett v. Commonwealth, 583
Luna, Mullenix v., 361, 362
Lund v. Commonwealth, 691
Lynnaugh, Penry v., 91

- Madigan, Moore v., 60
Madison v. Alabama, 97
Madison v. State, 202, 203
Magadini, Commonwealth v., 783, 784
Mahoney v. Doe, 654
Main, United States v., 197
Maldonado, People v., 506
Mally, State v., 138
Marrero, People v., 444
Marshall, State v., 321, 322–323
Martino, People v., 120
Martin v. City of Boise, 774–781
Martin v. State, 121
Maryland v. Pringle, 155, 156
Massachusetts, Caetano v., 59
Mather, United States v., 765
Maxwell, United States v., 369
Mayberry, People v., 569
McCleskey v. Kemp, 105, 113
McCloskey, Commonwealth v., 287
McDonald v. Chicago, 58, 59
McDonnell v. United States, 749
McGinnis, People v., 798–801
McGovern, United States v., 711
McLaughlin, State v., 292
McNeal, People v., 287
Mehserle, People v., 532–539
Melahn v. State, 234
Mendez, County of Los Angeles, California, v., 363
Messina v. State, 717
Metzger, State v., 27
Miami, City of, v. Pottinger, 774
Michael M. v. Superior Court, 34
Midgett v. State, 495–498
Mijares, People v., 149
Miles, United States v., 741
Miller, People v., 261, 268
Miller, United States v., 58
Miller v. Alabama, 96
Miller v. California, 42, 807
Miller v. Commonwealth, 444
Miller v. State, 387, 452–454
Minkowski, People v., 553
Mississippi, Jones v., 96
Mitchell, Wisconsin v., 44
Mitchell v. Prunty, 298
Moler v. State, 395, 408–411
Molina-Martinez v. United States, 76
Montana v. Egelhoff, 417
Montes, People v., 233
Montgomery v. Louisiana, 96
Moore, State v., 319
Moore, United States v., 136
Moore v. Madigan, 60
Moore v. Texas, 97
Morales, City of Chicago v., 785–793
Morales, People v., 553, 820, 837–840
Morgan, Director of Public Prosecutions v., 445, 570
Morris, State v., 57
Morris v. Brandenburg, 488
M.T.S., In the Interest of, 557, 562–567
Muhammad v. Commonwealth, 836
Mullenix v. Luna, 361, 362
Murray, People v., 273
Murtari, United States v., 654
Myers, State v., 510
Nations, State v., 171–173
Neeley v. Commonwealth, 583
Neumann, State v., 147
New Hampshire, Chaplinsky v., 41
New Jersey, Apprendi v., 74
Newman, State v., 126
New York, Feiner v., 41
New York City, New York State Rifle and Pistol Association v., 60
New York City Police Department, Loper v., 781–782
New York State Rifle and Pistol Association v. New York City, 60
New York Times Co. v. Sullivan, 42
New York v. Ferber, 43, 807
Norman, State v., 332–336, 337
North Carolina, Packingham v., 51
North Carolina, Woodson v., 85
Nosal, United States v., 691–698
Oakland Cannabis Buyers' Cooperative, United States v., 369
Ogg, People v., 532
O'Hagan, United States v., 737
Oklahoma, Bosse v., 80
Oklahoma, Eddings v., 87
Oklahoma, Thompson v., 88
O'Leary v. State, 601–602
Oliver, People v., 139
Olivo, People v., 667
O'Neil, People v., 521
Oreamuno, Diamond v., 737
Oregon, Gonzales v., 14

- Orlando, City of v. Osmar, 653, 654
Osmar v. City of Orlando, 653, 654
Owen v. State, 490–494
- Packingham v. North Carolina*, 51
Papachristou v. City of Jacksonville, 26, 772
Park, United States v., 245
Parker v. United States, 331
Parsons, City of Helena v., 364
Parsons v. State, 402
Patrick v. State, 530
Pauly, White v., 363
Payne v. Tennessee, 80
Pelham, State v., 198
Pelzer, Hope v., 83
Penn Valley Resorts, Inc.,
 Commonwealth v., 246
Penry v. Lynaugh, 91
Peoni, United States v., 223
The People, Belk v., 202
People, Stowell v., 628
People of the Virgin Islands v. Lake, 37
People of the Virgin Islands v. Simmonds, 34–38
People v. Abbott, 677
People v. Aguilar, 610–613
People v. Anderson, 434
People v. Angel G., 301
People v. Armitage, 198
People v. Atherton, 445
People v. Baker, 181–184
People v. Beardsley, 136, 145
People v. Bridgehouse, 524
People v. Britto, 667
People v. Burroughs, 509
People v. Burton, 141
People v. Casas, 671–674
People v. Ceballos, 349–351
People v. Cervantes, 200–203
People v. Chance, 592
People v. Conley, 163, 164
People v. Conroy, 805
People V. Cunningham, 709–711
People v. Daniels, 609
People v. Datema, 542
People v. Davis, 475–479
People v. Decina, 120
People v. Dlugash, 277
People v. Dominguez, 609
People v. Fontes, 377
People v. Gilbert, 201
People v. Goetz, 325–329
People v. Hernandez, 574
People v. Irvine, 589
People v. Islas, 615
People v. James, 804
People v. Johnson, 267, 719
People v. John Z., 576–580
People v. Kellogg, 130–135
People v. Kevorkian, 488
People v. Kurr, 481
People v. Lai Lee, 669–670
People v. Lauria, 226, 290
People v. Levitan, 709
People v. Low, 128, 423
People v. Lowery, 511–515
People v. Maldonado, 506
People v. Marrero, 444
People v. Martino, 120
People v. Mayberry, 569
People v. McGinnis, 798–801
People v. McNeal, 287
People v. Mehserle, 532–539
People v. Mijares, 149
People v. Miller, 261, 268
People v. Minkowski, 553
People v. Montes, 233
People v. Morales, 553, 820, 837–840
People v. Murray, 273
People v. Ogg, 532
People v. Oliver, 139
People v. Olivo, 667
People v. O’Neil, 521
People v. Perez, 223
People v. Perkins, 613
People v. Puesan, 691
People v. Pymm, 735
People v. Quinteros, 300
People v. Rayford, 612
People v. Redondo, 675
People v. Rideout, 204
People v. Rizzo, 270
People v. Robinson, 229–232
People v. Saavedra-Rodriguez, 198
People v. Saephanh, 307
People v. Schacker, 386
People v. Schmies, 198
People v. Scott, 169
People v. Shadden, 613
People v. Sidwell, 537
People v. Sisuphan, 673
People v. Stamp, 507
People v. Stanfield, 181
People v. Staples, 283

- People v. Stinson*, 681
People v. Strong, 185
People v. Superior Court, 109
People v. Swanson-Birabent, 222
People v. Travers, 244
People v. Upshaw, 767–770
People v. Valdez, 480
People v. Vela, 578
People v. Velez, 538
People v. Wesley, 126
People v. Wilhelm, 583
People v. Williams, 242, 243
People v. Wisneski, 455
People v. Young, 347
Perez, People v., 223
Perkins, People v., 613
Perl, Commonwealth v., 434
Pestinikas, Commonwealth v., 139
Peterson, Gresham v., 783
Peterson, United States v., 339–345
Peugh v. United States, 76
Phelps, Snyder v., 52
Picou v. Gillum, 55
Pike, State v., 404
Pinkerton v. United States, 293
Pinkham, State v., 187
Plata, Brown v., 84
Plumhoff v. Rickard, 361
Plunkett, State v., 570
Polk v. State, 192
Population Services International, Carey v., 55
Pottinger v. City of Miami, 774
Powell v. Texas, 129, 133, 779
Prankus, State v., 338
Pringle, Maryland v., 155, 156
Prunty, Mitchell v., 298
Puesan, People v., 691
Pymm, People v., 735
- The Queen v. Dudley and Stephens*, 367
Quill, Vacco v., 488
Quinet, State v., 403
Quinteros, People v., 300
- Raich, Gonzales v., 16
Ramer, State v., 432
Ramirez, State v., 460–463
R.A.V. v. St. Paul, 43
Rayford, People v., 612
Rector and Visitors of George Mason University,
DiGiacinto v., 62
- Redondo, People v., 675
Rees, Baze v., 85
Reeves, State v., 268
Regina v. Saunders & Archer, 169
Resweber, Louisiana ex rel. Francis v., 83
Rex v. Bazeley, 670
Rex v. Higgins, 262, 301
Rex v. Scofield, 262
Reynolds-Herr v. State, 189
Rice, United States v., 378, 379
Richter, State v., 440, 441
Rickard, Plumhoff v., 361
Rideout, People v., 204
Rink, Commonwealth v., 167–169
Rios v. Fergusan, 602
Rita v. United States, 75
Rizzo, People v., 270
Robinson, People v., 229–232
Robinson, State v., 229
Robinson v. California, 103, 128, 132, 779
Rockford, Grayned v., 25
Rockmore v. State, 714–719
Roe v. Wade, 55, 474, 477
Rogers, State v., 206
Romano, State v., 370
Roper v. Simmons, 66, 88–94, 95, 113
Rosales-Mireles v. United States, 76
Rose, State v., 192, 193–194
Ross v. State, 284–286
Roth v. United States, 806
Royal v. State, 716
Rucker, State v., 32
Russell, United States v., 451
Ryan D., In re, 53
- Saavedra-Rodriguez, People v., 198
Saephanh, People v., 307
St. Paul, R.A.V. v., 43
Salin, State v., 367
Salman v. United States, 738
Sampson v. State, 488
Sanborn, State v., 166
Sandoval, State v., 631
Saunders & Archer, Regina v., 169
Sawyer, State v., 260, 271–275
Schacker, People v., 386
Schmies, People v., 198
Schnopps, Commonwealth v., 531
Schroeder, State v., 331
Schuette, Speet v., 782
Schwartz, State v., 691
Scofield, Rex v., 262

- Scott, People v., 169
Scott v. Harris, 360, 361
Second Judicial District Court, State v., 645–649
Shadden, People v., 613
Shaffer, Commonwealth v., 323
Shelley, State v., 385, 386
Sherer, State v., 586
Sherman v. United States, 448
Sherron, State v., 235
Sherron v. State, 236–241
Shue v. State, 614
Sidwell, People v., 537
Simmonds, People of the Virgin Islands v., 34–38
Simmons, Roper v., 66, 88–94, 95, 113
Sisuphan, People v., 673
Smallwood v. State, 264–266
Smith v. Doe, 68, 69
Snyder v. Phelps, 52
Sonnier v. State, 705
Sophophone, State v., 515, 516
Sorrells v. United States, 447
Speet v. Schuette, 782
Squires, State v., 368
Staley v. State, 447
Stamp, People v., 507
Stanfield, People v., 181
Stanford v. Kentucky, 88, 91
Stanko, State v., 27–31
Stanley v. Georgia, 55
Stannard v. State, 440
Staples, People v., 283
Staples v. United States, 187
State, Alvarado v., 164
State, Banks v., 803
State, Barany v., 410
State, Batin v., 671
State, Baxter v., 488
State, Bei Bei Shuai v., 481
State, Berry v., 189
State, Bolton v., 271
State, Brazill v., 424, 425–428
State, Brown v., 128, 553
State, Buckley v., 649
State, Calvert v., 263
State, Campbell v., 509
State, Child v., 642
State, Collier v., 276
State, Craig v., 138, 141
State, Crocker v., 189
State, C.T. v., 39
State, Dawkins v., 150
State, DePasquale v., 453
State, Dixon v., 628
State, Doe v., 39
State, Durkovitz v., 174
State, Ellyson v., 629
State, Ewish v., 648
State, Fells v., 583
State, Fugarino v., 640
State, Galloway v., 412
State, Garnett v., 572–575
State, Girouard v., 470, 524, 525–528
State, Harshaw v., 324
State, Hawkins v., 149
State, Hernandez v., 378
State, Horn v., 27
State, Hranicky v., 162, 175–179
State, Hurston v., 702–705
State, J.B.A. v., 766
State, Jones v., 140
State, Kilmon v., 481
State, Kinchion v., 510
State, King v., 365
State, Law v., 352
State, Lee v., 659, 665–670
State, Lester v., 509
State, Lockhart v., 637
State, Madison v., 202, 203
State, Martin v., 121
State, Melahn v., 234
State, Messina v., 717
State, Midgett v., 495–498
State, Miller v., 387, 452–454
State, Moler v., 395, 408–411
State, O’Leary v., 601–602
State, Owen v., 490–494
State, Parsons v., 402
State, Patrick v., 530
State, Polk v., 192
State, Reynolds-Herr v., 189
State, Rockmore v., 714–719
State, Ross v., 284–286
State, Royal v., 716
State, Sampson v., 488
State, Sherron v., 236–241
State, Shue v., 614
State, Smallwood v., 264–266
State, Sonnier v., 705
State, Staley v., 447
State, Stannard v., 440
State, Steelman v., 188–191, 192
State, Tello v., 180
State, Thomas v., 717
State, Velazquez v., 204, 205
State, Waldon v., 606

- State, Ward v., 156, 157
State, Waterman v., 543
State, Westbrook v., 32
State, Whitner v., 481
State, Williams v., 175
State, Williford v., 190
State, Wilson v., 234
State, Worden v., 156
State, Wright v., 202
State, Yates v., 415
State, Young v., 483
State ex rel. Kuntz v. Thirteenth Judicial District, 147
State of Hawaii, Young v., 60
State v. Adams, 130
State v. Aiwohi, 481
State v. Alston, 581
State v. Anderson, 242, 348
State v. A.R., 424, 428–432
State v. Armstrong, 414
State v. Bash, 157
State v. Bauer, 205
State v. Bell, 153
State v. Bellamy, 232
State v. Belleville, 180
State v. Belt, 701
State v. Bingham, 484
State v. Boutin, 274
State v. Brooks, 569
State v. Brown, 379
State v. Bryan, 32
State v. Carradine, 441
State v. Casassa, 529
State v. Case, 223
State v. Cashen, 155
State v. Celli, 376, 377
State v. Chambers, 105
State v. Chism, 242
State v. Colbath, 582
State v. Cole, 369
State v. Cotton, 303, 304–307
State v. Craig, 596–604
State v. Crenshaw, 400
State v. Curtis, 277
State v. Damms, 282
State v. Davidson, 501–505
State v. Davis, 587
State v. Deborah, 481
State v. Dejarlais, 380, 382–385
State v. DeJesus, 338, 582
State v. Donner, 417, 418–422
State v. Doub, 506
State v. Ducheneaux, 376
State v. Dumlaو, 529
State v. Elliot, 530
State v. Ellis, 609
State v. Fair, 347
State v. Far West water & Sewer Inc., 518–521
State v. Fields, 121, 122–125
State v. Fierro, 482
State v. Fitch, 625, 651–653
State v. Flory, 525
State v. Forrest, 484–487
State v. Frahm, 204
State v. Fransua, 387
State v. Fuelling, 170
State v. Gargus, 139
State v. Gartland, 345
State v. Glas, 57
State v. Grant, 668
State v. Green, 368, 685
State v. Guthrie, 483
State v. Haines, 266
State v. Harden, 345, 346
State v. Harris, 153
State v. Henderson, 804
State v. Hennings, 170
State v. Hines, 82
State v. Hiott, 386
State v. Holt, 639
State v. Houston, 37
State v. Hoying, 590
State v. Hurley, 273
State v. Ives, 185
State v. Jackson, 153
State v. Jama, 421
State v. Janes, 337
State v. Jones, 541
State v. Jordan, 234
State v. Kalathakis, 516
State v. Kargar, 463
State v. Killingsworth, 688
State v. K.R.L., 433
State v. Lamy, 474
State v. Lenihan, 139
State v. Linscott, 228
State v. Losey, 205
State v. Mally, 138
State v. Marshall, 321, 322–323
State v. McLaughlin, 292
State v. Metzger, 27
State v. Moore, 319
State v. Morris, 57
State v. Myers, 510

- State v. Nations*, 171–173
State v. Neumann, 147
State v. Newman, 126
State v. Norman, 332–336, 337
State v. Pelham, 198
State v. Pike, 404
State v. Pinkham, 187
State v. Plunkett, 570
State v. Pranckus, 338
State v. Quinet, 403
State v. Ramer, 432
State v. Ramirez, 460–463
State v. Reeves, 268
State v. Richter, 440, 441
State v. Robinson, 229
State v. Rogers, 206
State v. Romano, 370
State v. Rose, 192, 193–194
State v. Rucker, 32
State v. Salin, 367
State v. Sanborn, 166
State v. Sandoval, 631
State v. Sawyer, 260, 271–275
State v. Schroeder, 331
State v. Schwartz, 691
State v. Second Judicial District Court, 645–649
State v. Shelley, 385, 386
State v. Sherer, 586
State v. Sherron, 235
State v. Sophophone, 515, 516
State v. Squires, 368
State v. Stanko, 27–31
State v. Stephen F., 584
State v. Stewart, 337
State v. Stinton, 631
State v. Suspitsyn, 804
State v. Tomaino, 251
State v. Toups, 150, 151–155
State v. Ulvinen, 218–222
State v. Unger, 435
State v. Van Dyke, 433
State v. Voorhees, 421
State v. Walden, 141, 218
State v. Wanrow, 330
State v. Ward, 377
State v. Watson, 529
State v. Williams, 570
State v. Woodmansee, 274
State v. Wright, 37
State v. York, 187
State v. Zeferino-Lopez, 685–689
Steelman v. State, 188–191, 192
Stephen F., State v., 584
Stevens, United States v., 813
Stewart, State v., 337
Stinson, People v., 681
Stinton, State v., 631
Stogner v. California, 24
Stowell v. People, 628
Strauder v. West Virginia, 33
Strong, People v., 185
Subhan, United States v., 440
Sullivan, New York Times Co. v., 42
Summers, City of Cincinnati v., 765
Superior Court, Berry v., 507
Superior Court, Keeler v., 12, 476
Superior Court, Michael M. v., 34
Superior Court, People v., 109
Suspitsyn, State v., 804
Suter v. Commonwealth, 242
Swanson-Birabent, People v., 222

Tecklenburg v. Appellate Division, 157
Tello v. State, 180
Tennessee, Payne v., 80
Tennessee v. Garner, 354, 355–359, 360
Terminiello v. Chicago, 40, 41
Texas, Lawrence v., 56
Texas, Moore v., 97
Texas, Powell v., 129, 133, 779
Texas v. Johnson, 51
Thirteenth Judicial District, State ex rel. Kuntz v., 147
Thomas v. State, 717
Thompson v. Oklahoma, 88
Timbs v. Indiana, 72
Tison v. Arizona, 255
Tomaino, State v., 251
Toups, State v., 150, 151–155
Travers, People v., 244
Trenton, Doe v., 253
Trop v. Dulles, 83
Trump v. Hawaii, 39

Ulvinen, State v., 218–222
Unger, State v., 435
United States, Alleyne v., 76
United States, Backun v., 224
United States, Bailey v., 218
United States, Blocker v., 404
United States, Bond v., 832
United States, Bradovich v., 668

- United States, Carpenter v., 57
United States, Cheek v., 444
United States, Clark v., 234
United States, Cramer v., 822, 823
United States, Dennis v., 824
United States, Durham v., 404
United States, Elonis v., 50, 51
United States, Flores-Figueroa v., 688–690
United States, Gall v., 75
United States, Gamble v., 14
United States, Gebardi v., 294
United States, Gorin v., 827
United States, Groomes v., 667
United States, Haupt v., 170
United States, John Bad Elk v., 364
United States, Jones v., 117, 142, 143–146
United States, Kelly v., 749–750
United States, Kent v., 87, 424, 427
United States, Kimbrough v., 75
United States, Koon v., 9
United States, Korematsu v., 38, 39
United States, Kotteakos v., 292
United States, Laney v., 342
United States, McDonnell v., 749
United States, Molina-Martinez v., 76
United States, Parker v., 331
United States, Peugh v., 76
United States, Pinkerton v., 293
United States, Rita v., 75
United States, Rosales-Mireles v., 76
United States, Roth v., 806
United States, Salman v., 738
United States, Sherman v., 448
United States, Sorrells v., 447
United States, Staples v., 187
United States, Watts v., 41
United States, Weems v., 98
United States, Yates v., 824
United States v. Alexander, 457
United States v. Alvarez, 681, 682
United States v. Azzarelli Construction Co. and John F. Azzarelli, 747
United States v. Baldwin, 741
United States v. Bell, 378
United States v. Black, 136
United States v. Booker, 75
United States v. Bradley, 615
United States v. Brown, 289
United States v. Bruno, 291
United States v. Byfield, 149
United States v. Carpenter, 737, 738
United States v. Carucci, 743–747
United States v. Contento-Pachon, 436–439
United States v. Dossie, 101
United States v. Dotterweich, 244, 245
United States v. Drew, 700
United States v. Duff, 739
United States v. Duran, 282
United States v. Eichman, 51
United States v. Falcone, 290
United States v. Fountain, 213, 224, 225–228
United States v. Garcia, 295, 296–300
United States v. Gementera, 77
United States v. Goodman, 740
United States v. Gupta, 751
United States v. Hamilton, 198
United States v. Hernandez, 441
United States v. Hutzell, 443
United States v. Jackson, 728, 747
United States v. Jenkins, 740
United States v. Jewell, 174
United States v. Jimenez-Calderon, 806
United States v. Johnson, 743
United States v. Kabat, 826
United States v. Lopez, 14
United States v. Lucien, 741
United States v. Main, 197
United States v. Mather, 765
United States v. Maxwell, 369
United States v. McGovern, 711
United States v. Miles, 741
United States v. Miller, 58
United States v. Moore, 136
United States v. Murtari, 654
United States v. Nosal, 691–698
United States v. Oakland Cannabis Buyers' Cooperative, 369
United States v. O'Hagan, 737
United States v. Park, 245
United States v. Peoni, 223
United States v. Peterson, 339–345
United States v. Rice, 378, 379
United States v. Russell, 451
United States v. Stevens, 813
United States v. Subhan, 440
United States v. Ursery, 72
United States v. Van Buren, 698–699
United States v. Walli, 826
Upshaw, People v., 767–770
Ursery, United States v., 72

Vacco v. Quill, 488
Valdez, People v., 480
Van Buren, United States v., 698–699
Van Dyke, State v., 433

- Vela, People v., 578
Velazquez v. State, 204, 205
Velez, People v., 538
Vieira, Commonwealth v., 222
Virginia, Atkins v., 90, 97
Virginia, Loving v., 33
Virginia v. Black, 44
Voorhees, State v., 421
- Wade, Roe v., 55, 474, 477
Walden, State v., 141, 218
Waldon v. State, 606
Walli, United States v., 826
Wanrow, State v., 330
Ward, State v., 377
Ward v. State, 156, 157
Washington, Blakely v., 74
Washington v. Glucksberg, 488
Waterman v. State, 543
Watkins v. Commonwealth, 284
Watson, State v., 529
Watts v. United States, 41
Weems v. United States, 98
Wesley, People v., 126
Westbrook v. State, 32
West Virginia, Strauder v., 33
West Virginia State Board of Education v. Barnette, 42
Wheeler v. Goodman, 129
- White v. Pauly*, 363
Whitner v. State, 481
Wilhelm, People v., 583
Williams, Commonwealth v., 719
Williams, People v., 242, 243
Williams, State v., 570
Williams v. Garcetti, 253
Williams v. State, 175
Williford v. State, 190
Wilson, Humphrey v., 98, 99
Wilson v. Arkansas, 364
Wilson v. State, 234
Wisconsin v. Mitchell, 44
Wisneski, People v., 455
Woodmansee, State v., 274
Woodson v. North Carolina, 85
Worden v. State, 156
Wright, State v., 37
Wright v. State, 202
- Yates v. State*, 415
Yates v. United States, 824
York, State v., 187
Young, People v., 347
Young v. State, 483
Young v. State of Hawaii, 60
- Zeferino-Lopez, State v., 685–689

SUBJECT INDEX

- ABA (American Bar Association), 389
Abandonment, 283–86
Abernathy, Letitia, 540
Abetting, 216, 230. *See also* Liability, accomplice
Abortion, 55
Abu Ghaith, Sulaiman, 834
Abuse, 337. *See also* Domestic violence
Abuse excuse, 455
Accessory after the fact, 214, 233
 elements of, 234
 in Model Penal Code, 233, 236
Accomplice after the fact, 220
Accomplice liability. *See* Liability, accomplice
Acquittal, 317
Act, 4
 attendant circumstances, 118
 definition of, 119
 failure to. *See* Omission
 involuntary, 119
 negative. *See* Omission
 overt, 288–89
 voluntary, 119, 121, 148
 See also Actus reus; Omission
Actus reus, 5, 118, 214
 of accomplice liability, 216–23
 of attempt, 267–86
 components of, 118
 concurrence and, 118, 192, 195
 of conspiracy, 288
 of criminal homicide, 473
 defined, 118
 of false imprisonment, 614
 of false pretenses, 675
 of forcible movement, 608
 of forgery, 707
 involuntary acts, 120
 of larceny, 661–62
 of modern rape, 556
 of receiving stolen property, 700
 of robbery, 712
 of solicitation, 302
 of treason, 821
 See also Act; Omission
Adams, Officer, 352
Addiction, as disease, 129. *See also* Status offenses
Addiction defense, 135–36. *See also* Status offenses
Affirmative defenses, 315, 317, 319
 See also Excuses
African Americans
 equal protection and, 32
 See also Race
Age, 423
Agency theory of felony murder, 509
Aggravated assault, 590
Aggravated battery, 586, 588
Aggravated burglary, 629
Aggravated larceny, 711
Aggravated robbery, 713
Aggressor, 320. *See also* Self-defense
Agreement to commit crime. *See* Conspiracy
Aiding, 216, 230. *See also* Liability, accomplice
AIDS, 265
Alcohol, sale of, 247–50
Alcoholism, 129, 131–34. *See also* Status offenses
Alder, Catherine, 432
Alexander (RSB defendant), 457
Alibi, 316
Alien and Sedition Acts, 823
Ali, Ismail, 107
Alito, Samuel A., Jr., 59, 85
Allegrucci, J., 501
Allen, Barry, 325
Alley Boys, 200
Allybone (English justice), 823
Alter ego rule, 346
Alvarez, Xavier, 681
Amendments. *See also* Individual amendments
Amendments, John Hinckley Amendment, 403
American Bar Association (ABA), 389
American bystander rule, 137
American Law Institute, Model Penal Code. *See* Model Penal Code
American rule for resistance to unlawful arrest, 364
Anderson (defendant), 242

- Anderson, Robert, 434
 Andrews, J., 703
 Angelos, Weldon, 101
 Animals, cruelty to, 813
 Anti-Drug Abuse Act of 1986, 99
 Antitrust violations, 747
 Antonio V., 762–64
 Appeals, 73
 Armitage, David, 198
 Arms, right to keep and to bear, 57–62. *See also* Self-defense
 Armstrong, Margaret, 434
 Arrest, unlawful, 364, 366
 Arson, 642–56
 Ashcroft, John, 14
 Asportation, 662
 Assault, 588–91
 Assault and battery, 585
 Assault rifles, 61
 Assistance, requirement to provide, 136, 138
 Assisted suicide, 487–88
 Athletic contests, 386
 Attempt, 286
 - abandonment, 283–86
 - actus reus of, 267–86
 - clarity test for, 269
 - in common law, 267
 - complete, 261
 - elements of, 262
 - history of, 261
 - impossible, 261, 276
 - incomplete, 261
 - last step approach, 269
 - legal tests for, 267–71
 - mens rea of, 263
 - objective approach to, 267
 - physical proximity test for, 269–70
 - preparation, 267
 - public policy and, 262
 - subjective approach to, 267
 - substantial step test for, 269
 - unequivocality test for, 269
 Attendant circumstances, 118
 Aurora, Colorado, movie theater shooting, 397
 Automatism, 120, 125
 Automobile owners, liability of, 214
 Azim, Charles, 289
 Bacanovic, Peter, 735
 Bacon, Francis, 262
 Bahr, William, 524
 Baker, J., 188, 408
 Baker, Randy, 361
 Baldus, David C., 106
 Baltazar, Julio, 297
 Banks (prostitute patronizer defendant), 803
 Barnes, Isaiah, 122–23, 125
 Barreau, Jon, 434
 Bartiromo, Cole, 737
 Baschab, Pamela, 157
 Batin, Marlon Javar, 671
 Battered child syndrome, 337
 Battered spouse syndrome, 332–35
 Battery, 585–88
 Bauer (defendant), 204
 Baumea, Gilbert, 297
 Baxter, J., 200
 Bell (defendant), 376, 378
 Bellamy, Keith Lamar, 233
 Bell, J., 575, 666
 Belton (defendant), 371
 Bendzynski, Al, 167
 Benefit of clergy, 471
 Benjamin, Charles, 88
 Benton, J., 596
 Bergman, Bernard, 71
 Berkowitz, David, 80
 Berkowitz, Robert, 560
 Berry, Michael, 507
 Beyond-a-reasonable-doubt standard, 74–75
 B.G., 584
 Bilateral conception of conspiracy, 290
 Bill of Rights, 40, 82. *See also* Individual amendments
 Bills of attainder, 22, 24
 Bilton, James, 126
 Bingham (choker), 484
 Biological defenses, 456
 Black, Hugo, 38, 54, 747
 Blackmun, J., 55
 Black rage defense, 456
 Blackstone Rangers youth gang, 441
 Blackstone, William, 3, 320, 379, 416, 470, 551, 553, 720, 759
 Blagojevich, Rod, 748
 Blameworthiness, moral, 163, 180, 186. *See also* Intent
 Blankenship, Don, 735
 Blindness, willful, 171
 Bloeds, 296
 Bobbitt, John, 588

- Bobbitt, Lorena, 588
 Boller, James, 177
 Boochever, J., 436
 Bowdery, James, 206
 Bowens, Carlon, Jr., 540
 Boyce (professor), 662, 711
 BP
 Deepwater Horizon oil rig, 247, 731
 Texas City Refinery, 517
 Brain death test, 481
 Brainwashing defense, 456
 Brandeis, Louis D., 53, 55
 Brant, Peter, 738
 Brazill, Nathaniel, 425–28
 Breaking, 627
 Breidenbach, Kenneth, 27, 29
 Brennan, William, 51, 54, 106, 470
 Breyer, Stephen, 24, 75, 811
 Bribery, 721, 748–49
 Bridgehouse (husband), 524
 Broken window theory, 770
 Brooks (defendant), 376
 Brooks (former husband), 569
 Brooks, Anthony, 378
 Brooks, Edmund, 367
 Brooks, Marcus, 457
 Brooks, Willis, 457
 Broughton, Wallace, 674
 Brown (conspiracy defendant), 289
 Brown (violent video games), 808–11
 Brown, Cottie, 580
 Brown, Derrick, 169
 Brown, J., 579
 Brown, Simon, 292
 Bruce (husband), 633
 Bruce, Deborah, 633
 Bryan, David C., 31
 Bryan, Pearl, 194
 Bryant, Kobe, 555
 Burden of persuasion, 317
 Burden of production, 317
 Burger, Warren, 358
 Burglary, 626–39
 Burke, J., 349
 Burning, 642–43
 Burns, Stella, 703–4
 Burroughs (self-proclaimed healer), 509
 Bush, George W., 80, 102, 836
 Business executives, liability for criminal acts
 of employees, 243–51
 But-for causation, 199
 Butler, David, 108
 Buxton, Professor, 54
 Byrd, Sgt., 362
 Bystander Rules, 136–37
 Cabey, Darryl, 325–29
 Cabrera, Hector, 200–203
 Caffey, Fedell, 242
 Calhoun, Larry, 516
 Calle Ocho gang, 301
 Campus Carry laws, 61
 Cantz, Troy, 325
 Capital and aggravated first-degree murder,
 489–95
 Capital punishment. *See* Death penalty
 Cappy, J., 560
 Carjacking, 720
 Carpenter, C.J., 137
 Carpenter, David, 738
 Carradine, Georgia, 441
 Carter, Michael Anthony, 593–95
 Carter, Michelle, 488
 Casas, Jorge Jose, 672, 674
 Case-in-chief, 316
 Cases and Comments
 accessory after the fact, 241
 accomplice liability, 223
 burglary/trespass/arson/mischief, 653
 consent, 386
 conspiracy, 298
 crimes against property, 669, 682
 crimes against public order and morality,
 759, 781, 793, 803
 criminal sexual conduct/assault and battery/
 kidnapping/false imprisonment, 567
 cruel and unusual punishment, 94–95
 equal protection, 39
 excessive force, 359–63
 freedom of speech, 50
 homicide, 480, 494, 528
 intent, 168–69
 involuntary acts, 127
 justifications, 382
 marijuana laws, 104
 police officers, 359
 possession, 157
 privacy, right to, 56
 racial discrimination, 38
 self-defense, 329–30, 336, 345
 void for vagueness, 31

- Case studies
 - abandonment, 283–86
 - accessory after the fact, 236–41
 - accomplice liability, 218, 220, 227–28
 - actus reus, 192, 195
 - attempt, 264, 271–86
 - causation, 200
 - computer crime, 691
 - concurrence, 194
 - conspiracy, 296–98
 - constitutional limitations, 44
 - crimes against public order and morality, 809
 - criminal mischief, 651
 - cruel and unusual punishment, 88–94
 - death penalty, 89–94
 - defense of home, 348
 - due process, 28–30
 - embezzlement, 672, 674
 - excuses, 408–63
 - false pretenses, 678
 - fleeing felon, 355
 - force, 355–59
 - forgery, 709–10
 - gangs, 786–92
 - hate crimes, 167–68
 - homicide, 474–521, 541
 - human immunodeficiency virus (HIV), 264–65
 - identity theft, 685
 - incitement to riot, 768–70
 - intent, 167–68, 171, 173, 181–85, 189–92, 194, 264–65
 - larceny, 666–68
 - liability, accomplice, 218, 220, 227–28
 - money laundering, 743–46
 - prostitution, 797–801
 - rape, 264, 266, 284–86, 560, 562–67, 572–80
 - receiving stolen property, 702–5
 - robbery, 715
 - self-defense, 321, 323, 325, 329, 332, 335, 339, 345, 348
 - status offenses, 134
 - strict liability, 188–91
 - terrorism, 836
 - unconsciousness, 122–25
 - void for vagueness, 28–31
- Cash, David, 147
- Cassell, Paul, 101
- Castillo, J., 175
- Castle doctrine, 339, 345, 387. *See also* Self-defense
- Castro, Ariel, 607
- Castro-Gomez, Cesar, 435
- Causation, 5, 162, 195
 - year-and-a-day rule, 206
- Cause in fact, 195
- Cavanagh, J., 231
- Celli (defendant), 376
- Centers for Disease Control and Prevention (CDC), on domestic violence, 337
- Cerone, J., 167
- Cervantes (defendant), 200–202
- Cesar V., 762–65
- CFAA (Computer Fraud and Abuse Act), 691–97
- C.G., 562
- Chain conspiracy, 291, 295
- Chambers, Jerry, 499
- Chance (defendant), 592
- Charles, Connie, 520
- Chase, Samuel, 23–24
- Cheek (airline pilot), 444
- Chemerinsky, Erwin, 32
- Chessman, Caryl, 609
- Chicago, crime in, 353
- Chicago City Council Gang Congregation Ordinance, 784–93
- Chicago Eight trial, 289
- Child molestation, 98. *See also* Abuse
- Child pornography, 42, 156–57
- Children
 - abuse of, 99, 141, 337
 - battered child syndrome, 337
 - parent's failure to protect, 218, 222
 - parent's liability for, 214, 243, 251–53
 - rape of, death penalty for, 97
- Chin, J., 576
- Chism, Brian, 241
- Choice of evils, 366, 370–71
- Circumstances
 - attendant, 118
 - mitigating, 318
- Cisneros, Juan, 200
- Civil action, 3
- Civil law, 3, 42
- Civil liability, 3
- Civil libertarians, 291
- Civil violation, vs. criminal, 68
- Clancy, Edwin, 246
- Clapper, James, 842
- Clarity, 24–32, 269
- Clemency, 73, 101
- Clemency Project 2014, 102
- Clements, J., 593

- Clinton, Bill, 66
Cobb, Robert, 122–23
Code jurisdiction, 12
Cohen, J., 247
Coincidental intervening acts, 196
Coke, Lord, 347
Cole, J., 525
Coleridge, Lord, 366
Colonial legal system, 11
Columbine High School, 228
Combat immunity, 835–36
Commanding, 216. *See also* Liability, accomplice
Common law, 10–11, 162, 472
 accessory after the fact, 233
 age, 423
 arson, 642
 attempt, 267
 beginning of human life, 474
 breach of peace, 759
 burglary, 626
 defense of home, 346
 duress, 433
 entrapment, 447
 extortion, 720
 false pretenses, 675
 felony-murder doctrine, 507
 group disorderly conduct, 765
 intent, 164
 intervention in defense of others, 346
 justification vs. excuses, 318
 kidnapping, 550
 larceny, 662–63, 666
 loitering, 758
 married women, 435
 mayhem, 588
 mental element, 162
 morally blameworthy individuals, 442
 murder, 470
 occurrence of crime, 573
 provocation, 523
 rape, 550–52, 570
 receiving stolen property, 700
 robbery, 713
 sedition, 823
 suicide, 487
 vagrancy, 758
 voluntary intoxication, 416
Common law states, 11
Communication, solicitation and, 305
Community consensus, 95
Computer crime, 691
Computer files, possession and, 156–57
Computer Fraud and Abuse Act (CFAA), 697
Computer trespassing, 640
Concealed carry, 60
Concurrence, 5, 118, 162, 194, 214
Condition, punishment for, 121. *See also* Status offenses
Connolly, John, 451
Connolly, Patrick, 451
Consent
 as justification, 379
 in Model Penal Code, 381
 withdrawal of, 576–80
Conspiracy, 216, 288
 actus reus of, 288
 bilateral conception of, 289
 chain conspiracy, 291, 295
 to commit felony, 288
 to commit misdemeanor, 288
 criminal objectives, 291, 293
 Gebardi rule, 294, 296
 mens rea of, 290
 in Model Penal Code, 293
 overt act, 288–89
 parties in, 289
 Pinkerton rule, 295
 prosecutions, 294
Racketeer Influenced and Corrupt Organizations Act (RICO), 294
sedition, 823
structure of, 291
unilateral approach to, 291
Wharton's rule, 293
wheel conspiracy, 291
Constitutional democracy, need for, 22
Constitutional limitations, 14
 clarity, 24–32
 due process, 25–26, 32, 59
 equal protection, 32–39, 68, 105–13
 See also Thirteenth Amendment
 keep and to bear arms, right to, 56–62
 See also Self-defense
 privacy, right to, 53–56
 speech, freedom of, 40
 See also Speech, freedom of
Constitutional rights
 criminal violation and, 68–69
 incorporation theory, 40
 protecting, 22
 See also Constitutional limitations of suspects, 353

- Constitution, U.S.
 - Article III, Section 5, 821
 - Supremacy Clause, 13
 - See also* Constitutional limitations; Constitutional rights; Individual amendments; Individual clauses
- Contento-Pachon, Juan Manuel, 436–39
- Contento-Pachon precedent, 439
- Contraception, 54–55
- Contract killing, 301
- Cooling of blood, 523–24
- Corporal punishment, 66
- Corporate liability, 243–51
- Corporate murder, 516–21
- Corrigan, Dan, 390
- Couch, Ethan, 459
- Cox (picketer), 445
- Cramer, Anthony, 823
- Crenshaw, Rodney, 400
- Crime
 - categories of, 6–10
 - defined, 2
- Crime in the News
 - accomplice liability, 243, 254
 - crimes against property, 700
 - crimes against the state, 836
 - excuses, 416, 456
 - medical marijuana, 15–16
 - self-defense, 365, 387
- Crime of Self-Defense* (Fletcher), 329
- Crime on the streets
 - criminal sexual conduct/assault and battery/kidnapping/false imprisonment, 584–85
 - homicide, 522
 - incarceration rates, 81
- Crimes
 - acts labeled as, 2–3
 - inchoate, 260
 - result, 118, 164
- Crimes of criminal conduct causing a criminal harm, 195. *See also* Causation
- Crimes of official misconduct, 748
- Crime Victims' Rights Act of 2004, 80
- Criminal attempt. *See* Attempt
- Criminal homicide, 471–82
 - See also* Manslaughter
- Criminal law
 - vs. civil law, 2
 - nature of, 2
 - principles of, 5
 - purpose of, 3–4
 - sources of, 10
- Criminal mischief, 654
- Criminal procedure, 5
- Criminal sexual conduct, assault and battery, kidnapping, and false imprisonment, 550
- assault and battery, 585
- rape, 550–85
- Criminal trespass, 639–40
- Criminal violation
 - vs. civil, 68
 - constitutional rights and, 68–69, 353
- Crips, 296
- Crist, Charlie, 73
- Criswell, Kelly, 590
- Crook, Shirley, 65, 89
- Crook, Steven, 89
- Cruel and unusual punishment, 82–94
 - amount of punishment, 84–94
 - methods of punishment, 82, 84
 - status offenses, 103, 119, 128
 - See also* Death penalty
- Cruelty to animals, 813
- Culpability, general requirements of, 165
- Cultural defense, 459
- Cummins, Ethel, 408–10
- Cunningham (forgery defendant), 709, 711
- Currer, Charles, 177–78
- Curtilage, 628
- Cyberstalking, 590
- Damms, Marjory, 281–82
- Damms, Ralph, 281–82
- Danville, Pennsylvania, water supply, 730
- Davidson, Sabine, 501–4
- Davis (shooter of pregnant woman), 475
- Davis, Jordan, 390
- Davis, Joseph, 728, 744–46
- Dawson, James, 176
- Death penalty, 72, 84, 89
 - accomplice liability and, 243, 254
 - arbitrariness of, 254
 - as cruel and unusual punishment, 83
 - for juveniles, 86–94
 - lethal injection, 85
 - mental disability and, 90–91, 96–97
 - race and, 97, 105
 - for rape of child, 97
 - sentencing and, 67
 - victim impact statements and, 80
- Defendant, defined, 2
- Defense of home, 351–52. *See also* Self-defense
- Defense of others, 346

- Defenses, 5
 - affirmative, 315, 317–18
 - Justifications
 - See also* Excuses
- DeJesus (defendant), 338
- Democracy, 22
 - broadly worded statutes and, 26
 - First Amendment and, 40
- Democratic Convention (1968), 289
- Denman, Lord, 292
- Dependent intervening act, 197, 199
- Depraved heart murder, 472, 507
- Derivative liability, 216
- Dershowitz, Alan, 455
- Desertion, military, 83
- Determinate sentencing, 72, 75, 79, 99
- Determinate sentencing law (DSL), 75
- Deterrence, 70, 74
 - general, 70–71
 - intent and, 164
 - specific, 70
- Devlin, Patrick, 794
- Diminished capacity, 415
- Disability, 317
- Disclose or abstain doctrine, 737
- Discrimination. *See* Equal protection
- Disorderly conduct, 759–65
- Dobbs, James, 305
- Domestic battery, 588
- Domestic terrorism, 829
- Domestic violence, 337
 - battered spouse syndrome, 332–35
 - castle doctrine and, 345
 - retreat and, 345
 - See also* Abuse
- Donnelly, J., 304
- Double jeopardy, 14
- Doubt, beyond reasonable, 74–75
- Douglas (Supreme Court justice), 772
- Douglas, William, 40, 54, 85
- Dressler, Joshua, 120, 196, 216, 228, 352, 662
- Drinking, teenage, 252
- Drug offenses
 - marijuana laws, 104, 369, 376
 - punishment for, 99–103
 - Rockefeller drug laws, 99, 101
- Drugs in jail, 127
- Drunkenness, public, 129–34
- DSL (determinate sentencing law), 75
- Dual sovereignty, 9, 14
- Ducheneaux, Matthew, 376
- Ducheneaux, Troy, 362
- Dudley, Debra, 494
- Dudley, Thomas, 367
- Due process, 25–26, 32, 59, 451
 - See also* Constitutional limitations
- Duff, James M., 739
- Du, Joseph, 107–8
- Duke, Tony, 241
- Dumlaو, Vidado, 529
- Dump (stepfather of defendant), 123–24
- Dunford, James, 131
- Dunn, Michael, 390
- Duran, Francisco Martin, 282
- Duress, 433
- Durex Industries, Tampa, Florida, 730
- Durham, Jerry, 39
- Durham product test, 404
- Durkovitz, Gary, 174
- Du, Soon Ja, 106–8
- Duty to intervene, 137–47
- D.W., 571
- Economic Espionage Act (EEA), 696
- Economic necessity, as justification, 377
- EEA (Economic Espionage Act), 695–96
- Eighth Amendment, 82–94, 128, 255, 783
- Elder, J., 633
- Ellis, Kevin, 606
- Elonis, Anthony Douglas, 50
- Embezzlement, 670–74
- Emerson, Thomas L., 40
- Emmanuel, Charles, 841
- Employees
 - duty of care and, 140
 - liability for, 243–50
- Encouraging, 216. *See also* Liability, accomplice
- English rule for resistance to unlawful arrest, 364
- Entertainment Merchants Association, 808
- Entrapment, 447–54
- Entry, 627
- Environmental crimes, 729–32
- Environmental defense, 456
- Equal protection, 32–39
 - scrutiny and, 32–33
 - sentencing and, 68, 105–12
- Escobedo, Jason, 300
- Espionage, 827–28, 843
- Estrich, Susan, 551
- Ethnic intimidation, 167–68, 170. *See also* Hate crimes
- European bystander rule, 136–37
- Evans, Debra, 243
- Evans, Robert, 177

- Evidence
 - circumstantial, 164
 - legal rules of, *ex post facto* laws and, 24
 - preponderance of, 74–75
- Evidentiary burden, intent and, 164
- Excusable homicide, 471
- Excuses, 317
 - age, 423
 - in common law, 317
 - diminished capacity, 415
 - duress, 433
 - entrapment, 447–54
 - insanity defense, 396–415
 - intoxication, 416–23
 - introduction, 396
 - vs. justification, 317
 - mistake of law and mistake of fact, 442–47
 - new defenses, 455–63
- Execution, 85–86. *See also* Death penalty
- Execution of public duties, 352
- Ex Post Facto Clause, 76, 206
- Ex post facto criminal punishment, 68
- Ex post facto laws, 23–24
- Expression, freedom of. *See* Speech, freedom of
- Express malice, 472
- Extortion, 720
- Extraneous factor, 276
- Extraterritorial jurisdiction, 830
- Exum, C.J., 486
- Exxon Valdez oil tanker, 731

- Factual cause, 195, 214
- Factual impossibility, 276
- Fair Sentencing Act of 2010, 100
- False pretenses, 675–82
- Far West Water & Sewer, 518
- FCPA (Foreign Corrupt Practices Act), 750, 754
- Federal crime of terrorism, 830
- Federal criminal code, 13
- Federal Death Penalty Act in 1994, 91
- Federal Food, Drug, and Cosmetic Act, 245
- Federal Kidnapping Act, 607
- Federal Rules of Criminal Procedure, 77
- Federal Sentencing Guidelines, 75
- Federal statutes, 13, 15
- Felis, Kenneth P., 738
- Felony, 6, 215, 288
- Felony murder, 472, 507–15
- Fennell, Elsie, 615
- Ferguson, Colin, 457

- Ferguson, Missouri, 771
- Ferino, Theresa, 168
- Field, Joseph Stephen, 136
- Fields, Randell, 242
- Field, Stephen J., 822
- Fields, Wallace, 123–25
- Fifth Amendment, 25, 32, 54, 660
- Fighting words doctrine, 41, 44
- Film Recovery, 521
- Fines, 6, 71, 246
- Firearms. *See* Second Amendment; Self-defense
- First Amendment, 22, 40, 54, 808–9. *See also* Speech, freedom of
- First-degree murder, 472, 483–95
- Fitch, Randy, 625, 651–52
- Fitzpatrick, C.J., 596
- Flag burning, 51
- Flag Protection Act, 51
- Flaum, J., 744
- Fleeing felon, 353, 361–62
- Fleeting possession, 149
- Fletcher, George P., 68, 318, 329, 347, 470
- Flint, Michigan, water supply, 730
- Flores-Figueroa, Ignacio, 689–90
- Flores, Maria, 475
- Fontes, Jesus Bernardo, 377
- Force
 - deadly, 338, 347, 355–59
 - excessive, 359–63
 - nondeadly, 338
 - objective test for, 359
 - police officers and, 352–57
 - in self-defense, 364, 366
- Ford Motor Company, 516–17
- Foreign Corrupt Practices Act (FCPA), 750
- Forgery, 709–10
- Forgery and uttering, 706–8
- Forrest, Clyde, 484
- Forrest, John, 484
- Fortas, J., 134
- Fountain, Clayton, 225, 227
- Fourteenth Amendment, 25, 32–33, 85, 88, 128.
 - See also* Speech, freedom of
- Fourth Amendment, 54, 354, 356, 358–60, 362, 626
- Frankel, Marvin, 71
- Fraud, 737–38
- Frazier, Erica, 572
- Frazier, William, 246
- Fredenberg, Dan, 390

- Freedom, individual, 22–23
Freeman, C.J., 511
Fuelling, Michelle, 170–71
Fugarino (computer programmer), 640
Fugitive Slave Clause, 32
Fuller, Joel, 228
Funerals, picketing, 52
- Gable, Clark, 682
Gadahn, Adam, 823
Galloway (bipolar man), 412
Gamble, James, 518–21
Gang membership, 299, 301
Gangs, 784–92
Gang solicitation, 303
Garcia, Leon “Cody,” 296–99
Gardephe, Paul G., 119
Garner, Edward, 354, 356
Garnett, Raymond Lennard, 572
Garrison, Officer, 352
Gartland, Ellen, 345
Gartland, John, 345
Gattenby, Virgil, 156
Gebardi rule, 294, 296
Geiger, Janice, 268
Gender discrimination, 21
 - intermediate level of scrutiny and, 33
 - in self-defense cases, 330
 - sentencing and, 106Geneva Convention of 1949, 836
Genocide, 841
Genovese, Kitty, 137
George Mason University (GMU), 61
Gibson, Jack, 169
Gines, Romano, 744
Ginochio, Sheriff, 261
Ginsburg, Ruth Bader, 14, 33, 69, 97
Girouard, Joyce M., 525
Girouard, Steven S., 525
Gleeson, John, 101
Gloria (victim), 241
Goetz, Bernhard, 325–29
Goings, Kenneth, 185
Golab, Stefan, 521
Goldberg, Arthur, 54
Gometz, Randy, 213, 226–27
Gonzalez, Mario, 385
Goodman (Travel Act defendant), 740
Good motive defense, 319
Good Samaritan statutes, 137, 141
- Good-time credits, 79
Gorshen (dock worker), 415
Governors, 73
Graft, 749
Graham, Terrance Jamar, 94
Grand larceny, 664–65
Grant, Oscar, 532
Gray, Ricky, 342
Green, Anthony Lee, 143–45
Green, Robert Lee, 143–45
Green, Shirley, 143–45
Grenier (victim), 229
Gresham, Jimmy, 782
Griffith, Thomas, 60
Gross, J., 425
Gross misdemeanor, 6
Group disorderly conduct, 765
Grunow, Barry, 425–26
Guilt, gang membership and, 299
Gun control. *See Arms, right to keep and to bear*
Gupta, Rajak K., 750
Guthrie (restaurant kitchen worker), 483
Guthrie, Michelle, 614–15
- Hale, Lord, 366, 416
Hale, Matthew, 551
Haley, J., Jr., 635
Haller, J., 130
Hall, Freddie Lee, 96
Hall, Jerome, 5, 163, 277, 416
Hamilton, Alexander, 23
Hamilton, Carrie, 741
Hand, Learned, 223, 226–27, 294
Handler, J., 562
Hansen, Robert, 434
Harden, Danuel, 345
Harden, Tanya, 345
Harlan, John Marshall, 54
Harlins, Latasha, 106
Harper, Brice, 390
Harrell, Evans, 123, 125
Harrington (extortion defendant), 721
Harrington, J., 767
Harris, Emmitt, 168
Harris, Eric, 228
Hart, Henry M., Jr., 2
Hate crimes, 167–68
Hate speech, 43
Haupt, Hans, 170

- Hauptmann, Bruno, 607
 Hawkins, Gordon, 793–94
 Hawley, Heidi, 130
 Hazing, 380
 Healey, Russell, 390
 Health care fraud, 740, 742
 Hearst, Patricia, 457, 607
 Heat of passion defense, 522–24
 Heidnik, Gary, 494
 Heller, Dick, 58
 Helmets, 55
 Henderson (prostitution payment defendant), 804
 Hendrick, Leroy, 3
 Hennings (defendant), 169
 Henry of Bracton, 261
 Henry, Patrick, 82
 H.F., 636–38
 Hickman, J., 498
 Highland Street, 200
 Hilliard, Richard, 342
 Hinckley, John, 403
 Hines, Charmaine, 81
 Hippies, 129
 Hitching post, 83
 Hitler, Adolf's diary, 706
 HIV (human immunodeficiency virus), 264
 Hoffman, Carol, 221
 Hoffman, David, 219–20
 Holder, Eric, 102
 Holmes, James, 397
 Holmes, Oliver Wendell, Jr., 32, 120, 162, 289,
 324, 510
 Home
 defense of, 346–52
 See also Self-defense
 sanctity of, 54
 Homelessness, 131, 134, 773, 783
 Homicide
 criminal homicide, 471–82
 death penalty and, 84
 See also Death penalty
 introduction, 470–71
 life imprisonment for juveniles and, 95
 manslaughter, 141, 521–41
 murder, 482–521
 time limit on prosecutions for, 206
 Honeyman, Carl, 507
 Hooker Electrochemical Company, 730
 Hooper, Ms., 329
 Hostages, 608
 Houston, Brian, 37
 Howard, Alice, 237–38, 240
 Howard, Charlotte, 237–41
 Howard, Ronald Ray, 457
 Hoying (assault defendant), 590
 Hranicky, Bobby Lee, 161, 175–79
 Hranicky, Kelly, 178
 Hudson Oil Refining Company of New Jersey, 730
 Hughes, Calvin, 169
 Human immunodeficiency virus (HIV), 264–65
 Human life, 474–81
 Humo, Noah, 296
 Hurst, Karol, 96
 Hurston, Zora Neale, 703
 Hyman, Elton, 355
 Hypermonitoring, 337
 Hypervigilance, 337
 Identity theft, 684–89
 Identity Theft and Assumption Deterrence Act, 685
 Imagination, freedom of, 119
 Imminence, 336
 Imperfect defense, 318
 Imperfect self-defense, 320. *See also*
 Self-defense
 Implied malice, 472
 Impossibility, in attempt, 276
 Imprisonment, 71
 Incapacitation, 70, 74
 Incarceration rates, 81
 Inchoate crimes, 260
 Incitement to violent action, 41
 Incorporation theory, 40
 Indecent exposure, 807
 Indeterminate sentence, 73, 79
 Indiana teenagers, 516
 Individual disorderly conduct, 758
 Industrial espionage, 827
 Infamous crimes, 7
 Information, 55
 Infractions, 6
 Inherent impossibility, 277
 Innocence, presumption of, 316
 Insanity, 124, 317. *See also* Excuses
 Insanity defense, 396–415
 Insanity tests, 396–405
 Insider trading, 736–37
 Intent, 4, 214, 821
 of accomplice liability, 223–43

- of arson, 644
of attempt, 262–65
categories of, 164
concurrence and, 118, 192, 194
of conspiracy, 290
constructive, 165
of criminal homicide, 482
of criminal mischief, 651
defined, 118
of disorderly conduct, 759
evidentiary burden and, 163
of false pretenses, 676–77
of first-degree murder, 483
of forgery, 706
general, 164
of kidnapping, 608
knowingly, 173
of larceny, 663
in Model Penal Code, 164, 166
negligently, 180–83
of prostitution, 796
punishment based on, 162
purposely, 166–69
of rape, 570
of receiving stolen property, 701
recklessly, 174–79
of robbery, 713
of solicitation, 302
specific, 164
strict liability offense, 186–91
transferred, 164, 169
of treason, 821
vicarious liability and, 245
See also Causation
Intermediate level of scrutiny, 33
Intermediate sanctions, 72
International criminal law, 840–41
International terrorism, 829
Interstate Commerce Clause, 13
Intervene, duty to, 136–47, 218
Intervening cause, 196–99
Intervention in defense of others, 346
Intimate activities, 55–56
Intoxication, 124, 416–23
Involuntary acts, 121, 125, 127
Involuntary intoxication, 417–23
Involuntary manslaughter, 472–73, 541
Irresistible impulse test, 402
Irvine (domestic battery defendant), 588
Isaac (son of Dominican mother), 461, 463
ISIS (Islamic State), 608
Islas (defendant), 615
Issues, newly arising, 40
Iverson, Sherrice, 147

Jackson (defendant), 193
Jackson, Mandell, 744
Jackson, Robert H., 40, 162–63, 288, 772, 822
Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 68
Jail, described, 81
Jaloveckas, Walter, 337
James, Audrey, 804
James, Mylice, 289
Janes, Andrew, 337
Janes, John Wesley, 187
Japanese Americans, detention of, 38
J.B.A., 766
Jeans, Albert, 261
Jerrett, Bruce Franklin, 458
Jeter, Mildred, 33
Jewell (defendant), 172
J.M., 434
John Hinckley Amendment, 403
Johnson, Lyndon, 41
John Z., 576
Jones, Latrece, 540
Jordan, Kenneth, 234
Jorge (criminal), 436
Joyce (wife), 470
J.P. (former wife), 569
Judges, 71, 74–75, 83–84. *See also* Sentencing
Judicial discretion, 67
Jury, 75
Jury nullification, 319
Just deserts, 70
Justifiable homicide, 471
Justifications, 196–246
 in common law, 318
 consent, 379
 defense of home, 346–52
 defense of others, 346
 execution of public duties, 352
 See also Law enforcement
 mitigating circumstance, 318
 necessity, 366–71
 property vs. human life, 377
 self-defense, 57–62, 318–45
 subjective approach to, 324–25
 theories for, 318

- Juvenile death penalty, 87–94
- Juveniles, life without parole for, 94–95
- J.Z., Deborah, 480–81

- Kaarma, Markus, 390
- Kagan, Elena, 96
- Kalathakis, Anita, 516
- Kalchinian (entraper), 448, 450
- Kanka, Megan, 68
- Kargar, Mohammad, 460
- Keeran, Charles, 254
- Keeran, Jeffery, 434
- Keitt, Charles, 340
- Kelling, George, 770
- Kellogg (defendant), 130–34
- Kelly, J., 232
- Kendall (defendant), 376
- Kennedy, Anthony, 24, 52, 69, 76, 84, 88–94, 96
- Kerling, Edward, 823
- Kevorkian, Jack, 488
- Kieczykowski, Adam, 126
- Kiern, Ron, 434
- King, Rodney, 1, 8–9, 14
- Kirschbaum, Charles, 521
- Klaas, Polly, 607
- Klebold, Dylan, 228
- Knowingly, 173
- Knowledge, guilty, 162
- Knowledge standard, 223
- Koczwara, John, 247–50
- Koory (robber), 507
- Korematsu, Fred, 38
- Korn/Ferry International computer crime case, 692–97
- KPMG International, 247
- K.R.L., 432–33
- Ku Klux Klan (KKK), 9, 44, 352
- Kurr (pregnant woman), 481
- Kyle, Chris, 396

- Lacey, Michael Eugene, 635–38
- LaCorte (criminal), 433
- LaFave, Wayne R., 5, 82, 113, 244, 664
- La Fond, Professor, 317
- Lambert (felon resident), 444
- Laney, Deanna, 396
- Lanser, Gary, 518–20
- Larceny, 661–71, 711
- Larceny by trick, 675
- Last step approach, 269

- Latin Kings, 223
- Laura T., 577
- Law (defendant), 351–52
- Law enforcement
 - deadly force and, 352–57
 - officer identification, 362
 - standards for, 25
 - See also* Police
- Law of entrapment, 448
- Law of parties statute, 255
- Lawson, Edward, 25
- Learned helplessness, 337
- Leavitt, Jason, 452–54
- Lee, Demiko, 145
- Lee, Joe William, Jr., 666
- Lee, Lai, 668–69
- Legal impossibility, 276
- Legality, principle of, 22, 277
- Legal/proximate cause, 195, 199, 214
- Lennon, John, 590
- Lethal injection, 85
- Leukemia patient, 509
- Liability
 - accomplice, 228
 - actus reus of, 216–22
 - mens rea of, 223–43
 - natural and probable consequences doctrine, 224, 228–31
 - See also* Solicitation
 - civil, 3
 - for conduct of another, 224
 - See also* Liability, vicarious
 - derivative, 216
 - exclusion from, 293
 - intervention and, 141
 - omission and, 142
 - strict, 186–91, 243
 - vicarious, 214, 243
 - automobiles and, 214, 251
 - corporate liability, 243
 - parents' liability, 214, 243, 252
 - public policy and, 246
 - See also* Liability, accomplice; Liability, vicarious; Parties to crime
- Libel, 42
- Liebenow (thief), 445
- Life, 474–81
- Life without parole, for juveniles, 94–95
- Linares, Richard, 200–201, 203
- Lindbergh, Charles, Jr., 607
- Lindbergh Law, 607
- Lindh, John Walker, 835–36

- Lindsay, Sandra, 494
Linn (disorderly conduct defendant), 765
Linscott (defendant), 229
Liquor
 sale of, 247–50
 teen consumption of, 252
Littlefield, Don, 396
Lloyd, Ira, 241
Locke, John, 660
Loewy, Arnold, 400
Loitering, 771, 773, 798–800
Love Canal, Niagara Falls, New York, 730
Lowery, Antonio, 511–15
Low, Robert, 422
Lucas, C.J., 475
Lund (student), 691
- MacPhail, Lori, 53
Madison, James, 23, 821
Madoff, Bernard L., 751–52
Magadini (homeless person), 782
Mail and wire fraud, 738
Majors, Val, 605
Make my day laws, 348
Mala in se crimes, 6, 186
Mala prohibita crimes, 6, 186
Maldonado (car driver), 506
Malice, in arson, 644
Malice aforethought, 471
Malvo, Lee Boyd, 836
Management Assistance Inc. stock sales, 737
Mandatory sentences, 75, 79, 98, 98–103
Manes, Mark, 228
Mann Act, 294
Mansfield, Lord, 262
Manslaughter
 defined, 471, 473
 vs. homicide, 141
 involuntary, 541
 through omission, 143
 reckless, 345
 voluntary, 106–531
Marchiano, P.J., 532
Marijuana, 15–16, 103, 369, 376
Mariscal, Michael, 362
Marketplace of ideas, 40, 42
Marrero (prison guard), 444
Marriage, interracial, 33
Marshall, J., 55
Martin, Trayvon, 390
Masey Energy Company, 735
Maskovich, Peter, 198
Mass transportation systems, 832
Mather (disorderly conduct defendant), 765
Mayhem, 588
Maynard, Brittany, 488
McAda, Hampton, 177–78
McClemore, Wayne, 238
McCowan (hunter), 422
McCoy, Leon, 233
McCray, Laverne, 804
McDonald, J, 134–35
McDonnell, Bob, 749
McEnery, David J., 193
McGinnis, Felicia, 798
McGovern (forgery defendant co-conspirator), 711
McKeown, J., 692
McNeill, Tyna, 631
Media intoxication defense, 457
Medical care, duty to provide, 138
Medical condition, 126
Medication, as involuntary intoxicant, 417
Meek, Joey, 235
Megan's Law, 68
Mehserle, Johannes, 539
Melendez, Irene, 300
Men, domestic violence and, 337
Mendoza, Carlos, 170–71
Mennin, J., 798
Mens rea, 5, 118, 162, 214, 249. *See also Intent*
Mental disability, 96–97
Mental element, 162. *See also Intent*
Mental state, 124. *See also Unconsciousness, state of*
Mere presence rule, 217–18, 222
Mestas, Andrea, 480
Metallic Marketing, 521
Meyer, J., 484, 486
Miami, Florida, 774
Michel, Gregg, 131
Midgett (father), 496–98
Midgett, Ronnie, Jr., 496–98
Mihara, J., 762
Miles, Alice, 741
Miles, Harold, 741
Miles, Richard, 741
Military, duty of care and, 140
Milk, Harvey, 415
Miller (convicted felon), 444
Miller, George, 386
Miller, Givens, 386
Miller, Richard, 452–54

- Mills, J., 460
- Mills, Willard, 123
- Milwaukee, Wisconsin, 798
- Mind, guilty, 162
- Minimum level of scrutiny test, 32
- Minorities, 101. *See also* Race
- Misappropriation doctrine, 737
- Mischief. *See* Criminal mischief
- Misdemeanant, 353
- Misdemeanor, 6, 288
- Misdemeanor manslaughter, 541–42
- Mistake, 320. *See also* Self-defense
- Mistake of law and mistake of fact, 442
- Mitchell, Todd, 44
- Mitigating circumstance, 318
- M.M.Z. (fetus), 480
- M'Naghten, Daniel, 399
- M'Naghten test, 399, 402–4
- Model Penal Code
 - abandonment, 283
 - accessory after the fact, 233, 236
 - arson, 645
 - assault, 591
 - assault and battery, 585
 - born alive rule, 474
 - burglary, 630
 - causation, 200
 - choice of evils, 370–71
 - consent, 381
 - conspiracy, 289, 293
 - corporate liability, 244
 - criminal mischief, 651
 - criminal trespass, 640, 642
 - deadly force, 338
 - defense of home, 346, 351
 - described, 12–13
 - diminished capacity, 415
 - disorderly conduct, 760–61
 - disturbing the peace, 759
 - duress, 439
 - entrapment, 448, 450
 - excuses, 442
 - factual impossibility, 276
 - false imprisonment, 614
 - felonious restraint, 616
 - felony murder, 509
 - forgery, 706, 708
 - forgery and uttering, 706
 - insanity test, 398
 - intent, 162, 164, 166, 169, 171
 - involuntary intoxication, 417
 - knowingly definition in, 173
 - larceny, 662
 - loitering or prowling, 771, 773
 - malice aforethought, 471
 - minimum requirement of culpability, 574
 - misdemeanor manslaughter, 542
 - mistake of fact, 444, 446
 - mistake of law, 444
 - on need for strict liability crimes, 187
 - objective test for intervention in defense of others, 346
 - omission, 136, 142
 - possession as act, 149
 - prostitution, 796, 801, 803
 - provocation, 523, 528–29
 - rape reform, 555–56
 - receiving stolen property, 700, 702
 - reckless conduct, 174
 - Requirement of Voluntary Act, 121
 - riot, 765, 767
 - robbery, 713, 715
 - self-defense, 320–21, 323, 325, 330
 - simulation, 707
 - solicitation, 302, 305
 - statutory rape, 572
 - substantial step test, 269–76
 - theft by deception, 677
 - theft by unlawful taking or disposition, 671
 - theft offenses, consolidation of, 683–84
 - use of force in law enforcement, 354–55
 - use of force in self-defense, 365–66
 - vicarious liability, 245
 - voluntary intoxication, 416
 - wife as chattel, 551
- Moler, Michael L., 408–11
- Molestation, child, 98. *See also* Abuse
- Molina, Sergio, 458
- Molina, Stephanie, 456
- Money laundering, 728, 743–46
- Monson, Diane, 15–16
- Moore, Bobby James, 97
- Moore, Joseph, 188
- Moore, Marlon, 511–13
- Moore, Maurice, 511
- Moore, Raymond, 135
- Morales (boyfriend impersonator), 553
- Morales (gang congregation ordinance defendant), 784–93
- Morality, conflict with law, 137
- Moral turpitude, 6
- Morenberg, Andrew, 386
- Morgan (rape case appellant), 445, 570
- Morgan, Mrs., 445, 570

- Morris, Norval, 793–94
Morrison, Jim, 73
Moscone, George, 415
Moseley, Winston, 137
Mosk, J., 478
Mostella, Greg, 237–38
Mostella, Rosa, 237–38, 240
Motiva Enterprises, 517
Motor vehicle, living in, 784
Moussaoui, Zacarias, 832
M.T.S., 562–67
Muhammad, John Allen, 836
Mullenix, Cadrin, 362
Murder
 corporate, 516–21
 depraved heart, 507
 felony, 507–15
 first-degree, 483–95
 second-degree, 495–99
 types of, 471–72
 year-and-a-day rule, 206
 See also Homicide
Murdoch (sheriff's deputy), 592
Murphy, Frank, 38
Murphy, J., 264, 572
Musmanno, J., 250
- National Firearms Act, 187
Nationality, sentencing and, 105. See also Status offenses
National Rifle Association (NRA), 387
Nations, Sandra, 171, 173
Natural and probable consequences doctrine, 224, 228–31
Necessity, 320, 338, 366–71. See also Self-defense
 Neeley (rape defendant), 583
Negligence, 180–83, 198
Negligent homicide, 517–21
Negligent manslaughter, 531–39
Nelson, Dale, 368
Newbern, J., 496
Nighttime and burglary, 629
Ninth Amendment, penumbras and, 54
Norman, John Thomas "J.T." 332–36
Norman, Judy, 332–36
Norteños, 301
Nosal (computer fraud defendant), 691–97
NRA (National Rifle Association), 387
Nullification, power of, 319
Nullum crimen sine lege, nulla poena sine lege, 23
Oakes, Judge, 289
Obama, Barack, 87, 101, 836, 842
Objective test for entrapment, 448, 450
Obscenity, 42, 806
Obstruction of justice, 235. See also Accessory after the fact
Occupational health and safety, 733
Occupational Safety and Health Act (OSHA), 733
O'Connor, Sandra Day, 51, 94, 98, 358
O'Donnell, B.N., 593–96
Offenders, education/treatment of, 73
Office for Victims of Crime (OVC), 80
Officer identification, 362
O'Leary, Joseph, 415
O'Malley, Michael, 625, 651–52
Omission, 136, 148
O'Neil, Steven, 521
Open carry, 61
Organized crime, 294
Osby, Daimion, 457
OSHA (Occupational Safety and Health Act), 733
Osmar, Timothy, 653
Otis, J., 218
Oulson, Chad, 390
OVC (Office for Victims of Crime), 80
Overbreadth, 43
Overreach of criminal law, 793
Overt act, 288–89
Overton, Richard, 615
Owen, Duane, 490–92
- Packingham, Lester Gerard, 52–53
Pandering, 797
Panhandling, 781–82
Pannell, Samuel, 229–31
Parental Kidnapping Prevention Act, 607
Parents, 251, 253
 failure to protect child, 218, 222
 liability for children, 214, 243, 251, 256
 See also Liability, vicarious
Parker, J., 332
Parker, Richard, 367
Parole, 79, 81
Parole boards, 73
Parties, in conspiracy, 290
Parties to crime, 214
Patronizing a prostitute, 803
Pauly, Daniel, 362
Pauly, Samuel, 362
Pavesich, Paolo, 53
P.B., 499–500

- Pearl, Daniel, 608
- Peel, Robert, 399
- Pena, Antonio, 481
- Pennsylvania State University, 139
- Penumbras, 54
- Peraza, Johnnie Ray, 480
- Per curiam decision, 452
- Perez, Joseph, 200, 203
- Perfect defense, 318
- Perfect self-defense, 334, 339
- Perkins, Professor, 662, 711
- Perl, Alan, 434
- Person, meaning of term, 245
- Persuasion, burden of, 317
- Peterson, Bennie L., 345
- Petit larceny, 664, 666
- Petraza, Zonia, 300
- Pettaway, Joyce Ann, 122
- Petty misdemeanor, 6
- Pharmacy-liquor store theft case, 659
- Physical proximity test, for attempt, 269–70
- Picketing military funerals, 52
- Pimping, 797
- Pinckney, Clementa C., 206
- Pinkerton, Daniel, 293
- Pinkerton rule, 216, 288, 295
- Pinkerton, Walter, 293
- Plato, 261
- Plea bargain, 67, 74, 77
- Plunkett (rape case appellant), 570
- Plurality requirement, 290
- PMS (premenstrual syndrome) defense, 456
- Police
 - arming of, 353
 - use of force, 352–59
 - See also* Law enforcement
- Police power, 12
- Policy. *See* Public policy
- Polk, Ronnie, 192
- Pornography, 42
 - child, 42, 156–57
- Portrayal, public, 55
- Posner, Richard, 224–25, 227
- Possession, 148–57
 - computer files and, 156–57
 - in Model Penal Code, 149
 - types of, 148–49
 - as voluntary act, 148
- Postpartum psychosis defense, 456
- Post-traumatic stress disorder (PTSD) defense, 457
- Potts, Officer, 352
- Poultry plant fire, North Carolina, 735
- Prather, J., 284
- Precedent, 10
- Preemption doctrine, 13
- Premenstrual syndrome (PMS) defense, 456
- Preparation, 267
- Preponderance of evidence, 74–75
- President, United States, 73
- Presumptive sentencing guidelines, 73
- Prince William Sound, Alaska, pollution, 732
- Principals, 214
- Principle of legality, 277
- Prison, described, 81
- Prisoners, release of, 79
- Privacy, right to, 22, 53–56
- Probation, 72, 81
- Production, burden of, 317
- Property, crimes against, 659, 661
 - carjacking, 720
 - embezzlement, 670–74
 - extortion, 720
 - false pretenses, 675–82
 - forgery and uttering, 706–8
 - larceny, 661–70
 - in Model Penal Code, 671, 677, 682, 700, 702, 707–8, 713
 - receiving stolen property, 700–705
 - robbery, 711
 - theft, 700
- Property of another, 663
- Proportionality, 84, 98, 320
- Prostitution, 6, 794–806
- Provenzino, Alex, 251
- Provenzino, Anthony, 251
- Provenzino, Susan, 251
- Provocation, 522–28
- Provocation doctrine, 363
- Proximate cause theory of felony murder, 510
- Proximate/legal cause, 195–98, 200, 214
- Psychological defenses, 456
- PTSD (post-traumatic stress disorder)
 - defense, 457
- Public corruption, 748–54
- Public indecencies
 - gangs, 784–92
 - homelessness, 773, 783
 - introduction, 770
 - vagrancy and loitering, 771
- Public order and morality, crimes against, 758
 - cruelty to animals, 813
 - disorderly conduct, 759–65
 - in Model Penal Code, 760–61, 767, 773, 802–3
 - obscenity, 806

- overreach of criminal law, 793
- public indecencies, 770
- riot, 757, 765–70
- Public policy
 - attempt and, 262
 - solicitation and, 302
 - vicarious liability and, 245
- Public welfare offenses, 186
- Puesan, Louis, 691
- Pulaski, Charles, 106
- Pump and dump, 737
- Punishment, 113
 - amount of, 98
 - ex post facto*, 22, 68
 - intent and, 161, 164
 - minorities and, 101
 - mitigating circumstance and, 318
 - proportionality and, 98
 - purpose of, 66–71, 74
 - race and, 101
 - severity of, 6
 - sex offender registration laws, 68
 - shaming punishment, 69, 77
 - status offenses, 103
 - threat of, 66
 - types of, 71
 - without trial, 66
 - See also* Cruel and unusual punishment; Death penalty; Sentencing
- Purposive standard, 165–70, 223
- Pursuit, 360–62

- Quality-of-life crimes, 770
 - gangs, 784–92
 - homelessness, 773, 783
 - vagrancy and loitering, 771

- Race
 - death penalty and, 97, 105
 - marijuana laws and, 104
 - punishment and, 101
 - self-defense and, 389
- Racial discrimination, strict scrutiny test and, 33
- Racketeer Influenced and Corrupt Organizations Act (RICO), 294
- Raich, Angel, 14, 16
- Rajaratnam, Raj, 751
- Ramirez (Dominican mother), 463
- Ramirez, J., 672
- Ramseur, James, 325–29

- Randall, Andre, 233
- Ransomware, 699
- Rao, Charles, 270
- Rape
 - accessory after the fact, 236–41
 - actus reus of modern rape, 569
 - common law, 550–52
 - death penalty for, 84, 97
 - mens rea, 570
 - punishment and sexual assault, 555
 - rape reform, 554–55
 - rape shield laws, 581–85
 - statutory rape, 34, 571–75
 - withdrawal of consent, 576–80
- Rape reform, 554–55
- Rape shield laws, 581
- Rape trauma syndrome, 555
- Rape victim, 556–60
- Rational basis test, 32, 34
- Raven (victim), 169, 171
- Reagan administration, 51
- Reagan, Ronald, 403
- Reasonable belief, 320, 323–30. *See also* Self-defense
- Reasonable doubt, 316
- Rebuttal, 316
- Receiving stolen property, 700–705
- Reception statute, 12
- Recidivism, 70, 80
- Reckless manslaughter, 345
- Recklessness, 174–80
 - vs. negligence, 180–83
 - vicarious liability and, 245
- Redondo, Andres, 674
- Reese, Demetrious, 703
- Reeves, Curtis, 390
- Reflex action, 127
- Regnier, J., 30
- Rehabilitation, 70, 73, 79
- Rehnquist, William, 51, 358
- Reider, Marc, 126
- Reid, Richard, 137
- Reinhardt, J., 296
- Reneau, Daniel Earl, 254
- Res ipsa loquitur*, 269
- Respondeat superior*, 245, 248
- Responsibility, 5
 - intent and, 164
 - personal, 216
 - of superior, 245–46, 248
- Responsive intervening acts, 196, 199
- Restoration, 71
- Result crimes, 118, 164

- Retreat, 320, 338–45. *See also* Self-defense
- Retribution, 70–71, 74
- Revenge porn, 699
- Reye, Billy, 300
- Reyes, Pacita, 529
- Rice (defendant), 378
- Richter, Geraldine, 456
- Rickard, 361
- RICO [Racketeer Influenced and Corrupt Organizations Act], 294
- Rights, constitutional. *See* Constitutional rights
- Right-wrong test, 399–402
- Rink, Ronald, 167
- Riot, 757
- Robbery, 711
- Roberts, John, 51, 193
- Robinson, J., 339–45
- Robinson, Thomas, 289
- Rockefeller drug laws, 99, 101
- Rockefeller, Nelson, 99
- Rockmore (robbery defendant), 715–17
- Rockwell International, 730
- Rocky Flats nuclear weapons plant, 730
- Rodriguez, Gabriel, 362
- Rodriquez, Daniel, 521
- Rogers, Wilbert, 206
- Rojas (gang member), 300
- Romano (defendant), 369
- Romero, Stacy, 297
- Roof, Dylan, 207
- Roosevelt, Franklin Delano, 38
- Rose, Henry, 193–94
- Rose, J., 181
- Rosenblatt, J., 709
- Ross, Sammy Joe, 284–86
- Rotten social background (RSB) defense, 457
- Routh, Eddie Ray, 396
- RSB (rotten social background) defense, 457
- Ruffin, Mark, 96
- Rule of legality, 22, 277
- Russell, Richard, 451
- Ryan D., 53
- Ryan, Danny, 305
- Ryan, George, 73
- Sabotage, 825
- SabreTech, 517
- Saechao, Cheng, 307
- Saeed, Ahmed Omar, 608
- Saephanh, Lou Tong, 307
- Salado, Teresa, 615
- Salin (defendant), 368
- Salvagno, Alexander, 731
- Salvagno, Raul, 731
- Same-sex relations, privacy and, 56
- Sanctions, intermediate, 72
- Sandusky, Jerry, 139
- Santec Corporation, 518–21
- Santiago Rodriguez, Luis Rafael, 435
- Sapp, Mickey, 175, 177–78
- Sarah S., 606
- Sarbanes-Oxley Act, 736
- Satz, J., 171
- Scalia, Antonin, 58, 88, 360, 791, 808
- Schacker, Robert, 386
- Schaeffer, Rebecca, 590
- Schnopps, George, 530
- Schnopps, Marylou, 530–31
- Schwartz, Terry, 131
- Scienter (guilty knowledge), 162
- Scott, Damien, 169
- Scott, Elaine, 169
- Scranton, Pennsylvania, landfill, 730
- Scruggs, Dwayne, 744
- Scrutiny, levels of, 32, 34
- Scull (forgery defendant co-conspirator), 711
- Search, unreasonable, 363
- Second Chance Act, 80
- Second-degree murder, 472, 495–99
- Securities fraud, 735, 737
- Sedition, 823–24
- Seizures, unreasonable, 354, 357, 363
- Seles, Monica, 590
- Self-defense, 57–62, 318–45
- battered spouse syndrome, 332–35
 - castle doctrine, 339, 345, 365, 387
 - components of, 320
 - force in, 365–66
 - imminence, 336
 - immunity provision, 388
 - in Model Penal Code, 320–21, 323, 325, 330
 - perfect, 339
 - race and, 389
 - reasonable belief, 323–30
 - resisting unlawful arrest, 364, 366
 - retreat, 320, 338–45
 - stand your ground laws, 338, 387–90
- See also* Arms, right to keep and to bear
- Self-fulfillment, 40
- Sentencing, 114
- appeals, 73
 - approaches to, 72
 - clemency, 73, 101

- concurrent sentences, 73
consecutive sentences, 73
death penalty. *See* Cruel and unusual punishment; Death penalty
determinate sentences, 72–73, 75, 79, 99
disparity in, 102
equal protection and, 68, 105
Ex Post Facto Clause and, 75
Federal Sentencing Guidelines, 75
good motive defense, 319
indeterminate sentences, 73, 79
judicial discretion, 67
mandatory, 73, 75, 98–103
nationality and, 81
plea bargaining, 67, 77
presumptive sentencing guidelines, 73
purpose of punishment and, 67
revolution in, 67
terms of years, 68
truth in sentencing, 67, 79
victims and, 67, 79
See also Cruel and unusual punishment; Death penalty; Punishment
- Sentencing Commission, 74
Sentencing grid, 74
Sentencing guidelines, 73, 79
Sentencing policies, 67
Sentencing Reform Act, 74
Sessions, Jeff, 17, 102
Sex discrimination. *See* Gender discrimination
Sex offender registration laws, 68
Sex offenders, freedom of speech and, 52–53
Sex trafficking, 805–6
Sexual assault, 555
Sexual freedom, 56
Sexually Violent Predator Act of 1994, 4
S.H., 583
Shaffer, Roberta, 323
Shakespeare, William, 684
Shaming punishments, 69, 77
Shapiro, Joe, 451
Shelley, Jason, 385
Sherer (battery defendant), 586
Sherman (entrancee), 448–50
Sherman Antitrust Act of 1890, 747
Sherron, Charlotte, 236–41
Sherron, George, 237–38, 240
Sherron, Xavier, 237–40
Shue, James, 614–15
Silverstein, Thomas, 213, 225, 227
Simmons, Christopher, 65, 88–94
Simple battery, 587
Simple robbery, 713
Simpson, O. J., 3
Simulation, 707
Singer, Professor, 317
Sixth Amendment, 74–77
SLA (Symbionese Liberation Army), 607
Slattery, Karen, 490–93
Slavery, 32, 66
Sleepwalking, 125
Smallwood, Dwight Ralph, 264–65
Smart, Elizabeth, 607
Smith, Shannon, 242
Snowden, Edward, 841, 843
Snow, Mary, 167–68
Snow, William, 167–68
Snyder, Al, 52
Snyder, Matthew, 52
Social host liability laws, 252
Social media, sex offenders and, 52–53
Social order, 4
Social stability, 22, 40
Sociological defenses, 457
Sodomy, privacy and, 56
Sognier, C.J., 704
Solicitation, 260, 795–96
 actus reus of, 302
 freedom of speech and, 302
 mens rea of, 302
 in Model Penal Code, 302, 305
 public policy and, 302
Son of Sam laws, 80
Sophophone, Sanexay, 515
Sorrells (entrancee), 447
Soto, James, 507
Sotomayor, Sonia, 362
Southwick, J., 236
Spanier, Graham, 139
Speech, freedom of, 40
 hate speech, 43
 limits to, 40
 overbreadth, 43
 See also First Amendment
Sports, 385, 391
Spring gun, 349–51
Squires (defendant), 368
Stability
 Constitution and, 22
 maintaining, 4
Stacy, C.J., 322
Stafford, George, 197
Stalking, 590
Stamp (robber), 507

- Standard of proof, 3
 Stand your ground laws, 338, 387–90
 Stanford, Kevin, 91
 State, crimes against, 820
 espionage, 827–28
 sabotage, 825
 sedition, 823–24
 terrorism, 829
 treason, 820–22
 State criminal codes, 11
 State terrorism statutes, 836–40
 Status offenses, 103, 128
 Statute of Labourers of 1349, 771
 Statutory clarity, 24–32
 Statutory rape, 34, 571–75
 Steelman, Monte, 188–91
 Stephen F., 583
 Stephen, James, 436
 Stephen, J. F., 366
 Stephens, Edwin, 367
 Stevens (husband), 470
 Stevens, John Paul, 24, 51, 88, 361, 786
 Stewart, Martha, 735
 Stewart, Potter, 42, 85, 103, 129
 Stinton (burglary defendant), 631
 Stock market fraud, 735, 738
 Stocks, Amy, 37
 Stogner, Marion, 24
 Stolen Valor Act, 681–82
 Stowell, Timothy, 126
 Strict liability, 186–91, 243
 Strict scrutiny test, 33
 Strohmeyer, Jeremy, 147
 Strong (defendant), 183
 Subhan (Pakistani defendant), 439
 Subjective test for entrapment, 448
 Subject matter offenses, 7
 Substantial capacity test, 404–5
 Substantial step test, for attempt, 269
 Substantive criminal law, 5
 Suicide, assisted, 487–88
 Summers, Terry, 765
 Supremacy Clause, 13
 Sureño gangs, 301
 Suspects, constitutional rights of, 353
 Sutherland, Edwin H., 728
 Swanson-Birabent, Holly, 222
 Symbionese Liberation Army (SLA), 457, 607
 Sysoumphone (co-felon), 515
- Tampa Bay Times*, 388
 Tasers, 59
- Teen party ordinances, 252
 Terms of years, sentencing and, 68
 Tessmer, John, 88
 Theft
 computer crime, 691
 consolidation of theft offenses, 683
 identity theft, 684–89
 Thiel, Werner, 823
 Third Amendment, penumbras and, 54
 Thirteenth Amendment, 32
 Thomas, Bernard, 229–31
 Thomas, Clarence, 369
 Thomas, J., 792
 Thomas, Robert, 511
 Thought, freedom of, 119
 Threats, 41
 Three Strikes and You're Out law, 98
 Time Warner computer crime case, 691
 Tirrell, Albert, 125
 Tomaino, Peter, 251
 Torpy, J., 715
 Torres, Daniel, 176
 Tort, 3
 Torture, 82, 494, 588, 841
 Trafficking of women, 805–6
 Traffic tickets, responsibility for, 251
 Travel Act of 1961, 740–41
 Treason, 170, 820–22
 Trespass, 639–42
 Trespassory taking, 661–62
 Trial, right to, 74–77
 Trieweiler, J., 27
 True man, 339
 Truesdale, Kevin, 362
 True threat, 41
 Trump, Donald, 17
 Truth in sentencing, 67, 79
 Tsarnaev, Dzhokhar, 235
 Tsarnaev, Tamerlan, 235
 Turnage, C.J., 30
 Turner, J., 651
 Tyler, Jared, 254
 Tyson, Dr., 334
 Tyson, Mike, 570
- Ulvinen, Helen, 221
 Umble, Don, 222
 Unconsciousness, state of, 121
 Unequivocality test, for attempt, 269
 Unger, Francis, 435
 Unification Church, 369
 Unilateral approach to conspiracy, 291

- Unlawful arrest, resisting, 364, 366
Unlawful assembly, 765
Upper Big Branch Mine, West Virginia, explosion, 735
Upshaw (inciter of riot defendant), 767
Upskirting, 56
Urban survivor defense, 457
Uttering and forgery, 706–8
- Vagabonds Act of 1530, 771
Vagrancy, 771
Vagueness, void for, 25–32
Valdez, Elasio, 480
Valenzuela, Gabriel, 297
Valle, Gilberto, 119
ValuJet Flight 592, 517
Vandalism, 625
Van Dyke, Sheryl, 433
Varrio Mexicanos Locos (VML), 301
Varrio Sureño Town Gang, 784
Velazquez (defendant), 204
Vicarious liability. See Liability, vicarious
Victim and Witness Protection Act of 1982, 226
Victim impact statements, 80
Victimless crimes, 758
Victims, sentencing and, 67, 79
Victims of Crime Act (VOCA), 80
Victims of trafficking and violence, 608, 615
Victims' rights, 79
Vietnam conflict, 319
Villafana, Lauren, 161, 178
Villafana, Richard, 178
Violations, 6, 186
Violence, incitement to, 41
Violent Crime Control and Law Enforcement Act of 1994, 79
Violent video games, 808–11
Virginia Military Institute, 33
Virginia Polytechnic Institute computer crime case, 691
VML (Varrio Mexicanos Locos), 301
VOCA (Victims of Crime Act), 80
Void for vagueness, 25–32
Voluntary intoxication, 416–17
Voluntary manslaughter, 472–73, 522–31
Voyeurism, 56
- Wachtler, C.J., 325
Waksal, Sam, 735
Wanrow, Yvonne, 329–30
Ward (defendant), 156
- Warren, Earl, 83, 448
Warren, Samuel D., 53
Watson, Rufus, 528
Wayne Burgarello, 390
Weapons of mass destruction, 831–32
Weidman, Brent, 518–20
Weisberg, J., 518
Welch, Charles, 367
Wells-Gorshen rule, 415
Wesler, William, 329
Westboro Baptist Church, 52
Westbrook, Nicole M., 32
Wharton's rule, 293
Wheel conspiracy, 291
Whichard, J., 122
Whippings, 66
White, Byron, 43, 51, 56, 84, 129, 133, 355, 470
White-collar crime
 antitrust violations, 747
 environmental crimes, 729–32
 health care fraud, 740, 742
 introduction, 728
 mail and wire fraud, 738
 money laundering, 728, 743–46
 occupational health and safety, 733
 public corruption, 748–54
 securities fraud, 735, 737
 Travel Act of 1961, 740
White, Dan, 415
White, Niya, 589
White, Officer, 362
Willful blindness, 172
Williams (rape case appellant), 570
Williams, Agnes, 123
Williams, Connie, 122–23
Williams, Jacqueline Annette, 242
Williams, Jonnie, 749
Williford (defendant), 189
Willingham, Cameron Todd, 655–56
Wilson, Christopher, 501–4
Wilson, James Q., 770
Winans, R. Foster, 738
Winner, Reality Leigh, 828
Wire fraud, 738–39
Withdrawal in good faith, 339
Woburn, Massachusetts, water supply pollution, 730
Women
 domestic violence and, 337
 equal protection and, 32
 punishment and, 101
 sentencing and, 105
 See also Gender discrimination

- Wood, Joseph, 254
Woodworth, George, 106
Worden, Christopher, 156
Wright, J., 143
Wright, J. Skelly, 136
Wright, Leslie, 355
- XYY chromosome defense, 456
- Yates, Andrea, 396
Year-and-a-day rule, 206
You Decide
 accessory after the fact, 242
 accomplice liability, 223, 228
 attempt, 286
 burglary/trespass/arson/mischief, 639, 649, 654
 concurrence, 194
 constitutional limitations, 55
 crimes against property, 705, 711
 criminal sexual conduct/assault and battery/kidnapping/false imprisonment, 569, 580, 583, 592, 606
- defense of home, 352
dual sovereignty, 8–9
equal protection, 39
excuses, 414, 432, 447
homicide, 474, 499, 531, 541
intent, 169, 173, 185, 191
involuntary acts, 127
keep and bear arms, right to, 60
necessity, 378
omission, 147
parental responsibility laws, 252
plea bargaining, 77
possession, 157
privacy, right to, 54
self-defense, 323, 336
sentencing, 81
status offenses, 135
strict liability offenses, 191
Youk, Thomas, 488
Young (card player), 483
Young, J., 229–31
- Zenger, John Peter, 319
Zimmerman, George, 390

ABOUT THE AUTHOR

Matthew Lippman is Professor Emeritus in the Department of Criminology, Law, and Justice at the University of Illinois Chicago (UIC) and has taught criminal law and criminal procedure for more than 30 years. He has also taught courses on civil liberties, law and society, and terrorism and has taught international criminal law at UIC School of Law. He earned a doctorate in political science from Northwestern University, earned a master of laws from Harvard Law School, and is a member of the Pennsylvania Bar. He has been voted by the graduating seniors at UIC to receive the Silver Circle Award for outstanding teaching on six separate occasions and has also received the UIC Flame Award from the University of Illinois Alumni Association, as well as the Excellence in Teaching Award, the Teaching Recognition (Portfolio) Award, the HOPE Award, and the Honors College Fellow of the Year Award. The university chapter of Alpha Phi Sigma, the criminal justice honors society, named him Criminal Justice Professor of the Year on three occasions. In 2008, he was recognized as a College of Liberal Arts and Sciences Master Teacher. He was honored by the College of Liberal Arts and Sciences, which named him Commencement Marshal at the May 2012 graduation. Professor Lippman is also recognized in *Who's Who Among America's Teachers*.

Professor Lippman is author of 100 articles and author or coauthor of six books. These publications focus on criminal law and criminal procedure, international human rights, and comparative law. He also is author of five other SAGE volumes: *Criminal Procedure* (4th ed., 2020), *Essential Criminal Law* (3rd ed., 2020), *Law and Society* (3rd ed., 2021), *Criminal Evidence* (2016), and *Striking the Balance: Debating Criminal Justice and Law* (2018). In 2018, he received the Cornerstone Author Award from SAGE Publishing. His work is cited in hundreds of academic publications and by domestic and international courts and organizations. He also has served on legal teams appearing before the International Court of Justice in The Hague and submitting briefs to the U.S. Supreme Court, has testified as an expert witness on international law before numerous state and federal courts, and has consulted with both private organizations and branches of the U.S. government. Professor Lippman regularly appears as a radio and television commentator and is frequently quoted in leading newspapers. He has served in every major administrative position at UIC in the Department of Criminology, Law, and Justice including Department Head, Director of Undergraduate Studies, and Director of Graduate Studies.

