Criminal Law

WEST ACADEMIC PUBLISHING'S LAW SCHOOL ADVISORY BOARD

BLACK LETTER OUTLINES

Criminal Law

THIRD EDITION

by Joshua Dressler
Distinguished University Professor
Frank R. Strong Chair in Law
Michael E. Moritz College of Law
The Ohio State University

BLACK LETTER SERIES®

WEST ACADEMIC PUBLISHING

Mat #41712648

444 Cedar Street, Suite 700
St. Paul, MN 55101
1-877-888-1330

Printed in the United States of America

ISBN: 978-1-63459-162-1

To Lucy Belle

To Maya Shoshana

To Gideon Jacob

Preface

This "Black Letter" is designed to help a law student recognize and understand the basic principles and issues of law covered in a law school course. It can be used both as a study aid when preparing for classes and as a review of the subject matter when studying for an examination.

Each "Black Letter" is written by experienced law school teachers who are recognized national authorities on the subject covered.

The law is succinctly stated by the authors of this "Black Letter." In addition, the exceptions to the rules are stated in the text. The rules and exceptions have purposely been condensed to facilitate quick and easy recollection. For an in-depth study of a point of law, citations to major student texts are given.

If the subject covered by this text is a code or code-related course, the code section or rule is set forth and discussed wherever applicable.

FORMAT

The format of this "Black Letter" is specially designed for review. (1) **Text.** First, it is recommended that the entire text be studied and, if deemed necessary, supplemented by the student texts cited. (2) **Capsule Summary.** The Capsule Summary is an abbreviated review of the subject matter which can be used both before and after studying the main body of the text. The headings in the Capsule Summary follow the main text of the "Black Letter." (3) **Table of Contents.** The Table of Contents is in outline form to help you organize the details of the subject and the Summary of Contents gives you a final overview of the materials. (4) **Sample Examination.** The Sample Examinations in Appendix A give you the opportunity to test yourself with the type of questions asked on an exam and compare your answer with a model answer.

In addition, a number of other features are included to help you understand the subject matter and prepare for examinations:

Perspective: In this feature, the authors discuss their approach to the topic, the approach used in preparing the materials, and any tips on studying for and writing examinations.

Analysis: This feature, at the beginning of each section, is designed to give a quick summary of a particular section to help you recall the subject matter and to help you determine which areas need the most extensive review.

Examples: This feature is designed to illustrate, through fact situations, the law just stated. This, we believe, should help you analytically approach a question on the examination.

Glossary: This feature is designed to refamiliarize you with the meaning of a particular legal term. We believe that the recognition of words of art used in an examination helps you to better analyze the question. In addition, when writing an examination you should know the precise definition of a word of art you intend to use.

We believe that the materials in this "Black Letter" will facilitate your study of a law school course and assure success in writing examinations not only for the course but for the bar examination. We wish you success.

The Publisher

2015

Summary of Contents

Table of Contents

Capsule Summary

PART ONE: INTRODUCTORY PRINCIPLES

I. CRIMINAL LAW OVERVIEW

A. "Criminal" Versus "Civil"

1. The Essence of the Criminal Law

What distinguishes a criminal from a civil sanction and all that distinguishes it, is the judgment of community condemnation that accompanies and justifies its imposition. A "crime" is (or, at least should be) limited to conduct that, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.

B. Sources of the Criminal Law

1. Common Law

"Common law" is judge-made law. For the most part, British common law became American common law.

2. Statutes

Today, all criminal lawyers in this country turn first to a book—often characterized as a "penal code"—that contains legislatively-drafted definitions of crimes, defenses to crimes, and other relevant doctrines of criminal law, which apply in that lawyer's jurisdiction.

3. Model Penal Code

The Model Penal Code (typically abbreviated as "MPC") is a code created in the 1950s and adopted in 1962 by the American Law Institute, a prestigious organization composed of top judges, scholars, and lawyers. Portions of the MPC have become law in many states.

C. Limits on the Criminal Law

State and federal legislation is subject to the strictures of the United States Constitution (and, with state laws, the constitution of the relevant state). Some of these strictures are discussed throughout this Outline.

D. Burden of Proof: Basics

A basic American principle of criminal law is that a defendant is presumed innocent. The Due Process Clauses of the Fifth and Fourteenth Amendments of the Constitution require that, to convict a defendant, the government must persuade the factfinder beyond a reasonable doubt of every fact necessary to constitute the crime charged.

E. Judge Versus Jury

1. Constitutional Law

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." Despite the phrase "in *all* criminal prosecutions," the Supreme Court has generally limited the right to a jury trial to prosecutions of crimes for which the maximum potential punishment exceeds incarceration of six months.

2. Jury Nullification

Jury nullification occurs when the jury decides that the prosecution has proven its case beyond a reasonable doubt, but for reasons of conscience it disregards the facts and/or the law and acquits the defendant. Jurors have the *power* to nullify (because the Double Jeopardy Clause of the United States Constitution forbids reprosecution of the same offense after an acquittal), but not the *right* to do so. Therefore, a defendant is not entitled to have the jury instructed that it may nullify the law.

II. "TOOLS" OF THE CRIMINAL LAW

A. Theories of Punishment

1. Different Theories

Two broad theories of punishment exist: *utilitarianism* and *retribution.*

2. Principles of Utilitarianism

a. Augmenting Happiness

Utilitarianism holds that the general object of all laws is to augment the total happiness of the community by excluding, as much as possible, everything that subtracts from that happiness, *i.e.*, everything that causes "mischief" (pain).

b. Role of Punishment

Both crime and punishment are bad because they both result in pain to individuals and to society as a whole. Therefore, the pain of punishment is undesirable unless its infliction is likely to prevent a greater amount of pain in the form of future crime.

c. Forms of Utilitarianism

i. General Deterrence

A person is punished in order to send a message to others (the general society or, at least, persons who might be contemplating criminal conduct) that crime does not pay.

ii. Specific Deterrence

D is punished in order to deter *D* from future criminal activity. This is done in either of two ways: by *incapacitation* (incarceration of *D* prevents her from committing additional crimes in the general community for the duration of her

sentence); and/or by *intimidation* (*D*'s punishment serves as a painful reminder, so that upon release *D* will be deterred from future criminal conduct).

iii. Rehabilitation

Advocates of this form of utilitarianism believe that the criminal law can prevent future crime by reforming an individual, by providing her with employment skills, psychological aid, etc., so that she will not want or need to commit offenses in the future.

3. Principles of Retribution

a. Just Deserts

Punishment of a wrongdoer is justified as a deserved response to wrongdoing. Retributivists punish *because* of the wrongdoing—the criminal gets his just deserts—regardless of whether such punishment will deter future crime.

b. Rationale

Wrongdoing creates a moral disequilibrium in society. The wrongdoer obtains the benefits of the law (namely, that other people have respected *his* rights), even as he does not accept the law's burdens (respecting others' rights). Proportional punishment of the wrongdoer—"paying his debt"—brings him back into moral equilibrium. Another justification is that both crime and punishment are forms of communication: one who commits a crime sends an implicit message to the victim that the wrongdoer's rights are more important than others' rights; punishment is a symbolic way of showing the criminal—and reaffirming for victims—that this message was wrong. Punishment proportional to the offense defeats the offender: it brings him down to his proper place in relation to others.

B. Proportionality of Punishment

1. General Principle

A general principle of criminal law is that punishment should be proportional to the offense committed.

2. Utilitarian Meaning

Punishment is proportional if it involves the infliction of no more pain than necessary to fulfill the law's deterrent goal of reducing a greater amount of crime.

3. Retributive Meaning

Punishment should be proportional to the harm caused on the present occasion, taking into consideration the actor's degree of culpability for causing the harm.

4. Constitutional Law

The Eighth Amendment Cruel and Unusual Punishment Clause prohibits grossly disproportional punishment.

a. Death Penalty Cases

The Supreme Court has held that death is grossly disproportional punishment for the crime of rape, because the latter offense does not involve the taking of human life. This is consistent with retributive proportionality principles.

b. Imprisonment Cases

According to the Supreme Court's most recent pronouncement, there is only a very "narrow proportionality principle" outside the context of the death penalty. The legislature (not the judiciary) has primary authority in setting punishments. No non-capital incarcerative punishment will be declared unconstitutional unless there are objective grounds—not simply a judge's own subjective views of the propriety of the punishment—for determining that the punishment is grossly disproportionate to the crime.

C. Legality

1. Requirement of Previously Defined Conduct

a. General Principle

The so-called "principle of legality" is that there can be no crime without (pre-existent) law, no punishment without (pre-existent) law.

b. Constitutional Law

The principle of legality not only is a common law doctrine, but has deep constitutional roots. *Legislatures* are prohibited by the Ex Post Facto Clause of the United States Constitution from enacting laws that would punish conduct that was lawful at the time of its commission, or that increases the punishment for an act committed before the law took effect. In turn, *courts* are prohibited from enlarging the scope of criminal statutes by the Due Process Clause.

2. Fair Notice

A corollary of the legality principle is that a person may not be punished for an offense unless the statute is sufficiently clear that a person of ordinary intelligence can understand its meaning. This is a fundamental common law concept, with constitutional roots as well in the Due Process Clause.

3. Nondiscriminatory Enforcement

Another corollary of the legality principle is that a criminal statute should not be so broadly worded that it is susceptible to discriminatory enforcement by law enforcement officers, thereby unduly expanding government power.

D. Burden of Proof

1. Burden of Production

This burden relates to the question of which party—the defendant or the government—has the obligation to first introduce evidence on a given issue. The party with this obligation, who fails to satisfy this burden, loses on the issue. In general, the government has the burden of production regarding *elements of a crime*; the defendant carries the burden as to *affirmative defenses*.

2. Burden of Persuasion

Once the burden of production has been satisfied, the next question becomes: who has the burden of persuading the factfinder on the particular issue? The party with the burden of *production* does not necessarily have the burden of *persuasion.*

a. Degree of Burden

i. Elements of a Crime

The Due Process Clause of the Constitution requires that the government carry the burden of persuasion, beyond a reasonable doubt, as to "every *fact* necessary to constitute the crime charged." The Court has limited the word "fact"—and, thus, the prosecutor's constitutional obligation to carry the burden of production beyond a reasonable doubt—to elements of an offense, and not to defenses and mitigating factors.

ii. Defenses to Crimes

A legislature is free to place the burden of persuasion regarding a criminal law defense on either party—the defendant or government—and to set the burden very high (proof beyond a reasonable doubt), somewhat high (clear and convincing evidence) or low (proof by preponderance of the evidence).

PART TWO: *ACTUS REUS*

I. *ACTUS REUS*: OVERVIEW

A. Definition

The "*actus reus*" of an offense is the physical, or external, component of a crime that society does not want to occur.

B. Two Elements

The *actus reus* of a crime consists of two components, both of which must be proved by the prosecutor beyond a reasonable doubt.

1. Voluntary Act or Legal Omission

Generally speaking, there can be no crime in the absence of conduct. But, only a certain type of conduct qualifies, namely, conduct that includes a

voluntary act. In rare circumstances, a person may be prosecuted because of what he or she did *not* do—an absence of conduct. An "omission" substitutes for a voluntary act when the defendant has a legal duty to act.

2. Social Harm

People are not punished for conduct (or omissions), but rather for conduct (or omissions) that result in "social harm."

II. VOLUNTARY ACT

A. General Rule

A person is not ordinarily guilty of a criminal offense unless his conduct includes a voluntary act.

1. Common Law Definition of Voluntary Act

A "voluntary act" is a willed muscular contraction or bodily movement by the actor. An act is "willed" if the bodily movement was controlled by the mind of the actor.

2. Model Penal Code

The MPC does not define "voluntary act." It provides examples of involuntary actions: a reflex or convulsion; bodily movement while unconscious or asleep; conduct during hypnosis or as a result of hypnotic suggestion; and/or "a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual."

3. Constitutional Law

The Supreme Court has never expressly held that punishment of an involuntary actor is unconstitutional. However, it *has* invalidated statutes that criminalize a "status" or "condition" (such as being a drug addict), rather than conduct.

4. Important Study Point

To be guilty of an offense, it is sufficient that the person's conduct *included* a voluntary act. *It is not necessary that all aspects of his conduct be voluntary.*

B. Rationale of Voluntary Act Requirement

1. Utilitarian

A person who acts involuntarily cannot be deterred. Therefore, it is useless to punish the involuntary actor. It results in pain without the benefit of crime reduction.

2. Retribution

A more persuasive justification for the voluntary act requirement is that blame and punishment presuppose free will: a person does not deserve to be punished unless she *chooses* to put her bad thoughts into action.

III. OMISSIONS

A. General Rule

Ordinarily, a person is not guilty of a crime for failing to act, even if such failure permits harm to occur to another, and even if the person could act at no risk to personal safety.

B. Rationale for the General Rule

1. Proving the Omitter's State of Mind

Criminal conduct requires a guilty state of mind (*mens rea*). It is often difficult to determine the state of mind of one who fails to act.

2. Line-Drawing Problems

Difficult line-drawing problems—which omitters should be prosecuted?—arise in omission cases.

3. Promoting Individual Liberty

In a society such as ours, premised on individual liberties and limited government, the criminal law should be used to prevent persons from causing positive harm to others, but it should not be used to coerce people to act to benefit others.

C. Exceptions to the General Rule

Notwithstanding the general rule, a person has a legal duty to act in limited circumstances, if he is physically capable of doing so.

1. Crimes of Omission: Statutory Duty

Some statutes expressly require a person to perform specified acts. Failure to perform those acts, by definition, constitutes an offense. Such an offense may be characterized as a "crime of omission."

2. Crimes of Commission

The criminal law sometimes permits prosecution for a crime of commission (an offense that, by definition, appears to require proof of conduct, rather than an omission), although the basis of the prosecution is an omission. Thus, we have a case of what might be characterized as commission-by-omission.

a. Duty by Status

A person has a common law duty to protect another with whom he has a special status relationship, typically, one based on dependency or interdependency, such as parent-to-child, spouse-to-spouse, and master-to-servant.

b. Duty by Contract

A person may have an express contract to come to the aid of another, or such a contract may be implied-in-law.

c. Duty by Voluntary Assumption

One who voluntarily assumes the care of another must continue to assist if a subsequent omission would place the victim in a worse position than if the Good Samaritan had not assumed care at all.

d. Duty by Risk Creation

One who creates a risk of harm to another must thereafter act to prevent subsequent harm.

IV. SOCIAL HARM

A. Definition

"Social harm" may be defined as the destruction of, injury to, or endangerment of, some socially valuable interest.

B. Identifying the Social Harm

You can determine the "social harm" of an offense by looking at the definition of the crime and identifying the words in that describe the external conduct that constitutes the crime.

C. Breaking Down the Social Harm into Categories

It is sometimes essential for a lawyer (especially in jurisdictions that follow the Model Penal Code) to be able to look at the definition of a crime, more specifically the *actus reus* portion, and divide up the "social harm" elements into one or more of the following three categories.

1. "Result" Elements (or Crimes)

Some crimes prohibit a specific result, such as the death of another human being.

2. "Conduct" Elements (or Crimes)

Some crimes prohibit specific conduct, whether or not tangible harm results thereby, such as offenses that prohibit drunk driving.

3. "Attendant Circumstance" Elements

A "result" or "conduct" is not an offense unless certain "attendant circumstances" exist. An "attendant circumstance" is a fact that exists at the time of the actor's conduct, or at the time of a particular result, which is required to be proven in the definition of the offense.

PART THREE: *MENS REA*

I. *MENS REA*: GENERAL PRINCIPLES

A. Meaning of "*Mens Rea*"

1. Broad ("Culpability") Meaning

A person has acted with "*mens rea*" in the broad sense of the term if she committed the *actus reus* of an offense with a "vicious will," "evil mind," or "morally blameworthy" or "culpable" state of mind.

2. Narrow ("Elemental") Meaning

"*Mens rea*" exists in the narrow sense of the term if, but only if, a person commits the *actus reus* of an offense with the particular mental state set out expressly in the definition of that offense. This may be called the "elemental" definition of *mens rea.*

B. Rationale of the *Mens Rea* Requirement

1. Utilitarian Argument

It is frequently asserted that a person who commits the *actus reus* of an offense without a *mens rea* is not dangerous, could not have been deterred, and is not in need of reform. Therefore, her punishment would be counter-utilitarian. (There is a competing utilitarian argument—one that might suggest that sometimes a utilitarian would support abandoning the *mens rea* requirement—set out in the Main Outline.)

2. Retributive Argument

The *mens rea* requirement is solidly supported by the retributive principle of just deserts. A person who commits the *actus reus* of an offense in a morally innocent manner, *i.e.*, accidentally, does not deserve to be punished, as she did not choose to act unlawfully.

II. COMMON LAW

A. "Intentionally"

1. Definition

A person commits the social harm of an offense "intentionally" if: (1) it was her conscious object to cause the result; or (2) if she knew that the result was virtually certain to occur because of her conduct.

2. Transferred Intent Doctrine

Courts frequently speak of a "transferred intent" doctrine: A person acts "intentionally" as the term is defined above, if the result of her conduct differs from that which she desired only in respect to the identity of the victim.

B. "Knowledge" or "Knowingly"

1. Definition

Some offenses require proof that the actor had knowledge of an attendant circumstance. At common law, a person acts "knowingly" regarding an existing fact (an "attendant circumstance") if she either: (1) is aware of the fact; (2) correctly believes that the fact exists; or (3) suspects that the fact exists and purposely avoids learning if her suspicion is correct. The latter form of "knowledge" is sometimes called "wilful blindness."

C. Risk-Taking: "Recklessness" and "Criminal Negligence"

1. Overview

Risk-taking is properly divisible into various types: justifiable risk-taking; unjustifiable risk-taking that may properly result in tort damages; and unjustifiable risk-taking that may also result in criminal punishment. The latter form of risk-taking may be divided into categories: "negligent" risk-taking and "reckless" risk-taking.

2. Unjustified Risk-Taking

In order to determine whether risk-taking is justifiable or not, one must look at three factors: the *gravity of harm* that a reasonable person would foresee might occur as the result of the risk-taking conduct; the *probability* that this harm will occur; and the *reason* for the proposed conduct, *i.e.*, the benefit to the individual or society of taking the risk. A risk is unjustifiable if the gravity of the foreseeable harm, multiplied by the probability of its occurrence, outweighs the foreseeable benefit from the conduct.

3. "Criminal Negligence"

A person acts in a "criminally negligent" manner if she should be aware that her conduct creates a substantial and unjustifiable risk of social harm. Synonyms for "criminal negligence," include "gross negligence" and "culpable negligence."

4. "Recklessness"

a. Holmes's View

Oliver Wendell Holmes, Jr., believed that a person acts "recklessly" if she should be aware that she is taking a *very* substantial and unjustifiable risk. This is simply a heightened version of "criminal negligence." Notice, under this view: "civil negligence" involves unjustifiable risk-taking; "criminal negligence" is *substantial* and unjustifiable risk-taking; and "recklessness" (as defined here) is *very* substantial and unjustifiable risk-taking.

b. Modern Definition

Most courts now provide that a person acts "recklessly" if she *consciously* disregards a substantial and unjustifiable risk that her conduct will cause the social harm of the offense. Under this definition, "recklessness" differs from "criminal negligence" in that it

requires that the actor subjectively be aware of the substantial and unjustifiable risk, whereas the negligent actor is unaware of the risk, but should be.

D. "Malice"

A person acts with "malice" if she intentionally or recklessly causes the social harm of an offense, as the latter *mens rea* terms are defined above. There is a special and different definition in the context of murder, discussed later.

E. "Specific Intent" and "General Intent"

The common law distinguishes between "general intent" and "specific intent" crimes. The distinction is critical, because some defenses apply only, or more broadly, in the case of so-called "specific intent" offenses.

1. "Specific Intent" Offenses

In most cases, a "specific intent" offense is one that *explicitly* contains one of the following *mens rea* elements in its definition: (1) the intent to commit some act over and beyond the *actus reus* of the offense; (2) a special motive for committing the *actus reus* of the offense; or (3) awareness of a particular attendant circumstance.

2. "General Intent" Offenses

Any offense that requires proof of a culpable mental state, but which does not contain a specific intent, is a "general intent" offense. Sometimes, such an offense will have no explicit *mens rea* term in the definition of the offense; it is enough that the defendant committed the *actus reus* with *any* culpable state of mind.

F. Statutory Construction

A frequent issue in criminal law litigation is whether a *mens rea* term in the definition of an offense applies to all or only some of the *actus reus* elements in the definition of the crime. In the absence of explicit rules, courts have struggled to interpret modern statutes.

1. Common Law Interpretive Rules of Thumb

a. Legislative Intent

The ultimate issue for any court today—*always*—is to determine what the legislature intended. A court will try to resolve interpretive problems by ascertaining the intention of the drafters of the law, sometimes by looking through legislative history. Often, however, evidence regarding legislative intent is non-existent or ambiguous, so courts must look elsewhere.

b. Position of the *Mens Rea* Term in Definition of Offense

Courts often look at the placement of the *mens rea* term in the definition of the offense, in order to ascertain legislative intent. See the Main Outline for a useful example.

c. Punctuation

Sometimes punctuation is relied upon to determine that a phrase set off by commas is independent of the language that precedes or follows it. See the Main Outline for a useful example.

d. Attendant Circumstances

Courts sometimes assume that, absent evidence to the contrary, *mens rea* terms in the definitions of offenses do *not* apply to "attendant circumstance" elements of the crime.

III. MODEL PENAL CODE

A. Section 2.02, Subsection 1

1. Language

In general, "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each material element of the offense."

2. Significance of Subsection

a. Role of *Mens Rea*

In general, the MPC requires proof of *mens rea.* More significantly, it requires proof of some particular *mens rea*—purpose, knowledge, recklessness, or negligence—as to *each* material element of the offense. This contrasts with the common law, where there might be a *mens rea* requirement as to one element but no *mens rea* required as to other elements. In other words, with the MPC, *each actus reus* element should be "covered" by some *mens rea* requirement. No elements are left naked!

B. Culpability Terms Defined

1. Purposely

The common law term "intentionally" is not used in the Model Penal Code. Instead, the MPC subdivides "intent" into its two alternative components, and calls them "purposely" and "knowingly." A person causes a result "purposely" if it is her conscious object to cause the result.

2. Knowingly

a. Results

A person "knowingly" causes a result if she is aware that the result is "practically certain" to occur from her conduct.

b. Attendant Circumstances

A person acts "knowingly" as to an attendant circumstance if he is aware that the circumstance exists, or if he is aware "of a high probability of its existence, unless he actually believes that it does not exist." The latter provision is the Code version of the "wilful blindness" doctrine discussed earlier.

3. Recklessly

a. Basic Definition

A person is said to have acted recklessly if "he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct."

b. Standard for Evaluating Conduct

The Code provides, basically, that the standard discussed earlier—measuring the gravity of foreseeable harm, the probability of its occurrence, and the reasons for taking the risk—should be applied. One is reckless when the risk-taking "involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."

4. Negligently

A person acts negligently when he *should be aware* of a "substantial and unjustifiable risk." This is a risk that constitutes "a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." The critical difference between recklessness and negligence under the Code is that in the former case, the actor is consciously aware of the substantial and unjustifiable risk, but proceeds anyway; in the case of negligence, the actor is *not* aware of the risk, but *should* be.

C. Interpretative Rules

1. Default Position

The MPC requires some *mens rea* term for each element of an offense (§ 2.05 aside). If the statute defining an offense is silent regarding the issue of *mens rea* as to one or more of the *actus reus* elements, the Code provides that "such element is established if a person acts purposely, knowingly, or recklessly with respect thereto." In essence, you fill in the blank with "purposely, knowingly, or recklessly."

2. When Just One *Mens Rea* Term Is Mentioned

If the definition of a MPC statute only sets out a single *mens rea* element in the definition of the offense, that *mens rea* term applies to *every* material element of the offense, *unless* a contrary legislative intent "plainly appears."

IV. STRICT LIABILITY

A. Nature of a Strict Liability Offense

An offense is "strict liability" in nature if commission of the *actus reus* of the offense, without proof of a *mens rea*, is sufficient to convict the actor.

B. Public Welfare Offenses

Strict liability most often applies in relation to "public welfare" offenses.

1. Characteristics of Most Public Welfare Offenses

a. Nature of the Conduct

Such offenses typically involve *malum prohibitum* conduct, *i.e.*, conduct that is wrongful only because it is prohibited (*e.g.*, motor vehicle laws), as distinguished from *malum in se* conduct, *i.e.*, inherently wrongful conduct (*e.g.*, murder).

b. Punishment

The penalty for violation of a public welfare offense is usually minor, such as a monetary fine or a very short jail sentence.

c. Degree of Social Danger

A single violation of a public welfare offense often threatens the safety of many persons, *e.g.*, transportation of explosives on a highway not designated for such use.

C. Non-Public Welfare Offenses

On rare occasion, *non*-public welfare offenses are considered strict liability in nature. Statutory rape is the most common example of such an offense.

D. Constitutionality of Strict Liability Offenses

Strict-liability offenses are not *per se* unconstitutional. Nonetheless, there is a strong presumption against strict liability as to offenses that have their roots in the common law. In such circumstances, a court will not assume (absent evidence to the contrary) that the legislature intended to abandon the common law *mens rea* requirement, even if the statute is silent regarding this element.

PART FOUR: *MENS REA* AND MISTAKES OF FACT OR LAW

I. MISTAKE OF FACT

A. Common Law

1. Specific-Intent Offenses

A defendant is not guilty of a specific-intent crime if her mistake of fact negates the specific-intent element of the offense. Even an unreasonable mistake of fact—a mistake that a reasonable person would *not* make—will exculpate the actor if the mistake negates the *mens rea* required for the offense.

2. General-Intent Offenses

a. Ordinary Rule

A defendant is not guilty of a general-intent offense if her mistake of fact was reasonable. An *unreasonable* mistake of fact does *not* exculpate.

b. Exception: "Moral Wrong" Doctrine

Although the principle stated above is the general rule, on rare occasion a court will convict a defendant of an offense, although her mistake of fact was reasonable, if her conduct violates the "moral wrong" doctrine. This doctrine provides that there should be no exculpation for a mistake where, if the facts had been as the actor believed them to be, her conduct would be immoral, albeit non-criminal. By knowingly committing a morally wrong act, an actor assumes the risk that the facts are not as she believed them to be, *i.e.*, that her actions are not just morally wrong, but also legally wrong. See the Example in the Main Outline.

c. Alternative Exception: "Legal Wrong" Doctrine

Occasionally, a court will convict a defendant of an offense, although her mistake of fact was reasonable, if her conduct violates the "legal wrong" doctrine. This rule substitutes the word "illegal" for "immoral" in the description of the moral-wrong doctrine, but is otherwise applied in the same manner. Thus, a person is guilty of criminal offense X, despite a reasonable mistake of fact, if she would be guilty of a different, *albeit lesser*, crime Y, if the factual situation were as she supposed. See the Example in the Main Outline.

3. Strict-Liability Offenses

A mistake of fact, whether reasonable or unreasonable, is never a defense to a strict-liability offense. This rule is logical: a strict-liability offense is one that requires no proof of *mens rea.* Therefore, there is no *mens rea* to negate. A defendant's mistake of fact is legally irrelevant.

B. Model Penal Code

1. General Rule

Subject to one exception noted below, a mistake of fact is a defense to a crime if the mistake negates a mental state element required in the definition of the offense. The Code dispenses with the common law distinction between "general intent" and "specific intent" offenses: the mistake-of-fact rule applies to all offenses in the same manner. Either the defendant had the required *mens rea* set out in the definition of the offense or she didn't.

2. Exception to the General Rule

In a variation on the common law legal-wrong doctrine, the defense of mistake-of-fact is inapplicable if the defendant would be guilty of a lesser offense had the facts been as she believed them to be. However, under such circumstances—unlike the common law—the defendant will be punished at the level of the lesser, rather than the greater, offense.

II. MISTAKE OF LAW

A. General Principles

1. General Rule

In general, knowledge of the law is not an element of an offense. Moreover, a mistake of law—even a reasonable one!—does not ordinarily relieve an actor of liability for the commission of a criminal offense.

2. Purported Justifications for the Rule

a. Certainty of the Law

The law is definite. Therefore, any mistake of law is inherently unreasonable. See the Main Outline for rebuttal arguments.

b. Concern About Fraud

If a mistake-of-law defense were recognized, it would invite fraud. Every defendant would assert ignorance or mistake, and it would be nearly impossible to disprove the claim. See the Main Outline for rebuttal arguments.

c. Promoting Knowledge of the Law

We want people to learn the law. To promote education—to deter ignorance—the law must apply strict liability principles. See the Main Outline for rebuttal arguments.

B. Exceptions to the General Rule

1. Mistakes That Negate the *Mens Rea*

A defendant is not guilty of an offense if his mistake of law, whether reasonable or unreasonable, negates an element of the crime charged.

2. Authorized-Reliance Doctrine

A person is not guilty of a criminal offense if, at the time of the offense, she reasonably relied on an official statement of the law, later determined to be erroneous, obtained from a person or public body with responsibility for the interpretation, administration, or enforcement of the law defining the offense.

a. On Whom or What Body Is Reliance Reasonable

Although the common law is less clear than the Model Penal Code in this regard, apparently a defendant may reasonably rely on an official statement of the law found in a statute, judicial opinion, administrative ruling, or an official interpretation of the law given by one who is responsible for the law's enforcement or interpretation, such as the United States or State Attorney General.

3. Due Process Clause

In very rare circumstances, it offends due process to punish a person for a crime of which she was unaware at the time of her conduct. The Due Process Clause apparently is violated if three factors exist: (1) the

"unknown" offense criminalizes an omission; (2) the duty to act is based on a status condition rather than conduct; and (3) the offense is *malum prohibitum* in nature.

PART FIVE: CAUSATION

I. ACTUAL CAUSE (CAUSE-IN-FACT)

A. General Principles

1. Rule

A person is not guilty of an offense unless she is an actual cause of the ensuing harm. Both the common law and the Model Penal Code provide that conduct is the "actual cause" of the prohibited result if the result would *not* have occurred but for the actor's conduct.

B. Steps for Determining the "Actual Cause"

1. Identifying the Relevant Conduct

Determine what is (are) the relevant voluntary act(s) committed by *D*. If the case is based on an omission, determine what the omission is, and substitute that for the "voluntary act" in the following discussion.

2. Frame the Question Properly

Ask the question: "But for *D*'s voluntary act [omission] would the social harm have occurred when it did?" If the social harm would have occurred when it did even if *D* had not acted, *D* is *not* the actual cause of the harm and, therefore, is not guilty of the offense. In a sense, "yes" [the social hard would have occurred when it did anyway] means "no" (no causal liability). If the social harm would *not* have occurred when it did but for *D*'s voluntary act(s), *D is* an actual cause of the social harm, in which case you move on to the remaining causation issue (proximate cause).

C. Multiple Actual Causes

There usually are multiple actual causes of a result. A person who dies of lung cancer, for example, might not have died *when she did* but for her smoking habit *and* living in a smog-polluted city. It can also be the case that two persons—two potential defendants—are the actual cause of a result. See the Main Outline for useful examples.

D. Concurrent Sufficient Causes

In rare circumstances, the "but for" test may fail to reach the morally sensible result. The problem arises when two acts, either one of which is sufficient to cause the resulting harm when it did, occur concurrently. See the Main Outline for useful examples.

1. Substantial Factor Test

In such cases, many courts resort to the "substantial factor" test, a standard that is often used in tort cases. The question to be asked is: "Was *D*'s conduct a substantial factor in the resulting harm?"

2. Model Penal Code

The MPC does not apply the substantial factor test—it uses the "but for" test in all cases. However, the Commentary to the Code explains that, in deciding whether a defendant was a "but for" cause of a "result," one would state the "result" with great specificity. See the Main Outline for details.

II. PROXIMATE CAUSE (LEGAL CAUSE)

A. General Principles

1. Role of "Proximate Cause" in Legal Analysis

A person who is an actual cause of resulting harm is not responsible for it unless she is also the proximate (or "legal") cause of the harm. When the law states that a defendant was the proximate cause of a result, this is a shorthand way of saying that it is morally just to hold this person responsible for the harm.

2. Common Law, Model Penal Code, and Study Point

As with any "what is morally just" analysis, there is no single or straightforward answer. The common law provides various potential factors to consider. The drafters of the Code have another way of handling the issue: they treat "proximate causation" as a culpability, rather than causal, issue. The MPC issue is whether the defendant can be said to have purposely, knowingly, recklessly, or negligently (whichever is relevant in a particular case) caused "a particular result," if the "result" occurred in an odd or unexpected manner. The Code takes all of the common law factors discussed below and basically rolls them into one, explicitly policy-oriented, question for the jury: Was "the actual result . . . too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of the offense."

B. Direct Cause

A direct cause is a but-for cause in which no other cause intervenes between it and the resulting social harm. A voluntary act that is a direct cause of the social harm is also a proximate cause of it. This is because there is no other candidate for causal responsibility.

C. Intervening Cause

1. Definition

An "intervening cause" is an actual cause (a "but for" cause) of social harm that arises *after D*'s causal contribution to the result.

2. General Role of Intervening Causes

An intervening cause does not necessarily relieve a defendant of causal responsibility for the resulting harm. At common law, various factors come into play in proximate causation analysis.

3. Nature of Intervening Cause

It is useful, *although not always dispositive*, to determine whether the intervening cause was a *response* to the defendant's act or merely a *coincidence*.

a. "Response" and "Coincidence" Distinguished

An intervening cause is a *responsive* intervening cause if it occurs as a response to the defendant's earlier conduct. An intervening cause is *coincidental* if the factor would have come into play even in the absence of the defendant's conduct.

b. Legal Significance of Terminology

Generally speaking, a defendant is causally responsible for a *responsive* intervening cause, *unless* the responsive intervening act was not only unforeseeable but freakish. In contrast, a defendant is *not* ordinarily causally responsible for a *coincidental* intervening cause, *unless* its occurrence was foreseeable to a reasonable person in the defendant's situation.

4. Other Important Factors

a. Intended Consequences Doctrine

In general, a defendant is the proximate cause of a result, even if there is an intervening cause, if the defendant intended the result that occurred. But, one should be very precise in stating what result the defendant intended: a person may want someone dead in a particular manner, in which case this doctrine only applies if the result occurs in the desired manner.

b. Free, Deliberate, Informed Human Intervention

In general, a defendant is *not* the proximate cause of a result if a free, deliberate, and informed act of another human being intervenes.

c. Apparent Safety Doctrine

Even though the defendant has created a dangerous situation, she is not responsible for the ensuing result if it can be determined that the dangerous situation created by the defendant is over—that the victim, once at risk, has reached apparent safety, only then to be jeopardized by another cause.

PART SIX: DEFENSES TO CRIME: JUSTIFICATIONS

I. JUSTIFICATION DEFENSES: GENERALLY

A. Definition

A justification defense is one that indicates society's conclusion that the defendant's conduct was morally good, socially desirable, or (at least) not wrongful.

B. Basic Structure of Justification Defenses

In general, a justification defense contains three components.

1. Necessity

Ordinarily, use of force against another is not justifiable unless it is necessary.

2. Proportionality

Ordinarily, a person may not use force that is disproportional to the threat that motivates the use of force. For example, deadly force should not be used to repel a non-deadly threat.

3. Reasonable Belief

A person may be able to successfully assert a justification defense even if she is wrong about the circumstances. Ordinarily, a defendant's use of force is justified if she possesses a reasonable, *even if incorrect*, belief that the use of force is necessary and proportional to the supposed threat.

II. SELF-DEFENSE

A. Common Law

1. General Rule

Subject to clarification below, a person is justified in using *deadly force* against another if: (a) he is not the *aggressor*; and (b) he *reasonably believes* that such force is *necessary* to repel the *imminent* use of *unlawful deadly force* by the other person.

2. Definition of "Deadly Force"

The term "deadly force"—whether applied to the actions of the aggressor or the person resisting aggression—is typically defined as "force likely to cause, or intended to cause, death or serious bodily harm."

3. "Aggressor"

An aggressor may not use deadly force in self-defense. It is possible, however, for an aggressor to purge himself of his status as an aggressor and regain the right of self-defense.

a. Definition

An "aggressor" is one who commits an "unlawful act reasonably calculated to produce an affray foreboding injurious or fatal consequences."

b. Losing the "Aggressor" Status

i. Nondeadly Aggressors

A, a nondeadly aggressor, may regain her right of self-defense against *B*, if *B* responds to *A*'s nondeadly aggression by threatening to use excessive—deadly—force in response. Courts differ, however, regarding how *A* regains the right to use deadly force.

(1) Majority Rule

A immediately regains her right of self-defense, as soon as *B* threatens excessive force.

(2) Minority Rule

If *B* responds to *A*'s nondeadly aggression by threatening to use deadly force against *A*, *A* may not use deadly force in self-defense unless *A* first retreats, and *B* continues to threaten *A* with deadly force. If no safe retreat is possible, however, *A* may immediately use deadly force.

ii. Deadly Aggressor

A, a deadly aggressor, loses the right of self-defense in a conflict unless she abandons her deadly design and communicates this fact to *B*.

4. Proportionality of Force: Deadly Against Deadly

Deadly force may not be used in response to a nondeadly threat, even if this is the only way to repel the nondeadly threat.

5. "Unlawful Force"/"Unlawful Threat"

A person has no right to defend herself against lawful justified force. She may only respond to unlawful threats of force.

6. "Imminency"

Although modern courts are somewhat less strict than their predecessors, generally speaking a person may not use deadly force in self-defense unless the aggressor's threatened force will occur immediately, almost at that instant.

7. Necessity to Use Deadly Force

A person may not use deadly force unless it is necessary.

a. Use of Less Force

A person may not use deadly force to repel an unlawful deadly attack if more moderate (nondeadly) force will do the job.

b. Retreat?

Must non-aggressors retreat—flee to a safe place—rather than stand their ground and use deadly force? Today, there is a conflict on this subject in non-Model Penal Code jurisdictions. A majority of non-MPC jurisdictions do *not* have a retreat requirement. A minority of jurisdictions provide that, with one key exception, a non-aggressor may *not* use deadly force to repel an attack if she *knows* of a *completely* safe place to which she can retreat. The exception is that a non-aggressor is never required to retreat from her own home.

8. "Reasonable Belief"

a. General Rule

The self-defense rules discussed above are modified by the "reasonable belief" principle, which provides that a person may use deadly force in self-defense if she has reasonable grounds to believe, and actually believes, that she is in imminent danger of death or serious bodily harm, and that use of deadly force is necessary to protect herself, *even if her reasonable beliefs in these regards are incorrect.*

b. What Is a "Reasonable Belief"?

A reasonable belief is a belief that a reasonable person would hold in the actor's situation. But, that only shifts the question to the issue: who is a "reasonable person"? Ordinarily, the defendant's physical characteristics may be incorporated into the "reasonable person." Many courts today also subscribe to the view that prior experiences of the defendant (such as her prior experiences with the decedent) that help the defendant evaluate the present situation are relevant.

c. Battered Women and Self-Defense

How should the law deal with the situation of a woman, physically abused for years by her husband or live-in partner, who kills her abuser at a moment when she is not, in fact, under imminent attack, for example, when the batterer is sleeping? Can we say that the battered woman *reasonably* believed that the batterer represented an imminent threat in such nonconfrontational circumstances?

i. Legal Trends

Most courts prohibit an instruction on self-defense if the homicide occurred in nonconfrontational circumstances, on the ground that no reasonable juror could believe that the defendant, *as a reasonable person*, would believe that a sleeping man represents an *imminent* threat. But, a few courts now do permit such cases to go to the jury if "Battered Woman Syndrome" evidence is introduced to show that the defendant, as a battered woman, suffered from this condition. See the Main Outline for more details.

B. Model Penal Code

1. General Rule

Subject to the limitations discussed below, a person is not justified in using deadly force against another unless she believes that such force is immediately necessary to protect herself against the exercise of unlawful deadly force, force likely to cause serious bodily harm, a kidnapping, or sexual intercourse compelled by force or threat, by the other person on the present occasion. See the Main Outline for a comparison of this rule to the common law. There are significant differences.

2. Limitations on General Rule

Even if deadly force is otherwise permitted, it is impermissible in two key circumstances.

a. Defendant as Aggressor

As with the common law, the defense is not permitted if the actor is the aggressor, which the Code defines as one who "provokes" the use of force against herself "in the same encounter" for the "purpose of causing death or serious bodily injury."

b. Retreat

The Code follows the minority common law position that a non-aggressor must retreat if she knows that she can thereby avoid the need to use deadly force with complete safety to herself. This retreat requirement, however, is itself subject to various exceptions, most notably that a person need not retreat from her own dwelling.

c. Other "Non-Necessity" Circumstances

The Code explicitly provides that deadly force may not be used if, subject to various exceptions, the defendant can avoid doing so "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."

III. DEFENSE-OF-THIRD-PARTIES

A. Common Law

1. General Rule

A person is justified is using deadly force to protect a third party from unlawful use of force by an aggressor. The intervenor's right to use force parallels the third party's *apparent* right of *self*-defense. That is, the third party may use force when, and to the extent that, she reasonably believes that the third party would be justified in using force to protect herself.

2. Minority Rule

Some jurisdictions provide that a person may only use force to defend a third party if the person being defended would *in fact* have been justified in using the same degree of force in self-defense. That is, the intervenor is placed in the shoes of the party whom she is seeking to defend. If the other person has no right of self-defense, *even though the intervenor reasonably believes that she does*, the intervenor loses her claim.

B. Model Penal Code

A person is justified in using deadly force to protect another if: (1) the intervenor would be justified in using such force to protect herself, if the facts were as she believed them to be; (2) according to the facts as the intervenor believes them to be, the third person would be justified in using such force to protect herself; (3) the intervenor believes force is necessary for the third party's protection; and (4) if the third party would be required to retreat under

the Code self-protection rules, the intervenor must attempt to cause the third party to retreat before using deadly force.

IV. DEFENSES OF PROPERTY AND HABITATION

A. Defense of Property

1. Common Law

A person is never justified in using deadly force to defend her real or personal property. A person *is* justified in using *non*deadly force if she reasonably believes that such force is necessary to prevent the imminent, unlawful dispossession of her property. Some jurisdictions also provide that, prior to using force, the property defender must ask the dispossessor to desist from his conduct, unless such a request would be futile or dangerous.

a. Important Clarification

With one exception, the defender must be in lawful possession of the property at the time force is used. If she has already been dispossessed of the property, force may *not* be used to *recapture* the property. Instead, the victim of dispossession must seek judicial redress. The exception to this rule is that nondeadly force *is* permitted in fresh pursuit of a dispossessor of property. In such circumstances, the use of force to recapture the property is treated as an extension of the original effort to prevent dispossession.

b. Another Important Clarification

The defender's right to use force is based on her rightful *possession* of the property; she does not need to have title to it.

2. Model Penal Code

The MPC differs from the common law in various key respects.

a. Belief Requirement

As with other justifications defenses, the right to use force to protect property is based on the actor's subjective belief, subject to the provisions of § 3.09, previously discussed in the Main Outline.

b. Recapture of Property

With one exception, the MPC goes further than the common law in that it generally authorizes use of nondeadly force to retake possession of land or recapture personal property, *even after fresh pursuit has ended*, if the actor believes that the dispossessor has no claim of right to the property. The exception is that in the case of land, a recapturer may *not* use force unless she believes that it would constitute an "exceptional hardship" to delay re-entry until she can obtain a court order.

c. Deadly Force

The Code authorizes the use of deadly force if *D* believes that *V*: (1) intends to dispossess *D* of his dwelling other than under a claim-of-

right to possession; or (2) intends to commit arson, burglary, robbery or felonious theft inside the dwelling and (2a) *V* "has employed or threatened deadly force against or in the presence" of *D* or (2b) the use of *non*deadly force to prevent commission of the crime would expose *D* or another to substantial risk of serious bodily harm.

B. Defense of Habitation

1. Common Law

a. Older, Broader Rule

D is justified in using deadly force against *V* if the actor reasonably believes that: (1) *V* intends unlawfully and imminently to enter *D*'s dwelling; (2) *V* intends to commit any felony inside, or to cause bodily injury, no matter how slight, to any occupant; and (3) deadly force is necessary to prevent the entry.

b. Narrower Rule

Many (perhaps most) jurisdictions no longer apply the broad rule set out above and instead hold that deadly force is limited to circumstances in which *D* believes that *V* will commit an "atrocious" (violent or dangerous) felony inside the dwelling if *V* enters. The other requirements set out above (namely (1) and (3)) still apply.

2. Model Penal Code

The Code does not recognize a separate interest in habitation, as distinguished from defense of property. See the comments above in regard to the MPC defense-of-property claim.

C. Special Issue: Spring Guns

1. Common Law

A person may use a spring gun to inflict deadly force on another "where an intrusion is, *in fact*, such that a person, were he present, would be justified in taking the life or inflicting the bodily harm with his own hands." As the italicized words suggest, the user of the spring gun acts at her peril: the deadly force must be necessary.

2. Model Penal Code

The justifiable use of force does not extend to any mechanical device that is intended to use, or is known to create, a significant risk of causing death or serious bodily injury.

V. LAW ENFORCEMENT DEFENSES

A. Crime Prevention

1. Common Law

a. Original (Now Minority) Approach

The original common law rule, followed today in a few jurisdictions, is that a police officer or private citizen is justified in using deadly force upon another if she reasonably believes that: (1) the other person is

committing *any* felony; and (2) deadly force is necessary to prevent commission of the crime. This version of the defense is controversial because it can authorize use of force grossly disproportional to the threat caused by the felon.

b. Modern (Majority) Approach

The majority rule differs from the original rule in one critical way: deadly force is only permitted if the actor reasonably believes that the other person is about to commit an "atrocious" felony, *i.e.*, a felony that involves a significant risk of serious bodily harm to an innocent person. Among the felonies that are considered atrocious are: murder, manslaughter, robbery, arson, rape, and burglary.

2. Model Penal Code

A police officer or private party may not use deadly force to prevent a felony unless she believes that: (1) there is a substantial risk that the suspect will cause death or serious bodily harm to another unless commission or consummation of the offense is prevented; (2) the force is immediately necessary to prevent commission of the offense; and (3) use of deadly force presents no substantial risk of injury to bystanders. As with other Code justification defenses, the defense is based on the actor's subjective belief, subject always to Code provisions that permit prosecution for reckless or negligent homicide if the actor's beliefs were reckless or negligent, as the case may be.

B. Arrest

1. Common Law

a. Rule for Police Officers

A police officer is justified in using deadly force against another if she reasonably believes that: (1) the suspect committed any felony; and (2) such force is necessary to immediately effectuate the arrest. As discussed below, this rule is now subject to constitutional limitation.

b. Special Problem of "Citizen Arrests"

Common law jurists were hesitant to permit private citizens to use deadly force in "citizen arrests." Therefore, although the rules vary considerably by jurisdiction, limitations on the use of deadly force by private parties are common. These may include: (i) limitation of the use of deadly force to atrocious felonies; (ii) a requirement that the private person give notice of her intention to make the arrest; and (iii) denial of the defense if the suspect *in fact* did not commit the felony, even if the private party reasonably believed that she did.

2. Model Penal Code

Deadly force may *never* be used by private citizens acting on their own to make an arrest or to prevent a suspect's escape. However, a police officer (or private citizen assisting the officer) may use deadly force to effectuate an arrest if she believes that: (1) the force can be applied at no risk to innocent bystanders; (2) such force is immediately necessary to make the

arrest; and either (3a) the felony for which the person is being arrested included the use or threatened use of deadly force; or (3b) a substantial risk exists that the suspect will cause serious bodily harm to another if she is not apprehended immediately.

C. Constitutional Law

1. Overview

The Fourth Amendment to the United States Constitution prohibits "unreasonable searches and seizures" by government officers, including by the police. In turn, an arrest of a person constitutes a "seizure" of that individual. So, police use of force to effectuate an arrest—and, thus, "seize" the person—must be performed in a constitutionally reasonable manner.

2. *Tennessee v. Garner*

In *Tennessee v. Garner* (1985), the Supreme Court's first decision on the subject, the Court held that it is unconstitutional for a police officer to use deadly force against an escaping felon unless: (1) 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" if the suspect is able to escape; (2) the officer first warns the suspect of her intention to use deadly force ("Stop or I'll shoot!"), unless such a warning would be futile; and (3) the officer reasonably believes that deadly force is necessary to make the arrest or prevent escape. Thus, deadly force may not be used against, for example, a fleeing unarmed thief.

3. Beyond *Garner*

a. Non-Deadly Force

In *Graham v. Connor* (1989), the Court held "that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, should be analyzed under the Fourth Amendment . . . 'reasonableness' standard." Among the relevant factors to be considered, the Court stated, are the seriousness of the crime, the extent to which the suspect poses an immediate threat to the safety of others, and the extent to which the suspect is resisting arrest or attempting to escape.

b. Deadly Force, Post-*Garner*

In Scott v. Harris (2007), the Supreme Court returned to the issue of use of *deadly* force in arrest situations, and suggested that there is no rigid rule for determining when police use of force constitutes an unreasonable seizure of a felon: "In the end we must still slosh through the factbound morass of 'reasonableness.' " Among the factors to consider are those set out above, as well as the "relative culpability" of the persons whose lives are put at risk.

VI. NECESSITY

A. Common Law

1. Elements of the Defense

a. Lesser-Evils Analysis

The actor must be faced with a choice of evils or harms, and he must choose to commit the lesser of the evils. Put differently, the harm that D seeks to *prevent* by his conduct must be greater than the harm he reasonably expects to *cause* by his conduct. The balancing of the harms is conducted by the judge or jury; the defendant's belief that he is acting properly is not in itself sufficient.

b. Imminency of Harm

The actor must be seeking to avoid imminent harm. This rule is strictly enforced: if there is sufficient time to seek a lawful avenue, the actor *must* take that lawful route.

c. Causal Element

The actor must reasonably believe that his actions will abate the threatened harm.

d. Blamelessness of the Actor

Many courts and/or statutes provide that the actor must not be at fault in creating the necessity.

2. Homicide Prosecutions

It is unclear whether the defense of necessity applies to the crime of murder, although there is substantial support for the understanding that the defense does not apply to the killing of an innocent person. Fortunately, the issue has only rarely arisen. The leading case—and the one most likely to be in your casebook—is *Regina v. Dudley and Stephens.* Read the Main Outline for discussion of this case.

B. Model Penal Code

1. Elements

A person is justified in committing an act that otherwise would constitute an offense if: (a) the actor believes that the conduct is necessary to avoid harm to himself or another; (b) the harm that the actor seeks to avoid is greater than that sought to be avoided by the law prohibiting his conduct; and (c) there does not plainly exist any legislative intent to exclude the justification claimed by the actor. If the actor was reckless or negligent in bringing about the emergency, the defense is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, is sufficient to prove guilt.

2. Comparison to Common Law

Under the Code, the threatened harm need not be imminent. Moreover, the Commentary to the Code expressly states that this defense *is* available in homicide prosecutions.

PART SEVEN: DEFENSES TO CRIME: EXCUSES

I. EXCUSE DEFENSES: GENERALLY

A. Excuse: Defined

An excuse defense is one that indicates that, although the actor committed the elements of the offense, and although his actions were unjustified—wrongful—the law does not blame him for his wrongful conduct.

B. Justification Versus Excuse

A justification defense tends to focus on the wrongfulness of an *act* or a result; an excuse defense focuses on the *actor*. The distinction between the two categories of defenses—justifications and excuses—is an important one, more fully laid out in the Main Outline.

II. DURESS

A. Rationale of the Defense: Justification or Excuse?

1. Duress as a Justification Defense

A few courts and treatises treat duress as if it were sub-species of the necessity defense and, thus, as a justification defense. According to this view, the only meaningful difference between necessity and duress is that the former defense involves natural, *i.e.*, non-human, pressures, whereas duress involves human-based threats (*e.g.*, a terrorist demanding an innocent person to commit a crime against other innocent persons; a criminal forcing an innocent person to rob a bank).

2. Duress as an Excuse Defense

Most courts and treatises treat duress as an excuse defense, and not as a justification defense. Intuitively, most people believe that a coerced person (based on the definition of duress discussed below) is morally blameless, but not that she has done nothing wrong. The essence of the duress defense is that a person is not to blame for her conduct if, because of an unlawful threat, she lacks a fair opportunity to conform her conduct to the law.

B. Common Law

1. Elements of Defense

Generally speaking, a defendant will be acquitted of an offense *other than murder* on the basis of duress if she proves that she committed the offense because: (a) another person unlawfully threatened imminently to kill or grievously injure her or another person unless she committed the crime;

and (b) she is not at fault in exposing herself to the threat. See the Main Outline for more details.

2. Coerced Homicides

The common law duress defense does not apply to the offense of murder. The no-defense rule is sometimes defended on the utilitarian ground that the drive for self-preservation, although strong, is not irresistible; therefore, people should be persuaded (by the threat of punishment) to resist such coercion. The rule is also defended on the moral ground that it is better to die than to kill an innocent person. However, this latter argument only serves to show that a person is not *justified* in killing an innocent person. It does not explain why a coerced actor should not be *excused* on the ground that virtually anyone, short of a saintly hero, would succumb to the coercion.

3. Intolerable Prison Conditions

a. The Issue

Suppose a prisoner is threatened by another inmate with sexual or physical assault, is denied critical medical care by prison officials, or is placed in some other intolerable condition. Therefore, the inmate escapes confinement, but is caught and returned to prison. She is now prosecuted for the offense of prison escape. The inmate wishes to avoid conviction for escape by arguing that she fled as a result of the intolerable prison condition. The frequently litigated issue is whether the inmate may make such a claim in court; and, if she may, is her claim one of necessity (justification) or excuse (duress)?

b. The Law

Originally, courts did not permit inmates to raise prison conditions as a defense to their escape. Today most courts recognize a limited defense. Some courts require the escapee to turn herself in after the escape, once the prison condition "has lost its coercive force," or else the defense is automatically lost. Other courts are more lenient and treat's an escapee's failure to turn herself in as just one factor to be considered by the jury in determining whether the escapee should be acquitted.

c. Nature of the Defense

Courts are fairly evenly divided on the question of whether the defense claim is basically one of duress or necessity. See the Main Outline to understand the conceptual problems in deciding whether these cases fall under duress or necessity, and to appreciate the practical significance of this issue.

C. Model Penal Code

1. Defense

The Model Penal Code unambiguously treats duress as an excuse, and not a justification, defense. Thus, the defense may be raised although the defendant did not commit the lesser of two evils. Instead, the defendant

must show that: (a) he committed an offense because he was coerced to do so by another person's use, or threat to use, unlawful force against him or a third party; and (b) a person of reasonable firmness would have committed the offense. The Code further provides that the defense is lost if the coerced actor put himself in a situation "in which it was probable that he would be subjected to duress." Furthermore, if he was negligent in placing himself in the situation, the defense is unavailable if he is prosecuted for an offense for which negligence is sufficient to prove guilt.

2. Coerced Homicides

Unlike the common law, there is no bar to use of the duress defense in murder prosecutions. See the Main Outline for details of the other distinctions between the common law and MPC versions of the defense of duress.

III. INTOXICATION

A. Common Law: Voluntary Intoxication

1. Definition of "Intoxication"

Intoxication may be defined as a disturbance of an actor's mental or physical capacities resulting from the ingestion of *any* foreign substance, most notably alcohol or drugs, including lawfully prescribed medication.

2. Not an Excuse Defense

A person is never *excused* for his criminal conduct on the ground that he became voluntarily intoxicated. Indeed, the act of getting intoxicated enhances, rather than mitigates, culpability.

3. *Mens Rea* Defense

Although voluntary intoxication is *not* an excuse for criminal conduct, most jurisdictions following the common law provide that a person is not guilty of a *specific-intent* offense if, as the result of voluntary intoxication, he lacked the capacity or otherwise did not form the specific intent required for the crime. However, voluntary intoxication does *not* exculpate for general-intent offenses.

4. "Temporary" Insanity

A defendant is *not* entitled to argue that, due to voluntary intoxication, he did not know right from wrong, or did not know what he was doing, at the time of the offense, even though such a mental state *would* result in acquittal on *insanity* grounds if he suffered from a mental illness.

5. "Fixed" Insanity

Long-term use of alcohol or drugs can cause brain damage or cause the individual to suffer from chronic mental illness. In such circumstances, the defendant who seeks acquittal is not claiming he should be exculpated because he was voluntarily intoxicated at the time of the crime, but rather that, because of long-term use of intoxicants, he is insane. Such a claim *is* recognized by the common law, but the applicable defense is insanity, and not intoxication.

B. Model Penal Code: "Self-Induced" (Voluntary) Intoxication

Subject to one exception, voluntary intoxication is a defense to any crime if it negates an element of the offense.

1. Exception to General Rule

If the defendant is charged with an offense for which recklessness suffices to convict, she cannot avoid conviction by proving that, because of intoxication, she was unaware of the riskiness of her conduct. That is, even if the defendant's actual culpability is that of negligence—she *should have been aware* that her conduct created a substantial and unjustifiable risk of harm—she may be convicted of an offense requiring recklessness (which ordinarily requires *actual awareness* of the risk), if the reason for her failure to perceive the risk is her self-induced intoxication.

C. Involuntary Intoxication

1. What Makes Intoxication Involuntary?

Intoxication is involuntary if any of the following occurs: (a) *coercion*: the actor is forced to ingest the intoxicant; (b) *mistake*: the actor innocently ingests an intoxicant; (c) *prescribed medication*: the actor becomes *unexpectedly* intoxicated from ingestion of a medically prescribed drug, perhaps due to an allergic reaction; or (d) *pathological intoxication*: the actor's intoxication is "grossly excessive in degree, given the amount of intoxicant, to which the actor does not know he is susceptible."

2. When Does Involuntary Intoxication Exculpate?

a. Lack of *Mens Rea*

The defendant will be acquitted if, as a result of involuntary intoxication, the actor lacks the requisite mental state of the offense for which she was charged, whether the offense could be denominated as specific-intent or general-intent. This is the common law and MPC rule.

b. "Temporary Insanity"

Unlike the rule with voluntary intoxication, a defendant *will* be exculpated on the ground of "temporary insanity" if, due to involuntary intoxication rather than mental illness, she otherwise satisfies the jurisdiction's insanity test (*e.g.*, she did not know right from wrong, or did not understand what she was doing, because of involuntary intoxication). This is the common law and Model Penal Code rule.

IV. INSANITY

A. Rationale of Defense

1. Utilitarian Argument

A person who suffers from a severe cognitive or volitional disorder, *i.e.*, a disorder that undermines the actor's ability to perceive reality (cognition) or to control her conduct (volition), is undeterrable by the threat of

punishment. Therefore, punishment is inefficacious. See the Main Outline for counter-arguments.

2. Retributive Argument

The insanity defense distinguishes the mad from the bad; it separates those whom we consider evil from those whom we consider sick. A person is not a moral agent, and thus is not fairly subject to moral condemnation, if she lacked the capacity to make a rational choice to violate the law or if she lacks the capacity to control her conduct.

B. The *M'Naghten* Test of Insanity

1. Rule

A person is legally insane if, at the time of the act, he was laboring under such a defect of reason, from disease of the mind, as: (1) not to know the nature and quality of the act he was doing; or, (2), if he did know it, that he did not know what he was doing was wrong. See the Main Outline for criticisms of the *M'Naghten* test.

2. Clarification of the Rule

a. "Know" Versus "Appreciate"

Although the *M'Naghten* test originally was phrased in terms of whether the defendant "knew" the nature and quality of his action or "knew" right from wrong, many jurisdictions now use the word "appreciate." "Appreciate" is a word intended to convey a deeper, or broader, sense of understanding than simple "knowledge." See the Main Outline for clarification.

b. "Right/Wrong" Prong

Courts have split fairly evenly on whether this prong refers to legal or moral wrongfulness. In jurisdictions that use the "moral wrong" test, the relevant issue is *not* whether the defendant believed that his act was morally right, but rather whether he knew (or appreciated) that *society* considered his actions morally wrong.

C. The "Irresistible Impulse" ("Control") Test of Insanity

1. Rule

In general, this supplement to *M'Naghten* provides that a person is insane if, as the result of mental illness or defect, she "acted with an irresistible and uncontrollable impulse," or if she "lost the power to choose between . . . right and wrong, and to avoid doing the act in question, as that [her] free agency was at the time destroyed." See the Main Outline for criticisms of the test.

D. The "Product" (*Durham*) Test of Insanity

1. Rule

A person is excused if his unlawful act was the product of a mental disease or defect. As subsequently defined, "mental disease or defect" is "any abnormal condition of the mind which substantially affects mental or

emotional processes and substantially impairs behavior controls." Thus, to be acquitted according to this rule, two matters must be proved: the defendant suffered from a mental disease or defect at the time of the crime; and, but for the mental disease or defect, he would not have committed the crime. See the Main Outline for criticisms of the test.

E. Model Penal Code Test of Insanity

1. Rule

The MPC test represents a broadened version of the *M'Naghten* and irresistible impulse tests. With modifications, it retains the second prong of *M'Naghten* and adds the volitional prong. The Code provides that a person is not responsible for her conduct if, at the time of the criminal act, as the result of a mental disease or defect (a term left undefined), she lacked the substantial capacity either: (1) to appreciate the criminality (or, in the alternative, wrongfulness) of her actions; or (2) to conform her conduct to the dictates of the law.

2. Closer Analysis

a. Avoiding All-or-Nothing Judgments

Both MPC prongs are modified by the phrase "lacks *substantial* capacity." Total cognitive or volitional incapacity is not required.

b. Cognitive Prong

First, the Code uses the word "appreciate" rather than *M'Naghten*'s "know," to permit a deeper, fuller analysis of the individual's cognitive capacity. Second, the drafters chose not to decide between "legal wrong" and "moral wrong": they invited legislators, in adopting the Code provision, to choose between the words "criminality" (legal wrong) and "wrongfulness" (moral wrong).

c. Volitional Prong

This prong is phrased to avoid the undesirable or potentially misleading words "irresistible" and "impulse." A person who has a very strong, but not irresistible, desire to commit a crime, including one who acts non-impulsively after considerable thought, can fall within the language of the MPC.

V. DIMINISHED CAPACITY

A. Putting "Diminished Capacity" in Context

1. *Mens Rea* Version

A defendant may potentially raise a claim of "diminished capacity" in order to show that he lacked the requisite *mens rea* for an offense. In that manner, "diminished capacity" works like mistake-of-fact or voluntary intoxication—it does not excuse the wrongdoer, but serves to show that the prosecutor has failed to prove an essential element of an offense.

2. Partial Responsibility Version

"Diminished capacity" may also serve as a highly controversial excuse defense, used exclusively in criminal homicide prosecutions, as a basis for reducing the severity of the offense.

B. Diminished Capacity and *Mens Rea*

A sane person may suffer from a mental disability (*e.g.*, mental illness, mental retardation, Alzheimer's) that arguably prevents him from forming the mental state required for the commission of an offense.

1. Model Penal Code Approach

As a matter of logic, a defendant should be acquitted of any offense for which he lacked the requisite *mens rea*, including those cases in which he lacked the mental state because of a mental disability, whether that disability is permanent or temporary. This is the position taken by the Model Penal Code.

2. Common Law

Logic notwithstanding, most states permit evidence of an abnormal mental condition, *if at all*, in order to negate the *specific* intent in a specific-intent offense. Psychiatric evidence is inadmissible in the prosecution of general-intent offenses. A minority of jurisdictions do not permit diminished capacity to be claimed in *any* case. See the Main Outline for the reasons for judicial hostility to the doctrine of diminished capacity.

C. Partial Responsibility

1. Common Law

In this country, the partial defense was originated in California and adopted by a small number of other courts. This rule, no longer followed in California, provides that a person who commits a criminal homicide and suffers from some mental illness or abnormality short of insanity may have her offense reduced because of her diminished mental capacity. States that recognize the partial-responsibility claim permit reduction of the offense from first-degree to second-degree murder, or from murder to manslaughter. The underlying rationale of the partial responsibility doctrine is that a person who does not meet a jurisdiction's definition of insanity, but who suffers from a mental abnormality, is less deserving of punishment than a killer who acts with a normal state of mind. Therefore, she should be convicted of a lesser offense.

2. Model Penal Code

The Code provides that a homicide that would otherwise be murder is reduced to manslaughter if the homicide was the result of "extreme mental or emotional disturbance for which there is a reasonable explanation or excuse." This language is intended to permit courts to recognize a partial responsibility defense.

VI. ENTRAPMENT

A. Overview

Entrapment issues arise when law enforcement agencies use undercover police officers to investigate crimes. The issue is how far the police may go in such undercover activity. Over time, two different approaches have developed, one called the "subjective" approach, which is followed in federal courts and many state courts; the other is the "objective" approach followed by some states.

B. Subjective Test

1. Test

Entrapment is proved if a government agent implants in the mind of an innocent person the disposition to commit the alleged offense and induces its commission in order that the government may prosecute. The defense does not apply if a private party, rather than a government agent, induces the crime. According to the Supreme Court, the police may employ "artifice and stratagem" to trap an unwary criminal, but it is improper when a criminal design, originating with the government, is used to induce an innocent person.

a. Predisposition of the Defendant

Applying the subjective test, entrapment does not occur if the government agent induces a "predisposed" person to commit the offense. A person is criminally "predisposed," if, when he is first approached by the government, he is ready and willing to commit the type of crime charged if a favorable opportunity to do so presents itself.

2. Rationale of the Subjective Test

The Supreme Court justifies the subjective version of entrapment on the ground that Congress did not intend its criminal sanctions to be applied to innocent persons induced by government officials to commit criminal offenses. See the Main Outline for the criticisms of the subjective test.

C. "Objective" Test

1. Test

In states that apply this standard, the test generally seeks to determine whether "the police conduct falls below standards, to which common feelings respond for the proper use of government power." Some states provide that entrapment only exists if the police conduct is sufficiently egregious that it would induce an ordinary law-abiding individual to commit the offense.

2. Rationale of the Objective Test

First, the defense should be used to deter police overreaching. Second, some argue that a court should protect "the purity of its own temple" by making sure that guilt is not proved by ignoble means. See the Main Outline for the criticisms of the objective test.

D. Procedural Aspects of "Entrapment"

Although entrapment is a criminal law defense, some jurisdictions (primarily those that apply the objective test) permit the defendant to raise the defense in a pre-trial hearing before a judge. If the judge determines that the defendant was entrapped, the prosecution is barred. No trial is held. In most jurisdictions, entrapment is treated like all other defenses: the defendant has the burden to raise the entrapment defense and present evidence in support of the claim at trial. If the factfinder determines that the defendant was entrapped, it brings back a not-guilty verdict.

E. Entrapment and the Due Process Clause

Although entrapment is not a constitutional doctrine, the Supreme Court has stated in dictum that police conduct could become so outrageous as to violate the Due Process Clause of the United States Constitution. More than once, however, the Court has refused to find a due process violation in entrapment-like circumstances.

PART EIGHT: INCHOATE CONDUCT

I. ATTEMPT

A. Common Law

1. General Principles

a. Basic Definition

In general, an attempt occurs when a person, with the intent to commit a criminal offense, engages in conduct that constitutes the beginning of the perpetration of, rather than mere preparation for, the target (*i.e.*, intended) offense.

b. Grading of Offense

A criminal attempt was a common law misdemeanor in England, regardless of the seriousness of the target offense. Today, modern statutes provide that an attempt to commit a felony is a felony, but it is considered a lesser felony that the target offense.

c. Merger Doctrine

A criminal attempt merges into the target offense, if it is successfully completed.

2. *Actus Reus*

There is no single common law test of when an attempt occurs. Typically, the common law tests focus on how close the actor is to completing the target offense. See the Main Outline for examples of each test.

a. Last Act Test

The rule used to be that a criminal attempt only occurred when a person performed all of the acts that she believed were necessary to

commit the target offense. Today, there is general agreement that an attempt occurs *at least* by the time of the last act, but no jurisdiction requires that it reach this stage on all occasions.

b. Dangerous Proximity Test

Oliver Wendell Holmes announced the "dangerous proximity to success" test. This standard is not satisfied unless the conduct "is so near to the result that the danger of success is very great." In this regard, courts consider three factors: the nearness of the danger; the substantiality of the harm; and the degree of societal apprehension felt as the result of the defendant's conduct. The more serious the offense, the less close the actor must come to completing the offense to be convicted of attempt.

c. Physical Proximity Test

To be guilty of attempt under this test, an act "must go so far that it would result, or apparently result in the actual commission of the crime it was designed to effect, if not extrinsically hindered or frustrated by extraneous circumstances." Or, stated differently, the actor's conduct must approach sufficiently near to the completed offense "to stand either as the first or some subsequent step in a *direct movement* toward the commission of the offense after the preparations are made."

d. "Unequivocality"/"Res Ipsa Loquitur" Test

This test provides that a person is not guilty of a criminal attempt until her conduct ceases to be equivocal, *i.e.*, her conduct, standing alone, demonstrates her criminal intent.

e. Probable Desistance Test

A person is guilty of attempt if she has proceeded past "the point of no return," *i.e.*, the point past which an ordinary person is likely to abandon her criminal endeavor.

3. *Mens Rea*

a. Dual Intent

A criminal attempt involves two "intents." First, the actor must intentionally commit the acts that constitute the *actus reus* of an attempt, as discussed above. Second, the actor must commit the *actus reus* of an attempt with the specific intent to commit the target offense.

b. Comparing *Mens Rea* of Attempt to Target Offense

An attempt sometimes requires a *higher* level of *mens rea* than is necessary to commit the target offense. Second, "attempt" is a specific-intent offense, even if the target crime is general-intent.

c. Special Problem: Attendant Circumstances

At common law, it is unclear what *mens rea*, if any, an actor must possess regarding an attendant circumstance to be guilty of attempt.

Some courts hold that a person may only be convicted of a criminal attempt if he is at least reckless with regard to an attendant circumstance. Other courts believe that it is sufficient that the actor is as culpable regarding an attendant circumstance as is required for that element of the target crime. See the Main Outline for clarification.

4. Special Defense: Impossibility

a. General Rule

The common law distinguished between "factual" and "legal" impossibility. Legal impossibility was a defense to an attempt; factual impossibility was not.

b. Factual Impossibility

Factual impossibility, which is not a defense, may be defined as occurring when an actor's intended end constitutes a crime, but he fails to complete the offense because of a factual circumstance unknown to him or beyond his control. One way to phrase this is: if the facts had been as the defendant believed them to be, would his conduct have constituted a crime? If yes, then this is a case of factual impossibility.

c. Legal Impossibility

There are two varieties of "legal impossibility."

i. Pure Legal Impossibility

This form of impossibility applies when an actor engages in lawful conduct that she incorrectly believes constitutes a crime. See the Main Outline for examples.

ii. Hybrid Legal Impossibility

The more typical case of legal impossibility occurs when an actor's goal *is* illegal (this distinguishes it from pure legal impossibility), but commission of the offense is impossible due to a mistake by the actor regarding the *legal* status of some *factual* circumstance relevant to her conduct. See the Main Outline for examples. This is a very difficult concept.

B. Model Penal Code

1. General Principles

a. Grading of Offense

Unlike the common law and non-MPC statutes, the MPC generally treats inchoate offenses as offenses of the same degree, and thus subject to the same punishment, as the target offense. The one exception is that, for a felony characterized as a "felony of the first degree" under the Code—basically, an offense that carries a maximum punishment of life imprisonment—an attempt to commit such an offense is a felony of the *second* degree, *i.e.*, a lesser offense.

b. Merger

The common law merger doctrine applies as well under the Code.

2. *Actus Reus*

The Code abandons all of the common law tests described above and replaces them with a *substantial step* standard. Specifically, one has gone far enough to constitute an attempt if the act or omission constitutes a substantial step in the course of conduct planned to culminate in the commission of the crime. One significant difference between the substantial step test and the various common law standards is that, in general, the common law looked to see how close the defendant was to completing the crime, whereas the MPC looks to see how far the defendant's conduct has proceeded from the point of initiation of the target offense.

3. *Mens Rea*

Please see the Main Outline for clarification of certain inartfully drafted, but critically important, aspects of the MPC criminal attempt statute.

a. Rule

The Code uses slightly different language than the common law, but the analysis is essentially the same. A person is not guilty of attempt unless he: "*purposely* engages in conduct that would constitute the crime"; acts "with the *purpose* of causing" or "with the *belief* that it will cause" the criminal result; or "*purposely* does . . . an act . . . constituting a substantial step" in furtherance of the offense. In short, "purpose" is the *mens rea* for a criminal attempt.

b. Special Problem: Attendant Circumstances

The "purpose" requirement for an attempt does *not* apply to attendant circumstances. As to attendant circumstances, a person is guilty of an attempt if she "act[s] with the kind of culpability otherwise required for commission of the [target] crime." In short, the actor need only be as culpable regarding an attendant circumstance as is required for the target offense.

4. Special Defense: Impossibility

The MPC has abandoned the hybrid legal impossibility defense. *Pure* legal impossibility remains a defense.

5. Special Defense: Renunciation of Criminal Purpose

The Code (but not the common law) recognizes a defense of "renunciation of criminal purpose." A person is not guilty of a criminal attempt, even if her actions constitute a substantial step in the commission of an offense, if: (1) she abandons her effort to commit the crime or prevents it from being committed; and (2) her conduct manifests a complete and voluntary renunciation of her criminal purpose. This defense is sometimes described as the "abandonment" defense.

II. CONSPIRACY

A. Common Law

1. General Principles

a. Definition

A common law conspiracy is an agreement between two or more persons to commit an unlawful act or series of unlawful acts.

b. Grading

At original common law, conspiracy was a misdemeanor. Today, conspiracy to commit a felony is usually a felony, but typically is a lesser offense than the target crime.

c. Rationale of the Offense

i. Preventive Law Enforcement

Like other inchoate offenses, recognition of the offense of conspiracy provides a basis for the police to arrest people before they commit another offense.

ii. Special Dangerousness

Group criminality is considered more dangerous than individual wrongdoing. The thesis is that when people combine to commit an offense, they are more dangerous than an individual criminal, because of their combined resources, strength, and expertise. They are also thought to be less likely to abandon their criminal purpose if they know that other persons are involved.

d. Merger

A common law conspiracy does *not* merge into the attempted or completed offense that is the object of the agreement.

2. *Actus Reus*: Basics

The gist of a conspiracy is the agreement by the parties to commit an unlawful act or series of unlawful acts together.

a. Overt Act

A common law conspiracy is committed as soon as the agreement is made. No act in furtherance of it is required. Today, many statutes provide that a conspiracy does not occur unless at least one party to the agreement commits an overt act in furtherance of it. The overt act, however, need not constitute an attempt to commit the target offense.

b. Method of Forming the Agreement

The conspiratorial agreement need not be in writing, nor even be verbally expressed. It may be implied from the actions of the parties.

c. Nature of Agreement

The object of the agreement must be unlawful. For purposes of conspiracy, an "unlawful" act is a morally wrongful act; *it need not be a criminal act.*

3. *Mens Rea*: The Basics

a. General Rule

Conspiracy is a dual-intent offense. First, the parties must intend to form an agreement (the *actus reus* of the conspiracy). Second, they must intend that the object(s) of their agreement be achieved. This second intent makes conspiracy a specific-intent offense.

b. Purpose Versus Knowledge

i. The Issue

An issue that arises in some conspiracy prosecutions is whether a person may be convicted of conspiracy if, with *knowledge* that another person intends to commit an unlawful act, *but with indifference as to whether the crime is committed*, he furnishes an instrumentality for that offense or provides a service to the other person that aids in its commission.

ii. Case Law

The law is split on this issue. Most courts, however, will not convict a person unless he acts with the *purpose* of promoting or facilitating the offense. Knowledge, coupled with indifference as to whether the offense is committed, is insufficient. But, sometimes one can infer purpose from knowledge. See the Main Outline for examples.

4. Plurality Requirement

No person is guilty of conspiracy unless *two or more persons* possess the requisite *mens rea.* However, the plurality doctrine does not require that two persons be prosecuted and convicted of conspiracy. It is satisfactory that the prosecutor proves beyond a reasonable doubt that there were two or more persons who formed the agreement with the requisite *mens rea.*

5. Parties to an Agreement

Even if it is clear that a conspiracy exists, it is sometimes difficult to determine *who* is a party to the conspiracy. The Main Outline, through examples, discusses so-called "wheel," "chain," and "chain-wheel" conspiracies.

6. Objectives of a Conspiracy

Since the gist of a conspiracy is an agreement, what if the parties to the agreement intend to commit more than one offense? Is this one conspiracy or more? Quite simply, there are as many (or as few) conspiracies as there are agreements made.

7. Special Defense: Wharton's Rule

a. Rule

If a crime *by definition* requires two or more persons as willing participants, there can be no conspiracy to commit that offense if the only parties to the agreement are those who are necessary to the commission of the underlying offense. This is Wharton's Rule, a common law defense to conspiracy.

b. Wharton's Rule Exceptions

There are two major exceptions: (1) Wharton's Rule does not apply if the two conspirators are not the parties necessary to commission of the offense; and (2) Wharton's Rule does not apply if more persons than are necessary to commit the crime are involved in the agreement to commit the crime. The Main Outline provides examples.

c. Breakdown of the Rule

Wharton's Rule is increasingly disliked by courts. The Supreme Court has stated that in federal courts the doctrine is no more than a judicially-created rebuttable presumption. If there is evidence that the legislature intended to reject Wharton's Rule, then the doctrine will not be enforced.

8. Special Defense: Legislative-Exemption Rule

A person may not be prosecuted for conspiracy to commit a crime that is intended to protect that person.

9. Special Defense?: Impossibility

Case law here is particularly thin, but it has been stated that neither factual impossibility nor legal impossibility is a defense to a criminal conspiracy.

10. Special Defense?: Abandonment

a. No Defense to Crime of Conspiracy

At common law, the crime of conspiracy is complete as soon as the agreement is formed by two or more culpable persons. There is no turning back from that. Once the offense of conspiracy is complete, abandonment of the criminal plan by one of the parties is not a defense to the crime of conspiracy.

b. Relevance of Abandonment

Although abandonment, or withdrawal, from a conspiracy is not a defense to prosecution of the *crime* of conspiracy, a person who withdraws from a conspiracy may avoid conviction for subsequent offenses committed in furtherance of the conspiracy by other members of the conspiracy, if the abandoning party communicates his withdrawal to every other member of the conspiracy (a near impossibility in many-member conspiracies).

B. Model Penal Code

1. General Principles

a. Definition

The MPC provides that "a person is guilty of conspiracy with another person or persons to commit a crime" if that person, "with the purpose of promoting or facilitating" commission of the crime, "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 if that person agrees to aid the other person or persons in commission of the offense or of an attempt or solicitation to commit such crime.

b. Grading

A conspiracy to commit any offense other than a felony of the first degree is graded the same as the crime that is the object of the conspiracy.

c. Merger

Unlike the common law, a conspirator may *not* be convicted of both conspiracy and the target offense(s), unless the conspiracy involves a continuing course of conduct.

2. *Actus Reus*: How It Differs from Common Law

a. Overt Act

In contrast to the common law, an overt act is required except for felonies of the first and second degree.

b. Nature of Agreement

In contrast to the common law, the object of the agreement must be a crime, and not merely an "unlawful" act.

3. *Mens Rea*

A person is not guilty of conspiracy unless she acts with the *purpose* of promoting or facilitating the commission of the conduct that constitutes a crime. One who furnishes a service or instrumentality with mere *knowledge* of another's criminal activities is not guilty of conspiracy.

4. Plurality Rule

The most influential feature of the MPC is its rejection of the common law plurality requirement. The Code defines the offense in unilateral terms: "*A person* is guilty of conspiracy with another person . . . [if he] agrees with such other person. . . ." It takes two people to agree, but it takes only one person to be *guilty* of conspiracy.

5. Parties to Agreement

Two aspects of the Code need to be kept in mind in determining the parties to a conspiracy. First, conspiracy is a unilateral offense, as discussed above. Second, the MPC provides that if a person guilty of

conspiracy knows that the person with whom he has conspired has, in turn, conspired with another person or persons to commit the *same* crime, the first person is also guilty of conspiring with the other persons or person, whether or not he knows their identity. See the Main Outline for a discussion of how these complicated provisions work to determine whether a person is party of an existing conspiracy.

6. Objectives of a Conspiracy

The Code provides that there is only one conspiracy between parties, even if they have multiple criminal objectives, as long as the multiple objectives are part of the same agreement or of a "continuous conspiratorial relationship."

7. Special Defenses

The MPC does not recognize Wharton's Rule, nor any impossibility defense.

a. Legislative-Exemption Rule

The Code provides that it is a defense to a charge of conspiracy "that if the criminal object were achieved, the actor would not be guilty of a crime under the law defining the offense or as an accomplice." The effect of this language is to permit a defense if enforcement of the conspiracy law would frustrate a legislative intention to exempt that party from prosecution.

b. Renunciation of Criminal Purpose

A person is not guilty of conspiracy under the Code if he renounces his criminal purpose, and then thwarts the success of the conspiracy "under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."

III. SOLICITATION

A. General Principles

1. Definition

At common law, a person is guilty of solicitation if she intentionally invites, requests, commands, or encourages another person to engage in conduct constituting a felony or a misdemeanor involving a breach of the peace or obstruction of justice.

a. Model Penal Code

The Code definition of "solicitation" is broader than the common law in that it applies to solicitation to commit *any* misdemeanor (as well as all felonies).

2. Grading

At common law, a criminal solicitation was a misdemeanor, even when the offense solicited was a felony. Today, a solicitation to commit a felony is usually treated as a felony, but of a lesser degree than the felony solicited.

a. Model Penal Code

As with other inchoate offenses, the MPC treats a solicitation to commit any offense other than a felony of the first degree as an offense of equal grade as the target offense.

3. Merger

The concept of merger applies to the crime of solicitation, just as it does to the offense of attempt.

B. *Actus Reus*

1. General Rule

The *actus reus* of a solicitation is consummated when the actor communicates the words or performs the physical act that constitutes the invitation, request, command, or encouragement of the other person to commit an offense.

2. Unsuccessful Communications

At common law, a solicitation does not occur unless the words or conduct of the solicitor are successfully communicated to the solicited party. In contrast, the Model Penal Code provides that one who unsuccessfully attempts to communicate a solicitation is guilty of solicitation.

3. Relationship of Solicitor to Solicited Party

At common law, a person is not guilty of solicitation if she merely asks another person to *assist* in the crime, that is, requests that the other person serve as an accomplice in the crime. To be guilty, a solicitor must ask the other person to actually perpetrate the offense herself. In contrast, the MPC provides that a person *is* guilty of solicitation if she requests the other person to do some act that would establish the latter person's complicity as an accomplice in the offense.

C. *Mens Rea*

1. Common Law

Solicitation is a specific-intent offense at common law. The solicitor must intentionally commit the *actus reus* (request, encourage, etc., another to commit the crime) with the specific intent that the person solicited commit the target offense.

2. Model Penal Code

The Model Penal Code does not deal in concepts of "specific intent" and "general intent." However, the analysis is the same: a person is not guilty of solicitation unless she acts with the purpose of promoting or facilitating the commission of the solicited offense.

D. Defense: Renunciation

The Model Penal Code—but not the common law—provides a defense to the crime of solicitation if the soliciting party: (1) completely and voluntarily renounces her criminal intent; and (2) persuades the solicited party not to commit the offense or otherwise prevents her from committing the crime.

IV. OTHER INCHOATE OFFENSES

A. Assault

1. Common Law Definition

A common law assault is an attempted battery. (A battery is unlawful application of force to the person of another.) However, the common law recognized "assault" as an offense before criminal attempt law developed, so attempt doctrines do not apply to it. To be guilty of assault, a person must engage in conduct that is in closer proximity to completion than is generally required for other attempt offenses.

2. Modern Statutes

Nearly all states have broadened the definition of assault to include the tort definition of assault: intentionally placing another person in reasonable apprehension of an imminent battery.

B. Inchoate Offenses in Disguise

1. Burglary

Common law burglary involves "breaking and entering the dwelling house of another at night with the intent to commit a felony therein." Thus, burglary only occurs if a person not only breaks into another person's dwelling at night, but has the further specific intention to commit a serious crime inside the dwelling. *The latter felony is inchoate* at the time that the *actus reus* of burglary (breaking and entering) occurs.

2. Larceny

Common law larceny is the trespassory taking and carrying away of the personal property of another with the intent to steal the property, *i.e.* permanently deprive the other of the property. The ultimate harm of theft comes when the wrongdoer *permanently* deprives the person of the property. *That* harm has not occurred at the moment when the thief nonconsensually "takes and carries away" the personal property.

PART NINE: COMPLICITY

I. ACCOMPLICE LIABILITY: COMMON LAW

A. General Principles

1. General Rule

Subject to substantial clarification below, a person is an accomplice in the commission of an offense if she intentionally assists another person to engage in the conduct that constitutes the offense.

2. Accomplice Liability as Derivative Liability

Accomplice liability is derivative in nature. That is, an accomplice's liability derives from the primary party to whom she provided assistance.

The accomplice is ordinarily convicted of the offense committed by the primary party.

3. Justification for Derivative Liability

Accomplice liability is loosely based on the civil concept of agency. That is, when a person intentionally assists another person in the commission of an offense, she manifests thereby her willingness to be held accountable for the conduct of the other person, *i.e.*, she allows the perpetrator of the crime to serve as her agent. Essentially, "your acts are my acts."

4. Common Law Terminology

There are four common law categories of parties to criminal offenses.

a. Principal in the First Degree

This is the person who, with the requisite *mens rea*, personally commits the offense, or who uses an innocent human instrumentality to commit it. The "innocent instrumentality doctrine" provides that a person is a principal in the first degree if she dupes or coerces an innocent human being to perform the acts that constitute an offense.

b. Principal in the Second Degree

This is the person who intentionally assists the principal in the first degree to commit the offense, and who is actually or constructively present during its commission. A person is "constructively" present if she is close enough to assist the principal in the first degree during the crime.

c. Accessory Before the Fact

This is the person who intentionally assists in the commission of the offense, but who is not actually or constructively present during its commission.

d. Accessory After the Fact

This is the person who knowingly assists a felon to avoid arrest, trial, or conviction.

B. What Makes a Person an Accomplice: Assistance

A person "assists" in an offense, and thus may be an accomplice in its commission, if she solicits or encourages another person to commit the crime, or if she aids in its commission.

1. If No Assistance

A person is not an accomplice unless her conduct *in fact* assists in commission of the crime.

2. Trivial Assistance

If a person intentionally aids in the commission of an offense, she is liable as an accomplice, although her assistance was trivial. *Indeed, an accomplice is liable even if the crime would have occurred without her assistance, i.e., she is guilty although her assistance did not cause the*

commission of the offense. Because any actual assistance, no matter how trivial, qualifies, a person may be an accomplice merely by providing psychological encouragement to the perpetrator.

3. Presence at the Scene

A person who is present at the scene of a crime, *even if she is present in order to aid in commission of the offense*, is not an accomplice unless she *in fact* assists in the crime. Although "mere presence" does not constitute assistance, it does not take much to convert presence into trivial assistance. In some circumstances, a person's presence could provide psychological encouragement to the principal, which is enough to trigger accomplice liability.

4. Omissions

Although a person is not generally an accomplice if she simply permits a crime to occur, one may be an accomplice by failing to act to prevent a crime when she has a duty to so act.

C. What Makes a Person an Accomplice: *Mens Rea*

1. Rule

A person is an accomplice in the commission of an offense if she possesses two mental states. She must: (1) intentionally engage in the acts of assistance; and (2) act with the level of culpability required in the definition of the offense in which she assisted.

2. Crimes of Recklessness or Negligence

The prosecutor does not have to prove that the accomplice *intended* a crime of recklessness to occur: it is enough that she was reckless in regard to the ensuing harm; as for a crime of negligence, it is enough to show that the would-be accomplice was negligent in regard to the ensuring harm.

3. Natural-and-Probable-Consequences Doctrine

An accomplice is guilty not only of the offense she intended to facilitate or encourage, but also of any reasonably foreseeable (that is, foreseeable) offense committed by the person whom she aided. That is, once the prosecutor proves that *A* was an accomplice of *P* in the commission of Crime 1 (using the analysis discussed so far), *A* is also responsible for any other offense committed by *P* that was a natural and probable consequence of Crime 1.

D. Accomplice Liability: If the Perpetrator Is Acquitted

1. If No Crime Occurred

If a jury finds that the alleged crime never occurred and, therefore, acquits the principal in the first degree, it logically follows that any accomplice must be acquitted as well, as there is no guilt to derive one cannot be an accomplice to a nonexistent crime.

2. If Perpetrator Is Acquitted on Grounds of a Defense

If a jury acquits the alleged perpetrator of a crime on the ground that he was justified in his actions, then the accomplice should also be acquitted, as this means she aided in a justified (proper) act. But, if the jury acquits the perpetrator on the ground of an excuse, the jury has determined that a crime *has* occurred. The perpetrator's excuse claim is personal to him, and should not protect the accomplice.

E. Perpetrator and Accomplice: Degrees of Guilt

The common law rule used to be that an accessory before the fact could not be convicted of a more serious offense, or a higher degree of an offense, than that for which the principal was convicted. This rule is breaking down. Even in an earlier era, however, most courts treated criminal homicides differently: on the proper facts, courts were and are prepared to convict an accomplice of a higher degree of criminal homicide than the perpetrator.

F. Special Defense: Legislative-Exemption Rule

A person may not be convicted as an accomplice in her own victimization.

II. CONSPIRACY LIABILITY

A. The *Pinkerton* Doctrine

At common law, a person may be held accountable for the actions of others either as an accomplice, discussed above, or as a conspirator. A controversial feature of conspiracy law in many jurisdictions is the *Pinkerton* doctrine, named after the Supreme Court ruling in *Pinkerton v. United States*. This doctrine provides that a conspirator is responsible for any crime committed by any other member of the conspiracy, whether or not he assisted, if the offense falls within the scope of the conspiracy or a reasonably foreseeable consequence thereof.

III. MODEL PENAL CODE

A. Forms of Complicity Liability

1. Innocent-Instrumentality Doctrine

A person is guilty of an offense that she did not personally commit if, acting with the requisite *mens rea*, she "causes an innocent or irresponsible person" to commit the crime. This is equivalent to the common law innocent-instrumentality rule discussed earlier.

2. Accomplice Liability

A person is guilty of an offense that she did not personally commit if she is an accomplice of another person in the commission of the offense.

3. *Pinkerton* Rule

The *Pinkerton* conspiracy doctrine discussed above is not recognized in the Code.

B. What Makes a Person an Accomplice: Assistance

1. Rule

To be an accomplice in the commission of an offense, the person must: (a) solicit the offense; (b) aid, agree to aid, or attempt to aid in its commission; or (c) fail to make a proper effort to prevent commission of the offense (assuming that she has a legal duty to act). See the Main Outline for a comparison of the MPC to the common law.

C. What Makes a Person an Accomplice: *Mens Rea*

1. Rule

To be an accomplice, the person must act "with the purpose of promoting or facilitating the commission of the offense."

2. Exception to the Requirement of Purpose

The MPC handles the issue of accomplice liability for a crime of recklessness or negligence with the following provision: A person who is an accomplice in the commission of *conduct* that causes a criminal *result*, is also an accomplice in the *result* thereof, if she has the level of culpability regarding the *result* required in the definition of the offense. See the Main Outline for an example of how this provision works.

D. Accomplice Liability: If the Perpetrator Is Acquitted

The Code provides that an accomplice in the commission of an offense may be convicted of that offense, even if the alleged perpetrator "has been convicted of a different offense or degree of offense or . . . or has been acquitted." One must be very careful in reading this provision: *if there has been no offense*, then one is not an accomplice "in the commission of *the offense."*

E. Special Defenses

1. Legislative-Exemption Rule

Like the common law, the MPC applies the legislative-exemption rule.

2. Inevitable Incidence

An accomplice is not guilty of an offense if her conduct is an inevitable incident to the commission of the offense, such as a customer in the act of prostitution.

3. Abandonment

A person is not an accomplice in the commission of a crime if she terminates her participation before the crime is committed, and if she either neutralizes her assistance, gives timely warning to the police of the impending offense, or in some other manner prevents commission of the crime.

F. Special Provision to Consider: Relationship of Accomplice Liability to Criminal Attempts

The Code goes well beyond the common law by permitting an accomplice to be convicted of a criminal attempt, if she attempts to aid in commission of an

offense, *although the other person never commits or even attempts to commit the offense.*

PART TEN: CRIMINAL HOMICIDE

I. CRIMINAL HOMICIDE: OVERVIEW

A. "Homicide"

1. Definition

The English common law defined "homicide" as "the killing of a human being by a human being." In American common law, it is "the killing of a human being by *another* human being."

2. "Criminal Homicide"

A criminal homicide is a homicide committed without justification (*e.g.*, in self-defense) or excuse (*e.g.*, as the result of insanity).

B. "Human Being"

1. At the Start of Life

The common law provides that a fetus is not a human being until it is born alive.

2. At the End of Life

At common law, a person is legally dead (and, therefore, ceases to be a "human being") when there is a total stoppage of the circulation of the blood and a permanent cessation of the functions of respiration and heart pulsation. Today, virtually every state provides that a person may be deemed legally dead if he experiences an irreversible cessation of breathing and heartbeat (the common law definition), *or* suffers from "brain death syndrome," which occurs when the whole brain (not just one portion of it) permanently loses the capacity to function.

C. Year-and-a-Day Rule

At common law, a homicide prosecution may only be brought if the victim dies within one year and a day of the injury inflicted by the accused. Today, in light of medical advances and life-support machinery, many states have abolished this rule.

II. COMMON LAW: MURDER

A. Definition of "Murder"

Common law murder is a killing of a human being by another human being *with malice aforethought.*

1. "Malice"

A person acts with "malice" if she unjustifiably, inexcusably, and in the absence of any mitigating circumstance, kills a person with any one of the following four mental states: (a) the intention to kill a human being; (b)

the intention to inflict grievous bodily injury on another; (c) an extremely reckless disregard for the value of human life (often called "depraved heart" at common law); or (d) the intention to commit a felony during the commission or attempted commission of which a death accidentally occurs (the "felony-murder rule"). The first form of malice ("intent to kill") is often called "express malice"; the other three versions of malice are called "implied malice." These four categories of malice are considered below.

2. "Aforethought"

Originally, the term "aforethought" meant that the actor thought about the killing beforehand, *i.e.*, that he premeditated the killing. Over time, the term lost significance.

B. Murder: Intent to Kill

1. General Rule

In view of the definition of "malice aforethought" set out above, an intentional killing that is unjustifiable (*e.g.*, not committed in self-defense), inexcusable (*e.g.*, not committed by an insane person), and unmitigated (*e.g.*, not the result of sudden heat of passion) constitutes common law murder.

2. Proving Intent

The prosecutor must prove beyond a reasonable doubt that the killer *purposely* or *knowingly* took another's life. For a long time, juries were instructed in murder prosecutions that "the law presumes that a person *intends* the natural and probable consequences of his voluntary acts." However, this instruction violates the Due Process Clause of the United States Constitution, because it improperly shifts the burden of proof regarding an element of the offense (malice aforethought, via a finding of intent-to-kill) from the prosecutor to the defendant. Nonetheless, the jury instruction simply points out the obvious. Therefore, even without an instruction, a jury may infer *(but not presume)* intent in such circumstances.

3. Statutory Reform: "Wilful, Deliberate, Premeditated" Formula

In many states that by statute divide murder into degrees, a "wilful, deliberate, premeditated" killing is first-degree murder.

a. Wilful

In the context of murder statutes, this term means, simply, "intentional."

b. Premeditated

To "premeditate" is "to think about beforehand." Some courts state that "no time is too short" for a person to premeditate. In contrast, others courts more properly require proof that the actor thought about the killing "some appreciable time."

c. Deliberate

Unfortunately, courts often fail to distinguish "premeditation" from "deliberation"—they treat it as a single entity. When courts do draw a distinction, as they should, the latter term means "to measure and evaluate the major facets of a choice or problem."

d. What If . . .

If a jury concludes that the defendant acted wilfully—intended to kill—but did *not* premeditate and/or deliberate, the defendant is guilty of *second*-degree murder in states with murder statutes of the sort being considered here. It is murder because the killing was intentional; since the killing was not premeditated and/or deliberate, it is not first-degree murder. So, by matter of elimination, it drops to second-degree.

C. Murder: Intent to Inflict Grievous Bodily Injury

A person acts with malice aforethought if she intends to inflict grievous bodily injury on another human being. Therefore, if a death results from her conduct, she is guilty of murder.

1. "Grievous Bodily Injury"

This term has been variously defined as injury "that imperils life," "is likely to be attended with dangerous or fatal consequences," or is an injury that "gives rise to the apprehension of danger to life, health, or limb."

2. Statutory Approach

In states that distinguish between degrees of murder, one who kills another person with this state of mind is usually guilty of second-degree murder.

D. Murder: "Depraved Heart" (Extreme Recklessness)

1. General Rule

A person who acts with what the common law colorfully described as a "depraved heart" or an "abandoned and malignant heart" is one who acts with malice aforethought. If a person dies as a result of such conduct, the actor is guilty of murder, although the death was unintended.

2. What Is "Depraved Heart"/"Extreme Recklessness"?

Common law judges did not provide a clear definition of "depraved heart" or "abandoned and malignant heart" behavior. In general terms, it is conduct that manifests an extreme indifference to the value of human life. Although no single definition of such extreme indifference can explain all of the common law decisions, today most courts would probably agree that an actor manifests an extreme indifference to the value of human life if he *consciously* takes a *substantial and unjustifiable foreseeable risk* of causing human death. In short, "depraved heart" equals "extreme recklessness."

3. Statutory Approach

In states that divide murder into degrees pursuant to the traditional model, a depraved-heart homicide ordinarily is second-degree murder.

E. Felony-Murder Rule

1. General Rule

At common law, a person is guilty of murder if she kills another person, even accidentally, during the commission or attempted commission of any felony.

a. Statutory Approach

Many states that divide murder into degrees have a dual approach to felony-murder. The murder statute will often provide that a killing that occurs during the commission of certain specifically listed felonies (most commonly: arson, robbery, rape, and burglary) is first-degree murder; a death during the commission of any non-listed felony constitutes murder of the second-degree.

2. Rationale of the Rule

The most plausible deterrence argument—the one that is used most often to defend felony-murder—is that the harshness of the rule will cause felons to commit their crimes in a less dangerous manner, thereby decreasing the risk that deaths will ensue.

3. Limitations on Felony-Murder Rule

Because the felony-murder rule is unpopular, many courts have limited its scope.

a. Inherently-Dangerous-Felony Limitation

Many states limit the felony-murder rule to killings that arise during the commission of "inherently dangerous" felonies. Courts disagree, however, on how to determine whether a felony is inherently dangerous. Some courts consider the felony in the abstract: they look at the definition of the crime and ask whether the offense could be committed without creating a substantial risk of loss of life. Other courts consider a felony inherently dangerous if it is dangerous in the abstract *or* in light of the circumstances surrounding the particular case. See the Main Outline for examples of each approach.

b. Independent-Felony Limitation

Some courts require that the felony that serves as the predicate for the felony-murder rule be "independent" of the homicide. A felony that is *not* independent "merges" with the homicide. The most obvious and least controversial example of a felony that merges is assault with a deadly weapon.

i. The Difficult Cases

Many violent offenses include assaultive conduct. For example, armed robbery basically consists of the offense of larceny +

assault with a deadly weapon; rape involves assaultive conduct; etc. In order that the "independent felony/merger" limitation does not entirely eat up the felony-murder rule, courts have followed either of two approaches: some only apply the merger principle to crimes of assault; some courts define a felony as independent—thus, a felony that will support the felony-murder rule, even if it is assaultive—if it involves an "independent felonious purpose." See the Main Outline for examples.

c. *Res Gestae* Limitation

Many courts provide that the mere fact that a death occurs, in a temporal sense, "during" the commission of a felony, is insufficient to trigger the felony-murder rule. There must also be a causal connection between the felony and the death. However, a death that occurs *after* the felony is committed, but during the escape from the site of the crime, falls within the "*res gestae*" of the felony.

d. Killing by a Non-Felon

Some jurisdictions provide that the felony-murder rule does not apply if the person who commits the homicide is a non-felon resisting the felony.

i. Judicial Approach to Issue

Many courts apply the "agency" theory of felony-murder. That is, a felon is only responsible for homicides committed *in furtherance* of the felony, thus by a person acting as the felon's "agent." Therefore, a homicide committed by a police officer, the victim of the felony, or a bystander, falls outside the felony-murder rule. After all, they are antagonists of the felon, not his agent. In contrast, some court apply a "proximate causation" rule, which holds that a felon may be held responsible for a homicide perpetrated by a non-felon if the felon proximately caused the shooting. See the Main Outline for example of this difficult concept.

III. COMMON LAW: MANSLAUGHTER

A. Manslaughter: General Principles

1. Definition of "Manslaughter"

Common law manslaughter is an unlawful killing of a human being by another human being *without* malice aforethought.

2. Categories of Manslaughter

The common law recognized two type of manslaughter, "voluntary" and "involuntary." Once punished alike, today voluntary manslaughter is the more serious offense.

B. Voluntary Manslaughter: Provocation ("Heat-of-Passion")

1. General Rule

An intentional, unjustified, inexcusable killing, which ordinarily is murder, constitutes manslaughter (or "voluntary manslaughter") if it is committed in sudden heat of passion, as the result of adequate provocation. Thus, the provocation doctrine functions as a full defense to murder, and as a partial defense overall (as the defendant is guilty of manslaughter).

2. Rationale of the Provocation Doctrine

Courts and commentators disagree regarding why an intentional killing in heat of passion is reduced to manslaughter.

a. Partial Justification

Currently the minority view, some courts in the past seemed to believe—and some scholars have expressly argued—that the provocation doctrine functions as a partial justification for a killing, *i.e.*, that the death of the provoker-victim constitutes less of a social harm than the killing of an entirely "innocent" person.

b. Partial Excuse

Most commentators today now characterize the defense as a partial excuse, as a concession to normal human frailty: the social harm is unmitigated, but the culpability of the actor is reduced because of the provocation. Why is this so? If the provocation is serious enough (what the common law calls "adequate provocation"), "we are prepared to say that an ordinary person in the actor's circumstances, even an ordinarily law-abiding person . . ., might become sufficiently upset by the provocation to experience substantial impairment of his capacity for self-control and, as a consequence, to act violently." See the Main Outline for discussion of criticisms of the provocation defense.

3. Elements of the Defense

a. Adequate Provocation

A person may not claim the defense simply because he was provoked. The provocation must be such that it might "inflame the passion of a reasonable man and tend to cause him to act for the moment from passion rather than reason." Or, the provocation must be such that it "might render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion, rather than judgment."

i. Fixed Categories

At original common law, the judge, rather than the jury, determined the adequacy of the provocation. Only a few types of provocation were considered adequate. The most common were: a serious battery; mutual combat; and observation by the husband of his wife in an act of adultery. "Adequate provocation" was *not*

proved if the husband was informed of the adultery but did not see it. And, a rigid rule existed: words alone, no matter how insulting, were insufficient grounds for reducing a homicide to manslaughter.

ii. Modern Trend

Today, most jurisdictions go beyond the limited categories of "adequate provocation" of the original common law. The issue is now typically left to juries to decide whether the alleged provocation would render an ordinary or reasonable person liable to act rashly. (However, most jurisdictions continue to hold that words alone are not adequate provocation for a homicide.) An increasingly critical legal issue in this context is the nature of the "reasonable person" or "ordinary person" mentioned in judicial instructions to juries. See the Main Outline for discussion.

b. State of Passion

For the provocation doctrine to apply, the defendant must kill the victim while in a state of passion, not after he has cooled off. Although the typical "passion" is anger, any over-wrought emotional state, including fear, jealousy, or even deep depression, may qualify.

c. Suddenness

The killing must occur in *sudden* heat of passion. That is, the defendant must not have had reasonable time to cool off.

d. Causal Connection

A causal link between the provocation, the passion, and the fatal act must be proved.

C. Involuntary Manslaughter: Criminal Negligence

1. General Rule

A person who kills another person in a criminally negligent manner is guilty of involuntary manslaughter. This offense often blurs into the depraved-heart version of reckless murder.

D. Involuntary Manslaughter: Unlawful-Act Doctrine

1. General Rule

In an analogue to the felony-murder rule, a person is guilty of involuntary manslaughter if she kills another person during the commission or attempted commission of an unlawful act that does not otherwise trigger the felony-murder rule.

2. Scope of the Rule

a. Broad Version

Some states apply the doctrine to all misdemeanors, as well as to any felony that is excluded from the felony-murder rule due to a limitation on the felony-murder rule. A few jurisdictions go so far as

to apply the doctrine if the conduct that causes the death is wrongful (immoral), albeit not illegal.

b. Limitations

Some jurisdictions limit the rule to *mala in se* misdemeanors, such as petty theft, or to "dangerous" misdemeanors, *i.e.*, offenses entailing "a reasonably foreseeable risk of appreciable physical injury."

IV. MODEL PENAL CODE

A. Criminal Homicide: Overview

The MPC provides that a person is guilty of criminal homicide if she takes the life of another human being purposely, knowingly, recklessly, or negligently. Unlike the common law, the Code divides criminal homicide into *three*, rather than two, offenses: murder, manslaughter, and negligent homicide.

B. Murder

1. Rule

In general, a homicide constitutes murder if the killing is committed: (a) purposely; (b) knowingly; or (c) "recklessly under circumstances manifesting an extreme indifference to the value of human life." Unlike many modern statutes, the MPC does *not* divide murder into degrees.

2. Common Law Versus MPC

a. Types of Murder

The common law term "malice aforethought" is abandoned. What about the underlying concept of malice aforethought? Consider the four common law forms:

i. Intent to Kill

This form *is* recognized under the MPC: as noted above, a criminal homicide is murder under the Code if the killing is committed purposely or knowingly. In essence, this is equivalent to the common law "intent to kill" form of *mens rea.*

ii. Intent to Commit Grievous Bodily Injury

Virtually any case that would qualify as common law murder according to this form of malice, will fit under the MPC "extreme recklessness" umbrella.

iii. Depraved Heart

The MPC extreme recklessness provision is similar to the depraved heart form of common law murder, except that it is explicit in requiring proof of advertent risk-taking, and that the risk-taking be "substantial and unjustifiable."

iv. Felony-Murder

The Code abandons the felony-murder rule. As a compromise, the Code provides that reckless indifference to human life may

be presumed if the person causes the death during commission of one of the felonies enumerated in the Code (robbery, arson, burglary, kidnapping, felonious escape, or rape or deviate sexual intercourse by force or threat of force). This presumption is rebuttable.

C. Manslaughter

Criminal homicide constitutes manslaughter in two circumstances.

1. Recklessness

A homicide committed recklessly constitutes manslaughter. The difference between reckless manslaughter and reckless murder is that here the conduct, although reckless, does *not* manifest an extreme indifference to human life.

2. Extreme Mental or Emotional Disturbance

The Code recognizes a much broader version of the common law provocation doctrine, and also allows states to recognize a "partial responsibility" diminished capacity defense, if they wish to do so. The Code provides that a murder constitutes manslaughter if the actor kills under the influence of an "extreme mental or emotional disturbance" (EMED), for which there is a "reasonable explanation or excuse."

a. Comparison to Common Law

i. Common Law Rigidity/Narrowness Rejected

The EMED provision is wide open: The MPC permits a jury, if it chooses to do so, to reduce the offense to manslaughter without considering the rigid common law categories of adequate provocation; also, "words alone" can qualify. Indeed, the defense applies *even if there is no provocation at all*, as long as the jury concludes that there is a reasonable explanation or excuse for the actor's EMED. There is also no "reasonable cooling off" requirement.

ii. Mixed Subjectivity and Objectivity

The Code provides that the reasonableness of the defendant's explanation or excuse for the EMED should be determined from the perspective of a person "in the actor's situation under the circumstances as he believes them to be." This allows for considerable subjectivization of the objective standard, although the Commentary to the Code concedes that the words "in the actor's situation" are "designedly ambiguous," so as to permit common law development of the subjective/objective issue.

3. What Is "Missing"

There is no "unlawful-act" manslaughter provision under the MPC. As for criminally negligent homicides, they represent a reduced offense, discussed immediately below.

D. Negligent Homicide

A criminally negligent killing—involuntary manslaughter at common law—is the lesser offense of "negligent homicide" under the Code.

PART ELEVEN: RAPE

I. COMMON LAW: FORCIBLE RAPE

A. In General

Blackstone defined rape as "carnal knowledge of a woman forcibly and against her will." Today, it is more accurate to characterize this as *forcible* rape. Rape is a general-intent offense.

1. Statutory Law

The traditional rape statute is apt to provide that forcible rape is sexual intercourse by a male, with a female not his wife, by means of force or threat of force, against her will, and without her consent.

B. *Actus Reus* in Detail

1. "Sexual Intercourse by a Male with a Female . . ."

The common law offense was not complete in the absence of penetration by a male of the female's vagina. Nonconsensual oral and anal sexual penetration constituted the separate offense of sodomy.

a. Modern Reform Statutes

Many states that have reformed their law have re-named the offense "sexual assault" or "sexual battery." These offenses typically prohibit *all* forms of forcible sexual penetration, and not simply vaginal intercourse. They also tend to be gender-neutral: male-on-male and female-on-female sexual penetration is included, as is nonconsensual female-on-male sexual penetration. Also, some states prohibit "sexual contact"—undesired contact that does not result in penetration—as a lesser degree of the offense.

2. ". . . Not His Wife" (Marital Immunity)

At original common law, a husband was not guilty of personally raping his own wife. He could be convicted as an *accomplice* in the rape of his wife (*e.g.*, he assists *X* to rape the husband's wife), but he could not convicted for personally committing the crime. See the Main Outline for a critique of this rule.

3. Nonconsent

The essence of rape is the nonconsensual nature of the sexual intercourse. "Nonconsent" is an element of the crime, rather than consent being a defense. This means that the prosecutor must prove nonconsent beyond a reasonable doubt.

4. Force

a. General Rule

The crime of forcible rape is not complete simply upon proof that the intercourse was nonconsensual. It must also be shown that the male acted forcibly or by threat of physical force. *Nonconsent and force are separate elements.*

b. How Much Force

Originally, the prosecutor had to prove that the male used or threatened substantial force upon the female in order for a forcible rape prosecution to succeed. In this regard, the common law developed a resistance requirement. Essentially, the rule was: if the male uses or threatens to use force likely to cause death or serious bodily injury to the female, the female is not required to resist. If the male uses so-called "moderate" force, the female *is* required to resist the rapist "to the utmost," or "until exhausted or overpowered."

c. Moving Away from Force

i. Requiring Less Force

Some states have begun to reshape forcible rape law by requiring far less proof of force, at least in cases involving atypical facts. See the Main Outline for an example.

ii. Changing the Resistance Requirement

A few states have abolished the resistance requirement outright. Most states, however, still retain the requirement, but only require "reasonable resistance," which leaves it to the jury to determine the sufficiency of the female's resistance.

iii. Abandoning the Force Requirement Altogether

One state has gone so far as to hold that the force inherently involved in the sexual act itself is sufficient proof of "force" to permit a forcible rape conviction. The effect of this decision is to make *all* cases of sexual intercourse "forcible." The only remaining issue is whether the intercourse was nonconsensual. Furthermore, this court has held that forcible rape is proved upon evidence of sexual intercourse, unless the complainant, by words or conduct, reasonably appears to give permission for the intercourse.

C. *Mens Rea*

1. General Rule

Rape is a general-intent offense. Therefore, most jurisdictions provide that a person is not guilty of rape if, at the time of intercourse, he entertained a genuine and *reasonable* belief that the female voluntarily consented.

2. Minority Rules

a. No Mistake-of-Fact "Defense"

A very few states provide that even a defendant's *reasonable* mistake of fact is not a defense.

b. Unreasonable Mistake-of-Fact as a "Defense"

At the other end of the spectrum, the English House of Lords ruled that even an *unreasonable* mistake of fact is a defense to rape. No American state has adopted this reasoning. Moreover, in light of public upset, the Parliament redrafted its rape statute to permit conviction for rape if the male was at least reckless in regard to the female's lack of consent.

II. COMMON LAW: RAPE BY NONFORCIBLE MEANS

A. Statutory Rape

1. Statutory Background

All states provide that intercourse by a male with an underage female to whom he is not married constitutes rape. Neither force nor the underage female's lack of consent is an element of the offense. The definition of "underage" varies by jurisdiction. Today, many states divide statutory rape into degrees of offense, based on the age of the female and, often, on the basis of the difference of age between the female and the male. The most severe penalties are imposed when the male is an adult and the female is pre-pubescent.

2. Rationale

An early rationale of statutory rape laws, especially in the Victorian era, was that such laws were needed to protect "chaste maidens" from becoming "fallen women." In recent years, statutory rape laws have been defended on a different ground: recent studies reveal that there is a high pregnancy rate among underage females as a result of sexual relations with adult males. At least in these cases, prosecution of statutory rape laws arguably might serve as a deterrent against adult exploitation and resulting pregnancies of young females.

3. Mistake of Fact Regarding Age

Nearly all jurisdictions treat statutory rape as a strict-liability offense. Therefore, the defendant is guilty of the offense, even if he reasonably believed that the victim was old enough to consent.

B. Rape by Fraud

1. Fraud-in-the-Inducement

At common law, a seducer is not a rapist. More specifically, a male is not guilty of rape even if he fraudulently induces the female to consent to intercourse with him.

2. Fraud-in-the-Factum

In contrast to fraud-in-the-inducement, consent to engage in sexual intercourse is invalid if, as the result of fraud, the victim is unaware that she has consented to an act of sexual intercourse. Therefore, in these so-called fraud-in-the-factum cases, consent is vitiated and a rape prosecution will lie.

III. MODEL PENAL CODE

A. Forcible Rape

1. Definition

"A male who has sexual intercourse with a female not his wife is guilty if . . . he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone." As this definition shows, the Code is gender-specific and recognizes the marital immunity rule. The term "sexual intercourse," however, is defined elsewhere to include oral and anal sexual relations, which is broader than the common law.

2. Looking a Little Deeper

Notice that the Code does not use the term "nonconsent." Instead, it uses the word "compels." Although, of course, compulsion by the male implies nonconsent by the female, the drafters believed that, as with other violent crimes, attention should be focused on the alleged perpetrator's actions—his acts of compulsion—and not on how the alleged victim responded. Thus, the MPC does *not* include a resistance requirement.

3. Grading Rape

The Code grades rape as a felony of the second degree except in two circumstances, in which it is aggravated to a felony of the first degree. It is first degree if: (1) the male actually inflicts serious bodily injury upon anyone during the course of the rape; or, very controversially today, (2) the female was *not* a "voluntary social companion of the actor upon the occasion of the crime and had not previously permitted him sexual liberties."

B. Other Forms of Rape

The Code also prohibits nonforcible sexual intercourse by a male with a female not his wife in other circumstances: (1) if he "substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants, or other means for the purpose of preventing resistance"; (2) if she was unconscious at the time of the intercourse; or (3) if she is under ten years of age. In the latter case, it is no defense that the male reasonably believed "the child to be older than 10."

C. Gross Sexual Imposition

The MPC drafters defined a new sexual offense, less serious than rape, to deal with three circumstances in which a male secures sexual intercourse with a female not his wife: (1) if "he compels her to submit by any threat that would prevent resistance by a woman of ordinary resolution"; (2) if he knows that she

suffers from mental disease "which renders her incapable of appraising the nature of her conduct"; or (3) if "he knows that she is unaware that a sexual act is being committed upon her or that she submits because she mistakenly supposed that he is her husband."

1. Clarification

The first version of gross sexual imposition set out above is intended to criminalize less serious *bodily* threats than are encompassed under the rape statute as well as *non*-bodily threats—economic, reputational, and the like. The limitation—that the threat would prevent resistance by a "woman of ordinary resolution"—is intended to reduce the risk that criminal prosecutions will be brought in cases of relatively trivial threats.

The third form above covers cases of fraud-in-the-factum and one specific issue that bedeviled common law courts: cases in which a female has intercourse with a man whom she incorrectly believes is her husband.

PART TWELVE: THEFT

I. LARCENY

A. General Principles

1. Common Law Definition

Larceny is the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive the other person of the property. For shorthand, lawyers often describe the *mens rea* as the "intent to steal" the property.

a. Possession

Larceny is a crime of possession not of title. If a wrongdoer wrongfully obtains title to another person's property, the offense of false pretenses, discussed later, may be implicated.

b. *Mens Rea*

Larceny is a specific-intent offense. The defendant is not guilty of the crime unless he commits the *actus reus* with the specific intent to steal the property.

2. Grade of the Offense

Common law larceny was a felony. However, the crime was divided up between "grand" and "petty" larceny. The death penalty applied to grand larceny. In modern statutes, petty larceny is a misdemeanor; grand theft is a non-capital felony.

B. *Actus Reus* in Detail

1. Trespass

The taking of another person's personal property is not larceny unless the taking is trespassory in nature. A trespass occurs if the defendant takes possession of the personal property of another, *i.e.*, she dispossesses

another person, without the latter's consent or in the absence of a justification for the nonconsensual taking.

a. Taking Possession by Fraud

A person who secures property deceitfully acts trespassorily, *i.e.*, the fraud vitiates the consent of the original possessor of the property. Larceny by fraud is sometimes called *larceny by trick*.

2. Taking Possession ("Caption")

Larceny implicates the trespassory taking of personal property. More specifically, a "taking" involves the wrongful taking of *possession*, rather than mere *custody*, of property. This distinction—possession versus custody—is critical to understanding larceny law.

a. Possession Versus Custody: Drawing the Distinction

i. Possession

A person is in "possession" of property if she has sufficient control over it to use it in a generally unrestricted manner. Possession may be actual or constructive. It is "actual" if a person has physical control over the property. It is "constructive" if she does not have physical control over it, but nobody else is in actual possession of it.

ii. Custody

A person is in "custody" of property if she has physical control of the property, but her right to use it is substantially restricted. In the ordinary situation, a person has custody rather than possession of property if she has temporary and limited right to use the property in the possessor's presence.

b. Special Possession/Custody Rules in Employment Relationship

i. Employer to Employee

When an employer (the "master") furnishes his personal property to his employee (the "servant") for use in the employment relationship, the common law ruled that the employer retains constructive possession of the property. The employee has mere custody.

ii. Third Person to Employee for Employer

When a person furnishes personal property to *another* person's employee, in order that it will be delivered to the employer, he transfers *possession* of the property to the *employee.*

c. Bailments: The Breaking Bulk Doctrine

When a bailee is entrusted by the bailor with a container for delivery to another person, the bailee receives possession of the container, but mere custody of its contents. Therefore, if the bailee wrongfully opens the container and removes its contents, *i.e.*, "breaks bulk," he takes

possession of the contents at that moment. As with other areas of theft law, the precise facts of the case can turn a larceny into a non-larceny, or vice-versa. See the Main Outline for examples.

3. Carrying Away ("Asportation")

A person is not guilty of larceny unless he carries away the property. Virtually any movement of property away from the place where possession was taken constitutes asportation. However, the asportation must consist of "carrying away" movement.

4. Personal Property of Another

a. "Personal Property"

i. Personal Versus Real Property

Larceny is not committed if a person takes property attached to the land, such as trees and crops, because such property is *real* rather than *personal* in nature. When real property is severed from the land, however, it becomes personal property, and the first person to take possession of it in that form is in lawful possession of it.

ii. Animals

At common law, domestic animals were protected by larceny law; animals in the state of nature *(ferae naturae)*, such as wild deer and birds, were not considered to be personal property belonging to another.

iii. Intangible Property

Intangible personal property—property that, by definition, cannot be taken and carried away—is not protected by the common law of larceny, but is covered in most modern statutes.

b. "Of Another"

Larceny involves the taking of another person's personal property. For purposes of larceny law, the "another" is the person who has lawful possession of the property. Ownership is not the key.

C. *Mens Rea*: "Intent to Steal"

1. General Rule

A person is not guilty of larceny when he wrongfully takes and carries away another person's personal property, unless he possesses the specific intent to permanently deprive the other person of the property.

a. Recklessness

Often, a court will find that the requisite intent is proven if the actor takes property, and then abandons it under circumstances in which he knows that the property will probably not be returned to its owner. In such circumstances, it is more accurate to describe the actor's *mens rea* as "reckless deprivation of another person's property."

2. Concurrence Requirement

In general, the intent to steal must *concur* with the taking of the property.

a. "Continuing Trespass" Doctrine

The concurrence requirement is subject to the "continuing trespass" doctrine. This legal fiction provides that when a person trespassorily takes possession of property, she commits a new trespass every moment that she retains wrongful possession of it. Therefore, even if the wrongdoer does not have the intent to steal the property when she originally takes property trespassorily, the concurrence requirement is met if she later decides to steal the property.

D. Special Problem: Lost or Mislaid Property

1. Lost Property

The rights of a finder of lost property depend on two factors: the possessory interest of the person who lost the property at the time the property is discovered by the finder; and the finder's state of mind when he retrieves the lost property.

a. Possessory Interest of the Owner

A person retains constructive possession of his lost property if there is a reasonable clue to ownership of it when it is discovered. A reasonable clue to ownership exists if the finder: (1) knows to whom the lost property belongs; or (2) has reasonable ground to believe, from the nature of the property or the circumstances under which it is found, that the party to whom it belongs can reasonably be ascertained.

b. State of Mind of the Finder

As with other larceny cases, it is important to determine the finder's state of mind when he takes possession of the lost property. See the Example in the Main Outline for clarification.

2. Mislaid Property

An object is "mislaid" if it is intentionally put in a certain place for a temporary purpose, and then accidentally it is left there when the owner leaves. The two factors just discussed regarding lost property also apply to mislaid property. However, in regard to the "reasonable clue to ownership" factor, the common law is more protective of the owner of mislaid property than of lost property: The common law provides that there is *always* a clue to ownership of mislaid property.

II. EMBEZZLEMENT

A. Elements of the Offense

Today, embezzlement is a felony or a misdemeanor, depending on the value of the property embezzled. Because the offense is statutory in nature, and differs from jurisdiction to jurisdiction, the precise contours of the offense cannot be stated. However, in general the offense requires proof of two or three elements:

1. Manner of Obtaining Possession

Embezzlement occurs when the actor takes possession of the personal property of another in a lawful—nontrespassory—manner.

2. Conversion

After securing lawful possession of the property, the actor converts the property to his own use, *i.e.*, he uses the property in a manner that manifests his intention to deprive another person of the property permanently.

3. Entrustment

Many embezzlement statutes provide that the actor must have obtained possession as a result of entrustment by another person.

B. Larceny Versus Embezzlement

The line between these two offenses is very thin, and depends in large part on the state of mind of the actor at the time he takes possession of property. See the Examples in the Main Outline for clarification.

III. FALSE PRETENSES

A. Elements of the Offense

The crime of "obtaining property by false pretense" is a felony or misdemeanor, depending on the value of the property taken. As with embezzlement, the statutory nature of the crime allows for only general description of the offense.

1. Title

With false pretenses, the victim transfers title, rather than mere possession, to the wrongdoer. This is the key difference between false pretenses, on the one hand, and larceny and embezzlement, on the other.

2. Nature of Fraud

False pretenses involves a false representation of an existing fact.

a. How the Misrepresentation Occurs

The misrepresentation may be in written or oral form, or can be the result of misleading conduct. Silence—nondisclosure of a fact—does not usually constitute false pretenses, even if *D* knowingly takes advantage of *V*'s false impressions.

b. Fact Versus Opinion

The misrepresentation must be of a fact and not of opinion.

c. Existing Fact Versus a Promise of Future Conduct

The majority rule is that, to constitute false pretenses, a factual misrepresentation must pertain to an existing fact, and not involve a promise of future conduct. The minority rule, led by the Model Penal Code, is that a prosecution is permitted, even if the misrepresentation is in the form of a promise of future conduct. However, the intention

to deceive cannot be proved solely on the basis of the promisor's failure to live up to his promise.

3. *Mens Rea*

The deceiver must make the false representation "knowingly" and with "the intent to defraud." That is, the actor must know that the representation is false; and he must make the false statement with the specific intent of defrauding the other person. This approximates the "intent to steal" concept in larceny.