LexisNexis Capsule Summary
Criminal Law

Chapter 1
THEORY, SOURCES, AND LIMITATIONS OF CRIMINAL LAW

§ 1.01 Theories of Criminal Punishment

[A] Utilitarianism

[1] Deterrence – The utilitarian theory is essentially one of deterrence – punishment is justifiable if, but only if, it is expected to result in a reduction of crime. Punishment must be proportional to the crime, i.e., that punishment be inflicted in the amount required (but no more than is required) to satisfy utilitarian crime prevention goals.

Utilitarians consider the effect of a form of punishment in terms of both general deterrence and specific (or individual) deterrence. When the goal is ***general deterrence***, punishment is imposed in order to dissuade the community at large to forego criminal conduct in the future. When the goal is ***specific deterrence***, punishment is meant to deter future misconduct by an individual defendant by both preventing him from committing crimes against society during the period of his incarceration (***incapacitation***), and reinforcing to him the consequences of future crimes (***intimidation***).

[2] Rehabilitation – Another form of utilitarianism is rehabilitation (or reform). Examples of rehabilitative "punishment" include: psychiatric care, therapy for drug addiction, or academic or vocational training.

[B] Retributivism – Under a retributive theory of penal law, a convicted defendant is punished simply because he deserves it. There is no exterior motive such as deterring others from crime or protecting society – here the goal is to make the defendant suffer in order to pay for his crime. Retributive theory assigns punishment on a proportional basis so that crimes that cause greater harm or are committed with a higher degree of culpability (e.g., intentional versus negligent) receive more severe punishment than lesser criminal activity.

[C] Denunciation (Expressive Theory) – The denunciation theory – which holds that punishment is justified as a means of expressing society's condemnation of a crime – has both utilitarian and retributive components. Under a utilitarian theory, denunciation is desirable because it educates individuals that the community considers specific conduct improper, channels community anger away from personal vengeance, and serves to maintain social cohesion. Under a retributive theory, denunciation serves to punish the defendant by stigmatizing him.

§ 1.02 Sources of Criminal Law

[A] Common Law – Common law is judge-made law. Even when superceded by statutory law, common law may serve to interpret ambiguous statutory terms.

[B] Criminal Statutes – Today, statutory law is the prevailing source of criminal law and essentially has replaced common law. Although most states have abolished common law crimes, a few have enacted ***"reception" statutes***, expressly recognizing common law offenses when statutory law does not provide a punishment for such offense. In effect, such a statute "receives" the common law offenses in place at the time of the statute's enactment.

Generally speaking, statutory law classifies a crime as a felony or a misdemeanor, both of which may be subdivided into degrees. A felony is punishable by death or imprisonment in a state or federal prison. The maximum punishment for a misdemeanor is a monetary fine, incarceration in a local jail, or both. Some jurisdictions also have an additional classification of "violation" or "infraction" for which only a monetary fine is authorized.

[C] Model Penal Code – Although the Code – published by the American Law Institute – is not the law in any jurisdiction, it stimulated adoption of revised penal codes in at least thirty-seven states. Although some state legislatures have adopted only small portions of the Model Code as their own, other jurisdictions (including New Jersey, New York, Pennsylvania, and Oregon) have enacted many of its provisions. Courts, on their own, sometimes turn to the Model Code and its supporting commentaries for guidance in interpreting non-Code criminal statutes.

§ 1.03 Constitutional Limitations on Criminal Law

Various provisions of the United States Constitution impose limits on federal and state legislative action. A state legislature is also limited by its own state constitution, which may place greater restrictions on it than does the federal Constitution.

[A] Limits on Federal Action – The "Bill of Rights" restricts the power of the federal government in its relationship to individuals.

[B] Limits on State Action – The Fourteenth Amendment to the United States Constitution imposes limits on state government. The 14th Amendment:

(1) prohibits states from making or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States"
(2) "deprive any person of life, liberty, or property without due process of the law;" or
(3) "deny to any person within its jurisdiction the equal protection of the laws."

§ 1.04 Legality

[A] Common Law – A person may not be punished unless his conduct was defined as criminal at the time of commission of the offense. This ***prohibition on retroactive criminal lawmaking*** constitutes the essence of the principle of legality.

There are three interrelated corollaries to the legality principle:

(1) Criminal statutes should be ***understandable to reasonable law-abiding persons.*** A criminal statute must give "sufficient warning to men of common intelligence as to what conduct is unlawful." A person is denied due process of law if he is convicted and punished for violation of a statute that lacks such clarity.

(2) Criminal statutes ***should not delegate basic policy matters*** to police officers, judges, and juries for resolution on an ad hoc and subjective basis.

(3) Judicial ***interpretation of ambiguous statutes should "be biased in favor of the accused"*** (the lenity doctrine).

[B] Model Code – The Model Penal Code does not recognize the lenity principle. Section 1.02(3) requires instead that ambiguities be resolved in a manner that furthers the general purposes of the Code and the specific provision at issue.

Chapter 2
GENERAL PRINCIPLES IN CRIMINAL TRIALS

§ 2.01 Jury Trials

[A] Right to Trial by Jury – The right to a jury trial only applies to "non-petty" offenses, generally deemed to be offenses punishable by imprisonment for more than six months. [*Baldwin v. New York,* 399 U.S. 66, 69 (1970)] Offenses for which the maximum term of imprisonment authorized by law is six months or less may also be deemed "non-petty" if additional available statutory penalties (including fines) "are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." [*Blanton v. City of North Las Vegas,* 489 U.S. 538, 543 (1989)]

[B] Required Number of Jurors – Although a jury composed of as few as six persons is constitutional [*Williams v. Florida,* 399 U.S. 78 (1970)], the current requirement in federal criminal trials is that a jury must be composed of twelve persons [Fed. R. Crim. P. 23(a)] Many states likewise require a 12-person jury in criminal trials.

[C] Number of Jurors Needed to Acquit or Convict – State laws permitting non-unanimous verdicts are permissible, as long as the vote to convict represents a "substantial majority" of the jurors [*Johnson v. Louisiana,* 406 U.S. 356 (1972)], but in federal criminal trials, a verdict to convict or acquit must be unanimous. [Fed. R. Crim. P. 31(a)]

[D] Jury Nullification – A jury has the power to return a verdict of acquittal even though the jury believes that the defendant is legally guilty of an offense. This might occur if the jury believes that the criminal statute is immoral or unjust, that the defendant has been "punished enough" already, or that the police or prosecutors misbehaved in some manner.

§ 2.02 Burdens of Proof

The fact-finding process imposes two types of burdens of proof: (1) the burden of production (sometimes called the "burden of going forward (with evidence)"); and (2) the burden of persuasion.

[A] Burden of Production

[1] Prosecution Burden of Production – Prior to trial the prosecution must file a document with the court that indicates the crime or crimes it believes that the defendant has committed. This document provides the accused with notice of the essential elements of the offense(s) charged, and the basic facts that the prosecutor intends to prove at trial to support his allegation that the defendant committed the crime(s). The prosecutor must produce enough evidence that a rational trier-of-fact may fairly determine that the elements of the crime have been proved beyond a reasonable doubt.

If the judge concludes that the prosecutor ***failed to satisfy the burden of production*** regarding *any* element of the offense charged, the defendant is entitled to a ***directed verdict*** of acquittal at the conclusion of the prosecutor's case-in-chief or at the end of the trial. If the prosecutor failed to introduce enough evidence to support a jury finding beyond a reasonable doubt that the defendant committed the crime, there is no reason for it to deliberate on the matter.

[2] Defendant's Burden of Production – The defendant is sometimes required to provide advance notice to the prosecution of defenses he intends to assert at trial. The amount of evidence required to satisfy the burden of production on affirmative defenses varies by jurisdictions. In some jurisdictions the defendant meets his burden of production (and, thus, is entitled to an instruction to the jury on the defense) if he produces ***more than a "scintilla of evidence"*** regarding an affirmative defense; in other jurisdictions the defendant must introduce enough evidence to raise a ***reasonable doubt*** on the issue of the defense claimed.

If the defendant fails to meet his burden of production regarding an affirmative defense, the judge will not instruct the jury on the law pertaining to the defense, and the defendant is not entitled to have the issue considered by the jury in its deliberations.

[B] Burden of Persuasion – Once a party satisfies his burden of production pertaining to an issue, that matter is properly before the jury as fact-finder, i.e., it will decide whose factual claims are more persuasive.

[1] Prosecution's Burden of Persuasion (the *Winship* doctrine) – Pursuant to the due process clause, a person charged with a crime is presumed innocent and, to enforce this presumption, the Supreme Court held in ***In re Winship*** [397 U.S. 358 (1970)] that the prosecution must persuade the fact-finder ***beyond a reasonable doubt of "every fact necessary to constitute the crime charged."*** This rule has come to be known as "the *Winship* doctrine."

If the prosecution fails to meet its burden of persuasion, the defendant must be acquitted. Procedurally, the acquittal may occur in either of two ways. First, after the prosecution completes its presentation of evidence or immediately before the case is due to be submitted to the jury, upon motion of the defendant, the trial court must direct a verdict of acquittal if the evidence, viewed in the manner most favorable to the prosecution, can support no reasonable verdict other than acquittal. Alternatively, if the judge believes that reasonable minds can differ and, therefore, permits the case to go to the jury, the jury must acquit if it possesses a reasonable doubt regarding one or more elements of the offense charged.

[2] Defendant's Burden of Persuasion – Jurisdictions differ in their allocation of the burden of persuasion regarding affirmative defenses. Some states require the prosecution to disprove beyond a reasonable doubt some or all defenses, once the defendant has met his burden of production. In states that allocate to the defendant the burden of persuasion regarding defenses, it is typical to require the defendant to prove the validity of the claimed defense by the less strict preponderance-of-the-evidence standard.

If a defendant presents sufficient evidence to meet his burden of *production* regarding a defense to the crime charged, the jury must be permitted to evaluate the defense claimed. When the defendant also has the burden of *persuasion*, a jury should reject the claimed defense if he fails to satisfy the stated burden.

If the prosecution has the burden of disproving a defense, the jury must acquit the defendant if the prosecution fails to persuade the jury beyond a reasonable doubt of the defense's non-existence.

[3] Determining if a Fact Relates to an Element or an Affirmative Defense – A prosecutor must prove every element of an offense beyond a reasonable doubt. The legislature may allocate to the defendant the burden of persuasion regarding "facts not formally identified as elements of the offense charged." [*McMillan v. Pennsylvania,* 477 U.S. 79, 86 (1986)] Thus, generally speaking, a legislature may allocate to the defendant the burden of persuasion regarding facts that relate to an affirmative defense. However, a court interpretation of the statute may be required to determine whether a particular "fact" relates to an element of an offense or to an affirmative defense. [Compare *Mullaney v. Wilbur* and *Patterson v. New York,* below.]

In ***Mullaney v. Wilbur,*** 421 U.S. 684 (1975), the homicide statute under which the defendant was tried defined "unlawful" killing as "*neither justifiable nor excusable.*" At trial the defendant presented evidence supporting his claim that he killed the victim "in the heat of passion on sudden provocation." The trial judge instructed the jury that if the prosecution proved that the defendant killed the victim unlawfully and intentionally, then the killing was murder, but if the defendant persuaded the jury by a preponderance of the evidence that the killing was "in the heat of passion on sudden provocation," it constituted the lesser offense of manslaughter. The Court found that the instruction violated the *Winship* doctrine, as it essentially shifted to the defendant the burden of disproving an element of the offense – that the homicide was not "unlawful" as defined in the statute.

In ***Patterson v. New York,*** 432 U.S. 197 (1977), the defendant raised an affirmative defense of "extreme emotional disturbance" as provided for in the New York homicide statute. The jury was instructed that the defendant bore the burden of persuasion for such defense. The Court upheld the resulting conviction. In contrast to *Mullaney* – where the *absence* of heat of passion (or any other justification or excuse) was an element of murder – absence of "extreme emotional disturbance" was not an element of the New York murder statute. Rather, existence of such a condition was an express affirmative defense to murder that mitigated the crime to manslaughter. As a non-element of murder, the state could properly place the burden of proving its existence on the defendant.

[4] Model Penal Code – Except for defenses that the Code expressly requires the defendant to prove – with the standard of proof being a preponderance of the evidence – the prosecution must prove every "element" of an offense beyond a reasonable doubt, [MPC § 1.12(1)] ***including conduct that negates an excuse or justification*** for the action. [MPC § 1.13(9)(c)] That is, the Model Penal Code allocates to the prosecution the duty to disprove defenses, assuming that the defendant has satisfied his burden of production.

§ 2.03 Presumptions

[A] Common Law Mandatory Presumptions – If a jury is instructed that it *must* presume Fact B upon proof of basic Fact A, the presumption is a "mandatory presumption."

[1] Rebuttable Mandatory Presumptions – A mandatory rebuttable presumption requires a finding of the presumed fact upon proof of the basic fact, unless that finding is rebutted by the opposing party. The procedural effect of a mandatory rebuttable presumption is to shift to the defendant the burden of persuasion regarding the presumed fact, upon proof by the prosecution of the basic fact. Rebuttable mandatory presumptions are unconstitutional when the presumed fact is an element of the crime charged. [*Sandstrom v. Montana*, 442 U.S. 510 (1979)].

[2] Irrebuttable ("Conclusive") Presumptions – An irrebuttable or conclusive presumption requires the jury to find the presumed fact upon proof of the basic fact, even if the opposing party introduces rebutting evidence. (NB: True irrebuttable presumptions are rare.) A mandatory irrebuttable presumption pertaining to an element of an offense is unconstitutional for the same reasons that mandatory rebuttable ones are impermissible.

[B] Common Law Permissive Presumptions ("Inferences") – A permissive presumption – or inference – is one in which the fact-finder may, but need not, find the existence of the presumed fact upon proof of the basic fact. As such, it does not formally shift the burden of proof from one party to another, as a true mandatory presumption does. While not unconstitutional per se, to be constitutionally permissible, there must be a rational connection between the basic fact and the presumed (inferred) fact; i.e., the presumed fact more likely than not flows from the basic fact.

[C] Model Penal Code – The Model Penal Code [§ 1.12(5)(b)] does not recognize mandatory presumptions but permits *permissive* presumptions regarding elements of an offense.

§ 2.04 Sentencing

[A] Distinctions Among Sources of Law

[1] State Law; Majority Approach – Consistent with rehabilitation, virtually every state by 1960 utilized some form of "indeterminate sentencing." This system afforded judges considerable sentencing discretion, encouraged individualization of maximum sentences, and authorized correctional officers (primarily parole boards) to release a prisoner before completion of the sentence imposed by the judge, if the prisoner satisfied rehabilitative goals. Today, ***most states have abandoned indeterminate sentencing systems*** for a determinate one, leaving no discretion to corrections officers to reduce sentences based on evidence of rehabilitation in prison.

[2] Federal Law – Federal judges are now required to impose sentences in conformity with the Federal Sentencing Guidelines. In brief, after following a series of steps, the judge arrives at a numerical range, within which he determines the specific sentence for a given convicted defendant. These guidelines greatly reduce the discretion afforded judges in federal criminal trials.

[B] Eighth Amendment Limits on Punishment

[1] General Principle – The Supreme Court has held that implicit in the Eighth Amendment's prohibition against "cruel and unusual punishment" is that punishment not be grossly disproportional to the crime committed. [*Weems v. United States*, 217 U.S. 349, 367 (1910)]

[2] Death Penalty – The Supreme Court has stated that the death penalty "does not invariably violate the Constitution" [*Gregg v. Georgia,* 428 U.S. 153 (1976), addressing capital punishment imposed for murder convictions] but has ruled that death is grossly disproportional punishment for the crime of rape of an *adult* woman. [Co*ker v. Georgia,* 433 U.S. 584 (1977)]

[3] Terms of Imprisonment – The Court has apparently struggled with the issue of whether punishment can be disproportionate to the offense in non-capital cases. Nevertheless, the following conclusions may be drawn:

(1) ***disproportionate sentences for petty offenses may be permissible if the statute provides for parole*** (compare *Rummel v. Estelle* and *Solem v. Helme*, below);

(2) even in the absence of parole, a seemingly ***disproportionate punishment might be permissible for a serious offense*** (see *Harmelin v. Michigan,* below).

[a] *Rummel v. Estelle* [445 U.S. 263 (1980)] – Rummel was convicted in Texas of the felony of obtaining by false pretenses a check for $120.75, and then cashing it. The offense carried a two-to-ten year prison term. However, Rummel had previously been convicted twice of theft (in which he fraudulently amassed property or cash valued at $108.36), and so he was sentenced as required under the state's habitual offender law to life imprisonment. (Rummel was eligible for parole consideration after approximately twelve years in prison.) The Supreme Court upheld Rummel's sentence, rejecting the argument that his life sentence constituted grossly disproportional punishment because his three offenses were all petty nonviolent crimes. The Court deferred to the Texas legislature's decision to enact legislation aimed at reducing recidivism by imposing harsher prison sentences on repeat offenders.

[b] *Solem v. Helm* [463 U.S. 277 (1983)]– The defendant Helm was sentenced to life imprisonment without possibility of parole pursuant to South Dakota's habitual offender law, upon conviction of fraudulently passing a "no account" check for $100.00. It was his seventh conviction. The Court invalidated Helm's sentence, and in so doing, reaffirmed the applicability of the constitutional principle of proportionality in non-capital offenses. The Court distinguished *Rummel* on the ground that Texas had a relatively liberal parole policy, whereas Helm's life sentence was without possibility of parole.

[c] ***Harmelin v. Michigan*** [501 U.S. 957 (1991)] – Harmelin was convicted of possessing 672 grams of cocaine. Although this was his first offense, he received the statutory mandatory term of life imprisonment without possibility of parole. Because there was no death penalty in Michigan, this was the harshest penalty available for any offense in the state. The Court held that Harmelin's sentence did *not* violate the Eighth Amendment.

Chapter 3
ACTUS REUS

§ 3.01 General Principle

"*Actus reus*" refers to the physical aspect of the criminal activity. The term generally includes (1) a ***voluntary act*** (2) that ***causes*** (3) ***social harm***.

§ 3.02 Voluntary Act

[A] General Rule – Subject to limited exceptions, a person is not guilty of a crime unless his conduct includes a voluntary act. Few statutes defining criminal offenses expressly provide for this requirement but courts usually treat it as an implicit element of criminal statutes.

[B] Definitions

"Act" – An act involves ***physical behavior***. It does not include the mental processes of planning or thinking about the physical act that gives rise to the criminal activity (such is the domain of *mens rea*).

"Voluntary" – In the context of *actus reus*, "voluntary" may be defined simply as any ***volitional movement***. Habitual conduct – even if the defendant is unaware of what he is doing at the time – may still be deemed voluntary. Acts deemed involuntary may include: spasms, seizures, and bodily movements while unconscious or asleep.

[C] Burden of Proof – Although a defendant may raise as a defense that his conduct was not voluntary, the voluntariness of an act proscribed by criminal law is in fact an ***element of the crime***, and as such, the prosecution bears the burden of proving such fact.

The prosecution does not need to show, however, that *every* act was voluntary in order to establish culpability. It is sufficient that the defendant's conduct – which is the actual and proximate cause of the social harm – *included* a voluntary act.

[D] Constitutional Law – A state may not dispense with the criminal law requirement of an *actus reus*. That is, the government may not punish a person for his thoughts alone, or for his mere propensity to commit crimes. The special rule of omissions aside, *some* conduct by the defendant is constitutionally required.

[1] *Robinson v. California* [370 U.S. 660 (1962)] – Robinson was convicted under a California statute that made it an offense for a person to "be *addicted* to the use of narcotics." The Supreme Court struck down the statute on Eighth and Fourteenth Amendment grounds.

Essentially, the Court held that, although a legislature may use criminal sanctions against specific acts associated with narcotics addiction, e.g., the unauthorized manufacture, sale, purchase, or possession of narcotics, it ***could not criminalize the status of being an addict***, which the Court analogized to other illnesses.

[2] ***Powell v. Texas*** [392 U.S. 514 (1968)] – Powell was charged with violating a Texas statute that prohibited drunkenness in a public place. Powell argued that he was a chronic alcoholic and was thus unable to prevent appearing drunk in public and sought relief under the reasoning of *Robinson*. The Court upheld his conviction, distinguishing the case from *Robinson* on the ground that Powell was being punished for the ***act of public drunkenness*** and not for his status as a chronic alcoholic.

[E] Model Penal Code – Similar to the common law, MPC § 2.01 requires that criminal conduct include a voluntary act. It does not define the term "voluntary," but Comments list bodily movements that are involuntary: reflexes, convulsions, conduct during unconsciousness, sleep, or due to hypnosis, as well as any conduct that "is not a product of the effort or determination of the defendant, either conscious or habitual." ***Excluded*** from the requirement that the act be voluntary are offenses that constitute a ***"violation"*** [§2.05], defined as an offense for which the maximum penalty is a fine or civil penalty.

§ 3.03 Omissions

[A] Common Law – Subject to a few exceptions, a person has ***no legal duty to act*** in order to prevent harm to another. The criminal law distinguishes between an act that affirmatively *causes* harm, and the failure of a bystander to take measures to *prevent* harm.

[B] Common Law Exceptions to the "No Duty to Act" Rule

[1] Duty Based on Status Relationship – One may have a common law duty to act to prevent harm to another if he stands in a special status relationship to the person in peril. Such a relationship is usually founded on the dependence of one party to the other – e.g., a parent to his minor child – or on their interdependence – e.g., spouses.

[2] Duty Based on Contractual Obligation – A duty to act may be created by implied or express contract. E.g., a person who undertakes the care of a mentally or physically disabled person and fails to do so may be found criminally liable based on omission for his ward's injury or death.

[3] Duty Based on Creation of a Risk – A person who harms another or places a person in jeopardy of harm, or who damages property, even if unintentionally, has a common law duty to render assistance. E.g., one who accidentally starts a house fire may be convicted of arson if he fails to extinguish the fire or take other steps to prevent or mitigate the damage. As another example, there is a split of authority regarding whether one who *justifiably* shoots an aggressor in self-defense has a subsequent duty to obtain medical attention for the wounded aggressor.

[4] Duty Based on Voluntary Assistance – One who voluntarily renders assistance to another already in danger has a duty to continue to provide aid, at least if the subsequent omission would put the victim in a worse position than if the defendant had not commenced the assistance at all.

[B] Statutory Duty to Act – Some duties are statutorily imposed, e.g., a driver involved in an accident must stop his car at the scene; parents must provide food and shelter to their minor children. A few states have enacted so-called ***"Bad Samaritan"*** laws, which make it an offense (usually a misdemeanor) for a person to fail to come to the aid of a person in need under specified circumstances.

[C] Model Penal Code – The Model Penal Code is consistent with the common law regarding omissions. Liability based on an omission may be found in two circumstances: (1) if the law defining the offense provides for it; or (2) if the duty to act is "otherwise imposed by law." [MPC § 2.01(3)(b)] The latter category incorporates duties arising under civil law, such as torts or contract law.

§ 3.04 Social Harm

[A] Elements of Social Harm – The social harm of an offense, as defined by statute or at common law, may consist of ***wrongful conduct, wrongful results, or both***. Moreover, the offense will contain so-called ***"attendant circumstance***" elements.

[1] "Conduct" Elements (or "Conduct" Crimes) – Some crimes establish social harm in terms of conduct, irrespective of any harmful results, e.g., driving under the influence of alcohol.

[2] "Result" Elements (or "Result" Crimes) – An offense may be defined in terms of a prohibited result. For example, murder is a "result" crime, because the social harm is the death of another human being, irrespective of the nature of the conduct that resulted in such death (e.g., whether the death occurred by shooting, stabbing, or poisoning).

[3] Combined "Result" and "Conduct" Elements – Some offenses contain both "conduct" and "result" elements. For example, a statute may define first-degree murder as the killing of another human (*the result*) by means of a destructive device or explosive (*the conduct*).

[4] Attendant Circumstances – An "attendance circumstance" is a fact or condition that ***must be present at the time*** the defendant engages in the prohibited conduct and/or causes the prohibited result that constitutes the social harm of the offense. Often an attendant circumstance is an element of the offense, e.g., the crime of burglary – the breaking and entering of the dwelling house of another at nighttime – contains an elemental attendant circumstance that the crime must occur at night.

[B] Constitutional Limits – Various constitutional provisions limit the extent to which a legislature may proscribe "social harm". For example, the ***First Amendment bars a state from criminalizing most forms of speech***. Even where some social harm may occur – such as some persons may find a given form of speech offensive – the law deems that the integrity of constitutional rights outweighs the society's interest in preventing the harm. [*See, e.g., Texas v. Johnson*, 491 U.S. 397 (1989) (pertaining to defacing the American flag)].

"Privacy" rights, such as reproductive choice and sexual conduct of consenting adults, have also been protected from state attempts to criminalize such conduct. [*See, e.g., Roe v. Wade,* 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 836 (1992); *Griswold v. Connecticut,* 381 U.S. 479 (1965); *Lawrence v. Texas,* 156 L. Ed. 2d 508 (2003)]

Chapter 4
CAUSATION

§ 4.01 General Principle

As discussed in chapter 3, the *actus reus* of a crime is composed of: (1) a voluntary act (2) ***that causes*** (3) social harm. As all offenses contain an *actus reus*, causation is an implicit element of all crimes. Causation may be "actual" or "proximate."

§ 4.02 Actual Cause (or "Cause-in-Fact")

[A] Common Law

[1] "But-for" test – There can be no criminal liability for resulting social harm "unless it can be shown that the defendant's conduct was a cause-in-fact of the prohibited result." In order to make this determination, courts traditionally apply the ***"but-for" or "sine qua non"* test:** "But for the defendant's voluntary act(s), would the social harm have occurred when it did?"

[2] Multiple Actual Causes – When a victim's injuries or death are sustained from two different sources, any of the multiple wrongdoers can be found culpable if his act was "a" cause-in-fact of the injury or death. It is not necessary that any act be the sole and exclusive cause-in-fact of injury.

[3] Accelerating a result – Even if an outcome is inevitable – e.g., everyone dies – if defendant's act accelerated death, he can be found criminally liable. The "but-for" test can be stated in such circumstances as "but for the voluntary act of the defendant, would the harm have occurred when it did?" E.g., a defendant shoots a terminally ill patient may still be found guilty of homicide since although the victim's death was inevitable, it would not likely have occurred when it did but for the defendant's unlawful act.

[4] Concurrent Causes – If, in the case of infliction of harm from two or more sources, each act alone was sufficient to cause the result that occurred when it did, the causes are concurrent and each wrongdoer can be found criminally liable.

[5] Obstructed Cause – If a defendant commits a voluntary act intending to cause harm – e.g., shooting a victim in the stomach intending to kill the victim – but another wrongdoer commits a more serious injury that kills the victim sooner, the initial wrongdoer might only be convicted of attempt to kill since the subsequent wrongdoer's act obstructed his goal to killing the victim.

[B] Model Penal Code – The Model Penal Code applies the but-for (*sine qua non*) rule. [MPC § 2.03(1)(a).]

§ 4.03 Proximate (or "Legal") Cause; Common Law

[A] Direct Cause – An act that is a direct cause of social harm is also a proximate cause of it.

[B] Intervening Causes – An "intervening cause" is an ***independent force*** that operates in producing social harm, but which only ***comes into play after the defendant's voluntary act or omission;*** e.g., the intervention can occur as a result of wrongdoing by a third party, or as the result of a dangerous or suicidal act by the victim, or a natural force ("an act of God").

When an intervening cause contributes to the social harm, the court must decide whether such intervening cause relieves the defendant of liability. If so, the intervening event is deemed a "superseding cause" of the social harm.

[1] *De Minimis* Contribution to the Social Harm – In some cases, if the defendant's voluntary act caused minor social harm compared to the social harm resulting from a substantial, intervening cause, the law will treat the latter as the proximate cause of the social harm.

[2] Foreseeability of the Intervening Cause – Some cases have held that the defendant cannot escape liability if the intervening act was reasonably foreseeable, whereas an unforeseeable intervening cause is superseding in nature. However, in determining foreseeability, the law tends to distinguish between "responsive" (or "dependent") and "coincidental" (or "independent") intervening causes.

A ***responsive intervening cause*** is an act that occurs as a result of the defendant's prior wrongful conduct. Generally, a responsive intervening cause does *not* relieve the initial wrongdoer of criminal responsibility, unless the response was highly abnormal or bizarre. E.g., a defendant who wrongfully injures another is responsible for the ensuing death, notwithstanding subsequent negligent medical treatment that contributes to the victim's death or accelerates it. However, grossly negligent or reckless medical care is sufficiently abnormal to supersede the initial wrongdoer's causal responsibility.

A ***coincidental intervening cause*** is a force that does not occur in response to the initial wrongdoer's conduct. The only relationship between the defendant's conduct and the intervening cause is that the defendant placed the victim in a situation where the intervening cause could independently act upon him. The common law rule is that a coincidental intervening cause relieves the original wrongdoer of criminal responsibility, unless the intervention was foreseeable.

[3] Apparent Safety Doctrine – A defendant's unlawful act that puts a victim in danger may be found to be the proximate cause of resulting harm, unless the victim has a route to safety but instead puts herself in further harm, which causes the injury of death. E.g., a spouse's physical violence causes his wife to flee the house on a freezing night, and although

the wife can find nearby shelter with a relative or friend, decides to spend the rest of the night outside, and dies from freezing temperature.

[4] Free, Deliberate, Informed Human Intervention – A defendant may be relieved of criminal responsibility if an intervening cause, e.g., a victim chose to stay outside in the freezing night and consequently died, was the result of a free, deliberate and informed human intervention. A subsequent dangerous action that caused the victim's injury or death would not relieve the defendant of liability is such act resulted from duress.

[5] Omissions – An omission will rarely, if ever, serve as a superseding intervening cause, even if the omitter has a duty to act. E.g., a father's failure to intervene to stop a stranger from beating his child will not ordinarily absolve the attacker for the ensuing homicide, although the father may also be responsible for the death on the basis of omission principles.

§ 4.04 Proximate Cause (Actually, Culpability); Model Penal Code

Unlike the common law, the "but-for" test is the exclusive meaning of "causation" under the Model Penal Code. The Code treats matters of ***"proximate causation"*** as ***issues relating instead to the defendant's culpability.*** That is, in order to find the defendant is culpable, the social harm actually inflicted must not be "too remote or accidental in its occurrence from that which was designed, contemplated or risked. [MPC §2.03(2)(b), (3)(c)] In such circumstances, the issue in a Model Code jurisdiction is not whether, in light of the divergences, the defendant was a "proximate cause" of the resulting harm, but rather whether it may still be said that he caused the prohibited result with the level of culpability—purpose, knowledge, recklessness, or negligence—required by the definition of the offense.

In the rare circumstance of an offense containing no culpability requirement, the Code provides that causation "is not established unless the actual result is a probable consequence of the defendant's conduct." [MPC § 2.03(4)] This would mean that in a jurisdiction that recognizes the felony-murder rule, but which applies Model Penal Code causation principles, a defendant may not be convicted of felony-murder if the death was not a probable consequence of his felonious conduct.

Chapter 5
MENS REA

§ 5.01 Common Law Principle and Definition

Simply put, "*mens rea"* refers to the mental component of a criminal act. However, there is much ambiguity inherent in this term. The doctrine has been defined in two basic ways:

[A] "Culpability" Definition of "*Mens Rea*" – In the early development of the doctrine, many common law offenses failed to specify any *mens rea*. *Mens rea* was defined broadly in terms of moral blameworthiness or culpability. Thus, at common law and in jurisdictions that still define the doctrine broadly, it was and is sufficient to prove that the defendant acted with a general culpable state of mind, without the need to demonstrate a specific state of mind such as "intentionally," "knowingly," or "recklessly."

[B] "Elemental" Definition of "*Mens Rea*" – Much more prevalent today is a narrow definition of *mens rea* which refers to the particular mental state set out in the definition of an offense. In this sense, the specific *mens rea* is an element of the crime. Note that a person can be culpable in that he was morally blameworthy yet lack the requisite elemental *mens rea.*

§ 5.02 Specific *Mens Rea* Requirements

[A] "Intentionally" – A person "intentionally" causes the social harm of an offense if: (1) it is his desire (i.e., his conscious object) to cause the social harm; or (2) he acts with knowledge that the social harm is virtually certain to occur as a result of his conduct.

The doctrine of ***"transferred intent"*** attributes liability to a defendant who, intending to kill (or injure) one person, accidentally kills (or injures) another person instead. The law "transfers" the defendant's state of mind regarding the intended victim to the unintended one.

[B] "Knowingly" or "With Knowledge" – Sometimes, knowledge of a material fact – an attendant circumstance – is a required element of an offense. A person has "knowledge" of a material fact if he is ***aware of the fact*** or he correctly believes that it exists. Most jurisdictions also permit a finding of knowledge of an attendant circumstance when the defendant is said to be guilty of "wilful blindness" or "deliberate ignorance," i.e., if the defendant is ***aware of a high probability of the existence of the fact*** in question, and he deliberately fails to investigate in order to avoid confirmation of the fact. An instruction in this regard is sometimes called an "ostrich instruction."

[C] "Wilfully" – "Wilful" has been held in different jurisdictions to be synonymous with other terms, e.g., "intentional," "an act done with a bad purpose," "an evil motive," or "a purpose to disobey the law."

[D] "Negligence" – Criminal negligence (as opposed to civil negligence) ordinarily requires a showing of a ***gross deviation from the standard of reasonable care***. A person is criminally negligent if he takes a *substantial,* unjustifiable risk of causing the social harm that constitutes the offense charged.

Three factors come into play when determining whether a reasonable person would have acted as the defendant did:

(1) the gravity of harm that foreseeably would result from the defendant's conduct;
(2) the probability of such harm occurring; and
(3) the burden to the defendant of desisting from the risky conduct.

[E] "Recklessness" – A finding of recklessness requires proof that the defendant ***disregarded a substantial and unjustifiable risk of which he was aware.***

[F] Distinction Between Negligence and Recklessness – The line between "criminal negligence" and "recklessness" is *not* drawn on the basis of the extent of the defendant's deviation from the standard of reasonable care — the deviation is gross in both cases — but rather is founded on the defendant's state of mind. ***Criminal negligence*** involves an objective standard – the defendant, as a reasonable person, ***should have been aware*** of the substantial and unjustifiable risk he was taking); ***recklessness*** implicates *subjective* fault, in that the ***defendant was in fact aware*** of the substantial and unjustifiable risk he was taking but disregarded the risk.

[G] "Malice" – A person acts with "malice" if he intentionally or recklessly causes the social harm prohibited by the offense.

§ 5.03 Statutory Interpretation of *Mens Rea* Terms

It is sometimes necessary to determine the precise elements that the *mens rea* term is intended to modify. For example, in *United States v. X-Citement Video, Inc.,* [513 U.S. 64 (1994)] the defendant was convicted of violating a federal statute that made it a felony to knowingly transport, receive, or distribute in interstate or foreign commerce any visual depiction "involv[ing] the use of a minor engaging in sexually explicit conduct." Although the defendant admitting to trading in sexually explicit materials, he claimed that he was unaware that such materials depicted a minor. The issue before the Supreme Court was whether the term "knowingly" modified the attendant circumstance element (relating to the age of the person depicted in the video) in addition to the obvious modification of the conduct elements ("transport, receive, or distribute").

The Supreme Court determined that the legislature intended to require knowledge of the age of the person in the video since distribution of sexually explicit, but non-obscene, videos of adults was lawful. It was therefore the knowledge that the video depicted child pornography that was criminal.

§ 5.04 "Specific Intent" and "General Intent"

The common law distinguished between general intent and specific intent crimes. Today, most criminal statutes expressly include a *mens rea* term, or a particular state of mind is judicially implied.

[A] Specific Intent – Generally speaking, a "specific intent" offense is one in which the definition of the crime:

(1) includes an intent or purpose to do some future act, or to achieve some further consequence (i.e., a special motive for the conduct), ***beyond the conduct or result that constitutes the actus reus of the offense,*** e.g., "breaking and entering of the dwelling of another in the nighttime with intent to commit a felony"; or

(2) provides that the defendant must be ***aware of a statutory attendant circumstance***, e.g., "receiving stolen property with knowledge that it is stolen."

[B] General Intent – An offense that does not contain one of the above features is termed "general intent," e.g., battery, often defined statutorily as "intentional application of unlawful force upon another." This is a general-intent crime, for the simple reason that the definition does not contain any specific intent beyond that which relates to the *actus reus* itself. The only mental state required in its definition is the intent to "apply unlawful force upon another," the *actus reus* of the crime.

§ 5.05 Model Penal Code

[A] General Principle – Model Penal Code § 2.02(1) provides that, except in the case of offenses characterized as "violations," a person may not be convicted 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." The Code requires the prosecution to prove that the defendant committed the *actus reus* of the offense—***in fact, each ingredient of the offense***—with a culpable state of mind, as set out in the specific statute.

Thus the Code:

- eschews the "culpability" meaning of "*mens rea*";
- discards the common law distinction between "general intent" and "specific intent";
- limits *mens rea* to four terms: "purposely"; "knowingly"; "recklessly"; and "negligently";
- requires application of *mens rea* to *every* material element of a crime, including affirmative defenses.

[B] *Mens Rea* Terms

[1] "Purposely" – In the context of a result or conduct, a person acts "purposely" if it is his "conscious object to engage in conduct of that nature or to cause such a result." [MPC § 2.02(2)(a)(i)] A person acts "purposely" with respect to attendant circumstances if he "is aware of the existence of such circumstances or he believes or hopes that they exist."

[2] "Knowingly" – A result is "knowingly" caused if the defendant "is aware that it is practically certain that his conduct will cause such a result." [MPC § 2.02(2)(b)(ii)] With "attendant circumstances" and "conduct" elements, one acts "knowingly" if he is "aware that his conduct is of that nature or that such [attendant] circumstances exist. Furthermore, the Code states that knowledge is established, if "a person is aware of a high probability of . . . [the attendant circumstance's] existence, unless he actually believes that it does not exist." [MPC § 2.02(7)]

[3] "Recklessly" and "Negligently" – The Code provides that a person acts "recklessly" if he "consciously disregards a substantial and unjustified risk that the material element exists or will result from his conduct." A risk is "substantial and unjustifiable" if "considering the nature and purpose of the defendant's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." [MPC § 2.02(2)(c)]

A person's conduct is "negligent" if the defendant "should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct." [MPC § 2.02(d)] The definition of "substantial and unjustifiable" is the same as that provided for in the definition of "recklessness," except that the term "reasonable person" is substituted for "law-abiding person."

As in common law, "negligence" and "recklessness," therefore, require the same degree of risk-taking: "substantial and unjustifiable," and the difference between them lies in the fact that the reckless defendant "consciously disregards" the risk, whereas the negligent defendant's risk-taking is inadvertent.

[C] Principles of Statutory Interpretation – A single *mens rea* term — of whatever specific type — modifies *each actus reus* element of the offense, absent a plainly contrary purpose of the legislature.

Chapter 6
STRICT LIABILITY

§ 6.01 Conduct Prohibited by Strict Liability Statutes

Strict liability offenses are those that lack a mens rea requirement regarding one or more elements of the *actus reus*. For such statutorily enumerated offenses, the mere proof of the *actus reus* is sufficient for a conviction, regardless of the defendant's state of mind at the time of commission.

Strict liability statutes often address so-called ***"public welfare" offenses.*** Such statutes are aimed at conduct that, although not morally wrongful, could gravely affect the health, safety, or welfare of a significant portion of the public. Examples include statutes that prohibit the manufacture or sale of impure food or drugs to the public, anti-pollution environmental laws, as well as traffic and motor-vehicle regulations.

Strict liability statutes also regulate other types of conduct against individuals, such as the offense of ***statutory rape*** which is aimed at protecting underage females who may be too immature to make knowing decisions about sexual activity.

§ 6.02 Presumption Against Strict Liability

While strict liability statutes are not per se unconstitutional, at least under due process grounds [*United States v. Balint*, 258 U.S. 250 (1922)], the Court has indicated that there is a presumption against strict liability absent a contrary legislative purpose. [*Morissette v. United States*, 342 U.S. 246 (1952); *United States v. United States Gypsum Co* [438 U.S. 422 (1978)] Thus, most courts will interpret a federal or state statute, otherwise silent in regard to *mens rea*, as containing an implicit requirement of some level of moral culpability.

§ 6.03 Model Penal Code

The Model Penal Code ***does not recognize strict liability***, except with respect to offenses graded as "violations." For all other offenses, section 2.02 requires the prosecution to prove some form of culpability regarding each material element.

Chapter 7
CATEGORIES OF DEFENSES: AN OVERVIEW

§ 7.01 Justification Defenses

A justification defense deems conduct that is otherwise criminal to be socially acceptable and non-punishable under the specific circumstances of the case. Justification focuses on the ***nature of the conduct under the circumstances.***

Examples include:

- Self-defense
- Defense of others
- Defense of property and habitation
- Use of lawful force
- Necessity

§ 7.02 Excuse Defenses

Excuse defenses focus on the defendant's ***moral culpability*** or his ability to possess the requisite *mens rea*. An excuse defense recognizes that the defendant has caused some social harm but that he should not be blamed or punished for such harm.

Examples include:

- Duress
- Insanity
- Diminished capacity
- Intoxication (in very limited circumstances)
- Mistake of fact
- Mistake of law (in very limited circumstances)

§ 7.03 Specialized Defenses ("Offense Modifications")

Justification and excuse defenses apply to all crimes. Some defenses, however, pertain to just one or a few crimes. For example, "legal impossibility" is a common law defense to the crime of attempt.

§ 7.04 Extrinsic Defenses ("Non-exculpatory Defenses")

Justification, excuse, and offense-modification defenses all relate to the defendant's culpability or to the wrongfulness of his conduct. In contrast, extrinsic or non-exculpatory defenses bar conviction, or even prosecution, based on factors unrelated to the defendant's actions or state of mind at the time of commission. Examples of such defenses are statutes of limitations, diplomatic immunity, and incompetency to stand trial.

Chapter 8
SELF-DEFENSE

§ 8.01 Use of Non-deadly force

[A] Common Law – A ***non-aggressor*** is justified in using force upon another if he ***reasonably believes*** that such force is ***necessary*** to protect himself from ***imminent*** use of *unlawful force* by the other person. However, the use of force must not be excessive in relation to the harm threatened***. One is never permitted to use deadly force to repel a non-deadly attack.***

[B] Model Penal Code – A person is justified in using force upon another person if he believes that such force is immediately necessary to protect himself against the exercise of unlawful force by the other on the present occasion. [MPC § 3.04(1)] In a departure from common law principles but in accord with the modern trend, a person may not use force to resist an arrest that he knows is being made by a police officer, even if the arrest is unlawful (e.g., without probable cause). [MPC § 3.04(2)(a)(i)] However, this rule does *not* prohibit use of force by an arrestee who believes that the officer intends to use excessive force in effectuating the arrest.

The provision does not specifically require the defendant's belief to be reasonable. However, nearly all of the Code justification defenses, including the defense of self-protection, are modified by § 3.09, which re-incorporates a reasonableness component.

§ 8.02 Use of Deadly force

[A] Common Law – Deadly force is only justified in self-protection if the defendant reasonably believes that its use is necessary to prevent imminent and unlawful use of deadly force by the aggressor. Deadly force may not be used to combat an imminent deadly assault if a non-deadly response will apparently suffice.

[B] Model Penal Code – The Code specifically sets forth the situations in which deadly force is justifiable: when the defendant believes that such force is immediately necessary to protect himself on the present occasion against:

(1) death;
(2) serious bodily injury;
(3) forcible rape; or
(4) kidnapping.

The Code prohibits the use of deadly force by a ***deadly aggressor***, i.e., one who, "with the purpose of causing death or serious bodily injury, provoked the use of force against himself in the same encounter." [MPC § 3.04(2)(b)(i)]

§ 8.03 Retreat Rule

[A] Common Law – If a person can safely retreat and, therefore, avoid killing the aggressor, deadly force is unnecessary. Nonetheless, jurisdictions are sharply split on the issue of retreat. A slim majority of jurisdictions permit a non-aggressor to use deadly force to repel an unlawful deadly attack, even if he is aware of a place to which he can retreat in ***complete*** safety. Many jurisdictions, however, provide that a non-aggressor who is threatened by deadly force must retreat rather than use deadly force, if he is aware that he can do so in ***complete*** safety.

A universally recognized ***exception to the rule of retreat*** is that a non-aggressor need not ordinarily retreat if he is attacked in his ***own dwelling place or within its curtilage*** [the immediately surrounding land associated with the dwelling], even though he could do so in complete safety.

[B] Model Penal Code – One may not use deadly force against an aggressor if he knows that he can avoid doing so with complete safety by retreating. ***Retreat is not generally required in one's home or place of work.*** However, retreat from the home or office *is* required: (1) if the defendant was the initial aggressor, and wishes to regain his right of self-protection; or (2) even if he was not the aggressor, if he is attacked by a co-worker in their place of work. However, the Code does not require retreat by a non-aggressor in the home, even if the assailant is a co-dweller.

§ 8.04 "Reasonable Belief"

The privilege of self-defense is based on reasonable appearances, rather than on objective reality. Thus, a person is justified in using force to protect himself if he subjectively believes that such force is necessary to repel an imminent unlawful attack, even if appearances prove to be false.

Courts are increasingly applying a standard of the "reasonable person in the defendant's situation" in lieu of the "reasonable person" standard. Factors that may be relevant to the defendant's situation or circumstances include:

(1) the physical movements of the potential assailant;
(2) any relevant knowledge the defendant has about that person;
(3) the physical attributes of all persons involved, including the defendant;
(4) any prior experiences which could provide a reasonable basis for the belief that the use of deadly force was necessary under the circumstances.

§ 8.05 "Imperfect" Self-Defense Claims

[A] Common Law – The traditional common law rule is that if any element necessary to prove self-defense is lacking, the defense is wholly unavailable to a defendant. Some states now recognize a so-called "imperfect" or "incomplete" defense of self-defense to murder, which results in conviction for the lesser offense of either voluntary or involuntary manslaughter. For example, a defendant who fails to satisfy the "reasonableness" component, although his belief was genuine, might be able to assert an "imperfect" or "incomplete" claim of self-defense, mitigating his crime to manslaughter.

[B] Model Penal Code – The Model Penal Code likewise recognizes an imperfect defense where the defendant asserts a justification defense, evaluated in terms of the defendant's subjective belief in the necessity of using the force or other material circumstances. However, justification defenses are subject to section 3.09(2), which provides that when the defendant is reckless or negligent in regard to the facts relating to the justifiability of his conduct, ***the justification defense is unavailable*** to him in a prosecution ***for an offense for which recklessness or negligence suffices to establish culpability.***

§ 8.06 Battered Woman Syndrome

A special type of self-defense is the "battered woman syndrome" defense. Cases in which this defense arise may occur under three scenarios:

(1)***"Confrontational" homicides,*** i.e., cases in which the battered woman kills her partner during a battering incident. In such cases, an instruction on self-defense is almost always given. It is now routine for a court to permit a battered woman to introduce evidence of the decedent's prior abusive treatment of her, in support of her claim of self-defense.

(2) ***"Non-confrontational" homicide,*** where the battered woman kills her abuser while he is asleep or during a significant lull in the violence. Courts are divided on whether self-defense may be claimed if there is no evidence of threatening conduct by the abuser at the time of the homicide, although the majority position is that homicide under such circumstances is unjustified.

(3) ***Third-party hired-killer cases,*** in which the battered woman hires or importunes another to kill her husband, and then pleads self-defense. Courts have unanimously refused to permit instructions in third-party hired-killer cases.

§ 8.07 Risk to Innocent Bystanders

[A] Common Law – Courts apply a transferred-justification doctrine, similar to the transferred-intent rule: a defendant's right of self-defense "transfers" (just as intent to kill does) from the intended to the actual victim. While the defense is absolute in some jurisdictions, other courts do not treat this rule as absolute. If the defendant, acting justifiably in self-defense against an aggressor, fires a weapon "wildly or carelessly," thereby jeopardizing the safety of known bystanders, some courts hold the defendant guilty of manslaughter (or of reckless endangerment if no bystander is killed), but not of intentional homicide.

[B] Model Penal Code – If a person justifiably uses force against an aggressor, but uses such force in a reckless or negligent manner in regard to the safety of an innocent bystander, the justification defense, which is available to the person in regard to the aggressor, is ***unavailable to him in a prosecution for such recklessness or negligence as to the bystander.***

Chapter 9
DEFENSE OF OTHERS

§ 9.01 Common Law Rule

Generally speaking, a person is justified in using force to protect a third party from unlawful use of force by an aggressor ***to the extent that the third party is justified in acting in self-defense.*** This so-called "alter ego" rule, as applied in early common law, required that the third party had to in fact have been justified in self-defense, irrespective of how the situation would have appeared to a reasonable person. Today, however, the majority view is that the use force may be justified ***if it reasonably appears necessary*** for the protection of the third party.

§ 9.02 Model Penal Code

[A] General Rule – Subject to retreat provisions, Section 3.05(1) justified force by an intervenor in order to protect a third party if:

(1) he uses no more force to protect the third-party than he would be entitled to use in *self*-protection, based on the circumstances as he believes them to be;

(2) under the circumstances as he believes them to be, the third party would be justified in using such force in self-defense; and

(3) he believes that intervention is necessary for the third party's protection.

[B] Effect of Retreat Rules – The Code's retreat rules have applicability in very limited circumstance here:

(1) the intervenor is only required to retreat before using force in protection of a third party in the unlikely circumstance that he knows that such retreat will assure the third party's complete safety. [MPC § 3.05(2)(a)]

(2) the intervenor must attempt to secure the third party's retreat if the third party herself would be required to retreat, if the defendant knows that the third party can reach complete safety by retreating. [MPC § 3.05(2)(b)]

(3) neither the intervenor nor the third party is required to retreat in the other's dwelling or place of work to any greater extent than in her own dwelling or place of work. [MPC § 3.05(2)(c)]

Chapter 10
DEFENSE OF PROPERTY AND HABITATION

§ 10.01 Defense of Property

[A] Common Law – A person in possession of real or personal property is justified in using non-deadly force against a would-be dispossessor if he reasonably believes that such force is necessary to prevent imminent and unlawful dispossession of the property. ***Under no circumstances may a person use deadly force to prevent dispossession.***

[1] Possession versus Title to Property – The privilege of defense-of-property entitles a person to use necessary force to retain rightful possession of, as distinguished from title to, personal or real property.

[2] Threat to Use Deadly Force – Although states universally prohibit use of deadly force to protect property, they are divided as to whether one may *threaten* it as a way to prevent dispossession.

[3] Claim of Right – When a person asserts a claim of right to property in the possession of another and seeks to reclaim such property, the possessor is not justified in using force to thwart the dispossession if he knows, believes, or as a reasonable person should believe, that the claimant has a legitimate claim of right to possession of the property in question. Since the use of force to protect property is legitimate only if the act/attempted act of dispossession is unlawful, ***in such cases of a legitimate claim to property, the act of dispossession is lawful.***

[4] Recapture of Property – A person may not ordinarily use force to recapture property of which he has been unlawfully dispossessed except if he acts *promptly* after dispossession. One may follow the dispossessor in hot pursuit in order to recapture his property and if necessary, use non-deadly force in the process.

[B] Model Penal Code

[1] General Rule Allowing Use of Non-deadly Force – The Model Penal Code essentially conforms to the common law. Section 3.06(1)(a) provides that a person may use non-deadly force upon another person to prevent or terminate an entry or other trespass upon land, or to prevent the carrying away of personal property, if he believes that three conditions exist:

(1) the other person's interference with the property is ***unlawful***;

(2) the intrusion affects property in the defendant's ***possession***, or in the possession of someone else for whom he acts; and

(3) non-deadly force is ***immediately necessary***.

[2] Limitations on Use of Non-deadly Force – Non-deadly force that is otherwise permitted in defense of property is unjustified in two circumstances.

(1) Force is not "immediately necessary" unless the defender first requests desistance by the interfering party. A request is not required, however, if the defender believes that a request would be useless, dangerous to himself or to another, or would result in substantial harm to the property before the request can effectively be made. [MPC § 3.06(3)(a)]

(2) One may not use force to prevent or terminate a trespass to personal or real property if he knows that to do so would expose the trespasser to a substantial risk of serious bodily injury. [MPC § 3.06(3)(b)]

[3] Recapture of Property – Section 3.06(1)(b) permits the use of non-deadly force to re-enter land or to recapture personal property if:

(1) the defendant believes that he or the person for whom he is acting was unlawfully dispossessed of the property; and either

(2a) the force is used immediately after dispossession; or

(2b) even if it is not immediate, the defendant ***believes that the other person has no claim of right to possession*** of the property. Here, however, re-entry of land (as distinguished from recapture of personal property) is *not* permitted unless the defendant also believes that it would constitute an "exceptional hardship" to delay re-entry until he can obtain a court order.

[4] Deadly Force to Prevent Serious Property Crimes – The Model Code goes beyond the common law in permitting deadly force to protect any type of property in limited circumstances, where the defendant believes that:

(1) the other person is attempting to commit arson, burglary, robbery, or felonious theft or property destruction;

(2) such force is immediately necessary to prevent commission of the offense; and either

(3a) the other person previously used or threatened to use deadly force against him or another person in his presence, or

(3b) use of non-deadly force to prevent commission of the offense would expose him or another innocent person to substantial danger of serious bodily injury.

[MPC § 3.06(3)(d)(ii)]

§ 10.02 Defense of Habitation

[A] Common Law Use of Deadly Force – It is generally accepted that a person may use deadly force to defend his home, but the extent to which such exercise of deadly force is justified varies. Some courts allow deadly force only to prevent entry into the home. In such jurisdictions, once entry has occurred, the defendant is only justified in using deadly force if based on another ground such as self-defense. Others permit deadly force in the home even after entry has been completed.

There are three approaches to the use of deadly force in defense of habitation.

[1] Early Common Law Rule – Early common law broadly defined this rule to permit a home-dweller to use deadly force if he reasonably believed that such force was necessary to prevent an imminent and unlawful entry of his dwelling.

[2] "Middle" Approach – A more narrow approach to the defense of habitation provides that a person may use deadly force if he reasonably believes that:

(1) the other person intends an unlawful and imminent entry of the dwelling;

(2) ***the intruder intends to injure*** him or another occupant, or to commit a felony therein; and

(3) deadly force is necessary to repel the intrusion.

[3] "Narrow" Approach – A narrow version of the defense provides that a person is justified in using deadly force upon another if he reasonably believes that:

(1) the other person intends an unlawful and imminent entry of the dwelling;

(2) the intruder intends to commit a ***forcible felony*** – a felony committed by forcible means, violence, and surprise, such as murder, robbery, burglary, rape, or arson – or to kill or seriously injure an occupant; and

(3) such force is necessary to prevent the intrusion.

[B] Model Penal Code – A person may use deadly force upon an intruder if he believes that:

(1) the intruder is seeking to dispossess him of the dwelling;

(2) the intruder has no claim of right to possession of the dwelling; and

(3) such force is immediately necessary to prevent dispossession.

[MPC § 3.06(3)(d)(i)] The defendant may use deadly force even if he does not believe that his or another person's physical well-being is jeopardized.

This provision is broader than the common law in that the right to use deadly force is not predicated on the defendant's right to safe and private habitation, but rather is founded on his right to possession of the dwelling. On the other hand, this provision does not authorize deadly force merely to prevent an unlawful entry into the home, as the common law originally permitted.

§ 10.03 Spring Guns

An increasing number of states now prohibit the use of a mechanical device designed to kill or seriously injure an intruder to protect property, even if the possessor would be justified in using deadly force in person. The Model Penal Code bans the use of such devices as well. [MPC § 3.06(5)(a)]

Chapter 11
USE OF FORCE FOR LAW ENFORCEMENT PURPOSES

§ 11.01 Authorization to Restrain One's Liberty; "Public Authority" Defense

[A] By Police Officers – At common law, a police officer was authorized to make an arrest under these circumstances.

(1) For a felony or for a misdemeanor, an arrest could be based upon "reasonable" or "probable" cause. [*Draper v. United States*, 358 U.S. 307, 310 n.3 (1959)]

(2) Felony arrests could be made with or without an arrest warrant. [*United States v. Watson,* 423 U.S. 411 (1985)]

(3) Warrantless misdemeanor arrests were valid only if the offense occurred in the officer's presence. However, in the absence of an emergency or consent, warrantless felony arrests in the home are unconstitutional. [*Payton v. New York,* 445 U.S. 573 (1980)]

[B] By Private Persons – Private persons have common law authority to make "citizen arrests" for a felony, or for a misdemeanor involving a breach of the peace, [*Cantwell v. Connecticut,* 310 U.S. 296, 308 (1940)] if: (1) the crime actually occurred; and (2) the private person reasonably believes that the suspect committed the offense. With misdemeanors, the offense must also occur in the arresting person's presence.

§ 11.02 Crime Prevention; Non-deadly Force

[A] Common and Statutory Law – In general, a police officer or private person is justified in using non-deadly force upon another if he reasonably believes that: (1) such other person is committing a felony, or a misdemeanor amounting to a breach of the peace; and (2) the force used is necessary to prevent commission of the offense.

[B] Model Penal Code – A police officer or private person is justified in using force upon another if he believes that: (1) such other person is about to commit suicide, inflict serious bodily injury upon herself, or commit a crime involving or threatening bodily injury, damage to or loss of property, or a breach of the peace; and (2) the force is immediately necessary to prevent the commission of the aforementioned act.

§ 11.03 Crime Prevention; Deadly Force

[A] Common and Statutory law – Deadly force may *never* be used in the prevention of a misdemeanor offense. Deadly force is permitted, however, in the prevention of a felony. A split of authority exists regarding the scope of the right to use deadly force in felony crime prevention. The minority broadly permits a police officer or private person to use deadly force upon another if he reasonably believes that: (1) such other person is committing any felony (including nonviolent felonies); and (2) deadly force is necessary to prevent commission of the crime. Most states, however, limit the right to use deadly force to the prevention of "forcible" or "atrocious" felonies.

[B] Model Penal Code – A police officer or private person may not use deadly force to prevent the commission of a crime unless he believes that: (1) a substantial risk exists that the suspect will cause death or serious bodily injury to another person unless he prevents the suspect from committing the offense; and (2) use of deadly force presents no substantial risk of injury to bystanders. [MPC § 3.07(5)(a)(ii)(A)]

§ 11.04 Effectuation of an Arrest; Non-deadly Force

[A] Common Law – Non-deadly force to effectuate an arrest is permissible by a police officer or private citizen.

[B] Model Penal Code – A police officer or private person is justified in using force upon another to make or assist in making an arrest, or to prevent the suspect's escape, if the defendant:

(1) believes that force is immediately necessary to effectuate a lawful arrest or to prevent the suspect's escape; and

(2a) makes known to such other person the purpose of the arrest; or

(2b) believes that such other person understands the purpose of the arrest or that notice cannot reasonably be provided. [MPC §§ 3.07(1), 3.07(2)(a), 3.07(3)]

§ 11.05 Effectuation of an Arrest; Deadly Force

[A] Common Law

[1] Police Officers – At early common law, police officers could use deadly force to apprehend a suspect even if such force was unnecessary. Today, most states impose a "necessity" requirement. Thus, a police officer is justified to use deadly force upon a suspect upon reasonable belief that: (1) the suspect committed a ***felony***; and (2) such force is necessary to make the arrest or to prevent the suspect from escaping. Generally, the rule with regard to arrest applies to all felonies; however, some jurisdictions also limit this rule to forcible or atrocious felonies.

However, the rule has been modified and narrowed as a result of ***Tennessee v. Garner,*** [471 U.S. 1 (1985)]. Here, an officer in pursuit of a suspect was "reasonably sure" that the suspect was unarmed. The suspect began to climb the fence. After the officer called out "police, halt" and the suspect did not cease his flight, the officer shot him to prevent him from escaping, hitting him in the head and killing him. Although the officer's use of deadly force was justified under state law, the Supreme Court found that the exercise of deadly force here was unlawful since the suspect was apparently unarmed.

The Court held that a police officer violates the Fourth Amendment prohibition on unreasonable searches and seizures if he uses deadly force to effectuate an arrest, unless: (1) he "has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others"; and (2) such force is necessary to make the arrest or prevent escape. In regard to the necessity element, a warning, if feasible, must be given to the suspect before deadly force is employed. The first condition is satisfied "if the

suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm."

[2] By Private Person – A private person may use deadly force, if reasonably necessary, to arrest or apprehend a felon, but in more limited circumstances than for police officers. Generally, the circumstances that would justify use of force to apprehend a suspect by a private person include:

(1) the offense must be a ***forcible*** felony;

(2) the private person ***must notify*** the suspect of his intention to make the arrest;

(3) the arresting party ***must be correct in his belief*** that the suspect actually committed the offense in question. It is irrelevant if the mistake of fact is reasonable in such cases.

[B] Model Penal Code – Deadly force may never be used by a private person, acting on his own, to make an arrest or to prevent a suspect's escape. However, deadly force may be employed by a ***police officer***, or a private person assisting someone he believes is a law enforcement officer, to make an arrest or to prevent the suspect's escape if the ***arrest is for a felony*** and the officer:

(1) believes that force is immediately necessary to effectuate a lawful arrest or to prevent the suspect's escape;

(2) makes known to the suspect the purpose of the arrest or believes that such other person understands the purpose of the arrest or that notice cannot reasonably be provided;

(3) believes that the use of deadly force creates ***no substantial risk of harm to innocent bystanders***; and either

(4a) believes that the crime included the use or threatened use of deadly force; or

(4b) believes that a substantial risk exists that the suspect will kill or seriously harm another if his arrest is delayed or if he escapes.

[MPC § 3.07(2)(b)]

Chapter 12
NECESSITY

§ 12.01 Generally

[A] Nature of the Defense – Generally speaking, "necessity" is a residual justification defense, although it shares some characteristics with excuse defenses as well. It is a defense of last resort as it legitimizes technically illegal conduct that common sense, principles of justice, and/or utilitarian concerns suggest is justifiable, but which is not specifically addressed by any other recognized justification defense.

[B] Requirements of the Defense – Approximately one-half of states now statutorily recognize a necessity defense. Generally speaking, a person is justified in violating a criminal law if the following six conditions are met:

(1) The defendant must be faced with a ***clear and imminent danger***.

(2) There must be a ***direct causal relationship*** between the action and the harm to be averted.

(3) There must be no effective *legal* way to avert the harm.

(4) The harm that the defendant will cause by violating the law must be less serious than the harm he seeks to avoid. The defendant's actions are evaluated in terms of the harm that was reasonably foreseeable at the time, rather than the harm that actually occurred.

(5) There must be no legislative intent to penalize such conduct under the specific circumstances.

(6) The defendant must come to the situation with ***"clean" hands***, i.e., he must not have wrongfully placed himself in a situation in which he would be forced to commit the criminal conduct.

[C] Limitations on the rule – The availability of the necessity defense may be further limited to:

(1) emergencies created by natural forces;

(2) ***non-homicide*** cases [see *Regina v. Dudley and Stephens,* 14 Q.B.D. 273 (1884)]

(3) protection of persons and property only, excluding for example, the protection of reputation or economic interests.

§ 12.02 Civil Disobedience

"Civil disobedience" is a nonviolent act, publicly performed and deliberately unlawful, for the purpose of protesting a law, government policy, or actions of a private body whose conduct has serious public consequences. The necessity defense rarely arises in cases of direct civil disobedience, where the goal generally is to have the protested law declared unconstitutional.

Indirect civil disobedience involves violation of a law that is not the object of the protest, e.g., violating trespass statutes to protest construction of a nuclear power plant or the performance of abortions at a clinic. While protesters often advocate that they should be

entitled to a "political necessity" defense, courts consistently have held that necessity is not a defense to indirect civil disobedience.

§ 12.03 Model Penal Code

The necessity defense is broader under the Code than under common law and many non-Code-based statutes. Under the Code, otherwise unlawful conduct is justified if:

(1) the defendant believes that his conduct is necessary to avoid harm to himself or another;

(2) the harm to be avoided by his conduct is greater than that sought to be avoided by the law prohibiting his conduct; and

(3) there is no legislative intent to exclude the conduct in such circumstances. [MPC 3.02(1)]

Unlike common law, the Code does not require that the harm be imminent or that the defendant approached the situation with "clean hands." Furthermore, the common law limitations regarding natural forces, homicide cases, and property and personal are inapplicable to the Code's necessity defense.

Chapter 13
DURESS

§ 13.01 General Principle

Generally speaking, a person may be acquitted of any offense ***except murder*** if the criminal act was committed under the following circumstances:

(1) Another person issued a specific threat to kill or grievously injure the defendant or a third party, particularly a near relative, unless he committed the offense;

(2) The defendant reasonably believed that the threat was genuine;

(3) The threat was "present, imminent, and impending" at the time of the criminal act;

(4) There was no reasonable escape from the threat except through compliance with the demands of the coercer; and

(5) The defendant was not at fault in exposing himself to the threat.

§ 13.02 Duress as a Defense to Homicide

The common law rule, expressly adopted by statute in some states, is that duress is not a defense to an intentional killing. A very few states recognize an "imperfect" duress defense, which reduces the offense to manslaughter. Courts are split on the availability of the duress defense in felony-murder prosecutions.

§ 13.03 Model Penal Code

Duress is an affirmative defense to unlawful conduct by the defendant if: (1) he was compelled to commit the offense by the use, or threatened use, of unlawful force by the coercer upon his or another person; and (2) ***a person of reasonable firmness in his situation would have been unable to resist the coercion.*** [MPC § 2.09(1)] The defense is unavailable if the defendant recklessly placed himself in a situation in which it was probable that he would be subjected to coercion. If he negligently placed himself in such a situation, however, the defense is available to him for all offenses except those for which negligence suffices to establish culpability. [MPC § 2.09(2)].

The Code's duress defense is broader than the common law in various respects. First, it abandons the common law requirement that the defendant's unlawful act be a response to an imminent deadly threat. Second, the defense is one of general applicability, ***so the defense may be raised in murder prosecutions.***

The Code defense is similar to the common law in two significant ways. First, the defense is limited to threats or use of "unlawful" force; therefore, it does not apply to coercion emanating from natural sources. Second, in conformity with the common law, the Code does not recognize the defense when any interest other than bodily integrity is threatened.

Chapter 14
INTOXICATION

§ 14.01 Voluntary Intoxication

Voluntary intoxication does not excuse criminal conduct; however***, in limited circumstances, intoxication may negate the necessary state of mind*** for a given offense and thus prove exculpatory. Intoxication resulting from alcoholism or drug addiction is considered voluntary under common law principles.

[A] ***Mens Rea*** **Defense –** While there are several approaches to evaluating the *mens rea* portion of criminal activity involving an intoxicated defendant, the most common approach distinguishes between general-intent and specific-intent crimes. Under this common law approach, voluntary intoxication is not a defense to general-intent crimes. Voluntary intoxication *is* a defense to specific intent crimes.

[B] Special Rule for Homicide – Two states, Virginia and Pennsylvania, limit the defense of voluntary intoxication to first-degree murder prosecutions. In states that recognize the defense in *all* specific-intent crimes, if the crime of "murder" is divided into degrees, a defendant may generally introduce evidence that his intoxication prevented him from being able to form the requisite state of mind for first-degree murder.

[C] Voluntary Act – Where a defendant's intoxication was so severe as to render him unconscious at the time of the commission of the crime, some courts have barred a defense based on unconsciousness if such condition resulted from the voluntary consumption of alcohol or drugs. Others courts allow the defendant to argue that the criminal act was not a voluntary one due to his unconscious state, but only in defense to specific-intent offenses.

[D] Intoxicated-Induced Insanity – The common law does not recognize a defense of ***temporary insanity*** based on intoxication where the defendant's intoxication was voluntary. Some jurisdictions do recognize a defense based on ***"fixed" insanity***, a condition which results from long-term use of drugs or alcohol

§ 14.02 Involuntary Intoxication

[A] Definition – Intoxication is "involuntary" if the defendant is not to blame for becoming intoxicated. It may result from:

- ***coerced intoxication;***
- intoxication by ***innocent mistake*** as to the nature of the substance being consumed;
- unexpected ***intoxication from a prescribed medication*** provided the defendant did not purposely take more than the prescribed dosage; or
- ***"pathological intoxication,"*** a temporary psychotic reaction, often manifested by violence, which is triggered by consumption of alcohol by a person with a pre-disposing mental or physical condition, e.g., temporal lobe epilepsy, encephalitis, or a

metabolic disturbance. The defense only applies if the defendant had no reason to know that he was susceptible to such a reaction.

[B] Availability of the Defense – Under common law, a defendant found to have been involuntarily intoxicated may avail himself of the defense of temporary insanity. Furthermore, one who committed an offense while involuntarily intoxicated can otherwise seek acquittal by asserting the *mens rea* defense.

§ 14.03 Model Penal Code

[A] General Rule – Model Penal Code § 2.08(4)–(5) distinguishes three types of intoxication:

(1) voluntary ("self-induced") intoxication;
(2) pathological intoxication; and
(3) involuntary ("non-self-induced") intoxication.

[B] Exculpation Based on Intoxication

[1] *Mens Rea* Defense – ***Any form of intoxication*** is a defense to criminal conduct if it negates an element of the offense. [MPC § 2.08(1)] Since the Code does not distinguish between "general intent" and "specific intent" offenses, the *mens rea* defense is broadly applied, with one exception. In the case of crimes defined in terms of ***recklessness***, a person acts "recklessly" as to an element of the crime if, as the result of the self-induced intoxication, he was not conscious of a risk of which he would have been aware had he not been intoxicated. [MPC § 2.08(2)]

[2] Insanity – ***Pathological and involuntary intoxication*** are affirmatives defenses***, if the intoxication causes the defendant to suffer from a mental condition*** comparable to that which constitutes insanity under the Code. [MPC § 2.08(4)]

Chapter 15
INSANITY

§ 15.01 Legal Tests to Determine "Insanity"

"Insanity" is a legal term that presupposes a medical illness or defect but is not synonymous with "mental illness," "mental disorder," and "mental disease or defect." "Mental illness" is a more encompassing term than "insanity," and thus, a person can be mentally ill – medically speaking – without legally being insane. Five tests of insanity have been applied at one time or another.

[A] *M'Naghten* Test – The *M'Naghten* rule focuses exclusively on ***cognitive disability.*** Under this rule, a person is insane if, at the time of the criminal act, he was laboring under such a defect of reason, arising from a disease of the mind, that he (1) did not know the nature and quality of the act that he was doing; or (2) if he did know it, he did not know that what he was doing was wrong.

This test requires total cognitive disability and does not allow for degrees of incapacity and nor does it recognize volitional incapacity in which a person is aware that conduct is wrong yet cannot control his behavior.

[B] "Irresistible Impulse" Test – Some jurisdictions have broadened the scope of *M'Naghten* to ***include mental illnesses that affect volitional capacity.*** Generally speaking, a person is insane if, at the time of the offense:

(1) he acted from an "irresistible and uncontrollable impulse";
(2) he was unable to choose between the right and wrong behavior;
(3) his will was destroyed such that his actions were beyond his control.

[C] Model Penal Code Test – The Model Penal Code provides that a person is not responsible for his criminal conduct if, at the time of the conduct, as the result of a mental disease or defect, ***he lacked substantial capacity*** to:

(1) appreciate the "criminality" (or "wrongfulness") of his conduct; or
(2) to conform his conduct to the requirements of the law.

This test does not require total mental incapacity.

[D] The Product (*Durham*) Test – This rule, now defunct, provided that a defendant's criminal behavior may be excused if he was suffering from a mental disease or defect at the time of the offense and the criminal conduct was the product of the mental disease or defect.

[E] Federal Test – In 1984, Congress enacted a statutory definition of insanity applicable to federal criminal trials. [18 U.S.C. § 17(a) (2000)] The federal law provides that a defendant may be excused based on insanity if he proves by clear and convincing evidence that, at the time of the offense, as the result of a severe mental disease or defect, he was unable to appreciate: (1) the nature and quality of his conduct; or (2) the wrongfulness of his conduct. This test requires ***complete cognitive incapacity.***

§ 15.02 Effect of an Insanity Acquittal

[A] Mental Illness Commitment Procedures

[1] Automatic Commitment – In many states, a person found "not guilty by reason of insanity" [NGRI] is automatically committed to a mental facility on the basis of the verdict. Under automatic-commitment laws, the NGRI-acquittee is not entitled to a hearing to determine whether he continues to suffer from a mental illness, or to determine whether his institutionalization is necessary for his protection or for that of society.

[2] Discretionary Commitment – In some jurisdictions, commitment of an insanity-acquittee is not automatic. Typically, however, the trial judge has authority to require a person found NGRI to be detained temporarily in a mental facility for observation and examination, in order to determine whether he should be committed indefinitely.

[B] Release After Commitment for Mental Illness

[1] Criteria for Release – An insanity-acquittee may be detained as long as she is *both* mentally ill and dangerous to herself or others. [*Foucha v. Louisiana,* 504 U.S. 71 (1992)].

[2] Length of Confinement – An insanity-acquittee is committed for as long as necessary until she meets the criteria for release. She may remain in a mental hospital for a longer period of time than she would have served in a prison had she been convicted of the crime that triggered her commitment. [*Jones v. United States*, 463 U.S. 354, 370 (1983)]

[C] Sexual Predator Laws – More than fifteen states have enacted highly controversial "sexual predator" statutes which provide for commitment and treatment of sexual violators, defined generally as persons ***convicted of or charged with*** a sexually violent offense and who suffer from a mental abnormality or personality disorder which makes further sexual predatory acts likely. To invoke the law, a prosecutor typically files a petition in a state court seeking the individual's involuntary commitment. If there is probable cause to believe that the person is a sexual predator, the individual is transferred to a mental facility for evaluation, after which a full hearing is held. If the court determines beyond a reasonable doubt that the individual is a sexually violent predator, he is committed until he deemed safe to be released into the community.

§ 15.03 Abolition of the Insanity Defense

Four states – Idaho, Kansas, Montana, and Utah – have abolished the insanity defense, but permit a defendant to introduce evidence of his mental disease or defect in order to rebut the prosecution's claim that he possessed the requisite mental state.

§ 15.04 "Guilty But Mentally Ill"

A number of states have adopted an alternative verdict, "guilty but mentally ill" [GBMI]. In all but two of these states, the insanity defense has been retained. In these states, the jury

returns a NGRI verdict if the defendant was insane at the time of the crime; it returns a GBMI verdict if he is guilty of the offense, was sane at the time of the crime, but is "mentally ill," as the latter term is defined by statute, at the time of trial.

Chapter 16
DIMINISHED CAPACITY

§ 16.01 Generally

"Diminished capacity" refers to a defendant's abnormal mental condition, short of insanity. There are two forms of diminished capacity: *mens rea* diminished capacity and "partial responsibility" diminished capacity.

§ 16.02 *Mens Rea* Defense

[A] General Rule – Evidence of mental abnormality is not offered by the defendant to partially or fully *excuse* his conduct, but rather as evidence to negate an element of the crime charged, almost always the *mens rea* element. In such circumstances, diminished capacity thus functions as a failure-of-proof defense.

[B] Scope of Defense – States are divided regarding the extent to which evidence of diminished capacity may be introduced for the purpose of negating the *mens rea* of an offense. States that follow the Model Penal Code [§ 4.02(1)] permit such evidence, when relevant, to negate the *mens rea* of *any* crime. Other states limit the admissibility of such evidence to some or all specific-intent offenses. A third group bars "diminished capacity" evidence in prosecutions of all offenses. And some jurisdictions bar "diminished capacity" evidence in all prosecutions whether the crime at issue is "specific intent" or "general intent."

§ 16.03 "Partial Responsibility" Defense

[A] General Rule – This form of diminished capacity partially excuses or mitigates a defendant's guilt even if he has the requisite *mens rea* for the crime. It is recognized now in only a few states, and only for the crime of murder, to mitigate the homicide to manslaughter.

[B] The Model Penal Code Approach – The Model Penal Code provides that a homicide that would otherwise constitute murder is manslaughter if it is committed as the result of ***"extreme mental or emotional disturbance*** for which there is a reasonable explanation or excuse." The reasonableness of the defendant's explanation or excuse for the "extreme mental or emotional disturbance" (EMED) is "determined from the viewpoint of a person in the defendant's situation under the circumstances as he believes them to be."[MPC § 210.3(1)(b)] At least two states appear to recognize the latter version of the defense.

Chapter 17
MISTAKES OF FACT

§ 17.01 Common Law Rules

[A] General Approach – Many states follow the Model Penal Code in requiring proof of *mens rea* for every element of the offense. Nevertheless, the common law's two approaches to mistakes—depending on whether the offense charged is characterized as general-intent or specific-intent—has endured.

If the crime is one of strict liability, a mistake of fact is irrelevant. Otherwise, the first step in analyzing a mistake-of-fact claim in a jurisdiction that follows common law doctrine is to determine whether the nature of the crime of which the defendant has been charge is specific-intent or general-intent.

[B] Specific-Intent Offenses – A defendant is not guilty of an offense if his mistake of fact negates the specific-intent portion of the crime, i.e., ***if he lacks the intent designated in the definition of the offense***, e.g., "knowingly," "negligently," "recklessly."

[C] General-Intent Offenses

[1] Ordinary Approach: Reasonableness – The ordinary rule is that a person is not guilty of a general-intent crime if his mistake of fact was *reasonable*, but he is guilty if his mistake was unreasonable.

[2] Moral-Wrong Doctrine – On occasion, courts apply the "moral wrong" doctrine, under which one can make a reasonable mistake regarding an attendant circumstance and yet manifest a bad character or otherwise demonstrate worthiness of punishment. The rule is generally that there is no exculpation for mistakes where***, if the facts had been as the defendant believed them to be, his conduct would still be immoral.***

[3] Legal-Wrong Doctrine – A less extreme alternative to the moral-wrong doctrine is the "legal-wrong doctrine." That rule provides for no exculpation for mistakes where, if the facts were as the defendant thought them to be, his conduct would still be "illegal." Often this means that a defendant possessed the *mens rea* for committing a lesser offense, but the *actus reus* was associated with a higher offense. Under this doctrine, the defendant ***is guilty of the higher offense*** in such circumstances.

§ 17.02 Model Penal Code

[A] General Rule – Section 2.04(1) provides that a mistake is a ***defense if it negates the mental state required to establish any element*** of the offense.

[B] Exception to the Rule – The defense of mistake-of-fact is not available if the defendant would be guilty of another offense, had the circumstances been as he supposed. In such cases, contrary to the common law, the Code only permits ***punishment at the level of the lesser offense***. [MPC § 2.04(2)]

Chapter 18
MISTAKES OF LAW

§ 18.01 General Principle

Under both the common law and Model Penal Code, ***ignorance of the law excuses no one.*** Nevertheless, a number of doctrines apply when a defendant is ignorant or mistaken about the law.

§ 18.02 Reasonable-Reliance Doctrine (Entrapment by Estoppel)

Under both the ***common law and Model Penal Code***, a person is excused for committing a criminal offense if he ***reasonably relies 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] "Official Statement" – For a statement of the law to be "official," it must be contained in:

(1) a statute later declared to be invalid;

(2) a judicial decision of the highest court in the jurisdiction, later determined to be erroneous; or

(3) an official, but erroneous, interpretation of the law, secured from a public officer in charge of its interpretation, administration, or enforcement, such as the Attorney General of the state or, in the case of federal law, of the United States.

Even if a person obtains an interpretation of the law from a proper source, that interpretation must come in an "official" manner, not an offhand or informal manner. For example, a person may rely on an official "opinion letter" from the state Attorney General, formally interpreting the statute in question.

[B] Exemptions to the Reasonable Reliance Doctrine

[1] Reliance on One's Own Interpretation of the Law – A person is *not* excused for committing a crime if he relies on his own erroneous reading of the law, even if a reasonable person – even a reasonable law–trained person – would have similarly misunderstood the law.

[2] Advice of Prosecutor – Although there is very little case law on the matter, there is some support for the proposition that a person may not reasonably rely on an interpretation of a law provided by a local prosecuting attorney.

[3] Advice of Private Counsel – Reliance on erroneous advice provided by a private attorney is not a defense to a crime.

§ 18.03 Fair Notice and the *Lambert* Principle

[A] Common Law – At common law, ***every one is presumed to know the law.*** However, in *Lambert v. California* [355 U.S. 225 (1957)], the Court overturned the petitioner's conviction for failing to register with the city of Los Angeles as a prior convicted felon, as required pursuant to a strict liability ordinance of which he was unaware; the Court reversed on "lack of fair notice" due process grounds.

The Supreme Court held in *Lambert* that, under very limited circumstances, a person who is unaware of a duly enacted and published criminal statute may successfully assert a constitutional defense in a prosecution of that offense.

Key to the court's decision in *Lambert* was the passive nature of the offense. Namely, (1) it punished an omission (failure to register); (2) the duty to act was imposed on the basis of a status (presence in Los Angeles), rather than on the basis of an activity; and (3) the offense was *malum prohibitum*. As a result of these factors, there was nothing to alert a reasonable person to the need to inquire into the law.

[B] Model Code – The Model Penal Code's fair notice exception [MPC § 2.04(3)(a)] applies where:

(1) a defendant does not believe that his conduct is illegal, and

(2) the statute defining the offense ***is not known to him***; and ***was "not published*** or otherwise reasonably made available" to him before he violated the law.

§ 18.04 Ignorance or Mistake that Negates *Mens Rea*

[A] Common Law

[1] "Different Law" Approach – A defendant's lack of knowledge of, or misunderstanding regarding the meaning or application of, *another* law – usually, it will be a nonpenal law – will negate the *mens rea* element in the definition of the criminal offense. When a defendant seeks to avoid conviction for a criminal offense by asserting a different-law mistake, on the ground that the different-law mistake negates his *mens rea*, the first matter for determination is whether the offense charged is one of specific-intent, general-intent, or strict-liability.

[2] Specific-Intent Offenses – A different-law mistake, whether reasonable or unreasonable, is a defense in the prosecution of a specific-intent offense, if the mistake negates the specific intent in the prosecuted offense.

[3] General-Intent Offenses – Although there is very little case law on point, a different-law mistake, whether reasonable or unreasonable, apparently is not a defense to a general-intent crime.

[4] Strict-Liability Offenses – A different-law mistake is never a defense to a strict-liability offense.

[B] Model Penal Code – MPC § 2.04(1) provides that mistake or ignorance of the law is a defense if it negates a material element of the offense. Application of this defense generally surfaces in cases of a different-law mistake.

Chapter 19
INCHOATE CRIMES, GENERALLY

§ 19.01 Overview to Inchoate Conduct

Activity that occurs after the formation of the *mens rea* but short of attainment of the criminal goal is described as "inchoate" – imperfect or incomplete – conduct. The most common of these offenses are attempt, solicitation, and conspiracy. Inchoate crimes are typically treated as a lesser offense than the substantive crime.

§ 19.02 Model Penal Code

[A] Punishment – In a significant departure from common law tradition, the Code provides for punishment of the inchoate offenses at the same level as the substantive crime, with the exception of crimes that carry a maximum penalty of life imprisonment ("felonies of the first degree"). [MPC § 5.05(1)] An attempt, solicitation, or conspiracy to commit one of these crimes constitutes a felony of the *second* degree. [MPC § 5.05(1)]

[B] Special Mitigation – The Code grants the trial judge authority to dismiss a prosecution of an inchoate offense, or to impose a sentence for a crime of a lower degree than is otherwise allowed, if the defendant's conduct was so inherently unlikely to result in a crime that neither he nor his conduct represents a danger to society justifying his conviction and punishment at ordinary level. [MPC § 5.05(2)]

Chapter 20
ATTEMPT

§ 20.01 Attempt, Generally

A criminal attempt occurs when a person, with the intent to commit an offense, performs any act that constitutes a ***substantial step toward the commission*** of that offense. Criminal attempts are of two varieties: "complete" (but "imperfect"); and "incomplete." A ***complete, but imperfect,*** attempt occurs when the defendant performs all of the acts that he set out to do, but fails to attain his criminal goal. In contrast, an ***incomplete attempt*** occurs when the defendant does some of the acts necessary to achieve the criminal goal, but he quits or is prevented from continuing, e.g., a police officer arrives before completion of the attempt.

§ 20.02 *Mens Rea* of Criminal Attempts

[A] General Rule – The defendant must intentionally commit the acts that constitute the *actus reus* of an attempt, i.e., acts that bring him in proximity to commission of a substantive offense or which otherwise constitute a substantial step in that direction, and he must perform these acts with the specific intention of committing the target crime. An ***attempt is a specific-intent offense,*** even if the substantive crime is a general-intent offense.

[B] "Result" Crimes – When the target crime is a "result" crime, the general rule is that a person is not guilty of an attempt unless his actions in furtherance of the target crime are committed with the specific purpose of causing the unlawful result.

§ 20.03 *Actus Reus* of Criminal Attempts

Courts have developed a number of tests to determine the point at which a defendant passes beyond the preparation stage and consummates the criminal attempt.

(1) ***"Last act" test –*** an attempt occurs *at least* by the time of the last act but this test does not necessarily require that each and every act be performed on every occasion.

(2) ***"Physical proximity" test –*** the defendant's conduct need not reach the last act but must be "proximate" to the completed crime.

(3) ***"Dangerous proximity" test –*** an attempt occurs when the defendant's conduct is in "dangerous proximity to success," or when an act "is so near to the result that the danger of success is very great."

(4) ***"Indispensable element" test –*** an attempt occurs when the defendant has obtained control of an indispensable feature of the criminal plan.

(5) ***"Probable desistance" test –*** an attempt occurs when the defendant has reached a point where it was unlikely that he would have voluntarily desisted from his effort to commit the crime.

(6) ***"Unequivocality" (or res ipsa loquitur) test –*** an attempt occurs when a person's conduct, standing alone, unambiguously manifests his criminal intent.

§ 20.04 Defense of Impossibility

[A] General Rule – At common law, legal impossibility is a defense; factual impossibility is not. However, today, ***most jurisdictions no longer recognize legal impossibility as a defense.***

[B] Factual Impossibility – "Factual impossibility" exists when a person's intended result constitutes a crime, but he fails to consummate the offense because of an attendant circumstance unknown to him or beyond his control. Examples of factual impossibility are a pickpocket putting his hand in the victim's empty pocket; shooting into an empty bed where the intended victim customarily sleeps; or pulling the trigger of an unloaded gun aimed at a person.

[C] "Inherent" Factual Impossibility – Although largely academic, the doctrine of *inherent* factual impossibility has been recognized as a statutory defense in at least one state (Minnesota). Where recognized, the defense applies if the method to accomplish the crime was one that a reasonable person would view as inadequate to accomplish the criminal objective.

[D] Pure Legal Impossibility – "Pure legal impossibility" arises when the law does not proscribe the result that the defendant seeks to achieve.

[E] Hybrid Legal Impossibility – Hybrid legal impossibility (or "legal impossibility") exists if the defendant's goal is illegal, but commission of the offense is impossible due to a *factual* mistake (and not simply a misunderstanding of the law) regarding the *legal* status of an attendant circumstance that constitutes an element of the charged offense, e.g., receiving *un*stolen property under the belief that such property was stolen, or shooting a corpse believing it is alive. Today, ***most states have abolished the defense of hybrid legal impossibility*** on the theory that a defendant's dangerousness is plainly manifested in such cases.

§ 20.05 Defense: Abandonment

Many courts do not recognize the defense of abandonment. Where recognized, it applies only if the defendant *voluntarily* and *completely* renounces his criminal purpose. Abandonment is not voluntary if the defendant is motivated by unexpected resistance, the absence of an instrumentality essential to the completion of the crime, or some other circumstance that increases the likelihood of arrest or unsuccessful consummation of the offense, or if the defendant merely postpones the criminal endeavor until a better opportunity presents itself.

§ 20.06 Model Penal Code

[A] Elements of the Offense – Generally speaking, a criminal attempt under the Code contains two elements: (1) the ***purpose to commit the target offense***; and (2) conduct constituting a ***"substantial step" toward the commission*** of the target offense.

[B] ***Mens Rea*** **–** In general, a person is not guilty of a criminal attempt unless it was his purpose, i.e., his conscious object, to engage in the conduct or to cause the result that would constitute the substantive offense. A person is likewise guilty of an attempt to cause a criminal result if he *believes* that the result will occur, even if it were not his conscious object to cause it. [MPC §5.01(1)(b)]

The *mens rea* of "purpose" or "belief" does not necessarily encompass the attendant circumstances of the crime. For these elements, it is sufficient that the defendant possesses the degree of culpability required to commit the substantive offense.

[C] ***Actus Reus*** **–** The Code ***shifts the focus*** of attempt law from what remains to be done, i.e., the defendant's proximity to consummation of the offense***, to what the defendant has already done.*** Subsection 5.01(1)(c) provides that, to be guilty of an offense, a defendant must have done or omitted to do something that constitutes a "substantial step in a course of conduct planned to culminate in his commission of the crime."

Section 5.01(2) provides a list of recurrent factual circumstances in which a defendant's conduct, if strongly corroborative of his criminal purpose, "shall not be held insufficient as a matter of law," including lying in wait; searching for or following the contemplated victim of the crime; reconnoitering the contemplated scene of the crime; unlawful entry into a structure or building in which the crime will be committed; and possession of the materials to commit the offense, if they are specially designed for a criminal purpose.

[D] Attempt to Aid – Under § 5.01(3), a person may be convicted of a criminal attempt, ***although a crime was neither committed nor attempted by another*****,** if:
(1) the purpose of his conduct is to aid another in the commission of the offense; and (2) such assistance would have made him an accomplice in the commission of the crime under the Code's complicity statute if the offense had been committed or attempted.

[E] Hybrid Legal Impossibility – There is no defense of hybrid legal impossibility under MPC §5.01(1).

[F] Pure Legal Impossibility – The Code does not expressly address the defense of pure legal impossibility.

[G] Renunciation (Abandonment) – Under the Code, a person is not guilty of an attempt if: (1) he ***abandons his effort*** to commit the crime or prevents it from being committed; and (2) his conduct manifests a ***complete and voluntary renunciation*** of his criminal purpose. [MPC § 5.01(4)] Under this provision, renunciation is not complete if it is wholly or partially motivated "by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim" or if motivated by "circumstances . . . that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose."

Chapter 21
SOLICITATION

§ 21.01 General Principles

[A] ***Actus Reus* –** The *actus reus* of a solicitation takes place when one ***person invites, requests, commands, hires, or encourages another to commit a particular offense.*** For a solicitation to occur, neither the solicitor nor the solicited party needs to perform any act in furtherance of the substantive crime. The solicitation is complete upon communication of the solicitation to another.

[B] ***Mens Rea* –** Common law solicitation is a specific-intent crime. A person is not guilty of solicitation unless he intentionally commits the *actus reus* of the inchoate offense, i.e., he intentionally invites, requests, commands, hires, or encourages another to commit a crime, with the specific intent that the other person consummate the target crime.

[C] Relationship of the Solicitor to the Solicited Party – At common law, no solicitation occurs if the solicitor intends to commit the substantive offense *himself*, but requests assistance by another.

§ 21.02 Model Penal Code

[A] Generally – The Model Penal Code provides that a person is guilty of solicitation to commit a crime if:

(1) his purpose is to promote or facilitate the commission of a substantive offense; and

(2) with such purpose, he commands, encourages or requests another person to engage in conduct that would constitute the crime, an attempt to commit it, or would establish the other person's complicity in its commission or attempted commission. [MPC § 5.02(1)]

Prior to the enactment of the Code, most state penal statutes did not provide for solicitation generally and instead proscribed solicitation of specific offenses. As a result of the Code's influence, many states today have solicitation statutes that apply to all crimes, or alternatively all felonies.

Unlike at common law, under the Code, the relationship of the solicitor to the solicited party need not be that of accomplice to perpetrator.

[B] Renunciation – The Model Code establishes a defense to solicitation of "renunciation of criminal purpose." A person is not guilty of solicitation if he:

(1) completely and voluntarily renounces his criminal intent; and

(2) either persuades the solicited party not to commit the offense or otherwise prevents him from committing the crime.[MPC § 5.02(3)]

Chapter 22
CONSPIRACY

§ 22.01 General Principle

Generally speaking, a conspiracy is an ***agreement*** by ***two or more persons*** to commit a criminal act or series of criminal acts, or to accomplish a legal act by unlawful means.

[A] The Agreement

[1] Common law – At common law, a conspiracy need not be based on an express agreement. Furthermore, an agreement can exist although not all of the parties to it have knowledge of every detail of the arrangement, as long as each party is aware of its essential nature. [*Blumenthal v. United States*, 332 U.S. 539, 557–58 (1947)] Moreover, a "conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense."[*Salinas v. United States*, 522 U.S. 52, 63 (1997)] It is enough that each person agrees, at a minimum, to commit or facilitate some of the acts leading to the substantive crime.

[2] Model Penal Code – Four types of agreement fall within the definition of conspiracy. A person is guilty of conspiracy if he agrees to:

(1) commit an offense;
(2) attempt to commit an offense;
(3) solicit another to commit an offense; or
(4) aid another person in the planning or commission of the offense.

[B] Overt Act

[1] Common and Statutory Law – A common law conspiracy is complete upon formation of the unlawful agreement. No act in furtherance of the conspiracy need be proved. [*United States v. Shabani*, 513 U.S. 10, 13 (1994)]

Today, many statutes ***require proof of the commission of an overt act*** in furtherance of the conspiracy. In jurisdictions requiring an overt act, the act need not constitute an attempt to commit the target offense. Instead, *any* act (and perhaps an omission), no matter how trivial, is sufficient, if performed in pursuance of the conspiracy. A single overt act by *any* party to a conspiracy is sufficient basis to prosecute *every* member of the conspiracy, including those who may have joined in the agreement *after* the act was committed. Most states apply the overt-act rule to all crimes.

[2] Model Penal Code – The Code's requirement of proof of an overt act only applies to cases involving a misdemeanor or a felony of the third degree. [MPC § 5.03(5)]

[C] "Plurality" Requirement

[1] Common Law – Common law conspiracy requires proof that at least two persons possessed the requisite *mens rea* of a conspiracy. For example, no conspiracy conviction is possible if one of the two persons is an undercover agent feigning agreement, or lacks the capacity to form the agreement due to mental illness.

[2] Model Penal Code; Majority Rule – The Model Code departs significantly from the common law by establishing a unilateral approach to conspiracy liability. The Code focuses on the culpability of the defendant whose liability is in issue, rather than on that of the larger conspiratorial group. Specifically, the Code provides, "*A person* is guilty of conspiracy with another person" if "*he agrees* with such other person" to commit an offense. The unilateral approach has been adopted in most states.

§ 22.02 *Mens Rea*

[A] In General

[1] Common law – Common law conspiracy is a specific-intent offense, requiring that two or more persons: (1) ***intend to agree;*** *and* (2) ***intend that the object of their agreement be achieved.*** Absence of either intent renders the defendants' conduct non-conspiratorial. However, courts are divided over the interpretation of "intent." Some require that the parties have the unlawful result as their ***purpose*** and others allow conviction for conspiracy based on the parties' ***mere knowledge*** that such result would occur from their conduct.

[2] Model Penal Code – The Code specifically provides that the conspiratorial agreement must be made "with the ***purpose*** of promoting or facilitating" the commission of the substantive offense. Thus, in jurisdictions following the Code, a conspiracy does *not* exist if one is aware of, but fails to share, another person's criminal purpose.

[B] Corrupt-Motive Doctrine – Some common law jurisdictions apply what has come to be known as the "corrupt motive doctrine." This doctrine states that in addition to the usual *mens rea* requirements of conspiracy (i.e., intent to agree, and intent to commit the substantive offense), the parties to a conspiracy must also have a corrupt or wrongful motive for their actions.

The Model Penal Code does not recognize the corrupt-motive doctrine.

§ 22.03 Parties to a Conspiracy

[A] Liability of Parties for Substantive Offenses – Each party to a conspiracy is liable for ***every offense committed by every other conspirato***r in furtherance of the unlawful agreement. Thus, an important issue in conspiracy trials may be to determine the precise confines of a conspiratorial enterprise.

[B] Overt-Act Requirement – The structure of a conspiracy is critical in jurisdictions recognizing an overt-act requirement. In these jurisdictions, ***an act*** of one conspirator in

furtherance of the agreement renders a prosecution permissible against every other party to the same agreement.

[C] Common Law Analysis

[1] In General – To be regarded as a co-conspirator, a person does not need to know the identity, or even of the existence, of every other member of the conspiracy, nor must he participate in every detail or event of the conspiracy. However, to be a co-conspirator he must have a general awareness of the scope and the objective of the criminal enterprise.

[2] Wheel Conspiracies – A "wheel" conspiracy is characterized by a central figure or group ("the hub") that engages in illegal dealings with other parties ("the spokes") and there exists a shared criminal purpose among all spokes and the hub. Parallel but separate objectives between similarly situated people do not make a wheel conspiracy (instead this would constitute multiple chain conspiracies).

In ***Kotteakos v. United States,*** 328 U.S. 750 (1946), a broker obtained fraudulent loans from the government for thirty-one people. All were tried under a theory of "wheel" conspiracy. However, evidence at trial demonstrated that the loan recipients were part of eight or more independent groups, none of which had any connection with any other group except that each used the same broker. Absent a single shared objective, the parties constituted eight or more chain conspiracies and not a single wheel conspiracy.

[3] Chain Conspiracies – Chain conspiracies ordinarily involve a criminal enterprise that cannot thrive unless each link successfully performs its part in the arrangement. In ***Blumenthal v. United States,*** 332 U.S. 539 (1947), the owner of a liquor wholesale agency distributed whiskey through two men, Weiss and Goldsmith, who arranged with Feigenbaum and Blumenthal to sell the whiskey to local tavern owners at a price in violation of the law. The Supreme Court held that the prosecutor's charge of a single conspiracy was proper, finding that each salesman "by reason of [his] knowledge of the plan's general scope, if not its exact limits, sought a common end, to aid in disposing of the whiskey."

An opposite conclusion was reached in ***United States v. Peoni,*** 100 F.2d 401 (2d Cir. 1938). Peoni sold a small quantity of counterfeit money to Regno, who in turn sold the money to Dorsey, who passed the money in commerce to innocent persons. No common interest was found between Peoni and Dorsey, and thus the court concluded that there existed two independent conspiracies, one between Peoni and Regno and another between Regno and Dorsey.

[D] Model Penal Code – In addition to §5.03(1), which sets forth a unilateral approach to conspiracy, §5.03(2) provides that if a person "knows that a person with whom he conspires to commit a crime has conspired with another person or persons to commit the same crime, he is guilty of conspiring with such other person or persons, whether or not he knows their identity, to commit such crime."

The Model Penal Code provides that a person with multiple criminal objectives is guilty of only one conspiracy if the multiple objectives are:

(1) part of the same agreement; or

(2) part of a continuous conspiratorial relationship. [MPC § 5.03(3)]

§ 22.04 Relationship to Target Offense

[A] General rule

[1] Common Law and Non-Model Penal Code Statutes – At common law, a conspiracy to commit a felony or a misdemeanor was a misdemeanor. Under modern statutory law, the seriousness of the crime of conspiracy varies. Some states continue to treat all conspiracies, regardless of the seriousness of their objectives, as misdemeanors. More often, however, the sanction for conspiracy corresponds to the contemplated crime so that conspiracy to commit a felony is graded as a felony, and conspiracy to commit a misdemeanor is a misdemeanor. In most states, a ***conspiracy to commit a felony is punished less severely than the target offense***.

[2] Model Penal Code – As with other inchoate offenses, the Model Penal Code sanctions a conspiracy to commit any crime other than a felony of the first degree at the ***same level as the target offense***. [MPC § 5.05(1)] If a conspiracy has multiple objectives, e.g., to rape and to steal, the conspiracy is graded on the basis of the most serious target offense.

[B] Punishment When the Target Offense is Committed

[1] Common Law – Unlike the crimes of attempt and solicitation, the offense of conspiracy does *not* merge into the attempted or completed offense that was the object of the conspiracy. [*Callanan v. United States,* 364 U.S. 587, 593–94 (1961)]

[2] Model Penal Code – The Code merges a conspiracy with the object of the conspiracy or an attempt to commit the target offense, unless the prosecution proves that the conspiracy involved the commission of additional offenses not yet committed or attempted. [MPC§ 1.07(1)(b)]

§ 22.05 Defenses

[A] Impossibility

[1] Common Law – The majority, but not universal, rule is that neither factual impossibility nor legal impossibility is a defense to a criminal conspiracy.

[2] Model Penal Code – The Model Penal Code does not recognize a defense of factual or hybrid legal impossibility in conspiracy cases. [MPC § 5.03(1)]

[B] Abandonment

[1] Common Law – The crime of conspiracy is complete the moment the agreement is formed or, in some jurisdictions, once an overt act is committed in furtherance of a criminal objective. However, if a person withdraws from a conspiracy, he may avoid liability for subsequent crimes committed in furtherance of the conspiracy by his former co-conspirators if he ***communicated his withdrawal to each co-conspirator***.

[2] Model Penal Code – The Model Code's abandonment defense to the crime of conspiracy is more onerous than that of the common law as it requires the conspirator to not only renounce his criminal purpose but to also ***thwart the success of the conspiracy*** under circumstances demonstrating a complete and voluntary renunciation of his criminal intent.

[C] Wharton's Rule – An agreement by two persons to commit an offense that by definition requires the voluntary concerted criminal participation of two persons – e.g., adultery, bigamy, incest, receipt of a bribe – cannot be prosecuted as a conspiracy. Wharton's Rule does not apply if more than the minimum number of persons necessary to commit an offense agree to commit the crime or if the two persons involved in the conspiracy are not the two people involved in committing the substantive offense.

The Model Penal Code does not recognize Wharton's Rule.

[D] Legislative-Exemption Rule

[1] Common Law – A person may not be convicted of conspiracy to violate an offense if his conviction would frustrate a legislative purpose to exempt him from prosecution for the substantive crime.

[2] Model Penal Code – Unless the legislature otherwise provides, a person may not be prosecuted for conspiracy to commit a crime under the Model Code if he would not be guilty of the consummated substantive offense: (1) under the law defining the crime; or (2) as an accomplice in its commission. A person is not guilty as an accomplice in the commission of an offense if he was the victim of the prohibited conduct, or if his conduct was "inevitably incident to its commission." [MPC § 2.06(6)(a)–(b)]

Chapter 23
COMPLICITY

§ 23.01 General Principles

[A] Common law – One is an accomplice in the commission of an offense if he intentionally assists another to engage in the conduct that constitutes the crime. Accomplice activity may include ***aiding, abetting, encouraging, soliciting, advising, and procuring*** the commission of the offense.

Accomplice liability is derivative in nature. In general, the accomplice may be convicted of any offense committed by the primary party with the accomplice's intentional assistance. Most jurisdictions extend liability to any other offense that was a natural and probable consequence of the crime solicited, aided or abetted.

[B] Model Penal Code – The Code rejects the common law natural-and-probable-consequences rule. Thus, an accomplice may only be held liable under the Code for acts that he purposefully commits.

§ 23.02 Parties to the Complicity

[A] Principal in the First Degree – A "principal in the first degree" is one who, with the *mens rea* required for the commission of the offense: (1) physically commits the acts that constitute the offense; or (2) commits the offense by use of an "innocent instrumentality" or "innocent human agent." The innocent-instrumentality rule provides that a person is the principal in the first degree if, with the *mens rea* required for the commission of the offense, he uses a non-human agent (e.g., a trained dog) or a non-culpable human agent to commit the crime.

[B] Principal in the Second Degree – A "principal in the second degree" is one who intentionally assisted in the commission of a crime in the presence, either actual or constructive, of the principal in the first degree. A person is "constructively" present if he is situated in a position to assist the principal in the first degree during the commission of the crime, e.g., serving as a "lookout" or "getaway" driver outside a bank that the principal in the first degree robs.

[C] Accessory Before the Fact – An "accessory before the fact" is one who is not actually or constructively present when the crime is committed; often such person solicits, counsels, or commands (short of coercing) the principal in the first degree to commit the offense.

[D] Accessory After the Fact – An "accessory after the fact" is one who, with knowledge of another's guilt, intentionally assists him to avoid arrest, trial, or conviction The conduct of the accessory after the fact occurs after the completion of the crime. If an accomplice is involved prior to the completion, i.e., up to the point when the principal in the first degree has reached a place of temporary safety, the accomplice is in fact a principal in the second

degree. Today, nearly all jurisdictions treat the offense of accessory after the fact as *separate* from, and often *less serious* than, the felony committed by the principal in the first degree.

§ 23.03 Acts Giving Rise to Accomplice Liability

[A] Common Law

[1] Types of Assistance – An accomplice is a person who, with the requisite *mens rea*, assists the primary party in committing an offense. Generally speaking, there are three basic types of assistance:

(1) assistance by ***physical conduct*** (e.g., furnishing an instrumentality to commit an offense, "casing" the scene in advance, locking the door to keep an assault victim from escaping, or driving a "getaway" car from the scene of the crime);
(2) assistance by ***psychological influence*** (e.g., incitement, solicitation, or encouragement); and
(3) assistance by ***omission*** (if there exists a duty to act). A person is not an accomplice simply because he knowingly fails to prevent the commission of an offense, but such failure to act may serve as a critical factor in determining that he assisted by psychological influence.

[2] Amount of Assistance Required – A person is not an accomplice unless his conduct (or omission) *in fact* assists in the commission of the offense. However, the degree of aid or influence provided is immaterial; even trivial assistance suffices. Furthermore, a secondary party is accountable for the conduct of the primary party even if his assistance was causally unnecessary to the commission of the offense.

[3] The *Pinkerton* Doctrine – In ***Pinkerton v. United States***, 328 U.S. 640 (1946), two parties conspired to violate certain provisions of the Internal Revenue Code and thereafter, while one co-conspirator was in prison for unrelated reasons, the other carried out the plan. Emerging from this case is the "*Pinkerton* doctrine" under which a party to a conspiracy is responsible for any criminal act committed by an associate if it:
(1) falls within the scope of the conspiracy; or
(2) is a foreseeable consequence of the unlawful agreement.

[B] Model Penal Code – A person is guilty of an offense if he commits it "by his own conduct or by the conduct of another person for which he is legally accountable, or both." Accomplice liability is founded on:

(1) ***Accountability through an innocent instrumentality –*** The Code explicitly provides that the innocent-instrumentality doctrine applies only if one *causes* another to engage in the conduct in question.

(2) ***Accomplice accountability –*** One is an accomplice if, with the requisite *mens rea*, he solicits, aids, agrees to aid, or attempts to aid in the planning or commission of the offense,

or has a legal duty to prevent the commission of the offense, but makes no effort to do so. [MPC § 2.06(2), (3)(a)]

(3) ***Miscellaneous accountability*** **–** Legislatures may enact special laws of accomplice liability, e.g., prohibiting the aiding and abetting of a suicide attempt, [MPC § 210.5(2)] or criminalizing the knowing facilitation of a prison escape. [MPC § 242.6]

The Model Code ***rejects the Pinkerton doctrine*** of conspiratorial liability. Thus, a person is not accountable for the conduct of another solely because he conspired with that person to commit an offense. The liability of one who does not personally commit an offense must be based on accountability through an innocent instrumentality, accomplice accountability, or miscellaneous accountability.

§ 23.04 *Mens Rea* in Complicity Offenses

[A] Common and Statutory Law

[1] "Intent" – The *mens rea* of accomplice liability is usually described in terms of "intention." As with the crime of conspiracy, however, there is considerable debate regarding whether a person may properly be characterized as an accomplice if he *knows* that his assistance will aid in a crime, but he lacks the *purpose* that the crime be committed. Most courts, however, hold that a person is not an accomplice in the commission of an offense unless he shares the criminal intent with the principal.

[2] Recklessness and Negligence – Although courts and statutes frequently express the culpability requirement for accomplice liability in terms of "intent," the majority rule is that accomplice liability may nevertheless attach in cases of crimes involving recklessness or negligence.

[B] Model Penal Code – The Code person resolves the common law ambiguity as to whether complicity requires purpose or mere knowledge of the consequences of their conduct. Under the Code, accomplice liability exists only if one assists "with the ***purpose*** of promoting or facilitating the commission of the offense." [MPC § 2.06(3)(a)]

Accomplice liability may also be found in cases involving recklessness or negligence when causing a particular result is an element of a crime:

(1) he was an accomplice in the *conduct* that caused the *result*; and

(2) he acted with the culpability, if any, regarding the *result* that is sufficient for commission of the offense. [MPC § 2.06(4)]

§ 23.05 Liability of the Secondary Party In Relation to the Primary Party

[A] Common Law – At common law, an accessory could not be convicted of the crime in which he assisted until the principal was convicted and, with the limited exception of criminal homicide, could not be convicted of a more serious offense or degree of offense than that of which the principal was convicted.

[B] Modern Rule – Today, the majority rule is that a ***conviction (or even a prosecution) of the principal in the first degree is not a prerequisite to the conviction of a secondary party.*** Non-prosecution of the principal might result from any one of numerous factors extraneous to his guilt (e.g., death, flight from the jurisdiction, or immunity from prosecution), and thus, does not in itself prove that a crime did not occur.

Furthermore, even if the principal is prosecuted but acquitted on the basis of an excuse defense, his acquittal should not bar a prosecution and conviction of a secondary party to whom the excuse does not extend. An acquittal on the ground of an excuse means that the actions of the primary party *were* wrongful, but that he was not responsible for them because of the excusing condition. However, since accomplice liability is derivative, there must be proof at the accomplice's trial of the principal's guilt.

An accomplice or accessory may be convicted of a more serious offense than is proved against the primary party.

[C] Model Penal Code – An accomplice in the commission of an offense may be convicted of a crime, upon proof of its commission by another person, regardless of whether the other person is convicted, acquitted, or prosecuted. Furthermore, an accomplice may be convicted of a different offense or different degree of offense than is the primary party. [MPC § 2.06(7)] The Code also expressly provides that a person who is legally incapable of committing an offense personally may be held accountable for the crime if it is committed by another person for whom he is legally accountable. [MPC § 2.06(5)]

§ 23.06 Limits to Accomplice Liability

[A] Common Law

[1] Legislative-Exemption Rule – A person may not be prosecuted as an accomplice in the commission of a crime if he is a member of the class of persons for whom the statute prohibiting the conduct was enacted to protect. For example, in a case of statutory rape, an underage female who engages in sexual intercourse cannot be prosecuted as a secondary party to her own statutory rape since the law was enacted to protect young females from immature decisions regarding sex.

[2] Abandonment – As with the law of conspiracy, many courts hold that a person who provides assistance to another for the purpose of promoting or facilitating the offense, but who subsequently abandons the criminal endeavor, can avoid accountability for the subsequent criminal acts of the primary party. The accomplice must do more than spontaneously and silently withdraw from the criminal activity. He ***must communicate his withdrawal to the principal and attempt to neutralize the effect of his prior assistance***.

[B] Model Penal Code – A person is not an accomplice in the commission of an offense if:

(1) he is the victim of the offense; or

(2) his conduct is "inevitably incident" to the commission of the offense; or
(3) he terminates his participation before the crime is committed, and he:
(a) neutralizes his assistance;
(b) gives timely warning to the police of the impending offense; or
(c) attempts to prevent the commission of the crime.

Chapter 24
HOMICIDE

§ 24.01 Definition of Homicide

[A] Common Law and Statutory Homicide – At very early common law, "homicide" was defined as "the killing of a human being by a human being." This definition included suicide. However, modern law defines "homicide" as "the killing of a human being by *another* human being." Suicide, therefore, is no longer a form of homicide in most statutes. Homicide is divided into two crimes – murder and manslaughter.

[1] "Human Being" – The ***common law and majority approaches*** define the ***beginning of life*** as ***birth*** for purposes of interpreting the criminal homicide law. A ***minority*** of states now treat a viable – or, at times, even nonviable – ***fetus*** as a human being under the homicide statute.

Regarding the ***end of human life***, a majority of states, either by statute or judicial decision, have incorporated ***"brain death"*** in their definition of "death."

[2] "Murder" – The common law definition of "murder" is "the killing of a human being by another human being with malice aforethought."

[3] "Manslaughter" – Manslaughter is "an unlawful killing of a human being by another human being *without* malice aforethought."

[4] "Malice" – As the term has developed, a person kills another acts with the requisite "malice" if he possesses any one of four states of mind:

(1) the intention to kill a human being;
(2) the intention to inflict grievous bodily injury on another;
(3) an extremely reckless disregard for the value of human life; or
(4) the intention to commit a felony during the commission or attempted commission of which a death results.

[B] Model Penal Code – A person is guilty of criminal homicide under the Model Code if he unjustifiably and inexcusably takes the life of another human being [MPC § 210.0(1)] purposely, knowingly, recklessly, or negligently. [MPC § 210.1(1)] The Code recognizes three forms of criminal homicide: murder, manslaughter, and (unlike the common law) negligent homicide.

§ 24.02 Murder

[A] Degrees of Murder – At common law, there were ***no degrees of murder***, and murder was a capital offense. Reform of the common law has resulted in the division of murder into degrees, with only murder in the first degree being a capital offense.

The Model Penal Code ***rejects the degrees-of-murder approach***.

[B] Intent to Kill

[1] "Deliberate and Premeditated" – Typically, a murder involving the specific intent to kill is first-degree murder in jurisdictions that grade the offense by degrees if the homicide was also "deliberate" and "premeditated."

[2] "Wilful, Deliberate, Premeditated" – Nearly all states that grade murder by degrees provide that a "wilful, deliberate, premeditated" killing is murder in the first degree.

[3] "Intent to Inflict Grievous Bodily Injury" – Malice aforethought is implied if a person intends to cause grievous bodily injury to another, but death results. In states that grade murder by degree, this form of malice nearly always constitutes second-degree murder.

[4] Extreme Recklessness ("Depraved Heart" Murder) – Malice aforethought is implied if a person's conduct manifests an extreme indifference to the value of human life. In states that separate murder into degrees, this type of murder almost always constitutes second-degree murder.

[C] Model Penal Code – A homicide is murder if the defendant intentionally takes a life, or if he acts with extreme recklessness (i.e., depraved heart murder).

§ 24.03 Felony-Murder

[A] Common Law – At common law, a person is guilty of murder if he kills another person during the commission or attempted commission of any felony. Nearly every state retains the felony-murder rule.

[B] Statutory Law – Under most modern murder statutes, a death that results from the commission of an enumerated felony (usually a dangerous felony, such as arson, rape, robbery, or burglary) constitutes first-degree murder for which the maximum penalty is death or life imprisonment. If a death results from the commission of an unspecified felony, it is second-degree murder. The felony-murder rule authorizes strict liability for a death that results from commission of a felony.

[C] Model Penal Code – The Code also provides for felony-murder by setting forth that extreme recklessness (and, thus, murder) is presumed if the homicide occurs while the defendant is engaged in, or is an accomplice in, the commission, attempted commission, or flight from one of the dangerous felonies specified in the statute. [MPC § 210.2(1)(b)]

§ 24.04 Limits on the Felony-Murder Rule

[A] Inherently-Dangerous-Felony Limitation – Many states limit the rule to homicides that occur during the commission of felonies which by their nature are dangerous to human life, e.g., armed robbery.

[B] Independent Felony (or Merger) Limitation – Most states recognize some form of "independent felony" or "collateral felony" limitation. That is, the felony-murder rule only applies if the predicate felony is independent of, or collateral to, the homicide. If the felony is *not* independent, then the felony *merges* with the homicide and cannot serve as the basis for a felony-murder conviction. For example, most jurisdictions hold that felonious assault may not serve as the basis for felony-murder.

[C] *Res Gestae* Requirement – A requirement of the felony-murder rule is that the homicide must occur "within the *res gestae* [things done to commit] of the felony," which requires both:

(1) ***temporal and geographical proximity*** – There must be a close proximity in terms of time and distance between the felony and the homicide. The *res gestae* period begins when the defendant has reached the point at which he could be prosecuted for an attempt to commit the felony, and it continues at least until all of the elements of the crime are completed. Most courts provide that the *res gestae* of a felony continues, even after commission of the crime, until the felon reaches a place of temporary safety.

(2) a ***causal relationship*** between the felony and the homicide.

[D] Killing by a Non-Felon

[1] The "Agency" Approach – A majority of states that have considered the issue apply the so-called "agency" theory of felony murder, which precludes any killing committed during the commission of the felon by a person other that the defendant or his accomplices from serving as the basis for felony-murder. However, a killing by an accomplice can be imputed to others involved in the commission of the felony so that felony-murder can be charged against the non-killers.

[2] "Proximate Causation" Approach – A minority of courts apply the "proximate causation" theory of felony-murder under which a felon is liable for any death proximately resulting from the felony, whether the killer is a felon or a third party.

[3] "Provocative Act" Doctrine – A felon may be held responsible for the death of another at the hands of a third party, if the basis for the charge is *not* felony-murder, but instead is founded on what is sometimes termed the "provocative act" doctrine, which is simply a form of reckless homicide, e.g., a felon recklessly provokes a victim to shoot in self-defense, killing an innocent bystander.

§ 24.05 Manslaughter

[A] Forms of Manslaughter – Traditionally, three types of unlawful killings constitute manslaughter:

(1) an ***intentional killing*** committed in ***"sudden heat of passion"*** as the result of ***"adequate provocation"*** (voluntary manslaughter);

(2) an ***unintentional killing*** resulting from the commission of a ***lawful act done in an unlawful manner*** (involuntary manslaughter). This is ***akin to criminally negligent homicide.***

(3) an ***unintentional killing*** that occurs during the commission or attempted commission of an unlawful act (involuntary manslaughter). This type of manslaughter is sometimes dubbed ***"unlawful-act manslaughter,"*** or if the killing occurred during the commission of a non-felony, "misdemeanor-manslaughter."

[B] Provocation ("Sudden Heat of Passion")

[1] Elements of the Mitigating Factor – Under common law principles, an intentional homicide committed in "sudden heat of passion" as the result of "adequate provocation" mitigates the offense to voluntary manslaughter. The common law defense contains four elements:

(1) The defendant must have acted in heat of passion ***at the moment of the homicide.*** "Passion" has been interpreted to include any violent or intense emotion such as fear, jealousy, and desperation.

(2) The passion must have been the ***result of adequate provocation.*** Under the modern approach, it is up to the jury to determine what constitutes adequate provocation. Juries in such cases are typically instructed to apply an objective "reasonable-person" standard.

(3) The defendant must not have had a reasonable ***opportunity to cool off.***

(4) There must be a ***causal link*** between the provocation, the passion, and the homicide.

[2] Words as Adequate Provocation – Surviving from the common law in most non-Model Penal Code jurisdictions is the rule that ***words alone do not constitute adequate provocation.*** However, a few courts allow the defense to be raised in the case of informational, but not insulting, words. Other courts have held open the possibility that insulting words may qualify in extreme circumstances. The "words alone" rule ***does not apply in jurisdictions following the Model Penal Code***.

[C] Unlawful-Act (Misdemeanor-Manslaughter) – An accidental homicide that occurs during the commission of an unlawful act not amounting to a felony (or, at least, not amounting to felony that would trigger the felony-murder rule) constitutes involuntary manslaughter. This may be termed "misdemeanor-manslaughter" or "unlawful-act manslaughter."

The scope of the doctrine varies widely by jurisdiction. Some courts limit its applicability to inherently dangerous misdemeanors while others apply the doctrine to all misdemeanors.

[D] Model Penal Code

[1] In General – A person is guilty of manslaughter if he:

(1) recklessly kills another; or

(2) kills another person under circumstances that would ordinarily constitute murder, but which homicide is committed as the result of "extreme mental or emotional disturbance" for which there is a "reasonable explanation or excuse."
[MPC § 210.3(1)(a)-(b)]

The Code does not recognize any form of criminal homicide based on the unlawful-act (misdemeanor-manslaughter) rule. [MPC § 6.06(2).]

[2] Reckless and Criminally Negligent Homicide – A person who kills another recklessly is guilty of manslaughter. In a sharp departure from the common law, the Code ***precludes liability for manslaughter based on criminal negligence.*** A criminally negligent homicide – involuntary manslaughter at common law – ***constitutes the lesser offense of negligent homicide*** under the Code. [MPC § 210.4]

[3] Extreme Mental or Emotional Disturbance – A person who would be guilty of murder because he purposely or knowingly took a human life, or because he killed a person recklessly under circumstances manifesting an extreme indifference to the value of human life, is guilty of the lesser offense of manslaughter if he killed the victim while suffering from an "extreme mental or emotional disturbance" (EMED) for which there is "reasonable explanation or excuse." The reasonableness of the explanation or excuse regarding the EMED is "determined from the viewpoint of a person in the defendant's situation under the circumstances as he believes them to be." The concept of EMED is intended to incorporate two common law doctrines: (1) sudden heat of passion (but in a much expanded form); and (2) partial responsibility (diminished capacity).

The EMED manslaughter provision is broader than the common law provocation defense in the following ways:

(1) a ***specific provocative act is not required*** to trigger the EMED defense;

(2) even if there is a provocation, it need not involve "an injury, affront, or other provocative act perpetrated upon [the defendant] by the decedent";

(3) even if the decedent provoked the incident, it need not fall within any fixed category of provocations;

(4) ***words alone can warrant a manslaughter instruction;***

(5) there is ***no rigid cooling-off rule.*** The suddenness requirement of the common law – that the homicide must follow almost immediately after the provocation – is absent from the EMED defense.

Chapter 25
RAPE

§ 25.01 General Principles

[A] Common law – Generally speaking, sexual intercourse by a ***male*** with a ***female not his wife***, constitutes rape if it is committed:

(1) forcibly;

(2) by means of deception;

(3) while the female is asleep or unconscious; or

(4) under circumstances in which the female is not competent to give consent (e.g., she is drugged, mentally disabled, or underage).

Rape is a ***general-intent*** offense. As such, a defendant is guilty of rape if he possessed a morally blameworthy state of mind regarding the female's lack of consent.

[B] Traditional Statutory Law – Traditional rape statutes define the offense as sexual intercourse achieved ***"forcibly,"*** "against the will" of the female, or "without her consent." Like the common law, such statutes are ***gender-specific,*** i.e., only males are legally capable of perpetrating the offense, and only females can legally be victims of the crime.

[C] Modern Statutory Law – Many states now extend the law to specified forms of ***non-forcible, but nonconsensual,*** sexual intercourse, e.g., sexual intercourse by a male with an unconscious or drugged female. Increasingly, rape is now defined in ***gender-neutral*** terms regarding both the perpetrator and the victim. In the most reformed statutes, the offense has been broadened to include all forms of sexual penetration; the name of the crime has been changed (e.g., "criminal sexual conduct" or "sexual assault") and the offense is divided into degrees.

[D] Model Penal Code – A ***male*** is guilty of rape if, acting ***purposely, knowingly, or recklessly*** regarding each of the material elements of the offense, he has sexual intercourse with a ***female*** under any of the following circumstances:

(1) the female is ***less than 10 years of age***;

(2) the female is ***unconscious***;

(3) he compels the female to submit by ***force or by threatening*** her or another person with ***imminent death, grievous bodily harm, extreme pain or kidnapping;*** or

(4) he ***administers or employs drugs or intoxicants*** in a manner that substantially impairs the female's ability to appraise or control her conduct. [MPC § 213.1(1)]

§ 25.02 "Forcible"

The ***traditional common law rule*** requires proof that both the female did not consent to the intercourse *and* that the sexual act was "by force" or "against her will" ***("resistance" requirement***). Generally speaking, nonconsensual intercourse is "forcible" if the male uses or threatens to use force likely to cause serious bodily harm to the female or, possibly, a third

person. Intercourse secured by a ***non-physical threat does not constitute forcible rape*** at common law.

A ***minority of jurisdictions*** by statute or common law interpretation have ***abolished the resistance requirement.*** Where state have retained the resistance requirement, the trend is to reduce the significance of the rule by lowering the barrier, typically requiring only that the alleged victim asserted a ***degree of resistance that was reasonable*** under the circumstances or that was sufficient to indicate that the sexual intercourse was without consent.

An ***extreme minority approach***, applied at least in New Jersey, is that a male can be convicted for forcible rape ***based solely on the lack of permission*** for the sexual intercourse. [*State in the Interest of M.T.S.*, 609 A.2d 1266 (1992)]

The ***Model Penal Code*** defines rape solely in terms of the male's acts of aggression and ***does not require proof of resistance*** by the victim.

§ 25.03 Marital Immunity Rule

At common law, a husband could not be guilty of raping his wife. The ***majority*** of states retain a ***partial exemption*** under which immunity does not apply if the parties are legally separated or are living apart at the time of the rape.

A ***minority*** of states maintain a ***total exemption*** for marital rape, while at least twelve states have ***abolished the rule***.

The ***Model Penal Code*** recognizes a ***partial marital*** exemption that bars a rape prosecution against a spouse or persons ***"living as man and wife,"*** although they are not formally married. More stringent than the majority exemption, the only exception to the marital immunity rule is for spouses living apart ***under a formal decree of separation.*** [MPC § 213.6(2)]

§ 25.04 Evidentiary Issues at Rape Trials

[A] Corroboration Rule – At common law, the testimony of the alleged rape victim did not need to be corroborated in order to convict for rape. However, a minority of states, by statute or case law, have instituted a corroboration requirement.

The Model Penal Code imposes a corroboration requirement. [MPC § 213.6(5)]

[B] Rape-Shield Statutes – If the defendant contends that the female consented to sexual intercourse with him on the occasion of the alleged rape, evidence of prior consensual sexual acts ***between the accused and the victim is admissible.*** However, today, most states ***bar evidence*** of the alleged victim's ***prior consensual sexual activity with persons other than the accused*** and ***her reputation*** for lack of chastity under the so-called "rape-shield" laws.

The Model Penal Code is silent regarding the admissibility of evidence of the alleged victim's sexual history or reputation for chastity.

[C] Rape Trauma Syndrome – Rape Trauma Syndrome (RTS) is a set of acute and long-term symptoms resulting from a rape or attempted rape. In the acute phase, a rape victim is as apt to appear calm and subdued immediately after an attack as she is to manifest fear, anger, or anxiety. Many woman in the acute phase also experience physical symptoms, such as tension headaches, fatigue, and disturbed sleep patterns. In the long-term phase, many rape victims develop phobias related to the circumstances of the rape.

There is a split of authority regarding the scientific reliability and, therefore, admissibility of RTS evidence. Jurisdictions that permit RTS expert testimony often ***admit it only for limited purposes,*** e.g., to explain the fact that the alleged victim appeared calm immediately after the rape if such conduct would likely be viewed by jurors as inconsistent with a claim of rape. Generally, however, ***RTS may not be introduced as proof of the commission of the rape itself.***

The Model Penal Code is silent regarding the admissibility of evidence of RTS.

§ 25.05 Other Sex Crimes

[A] Statutory Rape – Today, "statutory rape" remains an offense in most states. Many states apply a two-level approach to this offense: sexual intercourse with a very young girl (e.g., twelve years of age or younger) remains punishable at the level of forcible rape; intercourse with an older girl (especially if the male is older than the female by a specified number of years) is a felony of a lesser degree.

The ***Model Penal Code*** does not recognize any strict liability crimes, and thus ***does not recognize statutory rape,*** although it ***does punish sexual intercourse by a man with a female less than 10 years of age*** if he knew or should have known the female's age.

[B] Gross Sexual Imposition – Unlike the common law, the ***Model Penal Code does not provide for rape on the basis of fraud.*** However, such conduct does constitute the offense of gross sexual imposition. Subject to the marital immunity exemption, a male is guilty of gross sexual imposition if he has sexual intercourse with a female in any one of three circumstances:

(1) the female submits as the result of a ***"threat that would prevent resistance by a woman of ordinary resolution,"*** e.g., if the woman is threatened by a supervisor with loss of employment. [MPC § 213.1(2)(a)]

(2) a male has sexual relations with a female with knowledge that, as the result of mental illness or defect, she is ***unable to appraise the nature of his conduct.*** [MPC § 213.1(2)(b)]

(3) a male knows that the ***female is unaware*** that a sexual act is being committed upon her or that she submits because she ***mistakenly believes that he is her husband.*** [MPC § 213.1(2)(c)]

Chapter 26
THEFT

§ 26.01 Larceny

[A] General Rule – Common law larceny is the ***trespassory taking (caption) and carrying away (asportation)*** of the personal property of another with the ***intent to permanently deprive the possessor*** of the property. Larceny is a specific-intent crime.

Real property is not the subject of larceny law. Moreover, ***only tangible forms of personal property*** are encompassed in the offense.

Grand and petty larceny were felonies at common law, with grand larceny being punishable by death. Today, grand larceny is a felony and petty larceny is a misdemeanor.

[B] Trespass – A "trespass" is the dispossession of another's property without his consent, or in the absence of justification for such nonconsensual dispossession. Dispossession by fraud also constitutes a trespassory taking.

[C] "Of Another"

[1] Common law – Because larceny involves the trespassory taking of *possession* of another person's property, a person may be convicted of larceny of property he owns, e.g., if a landlord, who leases out furnished apartments, enters a tenant's apartment and takes and carries away the furniture in violation of the lease agreement, he has taken the personal property "of another" for purposes of larceny law.

[2] Model Penal Code – The Code defines "property of another" broadly to include "property in which any person other than the actor has an interest." [MPC § 223.0(7)] This definition includes a possessory or ownership interest.

[D] "Custody" versus "Possession" – Larceny involves the trespassory taking of personal property from the *possession* of another. ***Ownership is not the key***. A person has *possession* of property when he has ***sufficient control over it to use it in a reasonably unrestricted manner.*** Possession can be actual or constructive. It is *actual* if the person is in physical control of it; it is *constructive* if he is not in physical control of it but no one else has actual possession of it, either because the property was lost or mislaid or because another person has mere "custody" of it. All non-abandoned property is in the actual or constructive possession of some party at all times.

A person has mere ***custody*** of property if he has ***physical control over it, but his right to use it is substantially restricted*** by the person in constructive possession of the property. A person in physical control of property has mere custody of the property in any of the following situations:

(1) He has ***temporary and extremely limited authorization to use the property***.

(2) He ***received the property from his employer*** for use in the employment relation. However, an employee who obtains property from a third person for delivery to the employer takes lawful *possession* upon delivery, and thus cannot be convicted of larceny of the property if he carries it away.

(3) He is a ***bailee of goods*** enclosed in a container. When a bailee is entrusted with a container for delivery in unopened condition, he receives possession of the container but mere custody of its contents. When the bailee wrongfully opens the container and removes the contents, i.e., when he "breaks bulk," a trespassory taking of possession of the contents results.

(4) He ***obtained the property by fraud***. When one receives property from another based on a false promise to return it, he receives only custody of the property, and is guilty of larceny if he appropriates it. On the other hand, if one has an honest intent when he receives the property (and, thus, no fraud is involved), he receives *possession* of the property, and any subsequent misappropriation constitutes embezzlement or no offense.

[E] Carrying Away (Asportation)

[1] Common law – A person is not guilty of larceny unless he carries away the personal property that he took trespassorily from another. However, virtually any movement of the property away from the point of caption is sufficient, e.g., larceny, rather than attempted larceny, occurs even if a shoplifter is caught with the merchant's property in his possession inside the premises.

[2] Model Penal Code – The Code ***does not require proof of asportation***. [MPC § 223.2(1)] This feature of the Code has been incorporated into most states' revised theft laws.

[F] Personal Property

[1] Land and Attachments Thereto – The common law of larceny does not protect land because by its nature it is immovable. Items attached to the land, e.g., trees, crops, and inanimate objects affixed in the earth also fall outside the scope of the offense. Once they are severed from the land, however, they become personal property and subject to larceny law.

In contrast, the ***Model Penal Code and many modern theft statutes cover all property*** ("anything of value"), [MPC § 223.0(6)] including "immovable" property, such as real estate, and "movable" property, "including things growing on, or found in land." [MPC § 223.0(4)]

[2] Animals – At common law, animals in the state of nature or *ferae naturae* (e.g., wild deer, wild birds, fish in an open river) were not "property" within the meaning of larceny law. However, once an animal was confined by a person on his land or killed, it became his personal property, subject to the law's protection.

Domesticated animals of a "base nature" also fell outside the scope of the common law definition of larceny. Horses and cattle were subject to larceny laws; dogs were "base." Today all domesticated animals and birds are protected by theft statutes.

[3] Stolen Property and Contraband – It is larceny for a person to take and carry away the property of another, even if the "victim" also had no right to possess the property in question.

[4] Intangible Personal Property – Because common law larceny involves the wrongful taking and carrying away of personal property, property without a corporeal existence, i.e., intangible property, is excluded from its coverage. Today the ***vast majority*** of states follow the Model Penal Code and ***prohibit the unlawful transfer of intangible personal property rights.*** [MPC § 223.2(2)]

[G] Intent to Steal

[1] In General – Courts commonly state that a person is not guilty of larceny unless he takes and carries away the personal property of another with the "specific intent to steal" the property. However, courts have construed reckless behavior to constitute intent if the defendant knew that his conduct would create a substantial risk of permanent loss, i.e., that the defendant was guilty of recklessly exposing the property to permanent loss.

[2] Continuing-Trespass Doctrine – When a person takes possession of another person's property by trespass, every moment that he retains possession of it constitutes a new trespassory taking that continues until he terminates possession of the property.

[3] Claim of Right – A person is not guilty of larceny if he takes property belonging to another person based on the good faith belief that he has a right to possess the property. The defendant's belief negates the specific intent to steal.

[H] Lost and Mislaid Property – An owner of property retains constructive possession of his lost property if there exists 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 owner can be ascertained. If there is *no* reasonable clue to ownership of the lost property, the finder may use the property as he wishes; the act of picking up the property and using or disposing of it is not a "taking" (trespassory or otherwise). However, if there is a reasonable clue to ownership of the property, the finder's state of mind upon discovery becomes critical.

With *mislaid* property, the same two factors – the possessory interest of the owner in the property, and the finder's state of mind upon discovery – apply. An object is "mislaid" if it is intentionally placed in a location for a temporary purpose and then inadvertently left there.

§ 26.02 Embezzlement

Embezzlement is ***not a common law offense*** and thus is a legislative creation. Most embezzlement statutes set forth the following elements:

(1) that the defendant ***came into possession*** of the personal property of another ***in a lawful manner;***

(2) that the defendant ***thereafter fraudulently converted*** the property; and

(3) that the defendant came into possession of the property ***as the result of entrustment*** by or for the owner of the property.

§ 26.03 False Pretenses

[A] In General – At common law, a person who "knowingly and designedly" obtains title to property by false pretenses is guilty of the offense of false pretenses. A "false pretense" is a false representation of an existing fact.

[B] Elements of the Offense

[1] False Representation – False pretenses requires a false representation, whether in the form of writing, speech, or conduct. Generally, nondisclosure of a material fact does not constitute false pretenses, even if the omitter of the information knows that the other party is acting under a false impression. However, nondisclosure constitutes misrepresentation if the omitter has a duty of disclosure, such as when he has a fiduciary relationship to the victim.

[2] Existing Fact

[a] Common and Statutory Law – At common law, the expression of an ***opinion,*** uttered with the intent to defraud another, ***does not constitute false pretenses.*** According to the modern majority rule, the offense of false pretenses also ***does not apply to misrepresentations regarding future conduct,*** although many states have recently expanded their theft laws to encompass false promises.

[b] Model Penal Code – Section § 223.3 provides that a person is guilty of "theft by deception" (the Code's equivalent offense) if he creates or reinforces a ***false impression regarding the value of property.*** However, the Code expressly ***immunizes puffing,*** if the statement would not deceive an ordinary listener.

The Model Penal Code prohibits deception regarding a person's "intention or other state of mind." The Code expressly provides, however, that deception regarding the intention to fulfill a promise cannot be inferred solely from the fact that the promisor did not perform as guaranteed. [MPC § 223.3(1)]