

## CRIMINAL LAW

Prepared by Professor George Dix

### PART ONE: PROPERTY CRIMES

- General Summary:
- 1) Traditional analysis: larceny, embezzlement, false pretenses, receiving stolen property
  - 2) Modern statutes: single “consolidated” crime of \_\_\_\_\_

#### I. LARCENY

- Summary: Elements of larceny
- 1) taking (exercise of control )
  - 2) asportation (some movement )
  - 3) corporal personal property of another
  - 4) from possession of another
  - 5) wrongfully
    - a) without permission; or
    - b) with permission obtained by deception (larceny by trick )
  - 6) with intent to permanently deprive

#### “Taking” and “Asportation” of the Property of Another

- Summary:
- 1) Usually, if D asports the property, there is also a completed taking
  - 2) Sometimes there is no taking because despite asportation D has not exercised real control

1. Jones works in a hardware store that sells lawnmowers. His personal lawnmower breaks and he decides to steal one from his employer. About 9:30 a.m., he moves a nice mower from a display in the front of the store to the loading area at the back of the store, intending to later put it in his car. But it is discovered and he is prosecuted for larceny. Which of the following is his best possible defense?

       *He did not move the mower far enough to “asport” it.*

✓ *He did not exercise actual control over it and thus did not “take” it.*

**REMEMBER:** Asportation requires only some inches movement of the property.

**AND:** To complete the taking for larceny, D need not remove the

property from the premises

2. D takes his car to V's garage. V repairs it and D cannot pay his bill. V has a mechanic's lien on the car, which entitles V to keep it until D pays the repair bill. D nevertheless sneaks onto V's property at night and drives the car off. D is charged with larceny of the car. What result?

       *Since D had title to the car, it was "his" car and he cannot commit larceny of it.*

✓ *Since V has a right to possession of the car superior to D's title, the car was property of V and D is guilty of larceny.*

**REMEMBER:** D need only take property from someone with a greater right to possession than D.

### Intent to Permanently Deprive

- Summary
- 1) Taking with intent to return it cannot be larceny
  - 2) At the time of the "taking," the defendant must have intended to either:
    - a) permanently keep the property himself; or
    - b) do something with the property that would create a high risk that the owner would never get the property back.

3. D hears that there is a great movie playing at a drive-in theater, but he has no car. He sees V's car parked with the keys in it and drives off. D intends to drive the car into the drive-in, watch the movie, and then walk out leaving the car in the theater. As D drives to the theater, a truck runs a red light, hit the car, and totally demolishes it. D is charged with larceny of the car. What result?

       *Yes, because D took the property and the owner will never get it back.*

       *Yes, because D intended that the truck destroy the car.*

✓ *No, because D did not take the car intending to use it in a manner creating a sufficient risk of permanent loss.*

**REMEMBER:** What controls is/was D's intent to do with the property at time of taking, not what actually happened to it!

4. D took V's car, intending to use it in a robbery and then to abandon it in an isolated desert area where he had arranged to meet a get-away airplane. Again, before he drives any significant distance, a truck runs a red light and demolishes it. Again, he is charged with larceny. What result now?

*Not guilty because he lacked the intent to permanently deprive.*

*Guilty, because he took the car intending to use it in a manner creating a sufficient risk of permanent loss.*

**REMEMBER:** Critical issue is whether the intended use of the property involved a high enough risk of permanent loss to the owner!

### **“Coincidence” Between Act and Intent and the Larceny Exception**

Summary: 1) General Rule: When a crime requires both a particular act and an intent, the defendant must have the required intent when he does the act constituting the crime.

2) Exception for Some Larceny Cases: “continuing Trespass” Rule

5. Reddal was repairing his kitchen and needed a taller ladder. He went next door to Knoll’s house. Knoll agreed to loan Reddal a ladder for the kitchen repair if Reddal would return it that day and as soon as he finished with it. Reddal agreed, took Knoll’s ladder and used it. Deciding it was very useful, he decided to keep it and put it in his own basement. He is charged with larceny of the ladder. What result?

*Not guilty, because he did not have the intent to permanently deprive at the time when he took the ladder.*

*Guilty as charged.*

6. Suppose in the preceding situation that when Reddal went to Knoll’s house, Knoll was not home. Reddal knew Knoll kept a ladder in his basement and went in and took the ladder. He intended to return it before Knoll returned. But when he found out how nice the ladder was, he decided to keep it and put it in his own basement. Reddal is charged with larceny. What result?

*Not guilty, because he did not have the intent to permanently deprive at the time he took the ladder.*

*Guilty, because he wrongfully took the ladder (but without the intent to permanently deprive) and during that wrongful possession formed the intent to permanently deprive.*

**REMEMBER:** Forming the intent after the taking and during the possession is sufficient **only if** the original taking was wrongful !

## II. EMBEZZLEMENT

- Summary: Elements of offense
- 1) possession of property under trust arrangement
  - 2) conversion of that property (use of it contrary to the terms of the trust arrangement)
  - 3) with intent to defraud (less than perm deprive)

7. D arranges with V for V to care for D's dog while D is on a trip. D gives V an envelope with \$500 in it for V to use in purchasing dog food. V finds herself at the market but without her wallet and takes \$30 from the envelope to pay for own groceries, intending to place \$30 from her wallet into the envelope when she returns home. If she is charged with embezzlement, what result?

*Not guilty, because she did not covert the money.*

*Not guilty, because she intended to repay the money and thus lacked the intent to defraud.*

*Guilty.*

### **Custody/Possession and Larceny/Embezzlement**

- Summary:
- 1) A person who has "possession" of the property of another can commit embezzlement but not larceny of that property.
  - 2) A person who has only "custody" of the property of another can commit larceny of that property.
  - 3) "Possession" requires extensive and discretionary control.

8. K is a night watchman in an auto parts store. One night, he puts an inner tube into his lunch box and takes it home intending to keep it. His sun turns him in to the police. What crime has K committed by taking the inner tube?

*Embezzlement, because he already had "possession" of the inner tube and "converted" it by taking it home.*

*Larceny, because he had only "custody" of it and therefore took it from the possession of his employer.*

**REMEMBER:** Usually, an employee has only custody of employer's property.

### **III. FALSE PRETENSES**

- Summary:
- 1) Elements of crime
    - a) Obtaining title to property from another
    - b) by means of a misrepresentation of:
      - (1) past fact; or
      - (2) present fact

c) with intent to defraud

2) Not sufficient;

a) unkept promise ; or

b) misrepresentation of future fact.

9. Young Lawyer, starting practice, goes to a store to purchase office furniture. Although he has only one client, he tells the salesperson that he will have a lucrative practice soon. The store gives him extensive credit and he purchases quite nice furniture using this credit. In fact, his practice fails and he does not make the payments.

(a) On these facts, he is charged with obtaining the furniture by false pretenses. What result?

*Guilty, because he promised to pay for the furniture and failed to keep his promise.*

*Not guilty, because he made no misrepresentation of present or past fact.*

**RULE:** An unkept promise does not involve a sufficient misrepresentation!

(b) Suppose the prosecution proves that when he promised to pay for the furniture, he did not intend to do so?

*Not guilty.*

*Guilty because he obtained the furniture by misrepresenting his intention to keep his promise to pay for it.*

10. D agrees with V to guide V on a hunting trip, if V makes payment in full before they leave. V and D agree on six monthly payments of \$200 each. After V makes the second payment, D decides she will not guide V. Nevertheless, she accepts the remainder of the payments. D is charged with obtaining the last four payments—\$800—by false pretenses. What result?

*Not guilty, because the only possible misrepresentation was as to D's state of mind.*

*Not guilty, because D made no affirmative misrepresentation concerning her intent to perform her promise to guide V.*

*Guilty, because D's failure to correct V's misunderstanding was a misrepresentation, since D created the misunderstanding.*

**RULE:** Usually an affirmative misrepresentation is required. But failure to correct a misunderstanding is sufficient if D created the misunderstanding.

#### IV. RECEIVING STOLEN PROPERTY

Summary: elements of receiving stolen property

- 1) receiving (taking possession);
- 2) of property acquired by larceny (or some other property crime)
- 3) knowing that the property is stolen; and
- 4) with intent to permanently deprive owner.

11. An undercover police officer takes his very own TV set to Fence's pawn shop and misrepresents to Fence that he stole it. Fence takes the TV. Fence is charged with receipt of stolen property. What result?

*Not guilty, because this TV set was not actually stolen property.*

*Guilty.*

**REMEMBER:** The property must actually be stolen property!

#### V. THEFT

Summary: Theft: modern statutory crime:

A person commits theft if he unlawfully exercises control over the property of another without effective permission and with the intent to deprive the other of that property.

#### VI. ROBBERY AND EXTORTION

- Summary:
- 1) Robbery: Larceny in which property is taken either by
    - a) force (violence); or
    - b) threat (intimidation)
  - 2) Robbery by force: force must be to obtain property or prevent victim from *immediately* regaining it
  - 3) Robbery by threats
    - a) threats must be of imminent physical harm
    - b) victim must be put in fear of harm
    - c) threat must be such as would cause apprehension of harm in a reasonable person
  - 4) Number of robberies in a situation:

- a) one robbery for **each** person from whom property is taken
- b) **not** one robbery for each item taken

- 5) Extortion: Obtaining property by means of other threats, such as threats to:
- a) do something other than physical harm (as a threat to reveal an embarrassing fact); or
  - b) do physical but not imminent harm

12. V is holding his wallet loosely in his hand. D approaches and grabs the wallet away without V realizing what is happening. V sees D slinking away and suddenly realizes his wallet is gone. He pursues D but D eludes V. Two hours later, V sees D and grabs her, but D manages to knock V unconscious and escapes to Rio. Later extradited, D is charged with robbery. What result?

*Grabbing the wallet away was robbery by force.*

*Knocking D unconscious to get away made the taking of the wallet robbery by force.*

*No robbery, but larceny and battery.*

**REMEMBER:** Force must be closely related to the taking of the property!

- AND**
- Despite the effort used, no force involved if
  - 1) D lifts items from V's pocket
  - 2) D slips item from V's hand without resistance

13. D decided to rob a convenience store and carefully practiced a threatening speech to give to the clerk concerning a gun he planned to carry. He walked into the store with his hands in his pockets. The clerk, a nervous person, looked at D and before D said or did anything, screamed, "I know you've got a gun. Don't kill me. Take it all." He threw a bag of cash on the floor. D shook his head, took the money, and left. D is charged with robbery. What result?

*Guilty, because he obtained property from the clerk's possession by instilling fear of injury in the clerk.*

*Not guilty of robbery, because he did nothing that would have caused a reasonable person to fear imminent bodily injury from him.*

**REMEMBER:** Action constitutes a threat only if a reasonable person would be put in fear of immediate harm

PART TWO: CRIMES AGAINST THE HABITATION  
VII. BURGLARY

- Summary:
- 1) Elements of traditional burglary
    - a) entry ;
    - b) by breaking ;
    - c) of the dwelling of someone else;
    - d) during the nighttime ;
    - e) with the intent to commit a felony inside the structure
  - 2) Dwelling: Place actually used as living or sleeping place

14. D wants to kill V. She goes to V's house at midnight and can see V sleeping in bed. The window is slightly open. D slides the window open further, takes a pistol in her hand, and sticks the barrel of the pistol into the room. She looks at V and cannot bring herself to shoot, so she leaves. Apprehended on the way home, she is charged with burglary.

*Not guilty, because she did not "enter" V's dwelling.*

*Not guilty, because she did not enter by "breaking".*

*Not guilty, because she did not commit the crime of murder in the dwelling.*

*Guilty*

- REMEMBER:**
- 1) Entry can be by an instrument !
  - 2) Breaking requires only some force to create or enlarge an opening!
  - 3) D must have necessary intent intent at time of entry!
  - 4) D need not carry out the intent to be guilty!

15. V leaves his cheap camera on his car's front seat and walks away; it is high noon. D, seeing the car window open, decides to take the camera and sell it. He reaches in and picks up the camera. A cop sees this and arrests him. Successful theft of the camera would be a misdemeanor. He is prosecuted under the following statute:

Burglary: It is the felony offense of burglary to enter the residence, building or vehicle of another without the permission of that person with intent to commit theft or any felony.

What result?

*Not guilty because he did not enter a dwelling*

*Not guilty because he did not enter by breaking*

*Not guilty because the entry was not in the nighttime*

*Not guilty because he entered with intent to commit only misdemeanor theft*

*Guilty*

**REMEMBER:** Modern statutes often

- 1) expand places covered
- 2) eliminate need for breaking
- 3) eliminate requirement that entry be in nighttime
- 4) expand intent

16. X gives a party and invites 30 people, including D. When the guests arrive, X asks them to remain on the ground floor.

- (a) During the party, D hears other guests talking about the million dollar coin collection X has in his upstairs bedroom. D decides to steal it. She goes upstairs, opens the door to the bedroom, and goes in. An alarm goes off. Is D guilty of burglary?

*No, because she did not have the intent to steal when she entered X's house*

*Yes, because D entered the bedroom by "breaking" with intent to commit theft.*

**REMEMBER:** Burglary can be committed by entering a part of a dwelling.

- (b) During the party, D hears X has a coin collection in a large armoire located in the downstairs living room. She forces open the door to the armoire and reaches in to pull out the jewels. An alarm sounds. Burglary?

*No, because she did not have the intent to steal when she entered X's house*

*Yes, because D entered the armoire by "breaking" with intent to commit theft.*

### **Intent to Commit a Felony**

Summary: Prosecution must prove:

- 1) D entered with intent to commit certain acts; and
- 2) those acts if committed by D would be a felony.

17. D enters V's house at night by breaking, intending to use V's sophisticated computer without V's knowledge or permission. D believes this constitutes the felony offense of larceny. But he is wrong; under the jurisdiction's laws, such use of a computer is not in fact any criminal offense. D is prosecuted for burglary. What result?

\_\_\_\_\_ *Guilty, because he thought that using the computer was a crime and he entered with the intent to so use the computer.*

*Not guilty, because he did not enter with intent to do something that in fact would be a felony.*

**REMEMBER:** Mistaken belief .that one's intended conduct will be a felony is not "intent to commit a felony."

### VIII. ARSON

- Summary:
- 1) Arson:
    - a) malicious
    - b) burning .
    - c) of another's dwelling .
  - 2) "Burning"—requires
    - a) some physical damage
    - b) by flame . (not smoke or heat)
    - c) to a part of th structure itself.

18. D started a trash fire next to his lot line. He knew that the wind might carry sparks next door to his neighbor's house and set it on fire, but he just doesn't care. This happens, the house burns, and D is charged with arson. What result?

\_\_\_\_\_ *Not guilty because the burning was not intentional.*

*Guilty, because D acted with awareness of a high risk that the house would be burned and thus with the necessary "malice."*

**REMEMBER:** Awareness of a high risk is enough to make burning malicious.

19. D entered V's house and set fire to a chair. The fire destroyed the chair. No flames actually reached the wall or ceiling of the room. But a wall was blackened by soot from the fire. D is charged with arson. Should she be convicted?

\_\_\_\_\_ Yes, because the chair was “burned.”

\_\_\_\_\_ Yes, because the wall was “burned.”

✓ No, because there was no “burning” of any part of the “structure.”

**REMEMBER:** Arson requires that some part of the structure be burned by fire!

### **PART THREE: CRIMINAL HOMICIDE**

General Summary: Three homicide offenses  
1) murder  
2) voluntary manslaughter  
3) involuntary manslaughter

Analysis: 1) Did D “cause” death of victim?  
2) Did D act with “malice aforethought?” [if so, murder unless - see (3)]  
3) If so, was there also adequate provocation? [voluntary manslaughter]  
4) if no “malice,” did D either  
a) act with criminal negligence? [involuntary manslaughter]  
b) cause death while committing misdemeanor? [involuntary manslaughter]

### **IX. CAUSATION**

Summary: Three kinds of causation issues  
1) “Factual” causation: “But for” acts of D, victim would not have died when and as he actually did die  
2) Year-and-one-day rule: victim must die within a year and one day from the infliction of the fatal injury  
3) Proximate causation

If no causation, D is often guilty of attempted murder.

### **Proximate Causation**

Summary: 1) Basic Problem Situations:  
a) D intends to kill victim;  
b) D factually causes victim’s death;  
c) **BUT** death occurs in an unexpected manner.  
2) **RULE:** Proximate causation exists if the victim’s death naturally results from the defendant’s actions, even if this occurs in an unexpected manner, unless the events are very, very unusual.

- 3) **But:** Proximate causation is lacking if a “superseding” factor is interjected into the chain of causation. Such a factor must be:
- a) unforeseeable ; and
  - b) the sole or only immediate cause of the victim’s death.

20. Randall and Leda were married, but Leda was “seeing” Swan. Leda decided to poison Randall and put poison in his soup. Randall ate the soup. He experienced pain in his stomach, ran out of the house in agony, heading for the emergency room. Swan, driving by, saw Randall running down the street. Wanting to make Leda an eligible widow, Swan drove over Randall with his jeep. Randall died; an autopsy showed he expired from injuries sustained from being run over, but that poison in his system would have killed him in 30 minutes, had he survived.

(a) Is Swan guilty of murder or attempted murder?

*Only attempted murder, because he did not “factually” cause Randall’s death.*

*Only attempted murder, because his running over Randall was not the “proximate” cause of Randall’s death.*

*Guilty of murder.*

**REMEMBER:** A defendant who simply speeds up death of dying victim does factually cause the victim’s death!

(b) Is Leda guilty of murder or attempted murder?

*Only attempted murder, because her actions did not “factually” cause Randall’s death.*

*Only attempted murder, because Swan’s actions were a “superseding factor” that broke the chain of causation between her actions and Randall’s death.*

*Guilty of murder.*

**REMEMBER:** If an intended death occurs in an unexpected way, there may be a lack of proximate causation!

(c) What would be Leda’s liability if Randall died from loss of blood as a result of hemorrhaging from the poison and bleeding from the jeep injury?

*Attempted murder.*

*Murder, because Swan’s action did not become the sole immediate cause of*

*Randall's death.*

**REMEMBER:** An intervening even cannot break chain of proximate causation if it only becomes a contributin cause of death!

## X. MURDER

Summary: A killing is with “malice aforethought” and therefore murder if the defendant acted with:

- (1) intent to kill ; **or**
- (2) intent to cause serious bodily injury; **or**
- (3) awareness of extremely high risk that death will result (“abandon and malignant hear” doctrine); **or**
- (4) intent to commit a felony .

21. Knowing that V suffers from a serious back problem, D weakened the leg of a chair he knew V would use, wanting to disable V by aggravating the back condition. V sits in the chair, it collapses, and V strikes his head and dies. Which theory would be the strongest for the State to use in prosecuting D for murder?

\_\_\_\_\_ *D acted with intent to kill.*

\_\_\_\_\_ *D acted with awareness of a high risk that V would die.*

✓ *D acted with intent to cause serious bodily injury.*

**REMEMBER:** If D acted with one of other malice mental states, intent to kill is not necessary for murder!

22. In an effort to distract X and Y who are chasing him, D fires a shot in a crowd street hoping that the noise will panic the crowd and the panic will distract X and Y. In fact, D hits and kills Z. Under what theory is D most likely to be found guilty of murder?

\_\_\_\_\_ *D intended to kill.*

\_\_\_\_\_ *D intended to cause serious bodily injury.*

✓ *D acted with awareness of a high risk that death would occur.*

**REMEMBER:** Knowingly engaging in high risk activity can be malice.

### Felony Murder

Summary: 1) General Rule: Accidental deaths caused during commission of a felony are murder.

- 2) The death must have been “ \_\_\_\_\_ ”, **OR** felony must have been “ \_\_\_\_\_ ” as committed.
- 3) All cofelons are guilty of a felony murder, if the death was foreseeable *to them*.
- 4) “Merger” Rule: Felony murder cannot be based on felony assault (or battery) causing death of victim (“merges” into death of victim).

23. C and D agree to burglarize V’s house while V is on vacation. C is to wait outside while D goes in to get the jewels they believe are in the house. D learns that V has left an armed guard in the house. She does not tell C but secretly gets a gun to hold on the guard while taking the jewels. When D enters and pulls the gun, the guard resists, a struggle ensues, and the gun accidentally discharged, killing the guard.

(a) Is D guilty of felony murder?

- No, because the killing was accidental.*
- No, because the death of the guard was unforeseeable.*
- Yes.*

(b) Suppose C is prosecuted for felony murder, based on the killing of the guard by D. What result?

- Not guilty because he was not guilty of burglary.*
- Not guilty because he was not the “trigger person.”*
- Not guilty because the killing was unforeseeable.*
- Guilty.*

**REMEMBER:** A death during a felony may be foreseeable to some of the felons but not to others!

24. X, Y and Z are riding on a train. X wants to demonstrate to Y what a coward Z is, so X pulls a loaded gun, points it at Z and says, “I wanted for a long time to off you.” X does not intend to shoot Z. The train sways and X stumbles, causing the gun to accidentally fire, killing Z. Threatening another person with a gun is a felony. Is X guilty of felony murder?

- Sure, because the accidental discharge of the gun was “foreseeable.”*

No, because the only felony–assault–merged and cannot support felony murder.

### Resisting Victims, Bystanders, and Unlucky Felons

Summary: 1) Many courts will not apply felony murder if the fatal shot was not fired by one of the felons !  
2) Courts are most reluctant to apply felony murder where person killed is one of the felons !

25. X, Y and Z go to “Bubba’s Jewelry Store” intending to rob it. As they enter, they see an armed guard standing at the back. X shouts, “I’ll pin him down!” and opens fire. The guard returns the gunfire. Suppose three versions, in all of which X is charged with felony murder:

- A: X’s gunshots hit a customer and kill him.
- B: The guard’s return gunfire hits a customer and kills him.
- C: The guard’s gunfire hits Z and kills him.

(a) In which of the three versions is X *least* likely to be convicted of felony murder?

A                                       B                                       C

(b) If X could not be convicted of murder on a felony murder theory, is there any other theory on which a murder prosecution might succeed?

Yes – X intentionally killed the victim.

Yes – X caused the victim’s death with awareness of a high risk that this would happen (“abandoned and malignant heart” murder).

No way.

### XI. DEGREES OF MURDER: STATUTORY PROVISIONS

Summary: 1) Some statutory provisions divide murder into degrees. Most killings with “malice aforethought” are second degree murder. Some killings are first degree murder:  
a) certain felony murders  
b) premeditated killings

2) Premeditation requires some conscious deliberation over whether or not to kill.

26. D and V get into a heated argument over politics. V calls D a bastard. D responds by pulling a pistol and shooting V, killing him. D is prosecuted for first degree murder under the following statute:

A person commits first degree murder if he either:

- a. kills another intentionally and with premeditation; or
- b. kills another in the course of committing robbery, kidnapping, burglary, arson, or rape.

All murders not first degree murder are second degree murder.

Which offense had D most likely committed?

\_\_\_\_\_ *First degree murder, because he killed with intent to kill and after premeditation.*

✓ *Second degree murder, because he acted with intent to kill but without premeditation.*

**REMEMBER:** A provoking incident, even if not enough to reduce killing to voluntary manslaughter, may show absence of premeditation !

## XII. VOLUNTARY MANSLAUGHTER

Summary: 1) An intentional killing that would otherwise be murder is reduced to voluntary manslaughter if three things are shown:

- a) objectively reasonable provocation ; and
- b) D acted on that before an objectively sufficient cooling period elapsed; and
- c) this actually caused the defendant to kill the victim.

**A: a) provocation; b) cooling**

2) Some situations insufficient “as a matter of law”: best example – “mere words ”

27. D comes home early from work one morning and sees V, her spouse, having intercourse with X in what D had previously regarded as her and V’s “marital bed.” D leaves and neither V nor X were aware of her presence. That evening, D meets X on the street and, moved to rage, kills X. D is prosecuted for murder. Should she be convicted as charged or of voluntary manslaughter?

Was there “reasonable provocation”?

✓ Yes

No \_\_\_\_\_

*Did it cause D to kill victim?*

Yes ✓

No \_\_\_\_\_

*Did D act before a “cooling period”*

Yes \_\_\_\_\_

No ✓

*had elapsed?*

*Therefore, D should be convicted of [murder as charged] [only voluntary manslaughter].*

### **XIII. INVOLUNTARY MANSLAUGHTER**

Summary: A killing is involuntary manslaughter if the defendant killed either:

- 1) in the course of committing a misdemeanor ; or
- 2) with criminal negligence .

28. D goes hunting in an area quite crowded with hunters. Hearing a rustling in the bushes, she sees a brown object moving through the undergrowth. She opens fire with her rifle and shoots ten times at the noise. All ten shots hit the object, which is another hunter on his knees looking for a lost contact lens. The other hunter dies from the wounds. What homicide offense has D most likely committed?

\_\_\_\_\_ *Murder, under the “abandoned and malignant heart” doctrine.*

\_\_\_\_\_ *Involuntary manslaughter, by killing with criminal negligence.*

**REMEMBER:** Where negligence is used for criminal liability, it requires more negligence than is necessary for civil liability!

### **XIV. LIABILITY FOR OMISSIONS**

Summary: 1) Criminal liability can *sometimes* rest upon a person’s failure to act.

2) An omission is sufficient only if:

- a) the defendant has a legal duty to act, which can arise from:
  - (1) criminal law;
  - (2) tort law; or
  - (3) contract law; or
  - (4) any other body of law; and
- b) the defendant was aware of the facts giving rise to a duty to act;

- and  
c) performing the duty was possible.

3) D must also have necessary intent .

29. Jim is charged with the intentional murder of Kim, a two-year-old child. The evidence shows that Jim was present when Kim fell into a swimming pool and drowned. It also shows that as Kim went down for the third and final time, Jim danced gleefully around the pool and laughed loudly. Jim is a former Olympic swimmer.

a) What should be the result?

*No, because he lacked the mens rea necessary for murder.*

*No, because liability could only rest on his omission and he had no duty to save Kim.*

*Guilty.*

**REMEMBER:** Where D has no legal duty to act, criminal liability cannot rest upon D's failure to take action!

b) Suppose Kim fell into the pool because Jim was "horsing around" with the child and accidentally bumped the child into the pool. Now should Jim be convicted of murder?

*No, he still had no duty to save Kim.*

*Yes, because his fault in placing Kim in danger created a duty to attempt to save Kim.*

c) Suppose Jim had been employed by Kim's parents to care for her during the day her fatal accident happened. Now should Jim be convicted of murder?

*No, because he had only a contractual duty to save Kim.*

*No, because he lacked the mens rea necessary for murder.*

*Yes.*

#### **PART FOUR: OTHER CRIMES AGAINST THE PERSON**

##### **XV. RAPE OR SEXUAL ASSAULT**

Summary: 1) Rape: sexual intercourse by a male with a woman not his spouse

- without the woman's effective consent
- 2) Fraud will render woman's consent ineffective only if the fraud goes to the nature of the Act .

30. D, a man, attempts to persuade V, a woman, to consent to intercourse with him. She refuses on the ground they are not married. D misrepresents to V that if they exchange vows they will be legally married, knowing this is false. Believing this, V exchanges such vows with D and willingly engages in sexual intercourse with him. Is D guilty of rape?

*Yes, because the fraud by D caused her to give her consent.*

*No, because the fraud did not lead V to falsely conclude that what she consented to was not sexual intercourse.*

## XVI. KIDNAPPING

Summary: Kidnapping consists of

- 1) Either-
  - a) confining or restraining a person; or
  - b) moving (asporting) a person; and
- 2) without authority of law .

31. Wilma enters a fancy restaurant. When greeted by the tuxedo-clad owner, she pulls a gun and forces the owner to go into the nearby office and open the safe. She takes the money from inside. She is later apprehended and prosecuted for robbery and kidnapping. What is her best possible defense to the kidnapping charge?

*She didn't intend to confine or restrain the owner.*

*Anyone who wears a tuxedo should expect to be kidnaped.*

*The confinement and movement of the victim were merely incidental to the robbery.*

**RULE:** Where the victim of a crime such as robbery or rape is confined or moved during the crime, many courts hold that kidnapping does not occur unless the confinement or movement increases the risk of harm to the victim and thus is not merely incidental to the other crime.

## PART FIVE: "PARTIES" TO A CRIME

Summary:

- 1) All persons are guilty of a crime who either
  - a) commit the act constituting the crime ("primary actors"); or
  - b) participate in it (as "aiders and abettors" or accomplices either

before or during its commission.

- 2) Assistance to the primary actor after the crime is complete does not create liability for the crime.
- 3) Acquittal of one participant does not affect liability of others.

#### XVII. "AIDING AND ABETTING"; ACCOMPLICE LIABILITY

- Summary:
- 1) Elements of liability as aider and abettor or accomplice
    - a) participation in the offense; and
    - b) with the required intent
  - 2) "Participation" can be by either:
    - a) encouraging ; or
    - b) assisting the primary actor.**BUT:** Mere presence at scene of commission of crime not enough!
  - 3) To have required intent, aider and abettor must both:
    - a) know the primary actor is going to commit the offense; and
    - b) intend (which means desire ) to encourage or assist him in doing so.

**LOOK FOR:** evidence that D had motive for wanting primary actor to successfully commit crime.

33. D is hitchhiking and is picked up by A, B, and C. D falls asleep in the car. When he awakens, the car is stopping. A points to X, standing on the sidewalk, and says to B, "Let's rob that dude." A and B get out, approach X, and rob him at gunpoint. As they approach X, D says to C (who has remained in the car), "This is totally awesome! I always wanted to see a robbery". The group is captured. D is charged with the robbery and C testifies to the events and conversations. Should D be found guilty?

*No, because he did not participate in the robbery by either assisting or encouraging.*

*Yes, because his presence was sufficient encouragement to be participation.*

34. Suppose on the last facts that when the car stopped, A, B and C got out. A said to X, "We're going to rob that dude over there. You keep an eye out for cops." X responded, "Awesome, man! I can do that." In fact, he is so frightened he closes his eyes until the trio returns, having robbed X. Again, D is charged with the robbery.

- a) Now should D be found guilty?

*No, he still did not participate because he did not actually keep a lookout.*

*Yes, because he was present pursuant to an agreement to aid the primary actors, and this was sufficient encouragement to be participation.*

**REMEMBER:** Presence pursuant to an agreement to aid is sufficient to show participation.

b) Suppose at X's trial the evidence shows that A and B have been tried and acquitted for the robbery. Will this entitle X to an acquittal?

*Yes, because it shows no crime was committed.*

*No, because the liability of participants in a crime is independent.*

**REMEMBER:** An aider and abettor can be convicted even if the primary actor is acquitted .

34. A owns a hotel in a rundown neighborhood. She knows that Trixy often engages in prostitution.

a) Suppose Trixy rents a room from A, agreeing to pay the regular price for the room in the morning. She uses the room to engage in prostitution that night. A is charged as an accomplice to that crime. What result?

*Not guilty because he did not participate in the offense.*

*Not guilty, because he did not intend to encourage or assist the offense.*

*Guilty.*

b) Suppose Trixy seeks a room for an hour and A responds that she can have a room only at her special "hooker" rate, which is three times the regular nightly rate. Trixy takes the room and agrees to pay the amount when she leaves. She uses it for prostitution. A is charged as an accomplice to that crime. What result?

*Not guilty because he did not participate in the offense.*

*Not guilty, because he did not intend to encourage or assist the offense.*

*Guilty.*

**REMEMBER:** A person who actually assists or encourages another in committing a crime is most likely to have the intent necessary to be an aider and abettor if the evidence shows a motive to want the person to successfully commit the crime!

## XVIII. EXCEPTIONS TO LIABILITY AS AIDER AND ABETTOR

Summary: A participant in an offense is not guilty of the offense if either:

- 1) he is a member of the class of persons protected by the crime; or
- 2) the crime inherently involves several types of participants and only some are made liable.

35. Frank approached Judge Smith and offered to give Smith \$5,000 if Smith would impose probation in Frank's upcoming sentencing. Smith took the money and agreed to impose probation. Smith is convicted of a crime consisting of "accepting a bribe." Is Frank guilty as an accomplice?

\_\_\_\_\_ *Yes, because he assisted Smith in accepting the bribe with the intent to so assist Smith.*

\_\_\_\_\_ *No, because Frank is a member of the class of persons protected by the crime of bribery.*

✓ *No, because bribery inherently involves both "givers" of the bribes and "acceptors" of the bribes, and the crime makes only the "acceptors" guilty.*

**ALSO:** In drug sale case, buyer is not aider and abettor to sale for the same reason.

## PART SIX: THE "PREPARATION" CRIMES

### XIX. ATTEMPT

Summary:

- 1) Elements: To commit a criminal attempt, a person must
  - a) go far enough, i.e., do something constituting a substantial step towards commission of the crime;
  - b) with intent to commit the crime.
- 2) Possible Defenses
  - a) abandonment of attempt: no defense
  - b) impossibility of success

36. X decides to borrow V's ladder without permission. The ladder is standing on the sidewalk in front of V's house. X walks towards the ladder but as she approaches it, she decides that taking it would be "just wrong." She goes back to her house. Later, V asks X what she was doing in front of his house. When X explains, V persuades authorities to prosecute X for attempted larceny.

a) Did X go far enough to complete the attempt?

No, this was only “preparation” and not enough for attempt.

Yes.

b) Did X have the intent necessary?

No, because she did not intend to take the ladder.

No, because she did not have the intent required to make her taking of the ladder larceny, i.e., she did not intend to permanently deprive V of the ladder.

Yes

**RULE:** For attempt, a two-part intent must be proved:

- 1) intent to complete the act constituting the attempted crime; and
- 2) any intent necessary for attempted crime .

c) If X had acted with intent to deprive V of the ladder, would she have had a defense of abandonment?

No, because her abandonment was not timely.

No, because abandonment is not a defense.

Yes.

### “Impossibility” defense

Summary:

- 1) General Rules:
  - a) “ legal “ impossibility is a defense.
  - b) “ factual “ impossibility is NOT a defense.
- 2) Three distinguishable situations, each involving the defendant’s mistaken perception about something different.

**Note:** Impossibility is quite different from mistake as a defense generally. Mistake of fact and law is covered later. But impossibility situations all involve mistaken beliefs by the defendants that the attempts will be successful. They are best categorized by the bases for those mistaken beliefs.

37. State X is the only remaining range of the rare yellow-tailed deer. There are also numerous black-tailed deer. The legislature enacted a crime, “Killing of Protected Deer,”

making it a crime to kill a yellow-tailed deer. There is no criminal prohibition against killing black-tailed deer. Suppose several different scenarios.

### **Type 1 Situations: Mistake About One's Ability**

Summary: It will be impossible for D to:

- a) perform the conduct she has set out to perform; or
- b) cause the result she has set out to cause.

BUT D mistakenly believes she will be successful.

This is factual impossibility. D has no impossibility defense and is guilty of attempt.

- a) D sees and recognizes a yellow-tailed deer, aims his gun at it and pulls the trigger. The gun malfunctions and fails to shoot. The deer runs off. Is D guilty of attempted killing of protected deer?

*No, because this is legal impossibility.*

*Yes, because this is factual impossibility and no defense.*

### **Type 2 Situations: Mistake About Law**

Summary: D's intended conduct would not constitute a crime if completed. But D thinks it would be a crime because D is mistaken about the law. This is legal impossibility. D has a defense and is *not* guilty of attempt.

- b) D sees and recognizes a black-tailed deer. He mistakenly believes that "Killing of Protected Deer" prohibits killing of black-tailed *and* yellow-tailed deer. He shoots and kills the deer. Is D guilty of attempted killing of protected deer?

*No, because this is legal impossibility.*

*Yes, because this is factual impossibility and no defense.*

### **Type 3 Situations: Mistake About Circumstances**

Summary: D's intended conduct is completed would not constitute a crime, but D thinks it would because D is mistaken about the surrounding circumstances.

*If the circumstances were as D believed them to be, her intended conduct would constitute a crime.*

*Best Rule:* This is factual impossibility. D has no defense and *is* guilty of attempt.

- c) D sees what she thinks is a yellow-tailed deer and shoots it six times. In fact, it is a decoy made of plastic and skillfully painted to look like a yellow-tailed deer. Is D guilty of attempted killing of protected deer?

\_\_\_\_\_ *No, because this is legal impossibility.*

✓ *Yes, because this is factual impossibility and no defense.*

**Summary: Attempt Impossibility Situations**

D sets out to commit a crime. It is impossible for her to commit that crime. But D believes she can commit the crime, because she is mistaken about:

	<u>Guilty of Attempt</u>	<b>OR</b>	<u>Defense of Impossibility</u>
whether she can perform conduct/cause result			<u>✓</u>
			_____
circumstances surrounding the situation			<u>✓</u>
			_____
the substantive criminal law			<u>✓</u>

**OR** D is least likely to be guilty of attempt where the mistaken belief that a crime would be committed was about the \_\_\_\_\_.

**A: criminal law**

**XX. SOLICITATION**

Summary: The crime of solicitation consists of:  
 1) suggestions (request) someone to commit an offense;  
 2) with intent that commit the crime .

38. Margo, fed up with ongoing disputes with her next door neighbor Mark, contacts one of her friends in low places - Shifty - and arranges with Shifty to kill Mark for \$750. The next day she calls Shifty back and says, "Don't do it. I've changed my mind." Shifty, it turns out, never intended to kill Mark and had already reported the situation to police.

Margo is charged with solicitation of murder. What result?

\_\_\_ *Not guilty, because she abandoned the venture.*

\_\_\_ *Not guilty, because she never convinced Shifty to actually form the intent to commit murder.*

\_\_\_ *Not guilty, because it was impossible to persuade Shifty to commit the murder.*

✓ *Guilty.*

**RULE:** Solicitation is a crime even if it is immediately rejected .

## XXI. CONSPIRACY

- Summary:
- 1) Elements of crime of conspiracy:
    - a) an agreement ;
    - b) the object of which is the commission of a crime ;
    - c) an overt act in furtherance by one member of the group.
  - 2) Possible defenses
    - a) withdrawal
    - b) no “meeting of mind” (acquittal of co-conspirators)
    - c) impossibility (not a defense)

### Co-conspirator Rule and Withdrawal

- Summary:
- 1) Co-conspirator Rule: All members of a criminal conspiracy are guilty of crimes committed by other members of that conspiracy if those crimes are both:
    - a) committed in furtherance of the scheme; and
    - b) a foreseeable result of the scheme.
  - 2) “Defense” of Withdrawal from the conspiracy
    - a) Withdrawal is no defense to the crime of conspiracy itself .
    - b) An effective withdrawal *is* a defense to a crime for which the defendant is liable under the co-conspirator rule.
  - 3) For a withdrawal to be “effective,” it must be:
    - a) fully communicated to all other members of the agreement ;  
and

b) before the crime is committed.

39. A, B, and C agree to rob a store and C is assigned to obtain a car to use as a getaway vehicle. There is no specific discussion as to how C is to do this. After C leaves, A has second thoughts and leaves, saying to B, "I'm out of this. Tell C. Good bye." Meanwhile, C steals a car from a used car lot. When C returns, B tells C that A has quit. B and C nevertheless go through with the robbery of the store.

a) If A is charged with the larceny of the car, on which theory will the State have the strongest case?

*A knew C would commit the larceny and intended to encourage this, so she was an aider and abettor to C's larceny*

*The larceny was in furtherance of the conspiracy to rob and foreseeable to A, so she is guilty of it under the coconspirator rule.*

b) If A is charged with the following three crimes, does she have a withdrawal defense to:

1) conspiracy?

*No, withdrawal is not a defense to this crime.*

*No, A's effort to withdraw had not become effective.*

*Yes.*

2) larceny under co-conspirator rule?

*No, withdrawal is not a defense to this crime.*

*No, A's effort to withdraw had not become effective.*

*Yes.*

3) robbery under co-conspirator rule?

*No, withdrawal is not a defense to this crime.*

*No, A's effort to withdraw had not become effective.*

*Yes.*

**Defense of "No 'Meeting' of 'Guilty Minds'"**

Summary: 1) D charged with conspiracy must be acquitted upon proof that **all** other members of the alleged conspiracy have been acquitted or its equivalent.

- 2) Equivalents of acquittal ;
- a) not guilty by reason of insanity ; or
  - b) person did not intend to go through with crime (had “secret reservations”).

40. Arnie, Bernie and Carnie agree that the three of them will rob a specific store the next night. Before that time, Arnie and Bernie are apprehended, and charged with conspiracy to commit robbery.

- a) Separate trials are scheduled. Arnie is tried first and is acquitted. At Bernie’s later trial, the defense proves Arnie’s acquittal and that Carnie was a police undercover officer who never intended to actually participate in the robbery. What result?

*Guilty, since only Arnie was acquitted.*

*Guilty, since the two other members were shown not to have agreed, but for different reasons.*

*Not guilty, because there could not have been an actual agreement.*

- b) Suppose again separate trials are scheduled. After Arnie is tried and acquitted, Bernie is tried and proves Arnie’s acquittal. Now what result?

*Acquittal because all conspirator must be convicted.*

*Conviction, because despite Arnie’s acquittal there could still have been a “meeting of minds” between Bernie and Carnie.*

**REMEMBER:** conspiracy defendant is entitled to acquittal only upon showing that all of the other co-conspirators were acquitted or its equivalent!

## PART SEVEN: DEFENSES

### XXII. IGNORANCE OR MISTAKE OF “FACT”

Summary: 1) Ignorance or mistake concerning a matter of fact will affect criminal liability only if:

- a) it shows D lacked the mens rea required for the crime; and

b) the mistake was objectively reasonable .

2) If mistake shows absence of a necessary “ specific intent”, it need not be reasonable.

3) “specific Intent” Crimes

a) larceny, other property crimes (intent to permanently deprive or defraud)

b) burglary (intent to commit offense)

c) attempt and conspiracy (intent to complete the offense)

d) any offense defined as doing something “with intent to...”

Major crimes not specific intent crimes: arson and rape

4) Analysis Under Modern Statutes: Mistake of fact requires acquittal whenever it shows the lack of whatever mental state is required for the crime.

41. Returning from a business trip, D went to the airport self-park parking lot to retrieve his car. Being very tired, he went to the second floor rather than the third floor where he had parked his car. On the second floor, he saw a car of the same model and color as his. Believing it to be his, he drove away in it. Since he was tired and in a hurry, he did not notice the real owner’s ski equipment in the back seat. The next day the car was observed by a police officer in D’s driveway and D was prosecuted for larceny of it. If the jury believes D’s testimony, should it convict him?

\_\_\_ *Yes, because this was an unreasonable mistake of fact.*

\_\_\_ *Yes, because despite his mistake as to the factual matter, D had the intent necessary for larceny.*

✓ *No, because D’s unreasonable mistake of fact shows he lacked the specific intent required for larceny—the intent to permanently deprive another of their property.*

**REMEMBER:** A mistake of fact is only evidence that *may* show lack of intent !

### XXIII. CRIMINAL “INTENT”

- Summary:
- 1) Crimes generally require *mens rea* or “intent”
    - a) D must have been aware of the facts that constitute the crime.
    - b) D need not have known anything about the law .
  - 2) Exceptions: “Strict Liability” crimes do not require awareness of all the

facts

- a) statutory rape: no knowledge of victim's age required
- b) bigamy: D need not know at time of second marriage he still has a living spouse
- c) regulatory crimes (low penalty, enforcement device for regulatory scheme)

3) Modern statutes use more precise terminology in defining *mens rea*.

- a) purpose: a conscious desire
- b) knowledge: awareness of a practical certainty
- c) recklessness: awareness of a substantial risk
- d) negligence: reasonable person would have been aware of a substantial risk

4) General Rule of Modern Statutory Construction: A modern crime usually requires that the defendant have acted at least recklessly concerning all "physical" elements of the offense.

5) "Transferred" Intent: If D intends to injure one person and accidentally inflicts a similar injury upon another person, she will be treated as if she intended to injure the person actually harmed.

42. D is charged with statutory rape, consisting of sexual intercourse with a person under the age of 16. He offers evidence that he reasonably believed that the victim, V, was 23 years of age. If this evidence relevant to his guilt or innocence?

*Yes, it tends to show a mistake of fact that would require acquittal.*

*No, because D's awareness of, or mistake regarding, V's age is irrelevant.*

**REMEMBER:** There is no "mistake of fact" defense to a crime that is a strict liability crime!

43. D noted that his neighbor left her keys in her new automobile. D sneaked into it and drove it off to "test" it out. While approaching a sharp corner in a residential area at 55 mph, he shouted, "I think I can make it!" and gunned the motor. Unfortunately, D lost control and struck a tree. The car was a total loss.

a) Could D be convicted if charges are brought under the following:

It is an offense to purposefully or knowingly cause damage to the property of another.

*Three Step Analysis:*

1. *What facts must defendant be aware of?*

- Here, damage to property of another
2. What "level" of awareness is required?  
 Either purpose or knowledge
3. Does evidence show D had this awareness?  
 Here

Purpose	_____
	✓
No	_____
Knowledge	_____
	✓
No	_____

Therefore, D [could] [could not] be convicted.

- b) Could D be convicted if the crime is defined as follows:

It is an offense to negligently cause damage to the property of another.

\_\_\_\_\_ No.

✓ Yes, because D should have been aware of a substantial risk that he would cause damage to the car.

- c) Could D be convicted if the crime is defined as follows:

It is an offense to recklessly cause damage to the property of another.

\_\_\_\_\_ No.

✓ Yes, because D was in fact aware of a substantial risk that he would cause damage to the car.

- d) Suppose a statute provides:

It is an offense to cause damage to the property of another.  
 How is this crime most likely to be construed by the courts?

\_\_\_\_\_ As a strict liability offense, requiring no mens rea at all.

\_\_\_\_\_ The crime will require that the defendant have acted with purpose, that is, that he wanted to cause damage that he did.

✓ The crime will require that the defendant have acted recklessly, that is, that he was aware of a substantial risk that he would cause the damage that he in fact did.

#### XXIV. IGNORANCE OR MISTAKE OF "LAW"

- Summary:
- 1) Ignorance that the criminal law makes one's conduct a crime is not a defense.
  - 2) A defendant's affirmative (but mistaken) belief that the criminal law did not prohibit her conduct is a defense, if:
    - a) that belief was objectively reasonable ; and
    - b) the defendant relied upon:
      - (1) a statute later held invalid;
      - (2) a judicial decision later overruled; or
      - (3) an official interpretation of the law by a public official.

44. D is charged with criminal failure to support her child. In her defense, she testifies that she consulted attorney Mal Practice to determine whether she would be guilty of a crime if she did this, that she told Practice she intended to stop support payment, and that Practice assured her that her failure to support the child would not be a criminal offense. Should she be convicted?

*No, because she reasonably believed the law did not make her conduct a crime.*

*Yes, because she did not rely on the necessary official action in reaching her mistaken as to the law.*

**REMEMBER:** A defense of "mistake of law" cannot be based n advice of attorney .

45. Suppose in the last situation D was charged with the crime established in the following statute:

A person commits nonsupport if the person fails to provide reasonable support for a minor child, knowing the legal obligation to do so.

Now should she be convicted?

*Yes, because mistake of law based on advice of counsel is not a defense.*

*No, because this crime requires the accused to know the law is being violated and D's mistake shows she did not know this.*

**REMEMBER:** If the *men rea* of a crime requires knowledge that the law if being violated, advice of counsel may show the lack of that *mens rea*.

46. D is charged under federal tax laws with willfully failing to report income. He testifies that he believed that his wages were not "income" within the meaning of the tax laws. If the jury believes him, what should it do?

*Convict the dummy because ignorance of the law is not excuse.*



\_\_\_\_\_ *No, because he was still able to know his act was wrong.*

*Yes, because if the facts had been as he perceived them, his actions would have been legal.*

49. Suppose in the trial on the facts of Flakey's case, the defense experts testified as follows: In Flakey's deranged subconscious personality, killing V took on a strange pathological symbolism that Flakey was powerless to control. It was this pathological obsession with the death of V that render Flakey unable to resist his urge to kill V.

a) Under *M'Naghten*, is he entitled to acquittal if the jury believes these doctors?

\_\_\_\_\_ *Yes, because this testimony shows he did not know his acts were wrong.*

*No, because this testimony shows only an inability to control his conduct.*

**REMEMBER:** Under the usual interpretation of *M'Naghten* Rule, an insanity defense cannot be based upon loss of control !

b) Suppose the jurisdiction applied the following "modern" version of the insanity defense based on the Model Penal Code:

A defendant is not guilty by reason of insanity if, as the result of mental illness or defect, he either;

- a. has lost the substantial capacity to understand his act or its wrongfulness; or
- b. has lost the substantial capacity to conform his conduct to the law's requirement.

Now should Flakey be acquitted?

\_\_\_\_\_ *No, he cannot based a defense on loss of control.*

*Yes, because his inability to control himself shows he lacked the substantial capacity to conform to the law*

**REMEMBER:** Loss of control may be a defense under -  
1) statutory versions of insanity based on the Model Penal Code  
2) the "irresistible impulse" version of insanity"

## XXVI. UNCONSCIOUSNESS

Summary: 1) Criminal liability must be based upon a "voluntary act" of the

defendant.

- 2) If the defendant was unconscious , her behavior cannot constitute the necessary “voluntary act.”

50. Jones is charged with the murder of his wife. The prosecution’s evidence shows that he stabbed her 40 times and threw her into a pool where he held her head under water. Defense counsel offered an expert witness to testify that Jones is a pathological sleepwalker and, during the incident, he was in fact walking (and stabbing and drowning) in his sleep. On what defensive theory might this testimony be admissible?

       *Insanity.*

✓ *The absence of a “voluntary act” upon which liability for murder can be based.*

**REMEMBER:** Impaired consciousness (such as sleepwalking) may show absence of a voluntary act but not insanity!

## XXVII. INTOXICATION

Summary:

- 1) Intoxication is involuntary if either:
  - a) D did not know substance was intoxicating ; or
  - b) D consumed substance under duress .
- 2) Involuntary intoxication: treated as mental illness and insanity test applied.
- 3) Voluntary intoxication: defendant should be acquitted only if the crime requires proof of a specific and the intoxication shows he lacked that intent.
- 4) Voluntary intoxication as applied to homicide analysis:
  - a) can “disprove” premeditation
  - b) cannot “disprove” malice aforethought and reduce murder to manslaughter
- 5) Modern Statutory Analysis: voluntary intoxication requires acquittal if:
  - a) crime requires mental state higher than reckless (i.e.: purpose or knowledge) ; and
  - b) intoxication shows lack of this mental state.
- 6) Minority approach: voluntary intoxication is completely irrelevant to criminal liability
  - a) Thus D cannot argue lack of intent because of intoxication
  - b) U.S. Supreme Court has held: ✓  
this is

constitutionally  
permissible  
\_\_\_\_\_ this violates due  
process of law

51. At a law firm office party, D - an associate - becomes extremely drunk and lurches towards the neighborhood in which the firm's senior partners live. The evidence is that he fired flaming arrows at the homes of R and Z, senior partners. That aimed at R's home hit the mark and the home burned to the ground. That aimed at Z's home missed the home but landed in Z's Rolls Royce and the resulting fire damaged the vehicle. D is charged with arson and attempted arson. What effect might his intoxication have upon:

a) the attempted arson charge

\_\_\_\_\_ *No effect, because crime charged does not require a specific intent*

✓ *Acquittal required if jury finds that because of his intoxication, D did not have intent to commit arson when he shot at Z's house.*

b) the arson charge?

✓ *No effect, because crime charged does not require a specific intent*

\_\_\_\_\_ *Acquittal required if jury finds that because of his intoxication, D did not have malice when he set fire to R's house.*

### **Intoxication Defense Under Modern Statutes**

52. D is prosecuted for murder, under the following scheme:

Murder consists of purposefully or knowingly killing another person.

Manslaughter consists of recklessly killing another person.

Negligent homicide consists of killing another person with criminal negligence.

D can be convicted of manslaughter, or negligent homicide as lesser included offenses. The State shows that while driving she ran over V twice, killing him. D testifies that she was extremely drunk and had no idea V was in front of her car. Check any and all of the following that the trial judge should include in her instructions to the jury?

Yes *You should acquit D of murder if you find that because of her intoxication she did not cause the death of V purposefully or knowingly.*

No You should acquit D of manslaughter if you find that because of her intoxication D was unaware of a substantial risk that her actions would cause V's death and therefore did not act recklessly.

**REMEMBER:** Under modern statutes, there is no voluntary intoxication "defense" if recklessness is sufficient for liability!

## XXVIII. ENTRAPMENT

- Summary:
- 1) Majority Rule: Entrapment occurs only if:
    - a) the defendant was not predisposed to commit crimes like this; and
    - b) police officers created the intent to commit the crime.
  - 2) Minority "Objective" Rule: Entrapment occurs if police activity would cause a reasonable and unpredisposed person to form the intent to commit the crime.

**A: 1)a) predisposed; 1)b) intent; 2) intent**

53. Kate has served several prison terms for jewel thefts. She is now working as an aerobics instructor at a swank resort. Suspicious that Kate is responsible for several jewel thefts, a police undercover officer approaches her and offers her the chance to help him steal the jewels of Countess LaBonza, who is a guest of the resort. Kate declines, explaining that she is "going straight." The officer, however, argues that aerobics instruction provides no long-term security and that the jewel theft would "set you up for life." Kate changes her mind. As the officer keeps watch, she steals the jewels. He arrests her; she is prosecuted for larceny, and offers an entrapment defense. What results?

       *Guilty, because the prior convictions show shw was predisposed to committing this offense.*

✓ *Not guilty, because she was not predisposed and the officers created the intent to commit the crime in her mind.*

54. Suppose that in rebuttal, the prosecution produces evidence that when approached, Kate had already been "casing" the Countess' room. Kate's initial reluctance to join the officer was due to her suspicions that he might be a police undercover officer.

- a) What result now under the majority rule?

✓ *The evidence shows she was predisposed, so no entrapment occurred.*

       *The officers' conduct still compels a finding of entrapment.*

- b) What result if the jurisdiction applies the "objective" rule?

\_\_\_\_\_ *Same result, because evidence of predisposition still controls*

✓ *Acquit because officers' conduct would have created intent to commit crime in mind of reasonable unpredisposed person*

## XXIX. NECESSITY OR "CHOICE OF EVILS" DEFENSE

- Summary:
- 1) Generally, it is a defense that:
    - a) D believed that committing the crime would prevent an imminently threatened harm;
    - b) D believed this threatened harm would be greater than the harm that would result from commission of the crime; and
    - c) these beliefs were objectively reasonable.
  - 2) "Necessity" is *not* a defense if either:
    - a) the defendant wrongfully created the situation making the choice necessary; or
    - b) the defendant killed another to avoid his own death

55. Two Aggies are arrested for theft of bluebonnets and become the only inmates of the College Station jail. All of a sudden, the building begins shaking. The Aggies call the guard and scream, "We're taking Advanced Earthquake Geography, and this is for sure the long predicted 'Aggieland Big One.' We've got to get out of here!" The guard simply shakes her head and goes back to sleep. The Aggies rush past the guard and flee the building with the guard in pursuit. As soon as they get out, the building collapses. As the guard states at the pile of rubble, the Aggies return home. They are, however, [re] apprehended two months later when they appear at the new temporary jail building and request the return of their A & M registration material. Charged with escape, they assert a defense of necessity. What should be the prosecution's strongest response?

\_\_\_\_\_ *They could not reasonably have perceived that they were preventing a greater harm, since - to a reasonable person - no harm is greater than having tow more Aggies loose in the community.*

\_\_\_\_\_ *The threatened harm was not sufficiently imminent.*

✓ *The necessity of the earth quake may have justified A and B in leaving the jail but it did not justify their failure to turn themselves in to authorities when they successfully put themselves beyond harm from that source.*

**REMEMBER:** A defendant charged with escape is likely to have a defense of necessity only if he attempted to surrender to authorities as soon as the immediate threat was over.

## XXX. DURESS OR COERCION

- Summary:
- 1) General Rule: It is a defense that the defendant was compelled to commit the crime by a threat that if he did not do so, the threatening person would do:
    - a) immediate and physical harm
    - b) to D or a third person.
  - 2) Exception: Duress is not a defense to a crime that consists of an intentional killing.

56. D's husband and children are held captive by terrorists who tell D they will kill the family unless D cooperates in a robbery. At the terrorists' direction, D takes a gun and robs a nearby convenience store. The elderly clerk is so frightened that he dies of a heart attack. D is prosecuted for the felony murder of the clerk; she asserts a defense of duress. What result?

*Guilty, because the terrorists made no threat to harm D herself.*

*Guilty, because duress is not available as a defense to any murder charge.*

*Not guilty.*

**RULE:** Duress is available as defense to even murder if the prosecution's theory of guilt does not require proof of intent to kill.

### XXXI. SELF-DEFENSE

- Summary:
- 1) General Rule: It is a defense that the defendant believed that:
    - a) he was in imminent danger of being harmed by another;
    - b) the force he used was necessary to prevent the threatened harm; and
    - c) these beliefs were objectively reasonable.
  - 2) Deadly force
    - a) If crime involved deadly force, D has defense only if she reasonably believed:
      - (1) she was threatened with imminent death or serious bodily injury; and
      - (2) deadly force used was necessary to prevent that harm to her.
    - b) Need to "Retreat"
      - (1) Minority Rule: Any opportunity to retreat must be taken before using deadly force
        - (a) applies only if retreat possible with complete

- (b) safety.  
no duty to retreat when attacked in one's own home.

(2) General Rule: Opportunity to retreat is factor to consider in determining whether deadly force was reasonable .

3) "Aggressor" Rules

a) A person who starts a fight cannot use force in self defense during the fight

b) An aggressor regains the right to use force in self-defense during a fight by either

(1) withdraws from the fight; or

(2) giving notice of desire to do so.

**A: (1) withdraws; (2) desire**

57. D, by insulting and striking V, starts a fist fight with V. During the fight, V pulls a knife. D shouts, "I don't go for this serious stuff. I'm calling it quits." But V advances towards D. D pulls a gun and stabs V, killing him. D is charged with the murder of V. Does D have a defense of self-defense?

*Step One: Does starting the fight deprive D of any possible defense?*

(a)

*Did D actually withdraw from the fight?*

Yes ✓  
No

(b)

*Did D give notice of his desire to withdraw?*

✓  
Yes \_\_\_\_\_  
No

*Therefore: Does the right of self-defense apply?*

✓  
Yes \_\_\_\_\_  
No

*Step Two: If D does have right of self-defense, did he act*

*within it?*

(a)

*Do the special  
rules  
governing  
deadly force*

Yes ✓  
No \_\_\_\_\_

*situations apply?*

(b) *Critical questions:*

(1) *Did D reasonably believe he was  
threatened with immediate harm?*

Yes ✓  
No \_\_\_\_\_

(2) *Did D reasonably believe that harm  
was death or serious bodily injury?*

Yes ✓  
No \_\_\_\_\_

(3) *Did D reasonably believe that his own use  
of deadly force was necessary to prevent the  
harm with which he was threatened?*

✓ Yes \_\_\_\_\_  
No \_\_\_\_\_

*Therefore: Did he act within his right of self-defense?*

Yes ✓  
No \_\_\_\_\_

### **Imperfect Defense in Homicide Cases**

Summary: A defendant charged with murder who actually but unreasonably believed killing was necessary in self-defense:

- a) not entitled to acquittal
- b) should be convicted of manslaughter rather than murder.

58. Suppose in the last situation there is highly credible evidence that D knew that V was extremely inept, that D was larger and quicker than V, and D was trained in exotic self-defense techniques. D is charged with murder, based on the death of V. Defense counsel

is not optimistic regarding D's defense of self-defense, because she is afraid the jury will conclude that a reasonable person in D's position would have realized he could have disarmed and overcome V without using deadly force. Which of the following would be the best "Plan B" for the defense?

- Advance purchase discounts on air travel to South American countries with no extradition treaties.*
- Urge that the jury find D honestly but unreasonably thought shooting V was necessary, and convict him of manslaughter.*

### XXXII. DEFENSE OF OTHER PERSONS

Summary: It is a defense that the defendant believed that:

- 1) another person was threatened with imminent unlawfully harm by a third person;
- 2) the force used by D was necessary to prevent the harm
- 3) these beliefs were objectively reasonable.

59. D, while walking down a street, sees a youth struggling with a larger and older man. The youth is pleading for help from this "pervert." D intervenes and knocks the older man unconscious. The youth shouts, "That's the last time I try and mug anybody here," and runs off carrying the older man's wallet. D is prosecuted for battery upon the older man. Does she have a defense?

- No, because the person she defended was a stranger to her.*
- No, because the person she defended turned out to be n the wrong.*
- Yes, because she reasonably believed the young man was being wrongfully attacked.*

**REMEMBER:** Availability of defense turns on whether it reasonably appeared to D that person she aided was in the "right!"

### XXXIII. DEFENSE OF PROPERTY

Summary:

- 1) General Rule: It is a defense that force was used in the reasonable belief that it was necessary to prevent unlawful interference with real or personal property.
- 2) Limits
  - a) Only non-deadly force can be used to defend property.
  - b) Force can only be used to prevent the interference, and not to regain the property, except in immediate pursuit.

60. D, upon arising in the morning, looks out his window to see V riding off with D's bicycle. D runs down and outside, but is too late to catch V. A month later, D sees V riding the bicycle down a street. D grabs V and holds him until V gives up the bicycle. D is prosecuted for battery upon V, and defends on the ground that he was protecting his property. What result?