CRIMINAL LAW

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CRIMINAL LAW

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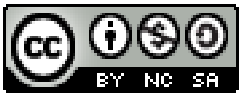

PREFACE

Welcome to Criminal Law at Madera Community College. This textbook was designed especially for Madera Community College Criminology students. It will examine the most commonly committed crimes in the State of California.

Each chapter concludes with a list of key terms, a summary of the unit, and several review questions. Many chapters encompass a section titled IDEA FRAMEWORK. IDEA is an acronym which stands for Inclusivity, Diversity, Equity, and Anti-Racism. Content was carefully selected to highlight these approaches.

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CHAPTER 1

DEFINING TERMS

LEARNING OBJECTIVES

- Define crime.
- Examine the criminal act.
- Distinguish between a crime and a tort.
- Differentiate between common law and statutory law.
- Understand the role of substantive law versus procedural law.
- Identify when the letter of the law and the spirit of the law is applied.
- Summarize the Latin term, Corpus Delicti.
- Recognize a confession versus an admission.

WHAT IS CRIME?

According to the penal code of California, crime is defined under section 15 and states, "A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: death, imprisonment, fine, removal from office, or disqualification to hold and enjoy any office of honor, trust, or profit in this State."[1]

Although deviance is a violation of social norms, it is not always punishable, and it is not necessarily bad. Crime, on the other hand, is a behavior that violates official law and is punishable through formal sanctions. Walking to class backward is a deviant behavior. Driving with a blood alcohol percentage over the state's limit is a crime. Like other forms of deviance, however, ambiguity exists concerning what constitutes a crime and whether all crimes are, in fact, "bad" and deserve punishment. For example, during the 1960s, civil rights activists often violated laws intentionally as part of their effort to bring about racial equality. In hindsight, we recognize that the laws that deemed many of their action's crimes—for instance, Rosa Parks taking a seat in the "whites only" section of the bus—were inconsistent with social equality. As you have learned, all societies have informal and formal ways of maintaining social control. Within these systems of norms, societies have legal codes that maintain formal social control through laws, which are rules adopted and enforced by a political authority. Those who violate these rules incur negative formal sanctions. Normally, punishments are relative to the degree of the crime and the importance to society of the value underlying the law.[2]

[1] California Penal Code (2024)
[2] Griffith and Keirns (2015)

THE CRIMINAL ACT

The government will always have to prove that the defendant committed some criminal act, the actus reus element and that he or she acted with criminal intent, the mens rea element. When proving a crime of conduct, the state must prove that the defendant's conduct met the specific actus reus requirement. The government must prove that the defendant's behavior was either a voluntary act (meaning not the product of a reflex or done while asleep, or under hypnosis), a voluntary omission to act (meaning that he or she failed to act) when there was a legal duty to do so, or that he or she possessed some item that should not have been possessed. To meet the mens rea element, the state must prove that the defendant's act was triggered by criminal intent. The elements of a specific crime may also include what is referred to as attendant circumstances. Attendant circumstances are additional facts set out in the substantive law's definition that the state must prove to establish a crime, for example, that the place burglarized be a dwelling, or that the property value is a at least a certain amount.[3]

TORT

The term tort is the French equivalent of the English word wrong. The word tort is also derived from the Latin word tortum, which means "twisted or crooked or wrong." Thus, conduct that is twisted or crooked and not straight is a tort.

Long ago, tort was used in everyday speech; today it is left to the legal system. A judge will instruct a jury that a tort is usually defined as a wrong for which the law will provide a remedy, most often in the form of money damages. The law does not remedy all "wrongs." The preceding definition of tort does not reveal the underlying principles that divide wrongs in the legal sphere from those in the moral sphere. Hurting someone's feelings may be more devastating than saying something untrue about him behind his back; yet the law will not provide a remedy for saying something cruel to someone directly, while it may provide a remedy for "defaming" someone, orally or in writing, to others.

Although the word is no longer in general use, tort suits are the stuff of everyday headlines. More and more people injured by exposure to a variety of risks now seek redress (some sort of remedy through the courts). Headlines boast of multimillion-dollar jury awards against doctors who bungled operations, against newspapers that libeled subjects of stories, and against oil companies that devastate entire ecosystems. All are examples of tort suits.

The law of torts developed almost entirely in the common-law courts; that is, statutes passed by legislatures were not the source of law that plaintiffs usually relied on. Usually, plaintiffs would rely on the common law (judicial decisions). Through thousands of cases, the courts have fashioned a series of rules that govern the conduct of individuals in their noncontractual dealings with each other. Through contracts, individuals can craft their own rights and

[3] Rutz-Burri (2019)

responsibilities toward each other. In the absence of contracts, tort law holds individuals legally accountable for the consequences of their actions. Those who suffer losses at the hands of others can be compensated.

Many acts (like homicide) are both criminal and tortious. But torts and crimes are different, and the difference is worth noting. A crime is an act against the people as a whole. Society punishes the murderer; it does not usually compensate the family of the victim. Tort law, on the other hand, views the death as a private wrong for which damages are owed. In a civil case, the tort victim or the family, not the state, brings the action. The judgment against a defendant in a civil tort suit is usually expressed in monetary terms, not in terms of prison time or fines and is the legal system's way of trying to make up for the victim's loss.

Figure 1.1: The United States Supreme Court.[i]

COMMON LAW

Common law consists of decisions by courts (judicial decisions) that do not involve interpretation of statutes, regulations, treaties, or the Constitution. Courts make such interpretations, but many cases are decided where there is no statutory or other codified law or regulation to be interpreted. For example, a state court deciding what kinds of witnesses are required for a valid will in the absence of a rule (from a statute) is making common law. United States law comes primarily from the tradition of English common law. By the time England's American colonies revolted in 1776, English common-law traditions were well established in the colonial courts. English common law was a system that gave written judicial decisions the force of law throughout the country. Thus, if an English court delivered an opinion

as to what constituted the common-law crime of burglary, other courts would stick to that decision, so that a common body of law developed throughout the country. Common law is essentially shorthand for the notion that a common body of law, based on past written decisions, is desirable and necessary.

In England and in the laws of the original thirteen states, common-law decisions defined crimes such as arson, burglary, homicide, and robbery. As time went on, US state legislatures either adopted or modified common-law definitions of most crimes by putting them in the form of codes or statutes. This legislative ability—to modify or change common law into judicial law—points to an important phenomenon: the priority of statutory law over common law.[4]

STATUTORY LAW

Another source of law is statutory law. While the Constitution applies to government action, statutes apply to and regulate individual or private action. A statute is a written (and published) law that can be enacted in one of two ways. Most statutes are written and voted into law by the legislative branch of government. This is simply a group of individuals elected for this purpose. The US legislative branch is Congress, and Congress votes federal statutes into law. Every state has a legislative branch as well, called a state legislature, and a state legislature votes state statute into law. Often, states codify their criminal statutes into a penal code. State citizens can also vote state statutes into law. Although a state legislature adopts most state statutes, citizens voting on a ballot can enact particularly important statutes. For example, a majority of California's citizens voted to enact California's medicinal marijuana law, California Compassionate Use Act of 1996, Cal. Health and Safety Code § 11362.5. In another example of statutory law, California's three-strikes law was voted into law by both the state legislature and California's citizens and actually appears in the California Penal Code in two separate places. An important fact to note is that Statutory law is inferior to constitutional law, which means that a statute cannot conflict with or attempt to supersede constitutional rights. If a conflict exists between constitutional and statutory law, the courts must resolve the conflict. Courts can invalidate unconstitutional statutes pursuant to their power of judicial review.[5]

SUBSTANTIVE CRIMINAL LAW

Substantive law includes laws that define crime, meaning laws that tell us what elements the government needs to prove in order to establish that this crime has been committed. Substantive law also includes the definitions of inchoate crimes (incomplete crimes) of conspiracies, solicitations, and attempts. Substantive law also sets forth accomplice liability (when a person will be held responsible when they work in concert with others to complete a crime). Substantive law also identifies the defenses that a person may raise when they are charged with a crime. Finally, substantive law indicates the appropriate penalties and sentences for crimes. Today, the vast majority of substantive law has been codified and is found in the

[4] Williams and Lumen Learning (2012)
[5] Williams and Lumen Learning (2012)

state's particular criminal code or in the federal code. Criminal codes are separated into two parts: a general part and a special part. The general part typically defines words and phrases that will be used throughout the code (for example, the word intentionally), indicates all possible defenses and provides the general scheme of punishments. The special part of the code typically defines each specific crime setting forth the elements of the crime (components of the crime) the government must prove beyond a reasonable doubt in order to convict a defendant of a crime.[6]

PROCEDURAL CRIMINAL LAW

As noted previously, procedural law governs the process used to investigate and prosecute an individual who commits a crime. Procedural law also governs the ways a person convicted of a crime may challenge their convictions. The sources of procedural law include the same sources that govern substantive criminal law: the constitution, cases law or judicial opinions, statute, and common law. Whereas most substantive criminal law is now statutory, most procedural law is found in judicial opinions that interpret the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment to the U.S. Constitution, the U.S. Code, and the state constitutional and legislative counterparts. Generally, the federal and state constitutions set forth broad guarantees (for example, the right to a speedy trial), then statutes are enacted to provide more definite guidelines (for example, the Federal Speedy Trial Act) and then judges flesh out the meaning of those guarantees and statutes in their court opinions.

PHASES OF THE CRIMINAL JUSTICE PROCESS

Procedural law applies to every point in the criminal justice process, which can be broken down into five phases: the investigative phase, the pre-trial phase, the trial phase, the sentencing phase, and the appellate or post-conviction phase.

[6] Rutz-Burri (2019)

Figure 1.2: Active Crime Scene "Do Not Cross Police" Tape.[ii]

Investigative Phase

The investigative phase is governed by laws covering searches and seizures (searches of persons and places, arrests and stops of individuals, seizures of belongings), interrogations and confessions, and identification procedures (for example, line-ups and photo arrays). This phase mostly involves what the police are doing to investigate a crime. However, when police apply for a search, seizure, or arrest warrant, "neutral and detached" magistrates (i.e., judges) must decide whether probable cause exists to issue search warrants, arrest warrants, and warrants for the seizure of property. They must also decide whether the scope of the proposed warrant is supported by the officer's affidavit (sworn statement). When an individual is arrested without a warrant, judges will need to promptly review whether there is probable cause to hold them in custody before trial.

Pretrial Phase

The pretrial phase is governed by laws covering the initial appearance of the defendant before a judge or magistrate; the securing of defense counsel; the arraignment process (in which the defendant is informed of the charges which have been filed by the state); the process in which the court determines whether to release the defendant pre-trial; the selection and use of a

grand jury or preliminary hearing processes (in which either a grand jury or a judge determines whether there is sufficient evidence that a felony has been committed); and any pretrial motions (such as motions to suppress illegally-seized evidence). During the pretrial phase, prosecutors and defendants (through their defense attorneys) may engage in plea bargaining and will generally resolve the case before a trial is held.

Trial Phase

The trial phase is governed by procedural laws covering speedy trial guarantees; the selection and use of petit jurors (trial jurors); the rules of evidence (statutory and common law rules governing the admissibility of certain types of evidence); the right of the defendant's compulsory process (to secure favorable testimony and evidence); the right of the defendant to cross-examine any witnesses or evidence presented by the government; fair trials free of prejudicial adverse pre-trial or trial publicity; fair trials which are open to the public; and the continued right of the defendant to have the assistance of counsel, and to be present, during their trial.

Sentencing Phase

The sentencing phase is governed by rules and laws concerning the constitutionality of different punishments; the time period in which a defendant must be sentenced; the defendant's right of allocution (right to make a statement to the court before the judge imposes sentence); any victims' rights to appear and make statements at sentencing; the defendant's rights to present mitigating evidence and witnesses; and the defendant's continued rights to the assistance of counsel at sentencing. In capital cases in which the state is seeking the death penalty, the trial will be bifurcated (split into the "guilt/innocence phase" and the "penalty phase") and the sentencing hearing will be more like a mini-trial.

Post-Conviction Phase (Appeals Phase)

The post-conviction phase is governed by rules and laws concerning the time period in which direct appeals must be taken; the defendant's right to file an appeal of right (an initial appeal which must be reviewed by an appellate court) and right to file a discretionary appeal; and the defendant's right to have the assistance of counsel in filing either. The post-conviction phase is also governed by rules and laws concerning the defendant's ability to file a writ of habeas corpus (a civil suit against the entity who is currently holding the defendant in custody) or a post-conviction relief suit (similar to a habeas corpus suit, but one which can be filed whether or not the defendant is in custody). The post-conviction phase also includes any probation and parole revocation hearings.

LETTER OF THE LAW VERSUS SPIRIT OF THE LAW

Simply stated, one can distinguish between the letter of the law and the spirit of the law in remarkably simple terms. Both concepts are related to enforcement. The letter of the law is typified by a zero-tolerance mindset. For example, a government agent adheres to the letter of

the law whenever he or she takes legal action against every violation observed. More specifically, a police officer writes the speeding driver a citation for exceeding the legal speed limit, as well as any other possible violations (e.g., expired driver's license, expired registration, or failing to wear a seatbelt.) On the contrary, an officer who follows a less rigid approach to enforcement will give more breaks and overlook minor violations. Both approaches are appropriate depending on the totality of the circumstances. [7]

CORPUS DELICTI

Corpus delicti means the body of the crime. The suspect over any crime is made on two-element actus reus and mens rea. The intention and the commission of crime successfully make the charges and punishment valid. These elements are basic to prove any crime. The guilty mind and act, both are essential components for proving corpus delicti. The principle of corpus delicti applied to prove the occurrence before conviction for commission of crime. For suspects and charges, evidence is must. The charges cannot be filed without proper evidence and body. The absence of evidence goes with confession. The confession needs fulfillment of components, lack of component, weakens the confession. The relevance and connection of corpus, crime, evidence admissibility of confession, fair trial, component of corpus delicti and related case laws will further be discussed under this topic.[8]

CONFESSIONS VERSUS ADMISSIONS

A confession is a written or oral statement by the accused to a person in authority that admits a factual element to the government's case. Where a confession has been admitted as evidence in the case, the trier-of-fact may consider the statement as proof of facts found within it. All confessions must be voluntary to be admissible. This is the court's key concern. When it is not voluntary is it not reliable and so is not admissible in evidence. Also, the government must prove voluntariness beyond a reasonable doubt. The confession must be given sufficient context background to be admissible. If the statement is too vague and the context of the statement could have multiple meanings, it should not be admitted.

An admission of guilt can encompass statements that are direct admissions of guilt or admission of fact that tends to prove guilt. Such an admission can be by words or by conduct that could reasonably be taken as intending to be an assertion.

CHAPTER SUMMARY

Defining terms is an important aspect of learning criminal law. A crime may involve doing something that is against the law or not doing something you are commanded by law to do. In exceedingly rare cases, such as the civil rights era of the 1960s, breaking the law may be the right thing to do. For a crime to be completed, there must be a criminal act (actus reus) and

[7] George Cartwright (2024)
[8] Singh (2020)

criminal intent (mens rea). A tort is categorized as a civil issue as opposed to a crime. Common law was shaped in England. Common-law decisions defined crimes such as arson, burglary, homicide, and robbery. Statutory law is another source of law. Most statutes are written and voted into law by the legislative branch of government. Substantive law includes laws that define crime, meaning laws that tell us what elements the government needs to prove in order to establish that this crime has been committed. Whereas procedural law governs the process used to investigate and prosecute an individual who commits a crime. Procedural law applies to every point in the criminal justice process, which can be broken down into five phases: the investigative phase, the pre-trial phase, the trial phase, the sentencing phase, and the appellate or post-conviction phase. The letter of the law means zero tolerance for all violations. Conversely, the spirit of the law follows a less rigid approach to enforcement will give more breaks and overlook minor violations. Corpus Deliciti translated means the body of the crime or the elements of the crime. A confession is a written or oral statement by the accused to a person in authority that admits a factual element to the government's case. An admission can be by words or by conduct that could reasonably be taken as intending to be an assertion.

KEY TERMS

- Crime
- Deviant behavior
- Actus Reus
- Mens Rea
- Tort
- Common law
- Statutory law
- Substantive criminal law
- Procedural criminal law
- Letter of the law
- Spirit of the law
- Corpus Delicti
- Confession
- Admission

REVIEW QUESTIONS

1. Explain what makes up a criminal act.
2. What is the difference in punishments between a crime and a tort?
3. Describe how common law was used in England and explain its historical importance.
4. Outline the key elements of substantive criminal law and procedural criminal law.
5. Illustrate how procedural law is used in every phase of the justice process.
6. Provide 2-3 real world examples describing the letter of the law and the spirit of the law.
7. Distinguish between a confession and an admission. Provide a real-world example to illustrate the differences.

IDEA FRAMEWORK

Rosa Parks

Rosa Parks' deliberate decision to test the practice of Jim Crow was the catalyst that triggered the 1955 bus boycott in Montgomery, Alabama. The daughter of James and Leona Edwards McCauley, she grew up in Pine Level, Alabama., and was sent away to a private girls' school in Montgomery at the age of 11. She later met Raymond Parks, a serious young barber with whom she spent many hours discussing the burden and injustice of the racial situation; they married in 1932. Mr. Parks was a member of the National Committee to Save the Scottsboro Boys, and she soon joined him in becoming active in the Montgomery chapter of the NAACP, serving as secretary and youth adviser. On December 1, 1955, Rosa Parks refused to give up her seat for a white passenger on a Montgomery bus. Her arrest and the subsequent development of a 381-day bus boycott by tens of thousands heralded a new phase in the civil rights movement. The Black community formed the Montgomery Improvement Association, electing as president, Martin Luther King, Jr.; Mrs. Parks served for a time on its board of directors. Fired from her job as an assistant tailor in a department store, she stayed in Montgomery until the boycott forced an end to all discriminatory practices on the bus lines. In 1957 she and her husband moved to Detroit, Mich., where in 1965 she took a part-time job as receptionist and administrative aide in the office of Congressman John Conyers. She was the first woman in 1980 to receive the Martin Luther King, Jr., Nonviolent Peace Prize. There is a National Committee for the Rosa L. Parks Shrine, organized to commemorate her life by the establishment of a home and library.[9]

[9] Flikr (2014)

CHAPTER 2

CRIMINAL INTENT, PARTIES TO CRIMINAL ACTS, AND ATTEMPTS TO COMMIT CRIMES

LEARNING OBJECTIVES

- Dissect the types of criminal intent.
- Understand the legal concept of motive.
- Explain the difference between an accomplice and an accessory.
- Explore the crime of attempt.

TYPES OF INTENT

Although there are exceptions that are discussed shortly, criminal intent or mens rea is an essential element of most crimes. Under the common law, all crimes consisted of an act carried out with a guilty mind. In modern society, criminal intent can be the basis for fault, and punishment according to intent is a core premise of criminal justice. Crimes that have an "evil" intent are malum in se and subject the defendant to the most severe punishment. Crimes that lack the intent element are less common and are usually graded lower, as either misdemeanors or infractions.

States and the federal government vary in their approach to defining criminal intent, and each jurisdiction describes the criminal intent element in a criminal statute, or case, in jurisdictions that allow common-law crimes. Criminal intents ranked in order of culpability are **malice aforethought, specific intent, and general intent**. Statutes and cases use different words to indicate the appropriate level of intent for the criminal offense, so what follows is a basic description of the intent definitions adopted by many jurisdictions.

Malice Aforethought

Malice aforethought is a special common-law intent designated for only one crime: murder. The definition of malice aforethought is "intent to kill." Society considers intent to kill the evilest of all intents, so malice aforethought crimes such as first- and second-degree murder generally mandate the most severe of punishments, including the death penalty in jurisdictions that allow for it.

Specific Intent

Specific intent is the intent with the highest level of culpability for crimes other than murder. Unfortunately, criminal statutes rarely describe their intent element as “specific” or “general,” and a judge may be required to define the level of intent using the common law or a dictionary to explain a word’s ordinary meaning. Typically, specific intent means that the defendant acts with a more sophisticated level of awareness (Connecticut Jury Instructions No. 2.3-1, 2011). Crimes that require specific intent usually fall into one of three categories: either the defendant intends to cause a certain bad result, the defendant intends to do something more than commit the criminal act, or the defendant acts with knowledge that his or her conduct is illegal, which is called scienter.

More specifically, a state statute defines mayhem as “physical contact with another, inflicted with the intent to maim, disfigure, or scar.” This statute describes a specific intent crime. To be guilty of mayhem under the statute, the defendant must inflict physical contact with the intent of causing the bad result of maiming, disfigurement, or scarring. If the prosecution cannot prove this high-level intent, the defendant may be acquitted (or charged and convicted of a lower-level intent crime like battery). So, if Pauline says, “It’s time to permanently mess up that pretty face,” and thereafter takes out a razor and slices Peter’s cheek with it, Pauline might be found guilty of mayhem. On the other hand, if Pauline slaps Peter while he is shaving without making the comment, and the razor bites into his cheek, it is more challenging to prove that she intended to scar, and Pauline might be found guilty only of battery.

Furthermore, the following is an example of specific intent to do more than the criminal act. A state statute defines theft as “a permanent taking of property belonging to another.” This statute describes a specific intent crime. To be guilty of theft under the statute, the defendant must intend to do more than “take the property of another,” which is the criminal act. The defendant must also intend to keep the property permanently. So, if Pauline borrows Peter’s razor to shave her legs, she has “taken the property of another,” but she has not committed theft for the simple reason that she intends to return the property after use. However, we have to look closer to a legal concept referred to as scienter.

Although the terms mens rea and scienter are sometimes used interchangeably, many jurisdictions define scienter as knowledge that an act is illegal. Scienter can be the basis of specific intent in some statutes. So, a statute that makes it a crime to “willfully file a false tax return” may require knowledge that the tax return includes false information and that it will be unlawful to file it (U.S. v. Pompanio, 2010). If the prosecution fails to prove beyond a reasonable doubt that the defendant knew his or her conduct was illegal, this could nullify scienter, and the prosecution cannot prove specific intent.

General Intent

General intent is less sophisticated than specific intent. Thus, general intent crimes are easier to prove and can also result in a less severe punishment. A basic definition of general intent is the

intent to perform the criminal act or actus reus. If the defendant acts intentionally but without the additional desire to bring about a certain result, or do anything other than the criminal act itself, the defendant has acted with general intent (People v. McDaniel, 2011).

Intent is a notoriously difficult element to prove because it is locked inside the defendant's mind. Ordinarily, the only direct evidence of intent is a defendant's confession, which the government cannot forcibly obtain because of the Fifth Amendment privilege against self-incrimination. Witnesses who hear the defendant express intent are often unable to testify about it because of evidentiary rules prohibiting hearsay. However, many jurisdictions allow an inference of general intent based on the criminal act (Commonwealth v. Ely, 2011). In essence, if the jury accepts the inference, the prosecution does not have the burden of proving intent for a general intent crime.

For example, a state statute defines battery as "intentional harmful or offensive physical contact with another." This statute describes a general intent crime. To be guilty of battery under the statute, the defendant must only intend the harmful or offensive contact. The defendant does not have to desire that the contact produces a specific result, such as scarring, or death; nor does the defendant need scienter, or awareness that the physical contact is illegal. Now, if Addie balls up her fist and punches Eddie in the jaw after Eddie calls her a "stupid idiot," Addie has probably committed battery under the statute. A prosecutor could prove that Addie committed the act of harmful or offensive contact using Eddie's testimony and a physician's report. The jury could thereafter be instructed to "infer intent from proof of the act." If the jury accepts the inference and determines that Addie committed the criminal act, the jury could find Addie guilty of battery without additional evidence of intent.

Transferred Intent

Occasionally, the defendant's criminal intent is not directed toward the victim. Depending on the jurisdiction, this may result in a transfer of the defendant's intent from the intended victim to the eventual victim, for the purpose of fairness (N.Y. Penal Law, 2011). Although this is legal fiction, it can be necessary to reach a just result. Transferred intent is only relevant in crimes that require a bad result or victim. In a case where intent is transferred, the defendant could receive more than one criminal charge, such as a charge for "attempting" to commit a crime against the intended victim.

For example, Billy and his brother Ronnie get into an argument at a crowded bar. Billy balls up his fist and swings, aiming for Ronnie's face. Ronnie ducks and Billy punches Amanda in the face instead. Billy did not intend to batter Amanda. However, it is unjust to allow this protective action of Ronnie's to excuse Billy's conduct. Thus, Billy's intent to hit Ronnie transfers in some jurisdictions over to Amanda. Billy can also be charged with attempted battery, which is assault, of Ronnie, resulting in two crimes rather than one under the transferred intent doctrine.

MOTIVE

Intent should not be confused with motive, which is the reason the defendant commits the criminal act or actus reus. Motive can generate intent, support a defense, and be used to determine sentencing. However, motive alone does not constitute mens rea and does not function as a substitute for criminal intent.

By way of application, Isabella, a homemaker with no criminal record, sits quietly in court waiting to hear the jury verdict in a trial for the rape of her teenage daughter by Ignatius. Ignatius has been convicted of child rape in three previous incidents. The jury foreman announces the decision finding Ignatius not guilty. Ignatius looks over his shoulder at Isabella and smirks. Isabella calmly pulls a loaded revolver out of her purse, and then shoots and kills Ignatius. In this case, Isabella's motive is revenge for the rape of her teenage daughter, or the desire to protect other women from Ignatius' conduct. This motive generated Isabella's criminal intent, which is malice aforethought or intent to kill. In spite of Isabella's motive, which is probably understandable under the circumstances, Isabella can be found guilty of murder because she acted with the murder mens rea. However, Isabella's motive may be introduced at sentencing and may result in a reduced sentence such as life in prison rather than the death penalty. In addition, Isabella's motive may affect a prosecutor's decision to seek the death penalty at all because this would probably be disfavored by the public.[10]

Figure 2.1: Means, Motive, and Opportunity Diagram.[iii]

PARTIES TO CRIMINAL ACTS

Accomplice

Often more than one criminal defendant plays a role in the commission of a crime. Defendants working together with a common criminal purpose or design are acting with complicity. When the participation and criminal conduct varies among the defendants, an issue arises as to who is

[10] University of Minnesota Libraries Publishing (2015)

responsible for which crime and to what degree. This chapter analyzes different parties to crime, along with their accompanying criminal liability.

At early common law, parties to crime were divided into four categories. A principal in the first degree actually committed the crime. A principal in the second degree was present at the scene of the crime and assisted in its commission. An accessory before the fact was not present at the scene of the crime but helped prepare for its commission. An accessory after the fact helped a party to the crime after its commission by providing comfort, aid, and assistance in escaping or avoiding arrest and prosecution or conviction.

In modern times, most states and the federal government divide parties to crime into two categories: principal, and accessories (Idaho Code Ann., 2010). The criminal actor is referred to as the principal, although all accomplices have equal criminal responsibility.
Accomplice Elements

An accomplice under most state and federal statutes is responsible for the same crime as the criminal actor or principal (18 U.S.C., 2010). However, accomplice liability is derivative; the accomplice does not actually have to commit the crime to be responsible for it. The policy supporting accomplice liability is the idea that an individual who willingly participates in furthering criminal conduct should be accountable for it to the same extent as the criminal actor. The degree of participation is often difficult to quantify, so statutes and cases attempt to segregate blameworthy accomplices based on the criminal act and intent elements.

Accomplice Act

In most states and federal, an accomplice must voluntarily act in some manner to assist in the commission of the offense. Some common descriptors of the criminal act element required for accomplice liability are aid, abet, assist, counsel, command, induce, or procure (K.S.A., 2010). Examples of actions that qualify as the accomplice criminal act are helping plan the crime, driving a getaway vehicle after the crime's commission, and luring a victim to the scene of the crime.

In many states, words are enough to constitute the criminal act element required for accomplice liability (N.Y. Penal Law, 2010). On the other hand, mere presence at the scene of the crime, even presence at the scene combined with flight, is not sufficient to convert a bystander into an accomplice (Commonwealth v. Hargrave, 2010). However, if there is a legal duty to act, a defendant who is present at the scene of a crime without preventing its occurrence could be liable as an accomplice in many jurisdictions (People v. Rolon, 2010).

Accomplice Intent

The criminal intent element required for accomplice liability varies, depending on the jurisdiction. In many jurisdictions, the accomplice must act with specific intent or purposely when aiding or assisting the principal (Or. Rev. Stat., 2010). Specific intent or purposely means the accomplice desires the principal to commit the crime.

Example of Accomplice Intent

Joullian, a hotel owner, rents a hotel room to Winnifred, a prostitute. In a state that requires an accomplice to act with specific intent or purposely, Joullian must desire Winnifred to commit prostitution in the rented room to be Winnifred's accomplice. Evidence that Joullian stands to benefit from Winnifred's prostitution, such as evidence that he will receive a portion of the prostitution proceeds, could help prove this intent. If Joullian's state allows for an inference of specific intent or purposely with serious crimes when an accomplice acts with general intent or knowingly, it is unlikely that prostitution is a felony that would give rise to the inference. If Joullian's state requires only general intent or knowingly for accomplice liability regardless of the crime's seriousness, to be deemed an accomplice Joullian must simply be aware that renting Winnifred the room will promote or facilitate the act of prostitution.

The Natural and Probable Consequences Doctrine

Accomplice liability should be imputed only to blameworthy, deserving defendants. However, in some jurisdictions, if the crime the defendant intentionally furthers is related to the crime the principal actually commits, the defendant is deemed an accomplice. As with legal causation, discussed in Chapter 4 "The Elements of a Crime", foreseeability is the standard. Under the natural and probable consequences doctrine, if the defendant assists the principal with the intent to further a specific crime's commission, and the principal commits a different crime that is foreseeable at the time of the defendant's assistance, the defendant could be liable as an accomplice (ME Rev. Stat. Ann., 2010). Several jurisdictions have rejected this doctrine as an overly harsh extension of accomplice liability (Bogdanov v. People, 2010).

Example of the Natural and Probable Consequences Doctrine

José shows up drunk and unruly at his friend Abel's house and tells Abel he wants to "beat the hell" out of his girlfriend Maria. José asks Abel to drive him to Maria's house, and Abel promptly agrees. Abel drives José to Maria's house and waits in the car with the engine running. José forces his way into Maria's house and then beats and thereafter rapes her. If José and Abel are in a jurisdiction that recognizes the natural and probable consequences doctrine, the trier of fact could find that Abel is an accomplice to the battery, burglary, and rape of Maria. Abel appears to have the criminal intent required to be an accomplice to battery because he assisted José in his quest to beat Maria. If burglary and rape were foreseeable when Abel drove a drunk and angry José to Maria's house, the natural and probable consequences doctrine would extend Abel's accomplice liability to these crimes. If Abel is not in a natural and probable consequences jurisdiction, the trier of fact must separately determine that Abel had the criminal intent required to be an accomplice to battery, burglary, and rape; Abel's intent will be ascertained according to the jurisdiction's accomplice intent requirement—either specific intent or purposely or general intent or knowingly.[11]

[11] University of Minnesota Libraries Publishing (2015)

Accessory

The difference between an accomplice and an accessory is crucial. An accomplice is responsible for the offense the principal commits. An accessory, on the other hand, is guilty of a separate crime that is almost always a misdemeanor.

Accessory Act

The criminal act element required for an accessory in the majority of jurisdictions is aiding or assisting a principal in escape, concealment, or evasion of arrest and prosecution or conviction after the principal commits a felony (Va. Code Ann., 2010). In most states, a defendant cannot be an accessory to a misdemeanor, although in some states a defendant can be an accessory to a high-level or gross misdemeanor (N.R.S., 2010). In a minority of states, the defendant can be an accessory to any crime (Haw. Rev. Stat., 2011).

In many states, words are enough to constitute the accessory criminal act element (Minn. Stat. Ann., 2010). Often special categories of individuals are exempted from liability as an accessory, typically family members by blood or marriage (Vt. Stat. Ann. tit. 13, 2010).

Example of Accessory Act

Jim wakes up late at night to the sound of someone pounding on his door. He gets out of bed, walks down the stairs, and opens the door. His father James is on the doorstep. James's eyes are bloodshot, and he is swaying slightly on his feet. He tells Jim that he just got into a car accident and needs to come inside before the police find out about it and begin an investigation. Jim steps aside and lets his father enter the house. The smell of alcohol on his father's breath is apparent. He thereafter allows his father to spend the night without contacting the police about the accident.

Jim has probably committed the criminal act element required for an accessory in many jurisdictions. Jim allowed his father to escape arrest and evade an alcohol screening after leaving the scene of a car accident, which is most likely felony drunk driving and hit and run. He also sheltered his father for the night, concealing him from law enforcement. If Jim is in a state that exempts family members from accessory liability, he may not be subject to prosecution because the principal to the crime(s) is his father. If Jim is not in a state that relieves family members from accessory liability, he could be fully prosecuted for and convicted of this offense.[12]

ATTEMPTS TO COMMIT CRIMES

At early English common law, attempt was not a crime (Schulhofer, S. J. and Kahan, D. M., 2010). Gradually, the law evolved, and a defendant who committed an attempt resulting in severe harm was punished for a minor crime, typically a misdemeanor. One of the first documented cases of attempt was Rex v. Scofield, Cald. 397 (1784) (Schulhofer, S. J. and Kahan,

[12] University of Minnesota Libraries Publishing (2015)

D. M., 2010). In Scofield, a servant was convicted of a misdemeanor for attempting to burn down his master's house with a lighted candle. A subsequent case, Rex v. Higgins, 102 Eng. Rep. 269 (K.B. 1801), upheld an indictment for attempted theft and firmly established the crime of attempt in English jurisprudence. In modern times, most states criminalize attempts, the majority in statutes, except in some states that permit common-law crimes. However, even in statutes, the word "attempt" is often left undefined, forcing courts to derive the meaning from common-law principles.

Attempt Statutes

In general, there are two types of attempt statutes. Some states have general attempt statutes that set forth attempt elements and apply them to any criminal offense (Tex. Penal Code, 2010). Other states and the federal government have specific attempt statutes that define attempt according to specified crimes, such as murder, robbery, or rape (18 U.S.C., 2011). Keep in mind that several states do not criminalize attempt in a statute and consider it a common-law crime (Grill v. State, 2010).

Attempt Act

The criminal act element required for attempt varies, depending on the jurisdiction. Remember, thoughts are not criminal acts. Thus, a defendant does not commit an attempt by plotting or planning an offense. An extension of this rule dictates that mere preparation is not enough to constitute the attempt criminal act element (People v. Luna, 2010). However, the crux of any attempt case is how close to completing the offense the defendant must get to fulfill the attempt criminal act requirement. In many statutes and cases, the attempt act is loosely defined to allow the trier of fact the flexibility needed to separate true criminal attempt from noncriminal preparation.

Jurisdictions use three tests to ascertain whether the defendant has committed the attempted criminal act: proximity test, res ipsa loquitur test, and the probable desistance test.

PROXIMITY TEST

The proximity test measures the defendant's progress by examining how close the defendant is to completing the offense. The distance measured is the distance between preparation for the offense and successful termination. It is the amount left to be done, not what has already been done, that is analyzed (Commonwealth v. Hamel, 2010). In some jurisdictions, if the defendant's criminal intent is clear, the defendant does not need to come as close to completion of the offense (People v. Dillon, 2010). Generally, the defendant does not have to reach the last step before completion (People v. Dillon, 2010), although many defendants do.

Example of the Proximity Test

Melissa and Matthew decide they want to poison their neighbor's dog because it barks loudly and consistently every night. Melissa buys some rat poison at the local hardware store.

Matthew coats a raw filet mignon with the poison and throws it over the fence into the neighbor's yard. Fortuitously, the neighbors are on an overnight camping trip, and the dog is with them. The next day, after a night of silence, Melissa feels regret and climbs over the fence to see what happened to the dog. When she sees the filet untouched on the ground, she picks it up and takes it back over the fence, later disposing of it in the trash. If Melissa and Matthew are in a jurisdiction that follows the proximity test, Melissa and Matthew have probably committed the criminal act element required for attempt. Melissa and Matthew finished every act necessary to commit the crime of destruction of property or animal cruelty (poisoning the dog). The only reason the crime was not successfully committed was the absence of the dog, which is a circumstance outside their control. Thus, Melissa and Matthew could most likely be charged with and convicted of this offense. If Melissa bought the rat poison but thereafter changed her mind and talked Matthew out of poisoning the dog, her actions would be a preparation, not a positive step toward commission of the crime. If Matthew coated the filet with poison but then changed his mind and threw the filet away, he would still be "too far" away from completing the offense. However, once the filet is thrown over the fence, the crime is proximate to completion; the only step left is the victim's (dog's) participation.

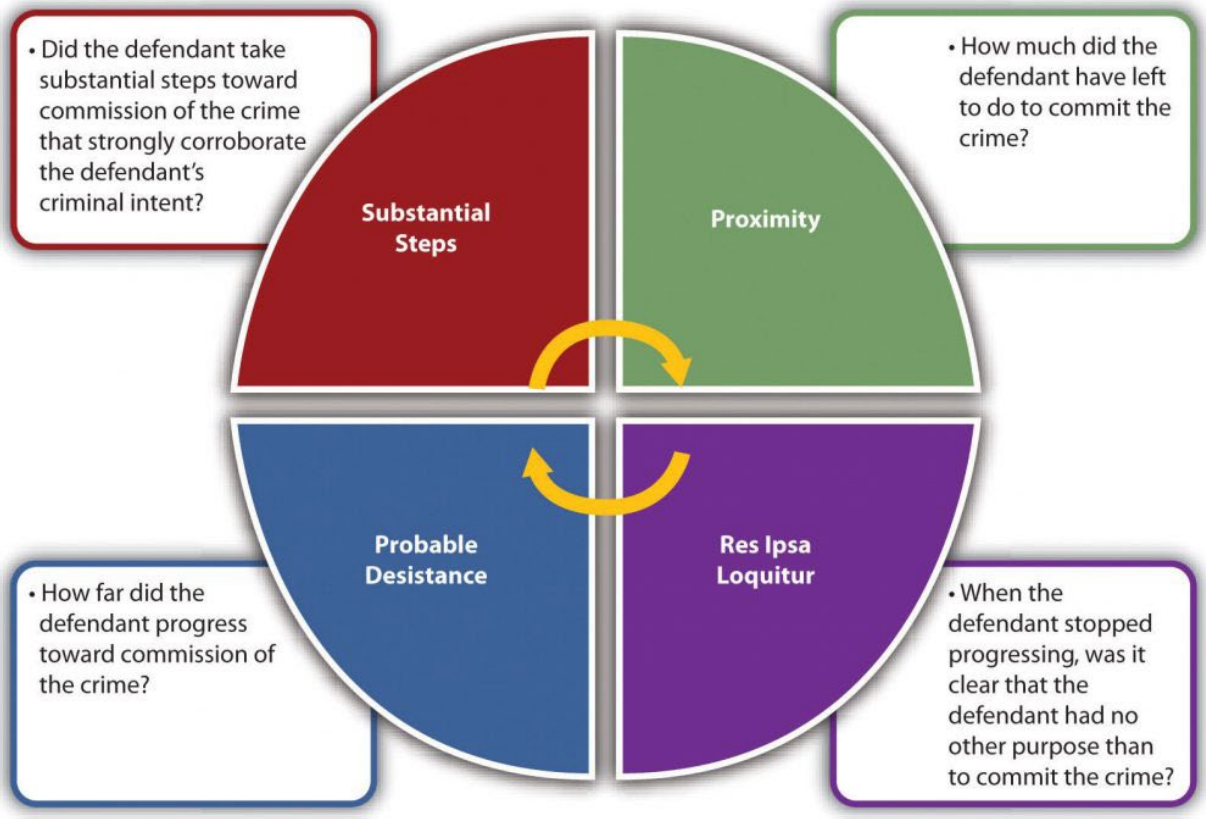

Figure 2.2: Various Tests for Attempt Act.[iv]

RES IPSA LOQUITUR TEST

Res ipsa loquitur means “the thing speaks for itself” (USLegal.com, 2010). The res ipsa loquitur test, also called the unequivocality test, analyzes the facts of each case independently. Under res ipsa loquitur or unequivocality, the trier of fact must determine that at the moment the defendant stopped progressing toward completion of the offense, it was clear that the defendant had no other purpose than commission of the specific crime at issue. This determination is based on the defendant’s act—which manifests the intent to commit the crime (Hamiel v. Wisconsin, 2010).

Example of the Res Ipsa Loquitur Test

Harry wants to kill his wife Ethel for the proceeds of her life insurance policy. Harry contacts his friend Joe, who is reputed to be a “hit man,” and sets up a meeting for the next day. Harry meets with Joe and asks him if he will murder Ethel for one thousand dollars. Joe agrees, and Harry pulls out a wad of cash and pays him. Unfortunately for Harry, Joe is a law enforcement decoy. If the state in which Harry paid Joe recognizes the res ipsa loquitur or unequivocality test, Harry has most likely committed attempted murder (along with solicitation to commit murder, which is discussed shortly). Harry’s actions in contacting and thereafter hiring and paying Joe to kill Ethel indicate that he has no other purpose than the commission of Ethel’s murder. Hiring and paying a hit man is more than just preparation. Note that evidence of Ethel’s life insurance policy is not needed to prove the attempt act. Harry’s conduct “speaks for itself,” which is the essence of res ipsa loquitur or unequivocality.

PROBABLE DESISTANCE TEST

The probable desistance test examines how far the defendant has progressed toward commission of the crime, rather than analyzing how much the defendant has left to accomplish. Pursuant to this test, a defendant commits attempt when he or she has crossed a line beyond which it is probable he or she will not desist unless there is an interruption from some outside source, law enforcement, or circumstances beyond his or her control (U.S. v. Mandujano, 2010).

Example of the Probable Desistance Test

Judy, who works at Zales jewelry store, tells her Facebook friends that she is going to steal a diamond necklace out of the safe that evening. Judy drives to Zales at eleven o’clock after the store has closed. She enters the building using her key and quickly disables the store alarm. She then turns off the store security camera. As she crouches down by the safe and begins to enter the combination, all the lights go on and she blinks, startled by the sight of several police officers pointing their guns at her. If the state in which Judy lives follows the probable desistance test, Judy has most likely committed attempted larceny, along with burglary. Judy informed others of her plan, drove to the crime scene, entered the building unlawfully, disabled the store alarm, and turned off the store security camera. This series of actions indicate that

Judy crossed a point of no return. It is unlikely that Judy would have desisted without the law enforcement interruption, which fulfills the attempt act requirement pursuant to the probable desistance test.[13]

CHAPTER SUMMARY

According to the law, criminal intents are ranked in order of culpability are malice aforethought, specific intent, and general intent. An accomplice to a crime is responsible for the crime as the criminal actor or principal. An accessory is guilty of a separate crime that is almost always a misdemeanor. There are two types of attempt statutes. Some states have general attempt statutes that set forth attempt elements and apply them to any criminal offense. Other states and the federal government have specific attempt statutes that define attempt according to specified crimes, such as murder, robbery, or rape. Keep in mind that several states do not criminalize attempts in a statute and consider it a common-law crime. Jurisdictions use four tests to ascertain whether the defendant has committed the attempted criminal act: proximity test, res ipsa loquitur test, probable desistance test, and the Model Penal Code's substantial steps test.

KEY TERMS

- Aforethought
- Malice aforethought
- Specific intent
- General intent
- Transferred intent
- Motive
- Accomplice
- Accessory

REVIEW QUESTIONS

1. Outline the types of intent and explain each one in detail.
2. What is motive and how does it help the state to convict a murderer?
3. Explain what an accomplice is and what an accessory is, provide examples of both.
4. Describe the following tests used to ascertain whether the defendant has committed the attempt criminal act.

[13] Minnesota Libraries Publishing (2012)

CHAPTER 3

THE SOCIAL CONTRACT, BILL OF RIGHTS, LAWS OF ARREST, AND RIGHTS AFTER ARREST

LEARNING OBJECTIVES

- Interpret the intent of The Social Contract.
- Discuss the most relevant amendments from the Bill of Rights.
- Examine the laws of arrest.
- Dissect the Miranda Rights.
- Explain the arraignment process.

THE SOCIAL CONTRACT

Social contract theory is another descriptive theory about society and the relationship between rules and laws, and why society needs them. Thomas Hobbes (1588-1689) proposed that a society without rules and laws to govern our actions would be a dreadful place to live. Hobbes described a society without rules as living in a "state of nature." In such a state, people would act on their own accord, without any responsibility to their community. Life in a state of nature would be Darwinian, where the strongest survive and the weak perish. A society, in Hobbes' state of nature, would be without the comforts and necessities that we take for granted in modern western society. The society would have:

- No place for commerce
- Little or no culture
- No knowledge
- No leisure
- No security and continual fear
- No arts
- Little language

Social contract theory is a cynical, but possibly realistic, view of humanity without rules and people to enforce the rules. An example of a society in a state of nature can at times be observed when a society is plunged into chaos due to a catastrophic event. This may occur in because of a war, such as happened in Rwanda, or by cause of a natural disaster, such as what happened in New Orleans in the aftermath of Hurricane Katrina. In both of these examples a

segment of society devolved from a country in which the rule of law was practiced to a community in a state of nature. Rules and laws were forgotten, and brute force dictated who would survive. Unfortunately, without laws and rules, and people to enforce those laws and rules, society devolves into a state of nature.

In general, even without the calamities of natural disasters and war, Hobbes assumed people would strive for more wealth and power in what could be described as a "dog eat dog" society, where, he believed, people will do whatever is required to survive in a state of nature, where rules and laws are non-existent. This would mean that people will act in "wicked" ways to survive, including attacking others before they are attacked themselves. With rules in place, people feel protected against attack.

In a state-of-nature society, the strongest would control others that are weak. Society would have no rules or laws forbidding or discouraging unethical or immoral behavior. People would be forced to be solely self-interested in order to survive and prone to fight over possession of scarce goods (scarce because of the lack of commerce).

For Hobbes, the solution is a social contract in which society comes to a collective understanding — a social contract — that it is in everyone's interest to enforce rules that ensure safety and security for everyone, even the weakest. Thus, the social contract can deliver society from a state of nature to a flourishing society in which even the weak can survive. The degree to which society protects the weak may vary; however, in our society, we agree to the contract and need the contract to ensure security for all.

The social contract is unwritten and is inherited at birth. It dictates that we will not break laws or certain moral codes, and, in exchange, we reap the benefits of our society, namely security, survival, education and other necessities needed to live.

According to Pollock (2007), there are five main reasons that laws are required in society:

1. The harm principle: to prevent the serious physical assault against others that would be victimized.
2. The offence principle: to prevent behavior that would offend those who might otherwise be victimized.
3. Legal paternalism: to prevent harm against everyone in general with regulations.
4. Legal moralism: to prevent immoral activities such as prostitution and gambling.
5. Benefit to others: to prevent actions that are detrimental to a segment of the population.

Problems with the social contract theory include the following:

- It gives the government too much power to make laws under the guise of protecting the public. Specifically, governments may use the cloak of the social contract to invoke the fear of a state of nature to warrant laws that are intrusive.

- From the time that we are born, we do not knowingly agree to a contract and therefore do not consent to the contract. An outflow of this thought is a movement entitled the "Sovereign Citizens" or "Freemen of the Land." The FBI identifies these movements as individual citizens who reject government control and "the government operates outside of its jurisdiction. Because of this belief, they do not recognize federal, state, or local laws, policies, or regulations." (US Department of Justice, 2010). The FBI considers these movements as domestic terrorist threats (FBI, 2011).
- If we do accept the contract and wish to abide by it, we may not fully understand what our part of the contract is or ought to be.

Contracts can be unfair for some. For example, the poor do not get the same benefits of the contract.

Q. How can social contract theory assist law enforcement in moral dilemmas?
While social contract theory does not tell people how they ought to behave, it does provide a basis to understand why society has implemented rules, regulations, and laws. If not for the social contract theory, our understanding of the need for these rules would be limited. Specifically, for law enforcement, social contract theory is important to justify the power that law enforcement can exert over the population (Evans and MacMillan, 2014). The power imbalance, held by law enforcement, is part of the contract that society has agreed upon in exchange for security. Where the contract can be problematic is when the power used by law enforcement exceeds what is expected by society under the contract.[14]

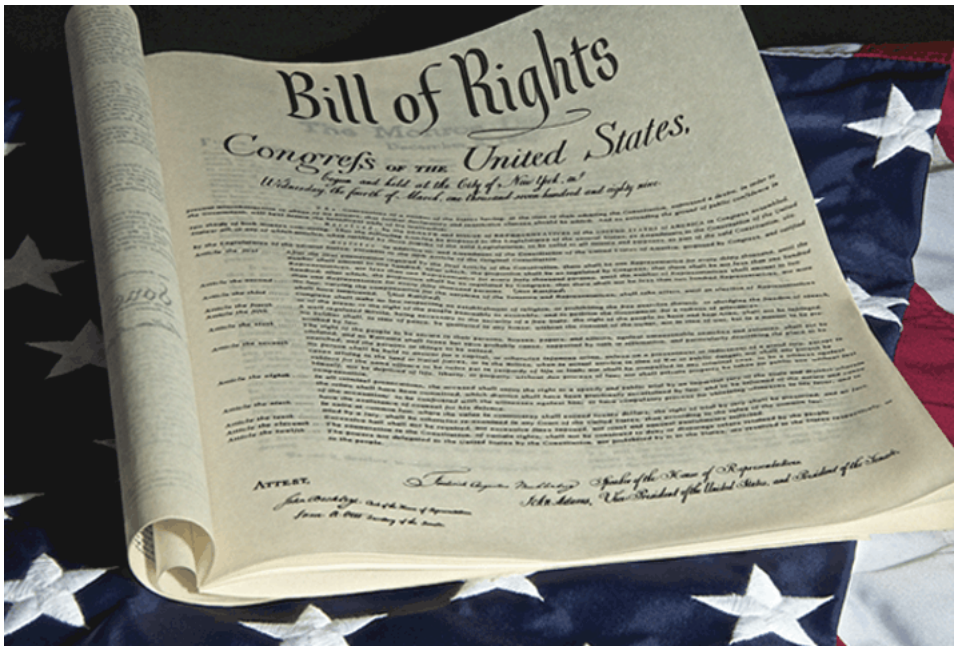

Figure 3.1: The Bill of Rights.[v]

[14] McCartney and Parent (2015)

THE BILL OF RIGHTS

The foundation of civil liberties is the Bill of Rights, the ten amendments added to the Constitution in 1791 to restrict what the national government may do.

The state conventions that ratified the Constitution obtained promises that the new Congress would consider adding a Bill of Rights. James Madison—the key figure in the Constitutional Convention and an exponent of the Constitution's logic in the Federalist papers—was elected to the first House of Representatives. Keeping a campaign promise, he surveyed suggestions from state-ratifying conventions and zeroed in on those most often recommended. He wrote the amendments not just as goals to pursue but as commands telling the national government what it must do or what it cannot do. Congress passed twelve amendments, but the Bill of Rights shrank to ten when the first two (concerning congressional apportionment and pay) were not ratified by the necessary nine states.

The first eight amendments that were adopted address particular rights. The Ninth Amendment addressed the concern that listing some rights might undercut unspoken natural rights that preceded government. It states that the Bill of Rights does not "deny or disparage others retained by the people." This allows for unnamed rights, such as the right to travel between states, to be recognized. We discussed the Tenth Amendment in Chapter 3 "Federalism", as it has more to do with states' rights than individual rights.

THE RIGHTS

Even before the addition of the Bill of Rights, the Constitution did not ignore civil liberties entirely. It states that Congress cannot restrict one's right to request a writ of habeas corpus giving the reasons for one's arrest. It bars Congress and the states from enacting bills of attainder (laws punishing a named person without trial) or ex post facto laws (laws retrospectively making actions illegal). It specifies that persons accused by the national government of a crime have a right to trial by jury in the state where the offense is alleged to have occurred and that national and state officials cannot be subjected to a "religious test," such as swearing allegiance to a particular denomination.

The Bill of Rights contains the bulk of civil liberties. Unlike the Constitution, with its emphasis on powers and structures, the Bill of Rights speaks of "the people," and it outlines the rights that are central to individual freedom (Goldwin, 1997).

The main amendments fall into several broad categories of protection:

- Freedom of expression (I)
- The right to "keep and bear arms" (II)
- The protection of person and property (III, IV, V)
- The right not to be "deprived of life, liberty, or property, without due process of law" (V)
- The rights of the accused (V, VI, VII)

- Assurances that the punishment fits the crime (VIII)
- The right to privacy implicit in the Bill of Rights

THE BILL OF RIGHTS AND THE NATIONAL GOVERNMENT

Congress and the executive have relied on the Bill of Rights to craft public policies, often after public debate in newspapers (Curtis, 2000). Civil liberties expanded as federal activities grew.

THE FIRST CENTURY OF CIVIL LIBERTIES

The first big dispute over civil liberties erupted when Congress passed the Sedition Act in 1798, amid tension with revolutionary France. The act made false and malicious criticisms of the government—including Federalist president John Adams and Congress—a crime. While printers could not be stopped from publishing, because of freedom of the press, they could be punished after publication. The Adams administration and Federalist judges used the act to threaten with arrest and imprisonment many Republican editors who opposed them. Republicans argued that freedom of the press, before or after publication, was crucial to giving the people the information they required in a republic. The Sedition Act was a key issue in the 1800 presidential election, which was won by the Republican Thomas Jefferson over Adams; the act expired at the end of Adams's term (Smith, 1956).

Debates over slavery also expanded civil liberties. By the mid-1830s, Northerners were publishing newspapers favoring slavery's abolition. President Andrew Jackson proposed stopping the US Post Office from mailing such "incendiary publications" to the South. Congress, saying it had no power to restrain the press, rejected his idea. Southerners asked Northern state officials to suppress abolitionist newspapers, but they did not comply (Curtis, 2000).

WORLD WAR I

As the federal government's power grew, so too did concerns about civil liberties. When the United States entered the First World War in 1917, the government jailed many radicals and opponents of the war. Persecution of dissent caused Progressive reformers to establish the American Civil Liberties Union (ACLU) in 1920. Today, the ACLU pursues civil liberties for both powerless and powerful litigants across the political spectrum. While it is often deemed a liberal group, it has defended reactionary organizations, such as the American Nazi Party and the Ku Klux Klan, and has joined powerful lobbies in opposing campaign finance reform as a restriction of speech.

THE BILL OF RIGHTS AND THE STATES

The Fourteenth Amendment, added to the Constitution in 1868, illustrated how its due process clause, which bars states from depriving persons of "life, liberty, or property, without due

process of law," is the basis of civil rights. The Fourteenth Amendment is crucial to civil liberties, too. The Bill of Rights restricts only the national government; the Fourteenth Amendment allows the Supreme Court to extend the Bill of Rights to the states.

The Supreme Court exercised its new power gradually. The Court followed selective incorporation: for the Bill of Rights to extend to the states, the justices had to find that the state law violated a principle of liberty and justice that is fundamental to the inalienable rights of a citizen. The table below, "The Supreme Court's Extension of the Bill of Rights to the States" shows the years when many protections of the Bill of Rights were applied by the Supreme Court to the states; some have never been extended at all.

Table 3.1 The Supreme Court's Extension of the Bill of Rights to the States

Date	Amendment	Right	Case
1897	Fifth	Just compensation for eminent domain	Chicago, Burlington & Quincy Railroad v. City of Chicago
1925	First	Freedom of speech	Gitlow v. New York
1931	First	Freedom of the press	Near v. Minnesota
1932	Fifth	Right to counsel	Powell v. Alabama (capital cases)
1937	First	Freedom of assembly	De Jonge v. Oregon
1940	First	Free exercise of religion	Cantwell v. Connecticut
1947	First	Non-establishment of religion	Everson v. Board of Education
1948	Sixth	Right to public trial	In Re Oliver
1949	Fourth	No unreasonable searches and seizures	Wolf v. Colorado
1958	First	Freedom of association	NAACP v. Alabama
1961	Fourth	Exclusionary rule excluding evidence obtained in violation of the amendment	Mapp v. Ohio
1962	Eighth	No cruel and unusual punishment	Robinson v. California
1963	First	Right to petition government	NAACP v. Button
1963	Fifth	Right to counsel (felony cases)	Gideon v. Wainwright
1964	Fifth	Immunity from self-incrimination	Mallory v. Hogan
1965	Sixth	Right to confront witnesses	Pointer v. Texas
1965	Fifth, Ninth, and others	Right to privacy	Griswold v. Connecticut
1966	Sixth	Right to an impartial jury	Parker v. Gladden
1967	Sixth	Right to a speedy trial	Klopfer v. N. Carolina
1969	Fifth	Immunity from double jeopardy	Benton v. Maryland
1972	Sixth	Right to counsel (all crimes involving jail terms)	Argersinger v. Hamlin
2010	Second	Right to keep and bear arms	McDonald v. Chicago

Table 3.2 Rights in the Bill of Rights Not Extended to the States

Amendment	Description of Rights Not Extended to the States
Third	No quartering of soldiers in private dwellings
Fifth	Right to grand jury indictment
Seventh	Right to jury trial in civil cases under common law
Eighth	No excessive bail
Eighth	No excessive fines

INTERESTS, INSTITUTIONS, AND CIVIL LIBERTIES

Many landmark Supreme Court civil-liberties cases were brought by unpopular litigants: members of radical organizations, publishers of anti-Semitic periodicals or of erotica, religious adherents to small sects, atheists and agnostics, or indigent criminal defendants. This pattern promotes a media frame suggesting that civil liberties grow through the Supreme Court's staunch protection of the lowliest citizen's rights.

The finest example is the saga of Clarence Gideon in the book Gideon's Trumpet by Anthony Lewis, then the Supreme Court reporter for the New York Times. The indigent Gideon, sentenced to prison, protested the state's failure to provide him with a lawyer. Gideon made a series of handwritten appeals. The Court heard his case under a special procedure designed for paupers. Championed by altruistic civil-liberties experts, Gideon's case established a constitutional right to have a lawyer provided, at the state's expense, to all defendants accused of a felony (Lewis, 1964). Similar storylines often appear in news accounts of Supreme Court cases. For example, television journalists personalize these stories by interviewing the person who brought the suit and telling the touching individual tale behind the case (Davis, 1994). This mass-media frame of the lone individual appealing to the Supreme Court is only part of the story. Powerful interests also benefit from civil-liberties protections. Consider, for example, freedom of expression: Fat-cat campaign contributors rely on freedom of speech to protect their right to spend as much money as they want to in elections. Advertisers say that commercial speech should be granted the same protection as political speech. Huge media conglomerates rely on freedom of the press to become unregulated and more profitable (Schauer, 1993).

Many officials must interpret the guarantees of civil liberties when making decisions and formulating policy. They sometimes have a broader awareness of civil liberties than do the courts. For example, the Supreme Court found in 1969 that two Arizona newspapers violated antitrust laws by sharing a physical plant while maintaining separate editorial operations. Congress and the president responded by enacting the Newspaper Preservation Act, saying that freedom of the press justified exempting such newspapers from antitrust laws.[15]

LAWS OF ARREST

What Is an Arrest

In California, an arrest is defined in section 834 of the penal code. An arrest occurs when a person is taken into custody in a manner authorized by law. An arrest can be made by a sworn law enforcement officer or by a private citizen. Of course, law enforcement officers make most arrests.

[15] University of Minnesota (2016)

Probable cause is the legal standard of proof which gives a law enforcement officer the authority to initiate an arrest. More specifically, to support an arrest, the officer has to articulate it is more likely than not, the person taken into custody is the same individual who committed the crime in question. Think of probable cause in terms of mathematics. More likely than not is fifty percent plus one (not fifty-one percent). In other words, it barely tips the scales.[16]

A valid arrest warrant must be issued by a neutral judge or magistrate, who has determined there is probable cause for an arrest, based upon sworn testimony or an affidavit in support of the petition for a warrant. The arrest warrant must specifically identify the person to be arrested. If a law enforcement affiant provides false information or shows reckless disregard for the truth when providing an affidavit or testimony in support of an arrest warrant, that may constitute grounds to invalidate the warrant.

These minimum requirements stem from the language contained in the Fourth Amendment. Federal statutes and most jurisdictions require the issuance of an arrest warrant for the arrest of individuals for most misdemeanors that were not committed within the view of a police officer. However, as long as police have the necessary probable cause, a warrant is usually not needed to arrest someone suspected of a felony in a public place; these laws vary from state to state. In a non-emergency situation, an arrest of an individual in their home requires a warrant.[17]

Figure 3.2: A person in handcuffs.[vi]

[16] George Cartwright (2024)
[17] Wikipedia

How an Arrest is Made

According to section 835 of the California Penal Code, “An arrest is made by an actual restraint of the person, or by submission to the custody of an officer. The person arrested may be subjected to such restraint as is reasonable for his arrest and detention.”

Authority to Arrest

The California Penal Code section 836 empowers law enforcement officials the ability to make an arrest provided it fits one of the following conditions:

1. The officer personally observes an individual commit a crime.
2. The officer establishes probable cause to arrest.
3. The officer has a valid arrest warrant.

The California Penal Code section 837 empowers a private person the ability to make an arrest provided it fits one of the following conditions:

1. For a public offense committed or attempted in his presence.
2. When the person arrested has committed a felony, although not in his presence.
3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.[18]

RIGHTS AFTER ARREST

Miranda Rights

Miranda v Arizona (1966) was a landmark case. The case set a precedent which held that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from questioning initiated by law enforcement officers after a person has been taken into custody, or otherwise deprived of his freedom of action in any significant way, unless it demonstrates the use of procedural safeguards effective to secure the Fifth Amendment’s privilege against self-incrimination.

The atmosphere and environment of incommunicado interrogation as it exists today is inherently intimidating and works to undermine the privilege against self-incrimination. Unless adequate preventive measures are taken to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

The privilege against self-incrimination, which has had a long and expansive historical development is the essential mainstay of our adversary system and guarantees to the individual the “right to remain silent unless he chooses to speak in the unfettered exercise of his own

[18] California Penal Code (2024)

will," during a period of custodial interrogation, as well as in the courts or during the course of other official investigations.

Similarly, the decision in Escobedo v. Illinois, 378 U. S. 478, stressed the need for protective devices to make the process of police interrogation conform to the dictates of the privilege. In the absence of other effective measures, the following procedures to safeguard the Fifth Amendment privilege must be observed: the person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him.

If the individual indicates, prior to or during questioning, that he wishes to remain silent, the interrogation must cease; if he states that he wants an attorney, the questioning must cease until an attorney is present.

Where an interrogation is conducted without the presence of an attorney, and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his right to counsel.

Where the individual answers some questions during in-custody interrogation, he has not waived his privilege, and may invoke his right to remain silent thereafter. The warnings required, and the waiver needed are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement, inculpatory or exculpatory, made by a defendant.[19]

Arraignment

Arraignment is a formal reading of a criminal charging document in the presence of the defendant, to inform them of the criminal charges against them. In response to arraignment, in some jurisdictions, the accused is expected to enter a plea; in other jurisdictions, no plea is required. Acceptable pleas vary among jurisdictions, but they generally include guilty, not guilty, and the peremptory pleas (pleas in bar) setting out reasons why a trial cannot proceed. Pleas of nolo contendere ('no contest') and the Alford plea are allowed in some circumstances.[20]

CHAPTER SUMMARY

The Social Contract explains why it is important for society to be governed by rules and laws. Thomas Hobbes assumed people would strive for more wealth and power in what could be described as a "dog eat dog" society, where, he believed, people will do whatever is required to

[19] Martella, Pogue, Clifford, and Schwartz (2014)
[20] Wikipedia

survive in a state of nature, where rules and laws are non-existent. This would mean that people will act in "wicked" ways to survive, including attacking others before they are attacked themselves. With rules in place, people feel protected against attack. The Bill of Rights encompasses the first ten amendments to the Constitution. The Bill of Rights contains the bulk of civil liberties. Unlike the Constitution, with its emphasis on powers and structures, the Bill of Rights speaks of "the people," and it outlines the rights that are central to individual freedom. An arrest occurs when a person is taken into custody in a manner authorized by law. An arrest can be made by a sworn law enforcement officer or by a private citizen. According to the California Penal Code, both law enforcement officials and private persons have the legal right to make an arrest. Miranda v Arizona (1966) set a precedent which held that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from questioning initiated by law enforcement officers after a person has been taken into custody, or otherwise deprived of his freedom of action in any significant way, unless it demonstrates the use of procedural safeguards effective to secure the Fifth Amendment's privilege against self-incrimination.

KEY TERMS

- The Social Contract
- Thomas Hobbes
- The Bill of Rights
- The Fourteenth Amendment
- The Laws of Arrest
- Miranda v. Arizona (1966)
- Arraignment

REVIEW QUESTIONS

1. Provide a summary of the Social Contract. Be sure to incorporate all the points made by the author.
2. Outline each of the amendments included in the Bill of Rights. Highlight the most relevant amendments related to the field of criminology.
3. Explain the laws of arrest. Remember to be detailed in your response.
4. Describe the Miranda Rights and explain all it provides for someone who has been arrested.
5. What happens during the arraignment process?

CHAPTER 4

HOMICIDE, PROXIMATE CAUSE, AND LARISSA SHUSTER

LEARNING OBJECTIVES

- Identify the classification of homicide from a provided scenario.
- Explain the meaning of malice.
- Distinguish between first- and second-degree murder from a given set of facts.
- Explain the Felony Murder Rule.
- Understand the crime of manslaughter.
- Summarize lawful homicide.
- Describe proximate cause.

HOMICIDE

The literal definition of homicide is the killing of one human being by another. There are some types of homicide which are legal. More specifically, when the government executes a prisoner, it is a lawful killing of the person. Additionally, if a homicide is shown to be justifiable or excusable, it is also lawful. More to follow on lawful homicide, in this chapter. The basic difference between lawful and unlawful homicide is intent. Murder, as summarized below, requires malice or evil intent.[21]

MURDER

California Penal Code section 187 (a) defines murder as the unlawful killing of a human being, or a fetus, with malice aforethought.[22]

Murder is a crime that has the elements of criminal act, criminal intent, causation, and harm. In this section, you learn the elements of murder. In upcoming sections, you learn the factors that classify murder as first degree, felony, and second degree.

Murder Act

Most jurisdictions define the criminal act element of murder as conduct that causes the victim's death (N.Y. Penal Law, 2011). The criminal act could be carried out with a weapon, a vehicle,

[21] George Cartwright (2024)
[22] California Penal Code (2024)

poison, or the defendant's bare hand. Like all criminal acts, the conduct must be undertaken voluntarily and cannot be the result of a failure to act unless a duty to act is created by common law or statute.

Murder Intent
It is the criminal intent element that basically separates murder from manslaughter. At common law, the criminal intent element of murder was malice aforethought. In modern times, many states and the federal government retain the malice aforethought criminal intent (Cal. Penal Code, 2011).

An exception to the criminal intent element of murder is felony murder. Most jurisdictions criminalize felony murder, which does not require malice aforethought or the Model Penal Code murder mental states. Felony murder is discussed shortly.

The Meaning of Malice

Malice, is defined by California Penal Code section 188 as the following:

(a) For purposes of Section 187, malice may be express or implied.

> (1) Malice is expressed when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature.
>
> (2) Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.
>
> (3) Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime.

(b) If it is shown that the killing resulted from an intentional act with express or implied malice, as defined in subdivision (a), no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite that awareness is included within the definition of malice.[23]

Example of Intent to Kill

Jay decides he wants to kill someone to see what it feels like. Jay drives slowly up to a crosswalk, accelerates, and then runs down an elderly lady who is crossing the street. Jay is acting with the intent to kill, which would be express malice or purposely.

Example of Intent to Cause Serious Bodily Injury

Jay wants to injure Robbie, a track teammate, so that he will be the best runner in the high school track meet. Jay waits for Robbie outside the locker room and when Robbie exits, Jay

[23] California Penal Code (2024)

attacks him and stabs him several times in the knee. Unfortunately, one of Jay's stabbing wounds is in the carotid artery, and Robbie bleeds to death. Jay is acting with the intent to cause serious bodily injury, which would be implied malice, or knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.

The Meaning of Aforethought

The term aforethought at common law meant that the defendant planned or premeditated the killing. However, this term has lost its significance in modern times and does not modify the malice element in any way. Premeditation is a factor that can elevate murder to first-degree murder, as is discussed shortly.[24]

Figure 4.1: Forensic Scientist and Police Officer at a Crime Scene.[vii]

Degrees of Murder

First and second-degree murder is defined in section 189 as follows:

(a) All murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor,

[24] University of Minnesota Libraries Publishing (2015).

poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 287, 288, or 289, or former Section 288a, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree.

(b) All other kinds of murders are of the second degree.[25]

FELONY MURDER RULE

Felony murder is a criminal homicide that occurs during the commission or attempted commission of a felony. Most states and the federal government include felony murder in their penal codes (18 U.S.C., 2011). However, it has not been universally adopted.
Felony Murder Intent

What distinguishes felony murder from murder is the absence of the typical murder intent. The criminal intent element required for felony murder is the intent required for a felony that causes a victim's death.

Explanation of Felony Murder Intent

When the defendant commits a felony that is inherently dangerous to life, he or she does so knowing that some innocent victim may die. This awareness is similar to implied malice, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life. What is difficult to justify is a conviction for felony murder when the felony is not inherently dangerous to life. Thus, most jurisdictions limit the felony murder doctrine to felonies that create a foreseeable risk of violence or death. States that include nonviolent felonies in their felony murder statutes generally grade them as second- or third-degree felony murder (Fla. Stat. Ann., 2010).

Example of Felony Murder Intent

Joaquin, who has just lost his job, decides to burn down his apartment building because he cannot afford to pay the rent. Joaquin carefully soaks his apartment with lighter fluid, exits into the hallway, and throws a lit, lighter-fluid-soaked towel into the apartment. He then runs outside to watch the entire building burn down. Several tenants die of smoke inhalation because of the fire. In jurisdictions that recognize felony murder, Joaquin can probably be charged with and convicted of murder for every one of these deaths.

In this example, Joaquin did not intend to kill the tenants. However, he did most likely have the criminal intent necessary for arson. Therefore, felony murder convictions are appropriate. Note

[25] California Penal Code (2024)

that Joaquin exhibited extreme indifference to whether the tenants in the building lived or died, which could also constitute the criminal intent of implied malice or depraved heart.[26]

MANSLAUGHTER

What distinguishes murder from manslaughter is the criminal intent element. Manslaughter is an unlawful killing without malice or murder intent (N.R.S. § 200.040, 2011). The criminal act, causation, and harm elements of manslaughter and murder are fundamentally the same. Thus, criminal intent is the only manslaughter offense element that is discussed in this section.

Voluntary Manslaughter

Manslaughter has two basic classifications: voluntary and involuntary. Voluntary manslaughter has the same criminal intent element as murder. In fact, a voluntary manslaughter killing is typically supported by express malice, specific intent to kill, or purposely. However, in a voluntary manslaughter, an emotional state called a heat of passion negates the murder intent. An adequate provocation from the victim inspires the heat of passion (Tenn. Code Ann., 2010). The adequacy requirement is essential to any voluntary manslaughter analysis. Many defendants are provoked and thereafter kill with murder intent. Nonetheless, most provocations are not adequate to drop the crime from murder to manslaughter. The victim's provocation must be serious enough to goad a reasonable person into killing (People v. Steele, 2011). A reasonable person is a fictional and objective standard created by the trier of fact. Of course, the defendant must actually be provoked, which is a subjective standard (People v. Steele, 2011).

Example of Inadequate Provocation

Dillon kills his supervisor Frank with a brass paperweight after Frank fires him. Clearly, Frank's conduct provokes Dillon into killing Frank. However, getting fired would not provoke a reasonable person into a killing frenzy. In fact, reasonable people are fired all the time and learn to live with it peacefully. Therefore, in this example, Dillon's crime is most likely murder, not voluntary manslaughter.

Example of Adequate Provocation

A traditional example of provocation that is adequate to reduce a crime from murder to manslaughter is an observation by one spouse of another spouse in the act of adultery (Ohio v. Shane, 2011). For example, José comes home from work early and catches his wife in bed with his best friend. He becomes so enraged that he storms over to the dresser, grabs his handgun, and shoots and kills her. Clearly, José acts with intent to kill. However, the victim provoked this intent with an act that could cause a reasonable person to kill. Thus, José has probably committed voluntary manslaughter in this case, not murder.

[26] University of Minnesota Libraries Publishing (2015).

Other Examples of Adequate Provocation

Other examples of adequate provocation are when the homicide victim batters the defendant and a killing that occurs during a mutual combat (Ohio v. Shane, 2011). Cases have generally held that words alone are not enough to constitute adequate provocation (Girouard v. State, 2011). Thus, in the adequate provocation example, if a friend told José that his wife was committing adultery, and José responded by shooting and killing his wife, this would probably be murder, not voluntary manslaughter.

Concurrence of the Killing and the Heat of Passion

The second requirement of voluntary manslaughter is that the killing occur during a heat of passion. Defendants generally exhibit rage, shock, or fright when experiencing a heat of passion. This emotional state negates the calm, deliberate, intent to kill that supports a charge of murder. However, the heat of passion mental state is typically brief in duration. Thus, there cannot be a significant time lapse between the victim's provocation and the killing (State v. Cole, 2010). If José waits until the next day to shoot and kill his wife, the crime is most likely premeditated first-degree murder, not voluntary manslaughter.[27]

Involuntary Manslaughter

Involuntary manslaughter is an unlawful killing that completely lacks murder intent. Involuntary manslaughter is distinguishable from voluntary manslaughter, which generally includes a murder intent that has been negated. Involuntary manslaughter generally can be classified as misdemeanor manslaughter, reckless or negligent involuntary manslaughter, or vehicular manslaughter.

Reckless or Negligent Involuntary Manslaughter

States and the federal government also criminalize reckless or negligent involuntary manslaughter (Ala. Code, 2011). Reckless involuntary manslaughter is a killing supported by the criminal intent element of recklessness. Recklessness means that the defendant is aware of a risk of death but acts anyway. Negligent involuntary manslaughter is a killing supported by the criminal intent element of negligence. Negligence means that the defendant should be aware of a risk of death but is not. This category includes many careless or accidental deaths, such as death caused by firearms or explosives, and a parent's failure to provide medical treatment or necessities for his or her child.

Reckless or negligent involuntary manslaughter is often similar to second-degree murder. If the prosecution charges the defendant with both crimes, the trier of fact determines which crime is appropriate based on the attendant circumstances.

Example of Reckless or Negligent Involuntary Manslaughter

Steven, an off-duty sheriff's deputy, brings his shotgun into the local rifle shop to be repaired. Steven thinks that the shotgun is unloaded and hands it to the employee with the safety off.

[27] University of Minnesota Libraries Publishing (2015)

Unfortunately, the gun is loaded and discharges, shooting and killing the employee. In this case, Steven should know that at certain times the safety on his shotgun must always be on because he is a registered gun owner and a sheriff's deputy who has been trained to handle guns.

However, Steven is unaware of the risk and believes that the gun is unloaded. If the employee dies, Steven could be convicted of negligent involuntary manslaughter in jurisdictions that recognize this crime. If Steven is in a jurisdiction that only recognizes reckless involuntary manslaughter, the prosecution may have to prove a higher degree of awareness, such as Steven's knowledge that the shotgun was loaded.

Figure 4.2: Wrecked vehicle.[viii]

Vehicular Manslaughter

Vehicular manslaughter is typically either the operation of a motor vehicle with recklessness or negligence resulting in death or the operation of a motor vehicle under the influence of alcohol or drugs resulting in death (N.Y. Penal Law §125.12, 2010). If the defendant uses a motor vehicle as a weapon to kill the victim, the intent to kill is present and the appropriate crime would be murder.[28]

In California, vehicular manslaughter is defined in section 192 (c) of the Penal Code as the unlawful killing of a human being without malice aforethought, and includes:

(a) Operating a vessel in violation of subdivision (b), (c), (d), (e), or (f) of Section 655 of the Harbors and Navigation Code, and in the commission of an unlawful act, not amounting to

[28]University of Minnesota Libraries Publishing (2015).

felony, and with gross negligence; or operating a vessel in violation of subdivision (b), (c), (d), (e), or (f) of Section 655 of the Harbors and Navigation Code, and in the commission of a lawful act that might produce death, in an unlawful manner, and with gross negligence.

(b) Operating a vessel in violation of subdivision (b), (c), (d), (e), or (f) of Section 655 of the Harbors and Navigation Code, and in the commission of an unlawful act, not amounting to felony, but without gross negligence; or operating a vessel in violation of subdivision (b), (c), (d), (e), or (f) of Section 655 of the Harbors and Navigation Code, and in the commission of a lawful act that might produce death, in an unlawful manner, but without gross negligence.

(c) Operating a vessel in the commission of an unlawful act, not amounting to a felony, and with gross negligence; or operating a vessel in the commission of a lawful act that might produce death, in an unlawful manner, and with gross negligence.

(d) Operating a vessel in the commission of an unlawful act, not amounting to a felony, but without gross negligence; or operating a vessel in the commission of a lawful act that might produce death, in an unlawful manner, but without gross negligence.[29]

LAWFUL HOMICIDE

Excusable Homicide, as defined in section 195 of the California Penal Code states a homicide is excusable in the following cases:

> (1) When committed by accident and misfortune, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.
>
> (2) When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner.[30]

Justifiable Homicide

Homicide is also justifiable when committed by any person in any of the following cases:

> (1) When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person.
>
> (2) When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein.

[29] California Penal Code (2024)
[30] California Penal Code (2024)

(3) When committed in the lawful defense of such person, or of a spouse, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he or she was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed.

(4) When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.[31]

PROXIMATE CAUSE

In law, a proximate cause is an event sufficiently related to an injury that the courts deem the event to be the cause of that injury. There are two types of causation in the law: cause-in-fact, and proximate (or legal) cause. Cause-in-fact is determined by the "but for" test: But for the action, the result would not have happened. (For example, but for running the red light, the collision would not have occurred.) The action is a necessary condition, but may not be a sufficient condition, for the resulting injury. A few circumstances exist where the but-for test is ineffective (see But-for test below). Since but-for causation is extremely easy to show (but for stopping to tie your shoe, you would not have missed the train and would not have been mugged).

A second test is used to determine if an action is close enough to harm in a "chain of events" to be legally valid. This test is called proximate cause. Proximate cause is a key principle of insurance and is concerned with how the loss or damage actually occurred. There are several competing theories of proximate cause. For an act to be deemed to cause a harm, both tests must be met; proximate cause is a legal limitation on cause-in-fact.[32]

CASE STUDY – LARRISA SHUSTER

Larissa Schuster is an American convicted murderer who was sentenced to life, in prison, without parole. In 2008, she murdered her estranged husband, Timothy Schuster, by submerging his body in hydrochloric acid. Due to the unusual manner in which she committed the murder, Larissa's case made national headlines. She has been dubbed "the Acid Lady." While working at a nursing home, Larissa met Timothy Schuster, who was attending nursing school. In 1982, the couple married. They had a daughter, Kristin, in 1985, followed by a son, Tyler, in 1990. In 1989, the family moved west to Fresno, California, where Larissa took a job at an agricultural research lab. She later went on to open her own laboratory, Central California Research Labs. The family was able to move to a larger home in Clovis, California in 2000. By 2001, she was earning twice Tim's annual salary.

[31] California Penal Code (2024)
[32] Wikipedia

By 2001, the Schuster marriage had deteriorated. In February 2002, Larissa filed for divorce, which proved to be acrimonious. Larissa and Tim fought over custody of their son Tyler and the splitting of their joint assets. Larissa was eventually awarded primary custody of Tyler and was allowed to stay in the couple's house. Tim moved into a condominium, but in August 2002, Larissa and her lab assistant James Fagone broke into Tim's home to retrieve some of her belongings. Larissa reportedly stated to her friend, Terri Lopez: "Well, I want [my husband] dead. You don't understand. I could do it and get away with it."

On the morning of July 10, 2003, Tim Schuster was supposed to meet with a co-worker for breakfast but had apparently missed the appointment. Later that day, he was supposed to retrieve his son from Larissa, but he never showed up. Larissa immediately became the prime suspect in her estranged husband's disappearance. She was initially interviewed by the Clovis Police Department but was not charged. Despite her husband being missing, Larissa and her son took a planned vacation to Disney World and then to Missouri. In the meantime, police interviewed Larissa's co-worker James Fagone, who was more forthcoming in his interrogation. During his police interrogation, James Fagone revealed that he and Larissa Schuster were responsible for the disappearance and murder of Timothy Schuster. James admitted that on the night of July 9, 2003, he and Larissa lured Tim from his home. The pair then used chloroform and a stun gun to incapacitate Tim, then disposed of his unconscious body in a 55-gallon barrel. They attempted to dissolve his body with hydrochloric acid. Larissa Schuster was arrested for first-degree murder at the St. Louis Airport.

James Fagone, who had also been charged with first-degree murder as well as kidnapping, went to trial in November 2006. His defense was that Larissa Schuster was the mastermind of Timothy Schuster's murder, and that he only acted as an accessory to murder after the fact under duress, maintaining that Larissa had threatened his life. Defense testimony came from James' friends, co-workers, and Larissa's friend Terri Lopez, all of whom stated that Larissa was a very controlling and forceful person. However, James had already confessed to the crime, which he had unsuccessfully tried to recant. Jurors were shown the video of James' police interrogation, where he is shown saying: "I held the barrel for her, put him in, poured all the solution and she like couldn't stand it. So, she said, put it on, the lid on. So, I helped her put the lid on and she put it in the shed." Although James Fagone was acquitted of kidnapping, he was found guilty of first-degree murder, and despite jurors' pleas for leniency, he was sentenced to life without parole.

Larissa Schuster's murder trial began on October 22, 2007, more than four years after she was charged. Her trial had to be moved from Clovis, California to Los Angeles due to the pre-trial publicity. She had been dubbed the "Acid Lady" by various media outlets in Fresno. Prosecutors had alleged to the jury that Larissa Schuster had attempted to solicit Tim's murder before, believing that she could get away with it. They also played graphic and berating phone messages from Larissa that Tim had saved on his answering machine. Prosecutors also stated how Larissa had access to all the chemicals used in the murder, being that she was a biochemist in a research lab.

Although her accomplice, James Fagone, did not testify in Larissa's trial, Larissa decided to take the witness stand in her own defense. Her attorney admitted that she had made a series of bad decisions, but that she was not guilty of the crime alleged against her. On the stand, Larissa testified how she had no foreknowledge of the murder, and that James Fagone was actually Tim Schuster's killer. She stated that James had told her: "I heard him say something like 'there had been an accident and Tim is dead.' I thought he was joking." She did however, admit to moving Tim's body. When confronted over the phone messages on Tim's answering machine, Larissa replied with: "It is something I'm really ashamed about. You have to realize that is something... a result of many accumulative things." She also maintained that the reason for the substantial amounts of chemicals at her laboratory were not to be used for the murder of Timothy Schuster, but for a wholesale cleaning of the items at the lab. Her testimony proved to have not swayed the jury; she was found guilty of first-degree murder with the special circumstance of financial gain. On May 16, 2008, Larissa Schuster was sentenced to life in prison without parole.[33]

CHAPTER SUMMARY

Homicide is defined as the killing of one human being by another. Not all forms of homicide are unlawful. First degree murder requires malice aforethought. Malice can be expressed or implied. Felony murder is a criminal homicide that occurs during the commission or attempted commission of a felony. What distinguishes murder from manslaughter is the criminal intent element. Manslaughter is an unlawful killing without malice or murder intent. Gross negligence is the standard to determine manslaughter. Homicide is excusable When committed by accident and misfortune, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent. It also excusable When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner. Proximate Cause is an event sufficiently related to an injury that the courts deem the event to be the cause of that injury.

KEY TERMS

- Homicide
- Murder
- Manslaughter
- Malice aforethought
- Implied intent
- Felony Murder Rule
- Negligence
- Lawful Homicide
- Proximate Cause

[33] Wikipedia

REVIEW QUESTIONS

1. What are the primary differences between first-degree and second-degree murder?
2. Explain how malice aforethought is determined in a murder case.
3. Create a scenario which illustrates the Felony Murder Rule.
4. Summarize voluntary manslaughter.
5. Summarize involuntary manslaughter.
6. Describe excusable homicide by applying it to a scenario you create.
7. Interpret the legal concept of Proximate Cause.

CHAPTER 5

CONSPIRACY, ROBBERY, CARJACKING, AND EXTORTION

LEARNING OBJECTIVES

- Evaluate the crime of conspiracy.
- Examine the crime of robbery.
- Identify the crime of carjacking.
- Analyze the crime of extortion.

CONSPIRACY

Conspiracy punishes defendants for agreeing to commit a criminal offense. Conspiracy is an inchoate crime because it is possible that the defendants never will commit the planned offense. However, a conspiracy is complete as soon as the defendants become complicit and commit the conspiracy act with the conspiracy intent. The rationale for punishing defendants for planning activity, which generally is not sufficient to constitute the crime of attempt, is the increased likelihood of success when defendants work together to plot and carry out a criminal offense (Dennis v. U.S., 2011). If the defendants commit the crime that is the object of the conspiracy, the defendants are responsible for the conspiracy and the completed crime.[34]

The crime of conspiracy is defined in section 182 of the California Penal Code.

(a) If two or more persons conspire:

(1) To commit any crime.

(2) Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime.

(3) Falsely to move or maintain any suit, action, or proceeding.

(4) To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform those promises.

[34] University of Minnesota Libraries Publishing (2015)

(5) To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.

(6) To commit any crime against the person of the President or Vice President of the United States, the Governor of any state or territory, any United States justice or judge, or the secretary of any of the executive departments of the United States.

(b) Upon a trial for conspiracy, in a case where an overt act is necessary to constitute the offense, the defendant cannot be convicted unless one or more overt acts are expressly alleged in the indictment or information, nor unless one of the acts alleged is proved; but other overt acts not alleged may be given in evidence.[35]

For example, Shelley and Sam meet at a bar and discuss their lack of finances. Shelley mentions that she and her friend Steffy work at a convenience store. Sam asks Shelley if she would like to help him rob the convenience store when Steffy is working. Shelley agrees. The two plan the robbery. Shelley and Sam agree that Shelley will drive the getaway car on the appointed date and time. Shelley informs Sam that Steffy is extremely meek and fearful and will readily hand over cash out of the cash register if Sam uses a fake handgun. Shelley and Sam probably have the criminal intent element required for conspiracy. Shelley and Sam have the intent to agree to work together because they both need each other to successfully complete the convenience store robbery. In addition, Shelley and Sam have the intent to successfully commit the robbery because they both want the money the robbery will produce. Thus, if no overt act is required in their jurisdiction, Shelley and Sam most likely have completed the crime of conspiracy and may be prosecuted for this offense whether or not the robbery actually takes place.[36]

Figure 5.1: Security Cameras.[ix]

[35] California Penal Code (2024)
[36] University of Minnesota Libraries Publishing (2015)

ROBBERY

Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear. It is defined in section 211 of the California Penal Code.[37]

Robbery was the first common-law theft crime. The criminalization of robbery was a natural progression from other common-law crimes against the person because robbery always involves force, violence, or threat and could pose a risk of injury or death to the robbery victim, defendant, or other innocent bystanders. Robbery is generally a serious felony that is included in most felony murder statutes as a predicate felony for first-degree felony murder. When robbery does not result in death, it is typically graded more severely than theft under a consolidated theft statute.

Robbery Act

The criminal act element required for robbery is a taking of personal property by force or threat of force (Ind. Code § 35-42-5-1, 2011). Force is generally physical force. The force can be slight, but it must be more than what is required to gain control over and move the property (S.W. v. State, 2011). Many jurisdictions require force during the taking, which includes the use of force to prevent the victim from reclaiming the property, or during escape (State v. Handburgh, 2011).

Example of Robbery Act

Rodney tells Lindsey he will kill her if she does not write him a check for fifteen thousand dollars. Rodney exemplifies his threat by pointing to a bulge in his front jacket pocket that appears to be a weapon. In this scenario, Rodney has most likely committed the criminal act element required for robbery, not extortion. Rodney's threat is a threat of immediate force. The criminal intent element required for robbery is the same as the criminal intent element required for larceny and extortion in many jurisdictions. The defendant must have the specific intent or purposely to commit the criminal act and to deprive the victim of the property permanently (Metheny v. State, 2011). Some jurisdictions do not require the intent to permanently deprive the victim of property and include temporary takings in the robbery statute (Fla. Stat. Ann. § 812.13, 2011).[38]

CARJACKING

The crime of carjacking is defined in section 215 of the California Penal Code.

(a) "Carjacking" is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a

[37] California Penal Code (2024)

[38] University of Minnesota Libraries Publishing (2015).

passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear.

(b) Carjacking is punishable by imprisonment in the state prison for a term of three, five, or nine years.

(c) This section shall not be construed to supersede or affect Section 211. A person may be charged with a violation of this section and Section 211. However, no defendant may be punished under this section and Section 211 for the same act which constitutes a violation of both this section and Section 211.[39]

Here is a real-life story to illustrate the desperation of this particular crime.

Stanislaus County, California — On Friday, September 22nd, 2023, at 3:45 p.m., deputies investigated a home burglary in the 3500 block of West Keyes Road in Keyes, where a handgun was stolen. At 5:31 p.m., a citizen in the 5100 block of Muncy Road in Modesto reported being carjacked at gunpoint by a male adult, later determined to be 43-year-old Jason Dingler, who stole the man's pickup truck. 6 minutes after the carjacking, at 5:37 p.m., an employee of the One Stop Market in the city Grayson reported a male with a gun stole from the store. The man was described the same as the one from the carjacking minutes earlier. He was also later identified as Dingler. A California Highway Patrol officer located the stolen truck traveling south on Highway 33 at 5:44 p.m. After multiple deputies arrived to assist with stopping the vehicle being driven by Dingler, he failed to pull over, leading them on a pursuit. With Air101, the Sheriff's Office helicopter overhead, Dingler continued fleeing from deputies on Highway 33, reaching speeds up to 95 MPH.

During the pursuit, at 5:59 p.m., Dingler sideswiped another car as he passed it, causing his vehicle to leave the roadway and crash at the edge of an orchard. He exited the truck and fled on foot into the same orchard, where he shot at deputies' multiple times. Air101 provided updates to deputies on the ground as Dingler moved through the orchard, including laying on the ground, shooting at deputies again and striking a patrol car. For the next several minutes, he could be seen with a gun in his hand and began moving closer to where the deputies were. At 6:26 p.m., Dingler was approaching deputies, at which time two discharged their firearms at least one time each. Dingler was struck by at least one bullet and fell to the ground. Deputies gave him multiple commands, but he was uncooperative and still had a gun within his reach. As additional safety equipment arrived at the scene, including armored vehicles, deputies were able to approach Dingler and take him into custody at 6:47 p.m. They immediately began providing him with medical treatment until he could be transported to a hospital by a nearby waiting ambulance. He survived his gunshot wound(s) and is in stable condition in the Intensive Care Unit.

[39] California Penal Code

The firearm used by Dingler to shoot at deputies was recovered from the orchard. It is the same as the handgun stolen in the earlier burglary and believed to be the same used in the carjacking and robbery at the market. The Major Crimes Unit, Stanislaus County District Attorney Office, and administrative investigators responded to the scene. It is standard for both criminal and administrative investigations to be conducted at the same time when an officer-involved shooting occurs. No deputies or other assisting law enforcement were injured in the incident. The driver of the sideswiped vehicle complained of pain from the accident but declined to be treated at the time. As related to each incident listed, 43-year-old Dingler is arrested for the following crimes:

Residential Burglary, Carjacking, Kidnapping, Assault with a Deadly Weapon, Robbery, brandishing a Firearm, Evading a Peace Officer, Hit and Run, Possession of a Stolen Vehicle Attempted Murder, Prohibited Person in Possession of Ammunition, and Prohibited Person in Possession of a Firearm.[40]

EXTORTION

The crime of extortion is defined in section 518 of the California Penal Code.

(a) Extortion is the obtaining of property or other consideration from another, with his or her consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right.

(b) For purposes of this chapter, "consideration" means anything of value, including sexual conduct as defined in subdivision (b) of Section 311.3, or an image of an intimate body part as defined in subparagraph (C) of paragraph (4) of subdivision (j) of Section 647.

All states and the federal government criminalize extortion, which is also called blackmail. Extortion is typically nonviolent, but the elements of extortion are very similar to robbery, which is considered a forcible theft offense. [41]

Extortion Act

The criminal act element required for extortion is typically the theft of property accomplished by a threat to cause future harm to the victim, including the threat to inflict bodily injury, accuse anyone of committing a crime, or reveal a secret that would expose the victim to hatred, contempt, or ridicule. Note that some of these acts could be legal, as long as they are not performed with the unlawful intent to steal.

[40] Wikimedia Commons (2023)
[41] California Penal Code (2024)

Example of Extortion Act

Rodney tells Lindsey that he will report her illegal drug trafficking to local law enforcement if she does not pay him fifteen thousand dollars. Rodney has probably committed the criminal act element required for extortion in most jurisdictions. Note that Rodney's threat to expose Lindsey's illegal activities is actually desirable behavior when performed with the intent to eliminate or reduce crime. However, under these circumstances, Rodney's act is most likely criminal because it is supported by the intent to steal fifteen thousand dollars from Lindsey.[42]

CHAPTER SUMMARY

The crime of conspiracy requires at least two people and is complete as soon as the defendants become complicit and commit the conspiracy act with the conspiracy intent. Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear. Robbery is a serious felony that is included in most felony murder statutes as a predicate felony for first-degree felony murder. "Carjacking" is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear. Extortion is the obtaining of property or other consideration from another, with his or her consent, or the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right. The criminal act element required for extortion is typically the theft of property accomplished by a threat to cause future harm to the victim, including the threat to inflict bodily injury, accuse anyone of committing a crime, or reveal a secret that would expose the victim to hatred, contempt, or ridicule.

KEY TERMS

- Conspiracy
- Inchoate
- Felony
- Overt Act
- Robbery
- Immediate Presence
- Carjacking
- Extortion
- Blackmail

[42] Storm (2012)

REVIEW QUESTIONS

1. Outline the corpus Deliciti for the crime of Conspiracy and explain each element, in detail.
2. Compare the crime of Robbery to the crime of Grand theft of a person.
3. Describe, in detail, what the term “immediate presence” means with regard to the crime of Carjacking.
4. Explain the crime of Extortion as if you were teaching it to someone who has no experience with criminal law.

IDEA FRAMEWORK

AMERICA’S CRIMINAL JUSTICE SYSTEM IS ROTTEN TO THE CORE

Before you can fairly assess the legitimacy of the ongoing protests or the quality of the government’s response, you must understand the relevant facts. And the most relevant fact is that America’s criminal justice system is rotten to its core. Though that certainly does not justify the violence and wanton destruction of property perpetrated by far too many protesters, it does provide useful context for comprehending the intensity of their anger and the fecklessness of the government’s response. If America is burning, it is fair to say that America’s criminal justice system—which is itself a raging dumpster fire of injustice—lit the fuse.
I feel moved to write these words because it appears from some of the commentary I’ve been reading—including even from libertarian circles—that many people who consider themselves to be generally skeptical of government and supportive of individual rights have no idea just how fundamentally broken our criminal justice system is and how wildly antithetical it has become to our core constitutional values.

Within days or weeks, most protesters will renounce the use of lawless violence as a tool of politics; but the state will not. That is the key takeaway and the thing you really need to understand about this moment in time.

As I will explain below, I see three fundamental pathologies in America’s criminal justice system that completely undermine its moral and political legitimacy and render it a menace to the very concept of constitutionally limited government. Those three pathologies are: (1) unconstitutional overcriminalization; (2) point-and-convict adjudication; and (3) near-zero accountability for police and prosecutors.

1. Unconstitutional overcriminalization. What is the proper role of a criminal justice system in a liberal democracy? Simply put, it is to employ state-sanctioned violence to discourage and punish conduct that threatens the very fabric of civil society—things like murder, violent assault, theft, and fraud. So, the first and most basic pathology of America’s criminal

justice system is that it vastly exceeds the scope of what a criminal justice system may legitimately seek to address while routinely using force against peaceful people in morally indefensible ways.

Take, for example, the Shreveport, LA, ordinance that made it illegal to wear saggy pants. There were 726 arrests for violating that law during the 12 years it was on the books—96 percent involving Black men—and it wasn't until police shot and killed a man named Anthony Childs while trying to arrest him for wearing saggy pants that the law was finally repealed.

Similarly, of the three most-preferred drugs in America—alcohol, nicotine, and marijuana—marijuana is by far the safest in terms of consumption-related deaths. But despite that fact and the massive push towards decriminalization, the number of arrests for marijuana offenses has been rising, not falling. For example, in Virginia, where I live, there were nearly 29,000 arrests for marijuana offenses—triple the number from 1999. All of those arrests, by definition, involved the actual or threatened use of state-sanctioned violence for conduct that appears to be no more harmful (and indeed, may well be considerably less harmful) to society than the purchase and consumption of the alcoholic beverages sold at any of the 370 stores operated for profit by the government of Virginia.

It is immoral to use force against another person without sufficient justification, and that is true even when the perpetrator is acting at the behest of the state. At the risk of stating the obvious, the fact that a person prefers the "wrong" not-particularly-harmful intoxicant is not a sufficient moral justification for doing violence to that person. Nor should it represent a sufficient constitutional justification for employing state violence, but unfortunately—and to its immense discredit—our judiciary says otherwise.

I have written a whole book about the judiciary's failure to properly enforce constitutional limits on government power, and I will not repeat the arguments here. Suffice it to say, a baseline constitutional limit on government is that it may not arbitrarily interfere with people's liberty—including how to worship, where to travel, or what to ingest. Working together, however, the three branches have essentially hacked that limitation using what amounts to a constitutional magic trick whereby the legislative and executive branches simply lie in court about their true justification for enforcing various laws and the judiciary pretends to credit those fraudulent explanations for restricting people's freedom.

Combining the powerful public-choice dynamics that motivate legislators to constantly and indiscriminately expand the scope of the criminal law with the judiciary's feckless refusal to enforce the Constitution's prohibition against unjustified restrictions of liberty results in a criminal justice system that routinely does violence to perfectly decent people for non-morally-wrongful conduct that presents no real threat to other people or to society. That is the essence of "unconstitutional overcriminalization," and it does incalculable damage to the moral and political legitimacy of our criminal justice system.

2. Point-and-convict adjudication. Unconstitutional overcriminalization could never have become the menace it is today if all criminal charges were adjudicated using the constitutionally prescribed mechanism of a jury trial. That is because jury trials are expensive and require twelve people to take time away from their jobs, families, and personal lives in order to decide whether to condemn a fellow human being and authorize the often quite vicious punishment the state seeks to inflict. If people are constantly being asked to put their lives on hold in order to help adjudicate trivial "crimes" such as low-level marijuana distribution, it will not be long before they send a clear message to prosecutors to stop wasting their time—and taxpayer money—on the enforcement of mickey-mouse laws that don't make people's lives any better or the community any safer.

But the government has hacked yet another key constraint against the abuse of criminal law by replacing expensive, inefficient, and uncertain jury trials with a method of adjudicating criminal charges that is cheap, efficient, and certain: coercive plea bargaining. Indeed, so proficient have prosecutors become at inducing people to condemn themselves that more than 95 percent of all criminal convictions today come from guilty pleas rather than jury trials. As the Supreme Court itself has observed, "[American] criminal justice today is for the most part a system of pleas, not a system of trials."

Inducing people to condemn themselves is an inherently squalid business, particularly in a system that purports to guarantee something as precious—from the standpoint of the accused—as a jury trial. Think of it this way: How on earth would you get someone to choose the certainty of conviction and punishment if they plead guilty over the possibility of acquittal and freedom if they exercise their constitutional right to require the government to prove their guilt beyond a reasonable doubt to the satisfaction of a unanimous jury? The answer is pressure—and lots of it.

Again, I have written extensively about the various coercive levers routinely employed by prosecutors to elicit guilty pleas from the guilty and innocent alike. Those levers include pretrial detention, charge-stacking, mandatory minimums, the notorious "trial penalty," and even gratuitous threats to indict a recalcitrant defendant's family members.

Coercing criminal defendants into waiving their constitutional right to a jury trial is of course patently unconstitutional. But if you have been paying attention, you can probably guess where the story goes next. That is right: Straight to the doorstep of our feckless judiciary, which has made itself complicit in this point-and-convict style of coercive adjudication by systematically turning a blind eye. Thus, for example, in a 1978 case called Bordenkircher v. Hayes, the Supreme Court rejected a due process challenge to a prosecutor's nakedly coercive threat to increase a defendant's exposure from a maximum of ten years to life imprisonment if he refused the prosecutor's invitation to accept a five-year plea offer. And in a 1992 case involving the spy Jonathan Pollard, the D.C. Circuit held that it is categorically non-coercive to threaten to indict a defendant's relatives in order to exert plea leverage.

The judiciary's collective indifference to the use of coercion in plea bargaining has resulted in the practical elimination of jury trials and enables the government to obtain convictions without the expense and inconvenience of that constitutionally prescribed procedure. As a matter of simple economics, when the cost of a particular good—whether it be automobiles or criminal convictions—comes down, consumption will rise, which appears to be precisely what has happened in America's hyper carceral criminal justice system.

Thus, if you think of the criminal justice system as a massive woodchipper that sucks in people and spits out convicts, the jury trial was meant to be a kind of aperture-restrictor over the maw of that ravenous machine. Again, trial by jury is a relatively expensive and inefficient mechanism for adjudicating criminal charges, and it ensures that neither the government nor society at large takes lightly the act of condemning human beings and putting them in cages. Coercive plea bargaining represents the government's success in prying off that aperture-restrictor to enable the criminal-justice woodchipper to operate at full capacity and ensure that America continues to have the highest incarceration rate in the world.

3. Near-zero accountability for police and prosecutors. The third and final pathology of America's criminal justice system that I will discuss here is our near-zero accountability policy for members of law enforcement, including particularly police and prosecutors. Cato's Project on Criminal Justice has written extensively about the cornerstone of that policy, qualified immunity, in recent days, so I will cut to the chase.

The bottom line is this: American police and prosecutors wield extraordinary power over the lives of others—including even the power of life and death—and yet they are among the least accountable people on the planet. And just because the killers of George Floyd are being prosecuted for murder, no one should be fooled into supposing that that would have happened without a viral video of the incident, or if the officers' violent assault had merely injured Floyd instead of killing him. The reality is that police are almost never prosecuted for the crimes they commit under the color of law, and the judiciary (starting to see a theme here?) has helped ensure that other avenues of accountability, including particularly the ability to bring civil-damages claims, are largely toothless.

Notably, what makes that fundamental lack of accountability particularly galling is that police and prosecutors are in the accountability business—for other people. Just listen to the closing argument of any prosecutor (if you can manage to find a criminal jury trial), and you will hear it dripping with sanctimony as the prosecutor recounts the details of the defendant's transgressions and imprecates the jury to hold him or her responsible. But when the shoe is on the other foot and a fellow prosecutor stands credibly accused of committing crimes in the course of his or her official duties, then suddenly all concern for responsibility, accountability, and preserving the delicate fabric of civil society goes right out the window as the milk of human kindness flows freely from judges and other prosecutors alike.

In short, we have a massive double standard between the level of accountability to which members of law enforcement hold the rest of us and the level of accountability to which they permit themselves to be held—which again, is remarkably close to zero.

A final point bears mentioning. America's criminal justice system is fundamentally rotten, but the effects of its dysfunction are not felt equally by all Americans. Instead, it is the marginalized and politically disenfranchised who bear the brunt of that injustice, including particularly communities of color. Although both the root causes and the significance of racial disparities in our criminal justice system are debatable, the existence of those disparities is not. And when people perceive—correctly in my judgment—that some lives are counted by the system as less sacred than others, they are going to be angry about it. And they damn well should be.[43]

[43] Neily (2020)

CHAPTER 6

KIDNAPPING, FALSE IMPRISONMENT, AND CHILD ABDUCTION

LEARNING OBJECTIVES

- Distinguish between the crime of kidnapping and the crime of false imprisonment, from a provided scenario.
- Examine the crime of child abduction.
- Explain the difference between lawful custodian and right to custody.
- Review the Elizabeth Smart child abduction case and identify key elements of the investigation.

KIDNAPPING

The crime of kidnapping is defined in section 207 of the California Penal Code.

(a) Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping.

(b) Every person, who for the purpose of committing any act defined in Section 288, hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any child under the age of 14 years to go out of this country, state, or county, or into another part of the same county, is guilty of kidnapping.

(c) Every person who forcibly, or by any other means of instilling fear, takes or holds, detains, or arrests any person, with a design to take the person out of this state, without having established a claim, according to the laws of the United States, or of this state, or who hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any person to go out of this state, or to be taken or removed therefrom, for the purpose and with the intent to sell that person into slavery or involuntary servitude, or otherwise to employ that person for his or her own use, or to the use of another, without the free will and consent of that persuaded person, is guilty of kidnapping.

(d) Every person who, being out of this state, abducts or takes by force or fraud any person contrary to the law of the place where that act is committed, and brings, sends, or conveys that

person within the limits of this state, and is afterwards found within the limits thereof, is guilty of kidnapping.

(e) For purposes of those types of kidnapping requiring force, the amount of force required to kidnap an unresisting infant or child is the amount of physical force required to take and carry the child away a substantial distance for an illegal purpose or with an illegal intent.[44]

Kidnapping Act

The criminal act element required for kidnapping is twofold. First, the defendant must confine the victim (720 ILC § 5/10-1). Second, in many states, the defendant must move the victim, which is called asportation. One common issue with the kidnapping criminal act is how far the victim must be moved. In the majority of states, the movement can be slight, as long as it is not incidental to the commission of a separate offense (People v. Dominguez, 2011). Other states do not require asportation when the kidnapping is for ransom (N.R.S. § 200.310, 2011). Some states have done away with the asportation requirement altogether (N.C. Gen. Stat. § 14-39(a), 2011).

Kidnapping Intent

The criminal intent element required for kidnapping in many jurisdictions is specific intent or purposely to commit the criminal act in order to harm or injure the victim or another, confine or hold the victim in secret (N.R.S. § 200.310(2), 2011), receive a ransom, commit a separate offense, subject the victim to involuntary servitude, or interfere with the purpose of the government or some political function (Ariz. Rev. Stat. § 13-1304, 2011).[45]

FALSE IMPRISONMENT

The crime of false imprisonment is defined in section 236 of the California Penal Code. The crime is defined as the unlawful violation of the personal liberty of another.[46]
In many jurisdictions, false imprisonment, also called felonious restraint, is a lesser included offense of kidnapping. This means that the crime of false imprisonment is missing one or two of the kidnapping elements and is graded lower than kidnapping. Often, false imprisonment functions as a partial defense to kidnapping because of the less serious sentencing options.
Example of False Imprisonment

Shawna asks Thomas to pull over and let her out. Thomas pulls over but thereafter locks all the doors and refuses to let Shawna out for twenty minutes, in spite of her begging and pleading for him to unlock the doors. In this case, Thomas might have committed false imprisonment. Although Shawna's entrance into Thomas's vehicle was consensual, when Thomas confined Shawna to his vehicle by locking the doors, he deprived her of her liberty against her will.

[44] California Penal Code (2024)
[45] University of Minnesota Libraries Publishing (2015)
[46] California Penal Code (2024)

Thomas did not move Shawna without her consent because he pulled over and stopped the vehicle at her request. However, asportation is not required for false imprisonment. Although Thomas's actions do not indicate specific intent or purposely to injure Shawna, commit a separate offense, or seek ransom, often general intent or knowingly to commit the criminal act is sufficient for false imprisonment. Thus, these facts indicate the lower-level crime of false imprisonment rather than kidnapping, and Thomas may be charged with and convicted of this offense.[47]

CHILD ABDUCTION

The crime of child abduction is defined in section 277 of the California Penal Code.

(a) "Child" means a person under the age of 18 years.

(b) "Court order" or "custody order" means a custody determination decree, judgment, or order issued by a court of competent jurisdiction, whether permanent or temporary, initial or modified, that affects the custody or visitation of a child, issued in the context of a custody proceeding. An order, once made, shall continue in effect until it expires, is modified, is rescinded, or terminates by operation of law.

(c) "Custody proceeding" means a proceeding in which a custody determination is an issue, including, but not limited to, an action for dissolution or separation, dependency, guardianship, termination of parental rights, adoption, or paternity.

(d) "Lawful custodian" means a person, guardian, or public agency having a right to custody of a child.

(e) A "right to custody" means the right to the physical care, custody, and control of a child pursuant to a custody order as defined in subdivision (b) or, in the absence of a court order, by operation of law, or pursuant to the Uniform Parentage Act contained in Part 3 (commencing with Section 7600) of Division 12 of the Family Code. Whenever a public agency takes protective custody or jurisdiction of the care, custody, control, or conduct of a child by statutory authority or court order, that agency is a lawful custodian of the child and has a right to physical custody of the child. In any subsequent placement of the child, the public agency continues to be a lawful custodian with a right to physical custody of the child until the public agency's right of custody is terminated by an order of a court of competent jurisdiction or by operation of law.

(f) In the absence of a court order to the contrary, a parent loses his or her right to custody of the child to the other parent if the parent having the right to custody is dead, is unable or refuses to take the custody, or has abandoned his or her family. A natural parent whose

[47] University of Minnesota Libraries Publishing (2015)

parental rights have been terminated by court order is no longer a lawful custodian and no longer has a right to physical custody.

"Keeps" or "withholds" means retains physical possession of a child whether or not the child resists or objects.

"Visitation" means the time for access to the child allotted to any person by court order.

"Person" includes, but is not limited to, a parent or an agent of a parent.

"Domestic violence" means domestic violence as defined in Section 6211 of the Family Code.

"Abduct" means take, entice away, keep, withhold, or conceal.[48]

Elizabeth Smart Abduction Case

Elizabeth Smart, a fourteen-year-old Mormon girl living in Salt Lake City, was asleep in the early morning hours of June 5th, 2002. Her nine-year-old sister Mary Katherine, who slept in the same room, woke as a man crept in the window. Frightened into pretending to sleep, Mary watched the intruder wake her sleeping sister and threaten her with a knife, saying, "You better be quiet, and I won't hurt you."

Moments later, both the intruder and Elizabeth were gone, leaving the nine-year-old to seek help from her sleeping parents.

The man led the captive girl to his camp in the woods, where his wife, Wanda Barzee, ritually washed Elizabeth's feet, a Biblical tradition. The kidnapper performed a ceremony he said married Elizabeth to him and proceeded to rape her.

The day after the kidnapping, the Smarts held a press conference pleading for whoever took their daughter to return her safely home. Soon after, 2,000 volunteers swept the area around the Smart home, even using dogs and aircraft to aid the search. They uncovered nothing.
As months passed, the police investigation uncovered hundreds of potential suspects, eventually focusing on a 26-year-old drifter named Bret Michael Edmunds. Suspicion intensified over Edmunds until he was discovered in a West Virginia hospital after suffering an overdose. Primary suspicion then turned to a handyperson previously hired by the Smarts, Richard Ricci, who was in police custody for other reasons. Ricci, on parole for the attempted murder of a police officer, was charged with felony burglary charges in the neighborhood of the Smart home. Despite pressure to confess from local police, Ricci refused until dying in jail of a brain hemorrhage. All leads died with him.

[48] California Penal Code (2024)

The Smart family, with extended kin, refused to let the lack of developments silence media coverage. They started a website to serve as a resource for the investigation and provided media with home videos of Elizabeth as a child and teenager.

Then, in October of 2002, Mary Katherine suddenly remembered where she had heard the kidnapper's voice: "I think I know who it is," she said. "Emmanuel."

Emmanuel ("God is with us" in Hebrew) had done a single day's paid yard work for the Smarts as well as spread word throughout the Salt Lake homeless population that the family was interested in hiring for odd jobs. When Mary Katherine told police she suddenly and without apparent cause remembered the kidnapper's voice as that of a man she had met briefly more than a year before, police did not believe her. The Smart family publicly accused police of not following up on the lead.

The family then hired a sketch artist to draw "Emmanuel's" face according to their memories and distributed the drawing to all interested media with the help of America's Most Wanted host John Walsh. Emmanuel's family recognized the drawing and reported the man's actual name: Brian David Mitchell.

On March 12, 2003, nine months after the abduction, an alert citizen in Sandy, Utah, who learned about the kidnapping on television, spotted Mitchell traveling with two people and contacted police. When officers approached the trio for questioning, they discovered Mitchell, Barzee, and, disguised in a gray wig and veil, Elizabeth.

Mitchell and Barzee were arrested. Initial psychological assessment announced Mitchell delusional and not competent to stand trial; the ruling was then superseded by the court. But when the trial began and Mitchell acted out demonstrably in court, shouting religious condemnations, scripture, and hymns, the judge ruled the behaviors suggested psychosis. Mitchell was placed in the care of Utah State Hospital for pathological paranoia.
In February of 2006, a bill passed the Utah legislature allowing for forcible medication of defendants to ensure competence to face trial. In June, a judge approved forcible medication of Barzee so she could stand trial. A similar motion regarding Mitchell proved highly controversial, eventually reaching federal court on October 10, 2008. Intense debate raged as to whether Mitchell was genuinely delusional or merely highly manipulative, with expert witnesses testifying to both perspectives. Mitchell was finally declared competent to stand trial.
Years before, negotiations in a plea deal had reached an impasse primarily on one point: Mitchell's defense demanded that Smart not testify in court. Eight years after taking Elizabeth out the window in view of her sister, Mitchell stood trial for the crime. The trial lasted more than four weeks. Smart testified in the presence of Mitchell for three days, recounting nine months of rape, sometimes multiple times a day, and being forced to watch pornographic films and drink alcohol to erode her resistance.

Elizabeth's testimony sealed her abductor's conviction. Mitchell was sentenced to two life sentences in federal prison.[49]

CHAPTER SUMMARY

The crime of kidnapping requires two elements. First, the victim must be confined by the perpetrator. Second, the perpetrator must move the victim. The movement is called asportation. The movement can be slight. As long as it places the victim in greater danger, it meets the qualifications for asportation. The crime of false imprisonment is a lesser included offense of kidnapping. Movement is not required. If the victim is restrained from his or her personal liberty, it meets the requirements for false imprisonment. Child abduction includes anyone under 18 years of age. To abduct a child means, take, entice away, keep, withhold, or conceal the minor.

LEARNING OBJECTIVES

- Kidnapping
- Asportation
- Specific Intent
- False Imprisonment
- Personal Liberty
- Child Abduction
- Court Order
- Custody Proceeding
- Lawful Custodian
- Right to Custody
- Elizabeth Smart

REVIEW QUESTIONS

1. What is meant by the term asportation?
2. Contrast the difference between kidnapping and false imprisonment.
3. Describe the significance of the term "movement no matter how slight."
4. Provide two examples of unlawful violations of personal liberty of another.
5. What is the difference between lawful custodian and having a right to custody?
6. Summarize the Elizabeth Smart child abduction case and critique how the investigation was handled. You will have to conduct additional internet research to answer this question.

[49] Johnson (2016)

IDEA FRAMEWORK

Who Is the Most Vulnerable to Human Trafficking?

E was 13 years old when she met a young man named D on Facebook who said he knew her from school. They soon met in person, and D began to take advantage of her vulnerabilities and gained her trust. He took exploitive photos and threatened her with them. At 14 years old, E began to be trafficked to strange men.

As a Native American, E is among the most vulnerable population for human trafficking. In a National Indigenous Women's Resource Center study of four sites in the United States and Canada, Native Americans represented 40 percent of those trafficked, even though they accounted for only 10 percent of the population in those areas. Indigenous people, including American Indians/Alaska Natives, Native Hawaiians, and Pacific Islanders are at a higher risk of human trafficking than other diverse populations because of racism and the historical mistreatment of these marginalized communities.

In addition to Native Americans, the Office of Victims of Crime identified the most vulnerable populations for human tracking as Lesbian, Bisexual, Gay, Transgender, and Queer (LGBTQ+) individuals; persons with disabilities; undocumented immigrants; runaways and homeless youth; and low-income individuals. Human trafficking—whether for sex or labor—involves the use of force, fraud, or coercion to hold individuals in servitude. Victims are promised love, a good job, or a stable life, but instead are forced to work under deplorable conditions for little or no pay.

LGBTQ+ youth, especially those who have been in foster care, are at particular risk of trafficking because many of their families or communities have turned their back on them because of their sexual orientation or gender identify. LGBTQ+ youth are disproportionately overrepresented among minor sex trafficking victims: they make up 20 to 40 percent of victims, compared to 5-7 percent of the general youth population, according to the Human Trafficking Hotline.

Persons with disabilities represent one in four adults in the United States and may include those with physical disabilities, sensory challenges, mental health diagnoses, substance use concerns, or intellectual or developmental disabilities. In addition to sex or labor trafficking, these individuals often are targeted for theft of social security and disability benefits. Among the factors that can make people with disabilities targets are relying on others to meet their basic needs, with the caregiver taking advantage of the dependency; being sheltered or isolated and craving friendship and human connection; having difficulty with communication or speech; being desensitized to inappropriate touching because of isolation, lacking informed sex education, or medical or intimate care related to their disability; and fearing that they will not be believed because of the social discrimination and prejudice.

Undocumented immigrants are particularly susceptible to human trafficking because they are unfamiliar with their rights in the United States and often do not speak English. They also do

not have the required paperwork to live or work in the country and so they are constantly under threat of deportation. They often are targeted because traffickers know they are less likely than legal residents to seek help.

According to the National Network for Youth, one in five runaways and unhoused youth are victims of human trafficking. Unhoused youth lack basic needs, such as a safe place to sleep, and often suffer from early trauma, such as experiencing physical or emotional abuse by parents or guardians or a history of sexual abuse. Survivors of childhood sexual abuse are at particularly considerable risk for sex trafficking, which can in turn lead to substance use and mental health issues.

Human traffickers also prey on the financially vulnerable, such as those living in poverty, unemployed, or homeless. Unable to meet basic needs, such as food, shelter or healthcare, these individuals are targeted with offers of meeting their basic needs in exchange for labor or sex. Finances are used as a means of control to prolong the exploitation, according to the United Way.

Because many of these vulnerable populations face systemic injustice and often do not self-identify as human trafficking victims, the International Association of Chiefs of Police offers the following recommendations when human trafficking is suspected:

- Be aware that traffickers might not be easy to distinguish from their victims and understand that some victims may have had to “collaborate” to survive.
- Educate yourself on trauma, its impact, and its effects, or collaborate with a trauma specialist to assist with interviews.
- Adopt a compassionate and nonjudgmental manner.
- Do interviews with victims and witnesses while in plain clothes, if possible.
- Conduct interviews individually and in private and remember that the victim may need a counselor or attorney present for support.
- When an interpreter is needed, select a skilled interpreter whom you are confident is in no way connected to the trafficker.
- Do not begin your interview by asking about documentation or legal status, as this may frighten or confuse victims and interfere with building trust.
- Do not ask “Are you a slave?” or “Are you a trafficking victim?”
- Allow interviewees to describe what happened to their counterparts before focusing on their own suffering; it is often easier for victims to talk about what happened to other people initially.
- Provide victims the opportunity to tell their story; it may help them heal.

It is vital to have multidisciplinary resources lined up before human trafficking or other crimes are reported. Here are some national resources that may assist you with identifying partners and building those teams:

Human Trafficking Hotline
(888) 373-7888
https://www.humantraffickinghotline.org
Human Trafficking Legal Center
info@htlegalcenter.org
Office for Victims of Crime Training and Technical Assistance Center
(866) 682-8822[50]

[50] Community Policing Dispatch (2024)

CHAPTER 7

MAYHEM, TORTURE, TYPES OF BATTERY CRIMES, AND ASSAULT WITH A DEADLY WEAPON

LEARNING OBJECTIVES

- Recognize the crime of mayhem from a provided scenario.
- Assess the crime of torture.
- Distinguish between the types of battery crimes.
- Identify the differences between felony and misdemeanor domestic violence crimes.
- Explore the crime of child abuse.
- Research the crime of assault with a deadly weapon.

MAYHEM

The crime of mayhem is defined in section 205 of the California Penal Code.
A person is guilty of aggravated mayhem when he or she unlawfully, under circumstances manifesting extreme indifference to the physical or psychological well-being of another person, intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body. For purposes of this section, it is not necessary to prove an intent to kill. Aggravated mayhem is a felony punishable by imprisonment in the state prison for life with the possibility of parole.[51]

The Story of Bertha Boronda

Bertha Boronda (March 14, 1877 – January 18, 1950) was an American woman who sliced off her husband's penis in 1907. She was convicted of the crime of mayhem; she used a straight razor to cut off her husband's penis. She fled the scene of the crime but was captured the next day. Boronda was tried, convicted and imprisoned at San Quentin Penitentiary.

The victim was Bertha Boronda's husband, Frank Boronda: Captain of Chemical Engine No. 1 with the San Jose Fire Department. On Friday, May 30, 1907, Bertha insisted that her husband Frank had visited a place of prostitution. Shortly after midnight, she cut her husband's penis off

[51] California Penal Code (2024)

with a razor while in bed. He was able to go to the firehouse, which was adjacent to his home, and received treatment in a hospital.

She was apprehended while disguised, wearing men's clothing, and mounting a bicycle to make her escape. She was not found by the police until more than 24 hours had passed. After her capture, Boronda admitted her crime and expressed no regret. The newspaper reports were tactfully non-specific. "'She drew a razor and cut her husband.' Then she walked to her nephew's room and simply stated, 'Frank cut himself.'"

On June 1, Frank Boronda made a complaint to Justice Brown from his hospital bed at the Red Cross Hospital. Boronda was accused of mayhem. The felony of mayhem, punishable by up to 14 years in prison. Boronda was held on $10,000 bond - $291,819.15 in 2021 dollars. Mr. Boronda testified at the trial that he and his wife had visited the San Jose theater, and that the attack was unprovoked. He claimed that she was amorous and had invited him to her bed before the attack. The prosecution's theory was that this was a deliberate planned attack in furtherance of a jealous rage.

Boronda had several defenses, the chief among them being her complete lack of any recollection of the night in question. She claimed she became enraged at her husband, and the two had an argument because she thought he was going to leave her. She admitted that she maimed him but expressed no regret. As reported in the Santa Cruz Sentinel, "Her only excuse is that she wanted to be revenged on Boronda, whom she believed intended deserting her and leaving for Mexico." Another defense was that Mr. Boronda had made "a vile request."

At the trial she settled on a defense of "emotional insanity" from extreme jealousy. She took the stand in her defense and explained why she dressed like a man when she fled after the incident. She stated that her husband had been gone for two weeks; and she often wore her brother's clothing when she spied on her husband.

The jury deliberated two hours before convicting her. Boronda was sentenced to five years in prison, but served only two and was released from prison on December 20, 1909. In the aftermath of the incident, Bertha and Frank Boronda divorced. Both Frank and Bertha later remarried.[52]

TORTURE

The crime of torture is defined in section 206 of the California Penal Code.
Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of another, is guilty of torture. The crime of torture does not require any proof that the victim suffered pain.[53]

[52] Wikipedia
[53] California Penal Code (2024)

The Story of Abner Louima

Abner Louima is a Haitian American man who, in 1997, was physically attacked, brutalized, and sexually assaulted by officers of the New York City Police Department (NYPD) after he was arrested outside a Brooklyn nightclub. His injuries were so severe that he required three major surgeries.

On the night of August 9, 1997, the police were called and several officers from the 70th Precinct were dispatched to the scene where Abner Louima and other men had been involved in a fight between two women in Club Rendez-Vous, a popular nightclub in East Flatbush, Brooklyn. Police, supporters, and various people all became involved in the fight outside the club. Police officers Justin Volpe, Charles Schwarz, Thomas Bruder, and Thomas Wiese, and others responded to the scene. In the ongoing altercation, Volpe said that Louima had attacked him. Louima was charged with disorderly conduct, obstructing government administration, and resisting arrest. Later, Volpe admitted his accusation about Louima being his assailant was a lie. On the ride to the station, the arresting officers beat Louima with their fists, nightsticks, and hand-held police radios.

On arriving at the station house, they had Louima strip-searched and put in a holding cell. The beating continued later, culminating with Louima being sexually assaulted in a bathroom at the 70th Precinct station house in Brooklyn. Volpe kicked Louima in the testicles, and while Louima's hands were cuffed behind his back, he first grabbed onto and squeezed his testicles and then forced a broken broomstick up his rectum. According to trial testimony, Volpe walked through the precinct holding the bloody, excrement-stained instrument in his hand, bragging to a police sergeant that he "took a man down tonight."

Louima's teeth were also severely damaged in the attack when the broom handle was jammed into his mouth. He testified that a second officer in the bathroom helped Volpe in the assault but could not positively identify him. The identity of the second attacker became a point of serious contention during the trial and appeals. Louima also initially claimed that the officers involved in the attack called him a racial slur and shouted, "This is Giuliani-time" during the beating. Louima later recanted that claim. The reversal was used by police defense lawyers to cast doubt on the entirety of his testimony.

The day after the incident, police took Louima to the emergency department at Coney Island Hospital. Escorting officers explained away his serious injuries, saying they were the result of "abnormal homosexual activities." An Emergency Department (ED) nurse, Magalie Laurent, suspecting that Louima's extreme injuries were not the result of consensual sex, notified Louima's family and the Police Department's Internal Affairs Bureau of the likelihood that he had been sexually assaulted and beaten in custody. Louima suffered severe internal damage to his colon and bladder in the attack, which required three major operations to repair. He was hospitalized for two months after the incident.

Officers responsible for the attack were charged and convicted in federal court, and Justin Volpe was sentenced to federal prison to serve a 30-year sentence. In 2001, Louima received a $8.75 million settlement (equivalent to about $15M in 2023) in his civil suit against the city for police brutality, the largest civil settlement at that time for such abuse. He has set up the Abner Louima Foundation to establish a hospital and community centers in Haiti, Florida, and New York for Haitian residents, immigrants, and others in need.[54]

Figure 7.1: Shadow of a Person Pointing a Gun at Someone Else.[x]

TYPES OF BATTERY CRIMES

Simple Battery

The crime of simple battery is defined in section 242 of the California Penal Code.

A battery is any willful and unlawful use of force or violence upon the person of another.[55]

Battery Act

The criminal act element required for battery in most jurisdictions is an unlawful touching, often described as physical contact. This criminal act element is what distinguishes assault from battery, although an individual can be convicted of both crimes if he or she commits separate acts supported by the appropriate intent. The defendant can touch the victim with an instrumentality, like shooting the victim with a gun, or can hit the victim with a thrown object, such as rocks or a bottle. The defendant can also touch the victim with a vehicle, knife, or a substance, such as spitting on the victim or spraying the victim with a hose.

[54] Wikipedia
[55] California Penal Code (2024)

Example of Battery Act

Chris, a newly hired employee at McDonald's, becomes angry at Geoff (a customer) and pours steaming-hot coffee on his hand. Although Chris did not touch Geoff with any part of his body, he did pour a substance that unlawfully touched Geoff's body, which could be sufficient to constitute the criminal act element for battery.

Battery Intent

The criminal intent element required for battery varies, depending on the jurisdiction. At early common law, battery was a purposeful or knowing touching. Many states follow the common-law approach and require specific intent or purposely, or general intent or knowingly (Fla. Stat. Ann. § 784.03, 2011). Others include reckless intent (K.S.A. § 21-3412, 2011), or negligent intent (R.I. Gen. Laws § 11-5-2.2, 2011). Jurisdictions that include reckless or negligent intent generally require actual injury, serious bodily injury, or the use of a deadly weapon.[56]

Felony Battery

The crime of felony battery is defined in section 243(d) of the California Penal Code.
(d) When a battery is committed against any person and serious bodily injury is inflicted on the person, the battery is punishable by imprisonment in a county jail not exceeding one year or imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years.[57]
A felony battery requires serious bodily injury. There are many types of injuries that can qualify as serious, including: broken bones, fractures, unconsciousness, concussion, impairment of organ function, wounds requiring stitches.

For example, Jack and Jamal get into a street fight. Jamal punches Jack in the jaw and knocks him out. When Jack falls to the ground, he hits his head on the curb of the sidewalk. The fall results in a concussion. Unless Jamal can prove he acted in self-defense, his actions qualify as a felony battery. [58]

Sexual Battery

The crime of sexual battery is defined in section 243.4 of the California Penal Code.

(a) Any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of sexual battery. A violation of this subdivision is punishable by imprisonment in a county jail for not more than one year, and by a fine not exceeding two thousand dollars ($2,000); or by

[56] University of Minnesota Libraries Publishing (2015)
[57] California Penal Code (2024)
[58] George Cartwright (2024)

imprisonment in the state prison for two, three, or four years, and by a fine not exceeding ten thousand dollars ($10,000).

As used in this subdivision, “touches” means physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim.

“Intimate part” means the sexual organ, anus, groin, or buttocks of any person, and the breast of a female.[59]

Actor Kevin Spacey

The Los Angeles District Attorney's office stated, in April 2018, that it would investigate an allegation that Spacey had sexually assaulted an adult male in 1992. In July 2018, three more allegations of sexual assault against Spacey were revealed by Scotland Yard, bringing the total number of open investigations in the UK to six. In September 2018, a lawsuit filed at Los Angeles Superior Court claimed that Spacey sexually assaulted an unnamed masseur in October 2016 at a house in Malibu, California.

In December 2018, Spacey was charged with a felony for allegedly sexually assaulting journalist Heather Unruh's 18-year-old son in Nantucket, Massachusetts, in July 2016. Spacey pleaded not guilty to the charge on January 7, 2019. Unruh's son told police that he was texting with his girlfriend throughout the alleged "groping" incident. Spacey's defense attorneys spent months trying to obtain copies of the texts and the phone itself. In mid-May 2019, Unruh's son's personal attorney informed the court that the phone in question was "missing." On June 4, 2019, the defense learned that, when Unruh gave the police her son's phone in 2017, she admitted that she had deleted some of the text messages. Later that month, her son filed a lawsuit against Spacey, claiming emotional damages. Shortly later, on July 5, 2019, they withdrew the lawsuit.

On July 17, 2019, the criminal assault charge against Spacey was dropped by the Cape and Islands prosecutors. When the anonymous massage therapist who accused him died, the last remaining criminal case against Spacey was closed.

On September 9, 2020, Anthony Rapp accused Spacey in a complaint about actions that allegedly happened in 1986 (sexual assault and sexual battery) and intentional infliction of emotional distress under the Child Victims Act, which extended New York's statute of limitations for suits related to child sexual abuse. Joining Rapp in the suit against Spacey was a man who requested to remain anonymous who accused Spacey of sexually abusing him in 1983, when he was 14 and Spacey was 24. On June 17, 2021, the anonymous accuser was dismissed from the case due to his refusal to publicly identify himself. As Rapp's trial lawsuit against Spacey commenced in October 2022, it was revealed Rapp had given an inaccurate description of the apartment where he alleged the abuse took place. On October 17, the judge

[59] California Penal Code (2024)

dismissed the emotional-distress charges as a "duplicate" of the battery charges. On October 20, a jury found Spacey not liable of all charges, with the court further ordering Rapp to pay Spacey $39,089 in damages.

In 2020, Spacey and his production companies M. Profitt Productions and Trigger Street Productions were ordered to pay $31 million to MRC, the studio that produced House of Cards, for violating its sexual harassment policy. Spacey appealed to have the arbitration award overturned, but the request was denied on August 4, 2022.

On May 26, 2022, Spacey was charged by the Crown Prosecution Service (CPS) in the United Kingdom with four counts of sexual assault against three complainants. The alleged offenses occurred between 2005 and 2013 in London and Gloucestershire. According to the Crown Prosecution Service, it would be possible to formally charge Spacey only if he entered England or Wales either voluntarily or through an extradition request. Nevertheless, in a statement to Good Morning America on May 31, 2022, Spacey said he would "voluntarily appear in the U.K. as soon as can be arranged."

In his first British court appearance, on June 16, Spacey denied the allegations against him. On July 14, he pleaded not guilty to the charges in London. On November 16, the CPS authorized an additional seven charges against Spacey, all related to a single complainant arising from incidents alleged to have occurred between 2001 and 2004. Three charges were dismissed before or during the trial, which began on June 28, 2023, and, on July 26, 2023, a jury found Spacey not guilty of the remaining nine charges.[60]

Domestic Violence

The crime of Battery Against Cohabitating Person is defined in section 273.5 of the California Penal Code.

(a) Any person who willfully inflicts corporal injury resulting in a traumatic condition upon a victim described in subdivision (b) is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars ($6,000), or by both that fine and imprisonment.

(b) Subdivision (a) shall apply if the victim is or was one or more of the following:

(1) The offender’s spouse or former spouse.

(2) The offender’s cohabitant or former cohabitant.

[60] Wikipedia

(3) The offender's fiancé or fiancée, or someone with whom the offender has, or previously had, an engagement or dating relationship, as defined in paragraph (10) of subdivision (f) of Section 243.

(4) The mother or father of the offender's child.[61]

A Story of Domestic Violence

I was abused by my ex-partner, who is also my children's father, for ten and a half years. I had four children with him - Angela, Rosalie, Mike, and Jackson. I was beat all throughout my first pregnancy, and as a result my girl Angela was born a month early. She did not develop properly and was born with her heart on the right side of her body. She was a Mother's Day baby, born on May 13, 1973, at 5 lbs. 11 ounces. I named her Angela Michelle because she looked just like an angel. She only lived to the age of 16 and died on January 17, 1990, in Prince George.
It is for her and in her memory that I tell this story.

You might be wondering why I stayed in a violent relationship for that long? I grew up without a dad and was often called a 'bastard'. I was always taunted with sayings such as: "Do you even know who your dad is?" It hurt a lot to be bullied and I did not want my own children to go through the same experience. So, I silently suffered the abuse. At the time I did not realize that it was equally bad, if not worse, for my children to witness the violence of their father beating up their own mother.

I tell this story for the women who are still in abusive relationships so that they will have the courage to get out. Anyone who controls you and physically and emotionally hurts you does not love you. We have to understand that violence against women is always unacceptable, and as Native women, we are five times more likely than other women to die as the result of violence. I became an alcoholic while I was in the relationship. The alcohol would numb the pain of being beaten; it would numb me for when he got home in the evenings so I could tolerate all the kicks and punches; it would numb me against his false accusations of me cheating on him when he was the one cheating on me with other women.

As a result of my drinking, the Ministry of Child and Family Development (MCFD) became involved in my children's lives. I had several visits from MCFD over the years and they told me to stop drinking and to get counseling, but I could not stop drinking. They also told me to leave my ex-partner, but I had nowhere to go. For years, MCFD kept apprehending my children. Sometimes they would take my children away for a few weeks; sometimes it was for a few months.

Then in December 1981, in a surprise visit, MCFD workers came to my home. I was not home, but my children's father was supposed to be home. However, he had left them alone in the house and the upstairs neighbor called MCFD. MCFD apprehended my children, this time

[61] California Penal Code (2024)

seeking a permanent order. That meant that my young children, ages 1-5, were going to essentially be kidnapped from me forever.

I broke down and started drinking even more heavily. I felt that if I did not have my children, then I had nothing to live for and would rather drink myself to death. One night in March 1982 I drank so much that I felt my heart was going to stop. That night I decided that I did not actually want to die an alcoholic and that I had to fight for my children. I quit drinking cold turkey. I went for alcohol counseling at the Native Court workers Society and also enrolled at Native Education Society to get my GED. I finally left my partner. After a few months I was able to get 2-hour supervised visits with my children every 6-8 weeks, but only after I appealed the decision by MCFD to deny me visits entirely.

After I won my right to supervised visits, I decided to appeal MCFD's decision to apprehend my children permanently. I did not even know that I could appeal this decision until I was informed by an advocate at Native Court workers that I could. I realized that MCFD had not informed me of my basic legal rights as a parent and did not actually care to fulfill their responsibility and mandate to keep families together. I felt that as a survivor of violence and as a Native woman, I was being re-victimized by being labeled as a bad mother who was unable to protect her children.

After four years of fighting in the Court system, I finally won my case, and my children were given back to me in 1986. Throughout the four years, I often felt like giving up, but I knew I had to fight for my family. The MCFD social worker reported to the Court that I was 'not showing love and affection' to my children. But the Court-ordered psychologist determined that there was lots of affection between us and said that it was clear that my children wanted to come back home. I thank Dr. Diane Mitchell for helping me win my case by recommending that my children be returned. It is frustrating though that we have to rely on these professionals to validate us.

The whole system of child apprehension is grossly unfair and unjust. From my experience and those of other women I know, it seems that the Ministry is interested in keeping children in the foster system rather than returning them to their parents. Most of the children in MCFD's custody are Native children. In BC, Native children are 6.3 times more likely to be removed from their homes than non-Native children. I believe this is both a continuation of the residential school experience - where children are torn away from their families and communities are destroyed - as well as a consequence of residential schools, which has forced Native families into social dysfunction with rampant alcohol/drug use and abuse in the home. I feel like the odds are stacked against us, but still, we continue on.

I am now 29 years sober and my three beautiful children – Rosalie and Michael and Jackson – are parents themselves. Once I had my children back, I told my boys to never hit a woman because it is like hitting your mother. I still live with the guilt about what happened to my deceased daughter Angela. I also felt responsible when my other daughter Rosalie was in an abusive relationship worse than mine. I felt that she thought it was okay to be abused because

she watched me take it. But now my daughter Rosalie is happy and has a beautiful 8-year-old daughter named Kayla. My son Michael is 31 years old and has been clean from heroin for several years now. He is working and has a 2-year-old daughter named Tayla. My youngest son Jackson is 30 years old and recently graduated from the Academy of Learning. He has a wonderful 10-month baby girl named Gianna. I am so proud of my children and thank the Creator for every new day. Love to all my family and friends.[62]

Domestic Battery

The crime of domestic battery is defined in section 243 (e) (1) of the California Penal Code.
(e) (1) When a battery is committed against a spouse, a person with whom the defendant is cohabiting, a person who is the parent of the defendant's child, former spouse, fiancé, or fiancée, or a person with whom the defendant currently has, or has previously had, a dating or engagement relationship, the battery is punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in a county jail for a period of not more than one year, or by both that fine and imprisonment. If probation is granted, or the execution or imposition of the sentence is suspended, it shall be a condition thereof that the defendant participate in, for no less than one year, and successfully complete, a batterer's treatment program, as described in Section 1203.097, or if none is available, another appropriate counseling program designated by the court.[63]

CHILD ABUSE

The crime of child abuse is defined in section 273d of the California Penal Code.
(a) Any person who willfully inflicts upon a child any cruel or inhuman corporal punishment or an injury resulting in a traumatic condition is guilty of a felony and shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for two, four, or six years, or in a county jail for not more than one year, by a fine of up to six thousand dollars ($6,000), or by both that imprisonment and fine.[64]

The Child Abuse Prevention and Treatment Act (United States Department of Health and Human Services, 2013) defines Child Abuse and Neglect as: Any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation; or an act or failure to act, which presents an imminent risk of serious harm (p. viii). Each state has its own definition of child abuse based on the federal law, and most states recognize four major types of maltreatment: neglect, physical abuse, psychological maltreatment, and sexual abuse. Each of the forms of child maltreatment may be identified alone, but they can occur in combination.

Victims of Child Abuse: During 2013 (the most recent year data has been collected) Child Protective Services (CPS) agencies received an estimated 3.5 million referrals involving approximately 6.4 million children, and 2.1 million referrals (60 percent) were investigated. This

[62] DTES Power Group (2011)
[63] California Penal Code (2024)
[64] California Penal Code (2024)

is a rate of 28.3 per 1,000 children in the national population. Professionals made three-fifths (61.6%) of alleged child abuse and neglect reports, and they included legal and law enforcement personnel (17.5%), education personnel (17.5%) and social services personnel (11.0%). Nonprofessionals, such as friends, neighbors, and relatives, submitted 18.6% of the reports. Approximately 3.9 million children were the subjects of at least one report, and 678,932 were found to be victims of child abuse and neglect (victim rate of 9.1 per 1,000 children). Victims in their first year of life had the highest rate of victimization (23.1 per 1,000 children of the same age). Most victims consisted of three ethnicities: White (44.0%), Hispanic (22.4%), and African-American (21.2%). The greatest percentages of children suffered from neglect (79.5%) and physical abuse (18.0%), although a child may have suffered from multiple forms of maltreatment. Nationally in 2013 an estimated 1,520 children died from abuse and neglect, and nearly three-quarters (73.9%) of all child fatalities were younger than 3 years old. Boys had a higher child fatality rate (2.36 per 100,000 boys), while girls died of abuse and neglect at a rate of 1.77 per 100,000 girls. More than 85 percent (86.8%) of child fatalities were comprised of White (39.3%), African-American (33.0%), and Hispanic (14.5%) victims, and 78.9% of child fatalities were caused by one or both parents (United States Department of Health and Human Services, 2013).

Sexual Abuse: Childhood sexual abuse is defined as any sexual contact between a child and an adult or a much older child. Incest refers to sexual contact between a child and family members. In each of these cases, the child is exploited by an older person without regard for the child's developmental immaturity and inability to understand sexual behavior (Steele, 1986). Research estimates that 1 out of 4 girls and 1 out of 10 boys have been sexually abused (Valente, 2005). The median age for sexual abuse is 8 or 9 years for both boys and girls (Finkelhorn, Hotaling, Lewis, & Smith, 1990). Most boys and girls are sexually abused by a male. Although rates of sexual abuse are higher for girls than for boys, boys may be less likely to report abuse because of the cultural expectation that boys should be able to take care of themselves and because of the stigma attached to homosexual encounters (Finkelhorn et. al., 1990). Girls are more likely to be abused by a family member and boys by strangers. Sexual abuse can create feelings of self-blame, betrayal, and feelings of shame and guilt (Valente, 2005). Sexual abuse is particularly damaging when the perpetrator is someone the child trusts and may lead to depression, anxiety, problems with intimacy, and suicide (Valente, 2005).

Stress on Young Children: Children experience different types of stressors. Normal, everyday stress can provide an opportunity for young children to build coping skills and poses negligible risk to their development. Even more long-lasting stressful events, such as changing schools or losing a loved one, can be managed fairly well. Children who experience toxic stress or who live in extremely stressful situations of abuse over prolonged periods of time can suffer long-lasting effects. The structures in the midbrain or limbic system, such as the hippocampus and amygdala, can be vulnerable to prolonged stress during early childhood (Middlebrooks and Audage, 2008). Elevated levels of the stress hormone cortisol can reduce the size of the hippocampus and affect the child's memory abilities. Stress hormones can also reduce immunity to disease. The brain exposed to extended periods of severe stress can develop a low

threshold making the child hypersensitive to stress in the future. However, the effects of stress can be minimized if the child has the support of caring adults.[65]

Figure 7.2: A close-up of a gun or deadly weapon.[xi]

ASSUALT WITH A DEADLY WEAPON

The crime of assault with a deadly weapon is defined in section 245 of the California Penal Code.

(a) (1) Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment.

(2) Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars ($10,000) and imprisonment.

(3) Any person who commits an assault upon the person of another with a machinegun, as defined in Section 16880, or an assault weapon, as defined in Section 30510 or 30515, or a .50 BMG rifle, as defined in Section 30530, shall be punished by imprisonment in the state prison for 4, 8, or 12 years.

(4) Any person who commits an assault upon the person of another by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison

[65] Lally and Valentine-French (2019)

for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment.[66]

CHAPTER SUMMARY

Mayhem intentionally causes permanent disability or disfigurement of another human being or deprives a human being of a limb, organ, or member of his or her body. Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury upon the person of another, is guilty of torture. The crime of torture does not require any proof that the victim suffered pain. The crime of simple battery is summarized as any offensive touching including spitting. Felony battery requires serious bodily injury which includes broken bones, fractures, unconsciousness, concussion, impairment of organ function, wounds requiring stitches. For the crime of sexual battery, intimate part is defined as the sexual organ, anus, groin, or buttocks of any person, and the breast of a female. Domestic violence includes former spouse. Domestic battery is a misdemeanor and can be a dating relationship. Child abuse requires willful cruelty. Assault with a deadly weapon is a felony crime.

KEY TERMS

- Aggravated Mayhem
- Torture
- Simple Battery
- Felony Battery
- Sexual Battery
- Domestic Violence
- Cohabitating Person
- Domestic Battery
- Child Abuse
- Assault with a Deadly Weapon

REVIEW QUESTIONS

1. List the types of injuries that qualify for the crime of mayhem.
2. Summarize the crime of torture and create a scenario to illustrate your understanding.
3. Explain the difference between a simple battery and a felony battery.
4. Review the elements of sexual battery and explain what is required to violate the crime.
5. What are the primary differences between domestic violence and domestic battery?
6. Explain what is meant by the element of child abuse (273d PC) that states, “willfully inflicts upon a child any cruel or inhuman corporal punishment or an injury resulting in a traumatic condition.”?

[66] California Penal Code (2024)

7. Illustrate your understanding of 245(a)(1) PC by creating a scenario depicting exactly what a violation looks like.

CHAPTER 8

SEX CRIMES

LEARNING OBJECTIVES

- Identify the sex crime from a provided fact pattern.
- Examine the psychosocial and psychological effects of being the victim of a sex crime.

RAPE

The crime of rape is defined in section 261 of the California Penal Code.

(a) Rape is an act of sexual intercourse accomplished under any of the following circumstances:

(1) If a person who is not the spouse of the person committing the act is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act. Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act (Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code), the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent. This paragraph does not preclude the prosecution of a spouse committing the act from being prosecuted under any other paragraph of this subdivision or any other law.

(2) If it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.

(3) If a person is prevented from resisting by an intoxicating or anesthetic substance, or a controlled substance, and this condition was known, or reasonably should have been known by the accused.

(4) If a person is at the time unconscious of the nature of the act, and this is known to the accused. As used in this paragraph, "unconscious of the nature of the act" means incapable of resisting because the victim meets any one of the following conditions:

(A) Was unconscious or asleep.

(B) Was not aware, knowing, perceiving, or cognizant that the act occurred.

(C) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact.

(D) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose.

"Duress" means a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which otherwise would not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and the victim's relationship to the defendant, are factors to consider in appraising the existence of duress.

"Menace" means any threat, declaration, or act that shows an intention to inflict an injury upon another.[67]

Our knowledge about the extent and context of rape and reasons for it comes from three sources: the FBI Uniform Crime Reports (UCR) and the National Crime Victimization Survey (NCVS) and surveys of and interviews with people conducted by academic researchers. From these sources we have a fairly good if not perfect idea of how much rape occurs, the context in which it occurs, and the reasons for it. What do we know?

According to the UCR, which are compiled by the Federal Bureau of Investigation (FBI) from police reports, 88,767 reported rapes (including attempts, and defined as forced sexual intercourse) occurred in the United States in 2010 (Federal Bureau of Investigation, 2011). Because women often do not tell police they were raped, the NCVS, which involves survey interviews of thousands of people nationwide, yields a better estimate of rape; the NCVS also measures sexual assaults in addition to rape, while the UCR measures only rape. According to the NCVS, 188,380 rapes and sexual assaults occurred in 2010 (Truman, 2011). Other research indicates that up to one-third of US women will experience a rape or sexual assault, including attempts, at least once in their lives (Barkan, 2012).

A study of a random sample of 420 Toronto women involving intensive interviews yielded an even higher figure: Two-thirds said they had experienced at least one rape or sexual assault, including attempts. The researchers, Melanie Randall and Lori Haskell (1995, p. 22), concluded that "it is more common than not for a woman to have an experience of sexual assault during their lifetime."

Studies of college students also find a high amount of rape and sexual assault. About 20–30 percent of women students in anonymous surveys report being raped or sexually assaulted (including attempts), usually by a male student they knew beforehand (Fisher, Cullen, & Turner,

[67] California Penal Code (2024)

2000; Gross, Winslett, Roberts, & Gohm, 2006). Thus, at a campus of 10,000 students of whom 5,000 are women, about 1,000–1,500 women will be raped or sexually assaulted over a period of four years, or about 10 per week in a four-year academic calendar.

The public image of rape is of the proverbial stranger attacking a woman in an alleyway. While such rapes do occur, most rapes happen between people who know each other. A wide body of research finds that 60–80 percent of all rapes and sexual assaults are committed by someone the woman knows, including husbands, ex-husbands, boyfriends, and ex-boyfriends, and only 20–35 percent by strangers (Barkan, 2012). A woman is thus two to four times more likely to be raped by someone she knows than by a stranger.

In 2011, sexual assaults of hotel housekeepers made major headlines after the head of the International Monetary Fund was arrested for allegedly sexually assaulting a hotel housekeeper in New York City; the charges were later dropped because the prosecution worried about the housekeeper's credibility despite forensic evidence supporting her claim. Still, in the wake of the arrest, news stories reported that hotel housekeepers sometimes encounter male guests who commit sexual assault, make explicit comments, or expose themselves. A hotel security expert said in one news story, "These problems happen with some regularity. They're not rare, but they're not common either." A housekeeper recalled in the same story an incident when she was vacuuming when a male guest appeared: "[He] reached to try to kiss me behind my ear. I dropped my vacuum, and then he grabbed my body at the waist, and he was holding me close. It was very scary." She ran out of the room when the guest let her leave but did not call the police. A hotel workers union official said housekeepers often refused to report sexual assault and other incidents to the police because they were afraid, they would not be believed or that they would get fired if they did so (Greenhouse, 2011, p. B1).

Sociological explanations of rape fall into cultural and structural categories similar to those presented earlier for sexual harassment. Various "rape myths" in our culture support the absurd notion that women somehow enjoy being raped, want to be raped, or are "asking for it" (Franiuk, Seefelt, & Vandello, 2008). One of the most famous scenes in movie history occurs in the classic film Gone with the Wind, when Rhett Butler carries a struggling Scarlett O'Hara up the stairs. She is struggling because she does not want to have sex with him. The next scene shows Scarlett waking up the next morning with a satisfied, loving look on her face. The not-so-subtle message is that she enjoyed being raped (or to be more charitable to the film, was just playing hard to get).

A related cultural belief is that women somehow ask or deserve to be raped by the way they dress or behave. If she dresses attractively or walks into a bar by herself, she wants to have sex, and if a rape occurs, well, then, what did she expect? In the award-winning film The Accused, based on a true story, actress Jodie Foster plays a woman who was raped by several men on top of a pool table in a bar. The film recounts how members of the public questioned why she was in the bar by herself if she did not want to have sex and blamed her for being raped.
A third cultural belief is that a man who is sexually active with a lot of women is a stud and thus someone admired by his male peers. Although this belief is less common in this day of AIDS and

other STDs, it is still with us. A man with multiple sex partners continues to be the source of envy among many of his peers. At a minimum, men are still the ones who have to "make the first move" and then continue making more moves. There is a thin line between being sexually assertive and sexually aggressive (Kassing, Beesley, & Frey, 2005).

These three cultural beliefs—that women enjoy being forced to have sex, that they ask or deserve to be raped, and that men should be sexually assertive or even aggressive—combine to produce a cultural recipe for rape. Although most men do not rape, the cultural beliefs and myths just described help account for the rapes that do occur. Recognizing this, the contemporary women's movement began attacking these myths back in the 1970s, and the public is much more conscious of the true nature of rape than a generation ago. That said, much of the public still accepts these cultural beliefs and myths, and prosecutors continue to find it difficult to win jury convictions in rape trials unless the woman who was raped had suffered visible injuries, had not known the man who raped her, and/or was not dressed attractively (Levine, 2006).

Structural explanations for rape emphasize the power differences between women and men like those outlined earlier for sexual harassment. In societies that are male dominated, rape and other violence against women is a likely outcome, as they allow men to demonstrate and maintain their power over women. Supporting this view, studies of preindustrial societies and of the fifty states of the United States find that rape is more common in societies where women have less economic and political power (Baron & Straus, 1989; Sanday, 1981). Poverty is also a predictor of rape; although rape in the United States transcends social class boundaries, it does seem more common among poorer segments of the population than among wealthier segments, as is true for other types of violence (Truman & Rand, 2010). Scholars think the higher rape rates among the poor stem from poor men trying to prove their "masculinity" by taking out their economic frustration on women (Martin, Vieraitis, & Britto, 2006).[68]

GANG RAPE

The crime of gang rape is defined in section 264.1 of the California Penal Code.

(a) The provisions of Section 264 notwithstanding, when the defendant, voluntarily acting in concert with another person, by force or violence and against the will of the victim, committed an act described in Section 261 or 289, either personally or by aiding and abetting the other person, that fact shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or if admitted by the defendant, the defendant shall suffer confinement in the state prison for five, seven, or nine years.

[68] Northeast Wisconsin Technical College (2010)

(b) (1) If the victim of an offense described in subdivision (a) is a child who is under 14 years of age, the defendant shall be punished by imprisonment in the state prison for 10, 12, or 14 years.

(2) If the victim of an offense described in subdivision (a) is a minor who is 14 years of age or older, the defendant shall be punished by imprisonment in the state prison for 7, 9, or 11 years.[69]

Suspects in Fairmont Hotel Gang Rape Flee Egypt

Seven suspects in the Fairmont gang rape case have fled Egypt. The public prosecutor has said they left between 27-29 July following allegations against them on the internet. The prosecution said in a statement that they are conducting investigations into where the Fairmont Hotel suspects are, based on flight records, and said that they are on an airport watch list. They are still looking for two other suspects implicated in the case. Nine men have been accused of drugging and raping a woman at the luxury Fairmont Nile City Hotel in 2014.
The group allegedly filmed the rape and then used the footage to blackmail the victim. Their actions were revealed by the Instagram account Assault Police, which not long before had exposed serial sexual offender Ahmed Bassem Zaki. Assault Police, which aims to expose rapists and secure justice for sexual assault victims, was shut down after its administrators received death threats.

It was in July that accusations against the Fairmont Hotel gang circulated yet it was not until the end of August that Egypt's prosecution ordered that the men be arrested. At the time there was skepticism over whether the case would be taken seriously since they were all the sons of prominent businesspeople.

For weeks social media users lamented inaction on the part of the government-run National Council for Women and the prosecutor general. Though there is legislation against sexual assault in Egypt, it is not enforced adequately, and victims often remain quiet for fear of retribution.
Several Egyptian influencers, now known as the TikTok women, have been imprisoned on charges of debauchery and violating family values for simply appearing in videos they posted online. As social media pressure has grown over the Fairmont incident and Zaki's crimes, the government issued a draft law offering victims and witnesses of sexual harassment anonymity. Experts say that the long-term implementation of this law is vital to avoid mere window dressing, as has been the case in the past.[70]

UNLAWFUL SEXUAL INTERCOURSE

The crime of unlawful sexual intercourse is defined in section 261.5 of the California Penal Code.

[69] California Penal Code (2024)
[70] Middle East Monitor (2017)

(a) Unlawful sexual intercourse is an act of sexual intercourse accomplished with a person who is not the spouse of the perpetrator, if the person is a minor. For the purposes of this section, a "minor" is a person under 18 years of age and an "adult" is a person who is 18 years of age or older.

(b) A person who engages in an act of unlawful sexual intercourse with a minor who is not more than three years older or three years younger than the perpetrator, is guilty of a misdemeanor.

(c) A person who engages in an act of unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170.

(d) A person 21 years of age or older who engages in an act of unlawful sexual intercourse with a minor who is under 16 years of age is guilty of either a misdemeanor or a felony, and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years.[71]

Example of Statutory Rape

Gary meets Michelle in a nightclub that only allows entrance to patrons eighteen and over. Gary and Michelle end up spending the evening together, and later they go to Gary's apartment where they have consensual sexual intercourse. In reality, Michelle is actually fifteen and was using false identification to enter the nightclub. If Gary and Michelle are in a state that requires strict liability for the criminal intent element of statutory rape, Gary can be subject to prosecution for and conviction of this offense if fifteen is under the age of legal consent. If Gary and Michelle are in a state that allows for mistake of age as a defense, Gary could use Michelle's presence in the nightclub as evidence that he acted reasonably in believing that Michelle was capable of rendering legal consent. If both Gary and Michelle used false identification to enter the nightclub, and both Gary and Michelle are under the age of legal consent, both could be prosecuted for and convicted of statutory rape in most jurisdictions because modern statutory rape statutes are gender-neutral.[72]

SODOMY

The crime of unlawful sodomy is defined in section 286 of the California Penal Code.

(a) Sodomy is sexual conduct consisting of contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy.

[71] California Penal Code (2024)
[72] University of Minnesota Libraries Publishing (2015)

(b) (1) Except as provided in Section 288, any person who participates in an act of sodomy with another person who is under 18 years of age shall be punished by imprisonment in the state prison, or in a county jail for not more than one year.

(2) Except as provided in Section 288, any person over 21 years of age who participates in an act of sodomy with another person who is under 16 years of age shall be guilty of a felony.

(c) (1) Any person who participates in an act of sodomy with another person who is under 14 years of age and more than 10 years younger than he or she shall be punished by imprisonment in the state prison for three, six, or eight years.

(2) (A) Any person who commits an act of sodomy when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years.

(3) Any person who commits an act of sodomy where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat, shall be punished by imprisonment in the state prison for three, six, or eight years.[73]

The Impact of Repealing Sodomy Laws on Crime

Sodomy has historically encompassed both oral and anal sex, as well as bestiality. Sodomy laws are legislative measures that criminalize these activities. The American colonies inherited these laws from the British Empire, where sodomy was punishable by death in most colonies. After receiving independence, the United States continued to deem sodomy a criminal offense, often punishable by a life sentence throughout the 19th century. Even after World War II, government officials employed these laws to target and persecute LGBTQ+ individuals.

In the years following World War I, a so-called gay panic arose. The public widely believed that gay people were sexual predators who targeted children and susceptible young adults to make them gay as well. The legal and social environment remained hostile toward LGBTQ+ individuals even after World War II. Estimates suggest that between 6,600 and 21,600 people—mostly men—were arrested each year from 1946 to 1961 for nonconforming gender or sexual behaviors. During the same period, tens of thousands of LGBTQ+ individuals were detained, extorted, or harassed by police officers. Additionally, officials used sodomy laws against sexual minorities to limit their rights to adopt or raise children, justify firing them, and exclude them from hate crime laws. Even in the 1990s and early 2000s, before the Supreme Court deemed sodomy laws unconstitutional in 2003, the penalties for violating these laws ranged from a $500 fine in Texas to a life sentence in Idaho.

[73] California Penal Code (2024)

Our research explores the impact of sodomy laws on crime rates using variation in the timing of decriminalizing same-sex sexual intercourse between states. Before the Supreme Court ruling in 2003, 36 states plus the District of Columbia had legalized same-sex sexual acts. By analyzing data from the Uniform Crime Reporting program's arrest database for 1995–2018, our findings provide the first evidence of any study that the elimination of sodomy laws led to a persistent decline in the number of arrests for disorderly conduct, prostitution, and other sex offenses. Additionally, our research shows a reduction in arrests for drug and alcohol consumption following the repeal of sodomy laws, and it also suggests a drop in the number of suicides among men.

These findings are consistent with the hypothesis that repealing sodomy laws improved the mental health of LGBTQ+ individuals, reduced stress among sexual minorities, and led to a decrease in substance abuse as a coping mechanism for non-heterosexual people.
These findings are crucial for policymakers, as they can aid international institutions such as the World Bank and the European Union in accurately assessing the costs and benefits of pressuring or suspending foreign aid to countries that blatantly violate basic LGBTQ+ rights. There are still several countries in the world where same-sex sexual activity is still illegal, and some countries have recently passed laws that explicitly target LGBTQ+ individuals.

International institutions must balance promoting economic development and avoiding undue political interference with deterring human rights violations and protecting their employees working in those countries. Our research highlights additional costs related to the enactment and enforcement of sodomy laws and other anti-LGBTQ+ legislation, providing valuable information to guide international decisionmakers. Likewise, this analysis outlines the potential benefits of decriminalizing same-sex sexual intercourse for policymakers in countries that still persecute gay people.[74]

ORAL COPULATION

The crime of oral copulation is defined in section 287 of the California Penal Code.

(a) Oral copulation is the act of copulating the mouth of one person with the sexual organ or anus of another person.

(b) (1) Except as provided in Section 288, any person who participates in an act of oral copulation with another person who is under 18 years of age shall be punished by imprisonment in the state prison, or in a county jail for a period of not more than one year.

(2) Except as provided in Section 288, any person over 21 years of age who participates in an act of oral copulation with another person who is under 16 years of age is guilty of a felony.

[74] Ciacci and Sansone (2024)

(c) (1) Any person who participates in an act of oral copulation with another person who is under 14 years of age and more than 10 years younger than he or she shall be punished by imprisonment in the state prison for three, six, or eight years.

(2) (A) Any person who commits an act of oral copulation when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years.[75]

PENETRATION WITH A FOREIGN OBJECT

The crime of penetration with a foreign object is defined in section 289 of the California Penal Code.

(A) Any person who commits an act of sexual penetration when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years.

(B) Any person who commits an act of sexual penetration upon a child who is under 14 years of age, when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, shall be punished by imprisonment in the state prison for 8, 10, or 12 years.

(C) Any person who commits an act of sexual penetration upon a minor who is 14 years of age or older, when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, shall be punished by imprisonment in the state prison for 6, 8, or 10 years.

"Sexual penetration" is the act of causing the penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the defendant's or another person's genital or anal opening for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object.

"Unknown object" shall include any foreign object, substance, instrument, or device, or any part of the body, including a penis, when it is not known whether penetration was by a penis or by a foreign object, substance, instrument, or device, or by any other part of the body.[76]

[75] California Penal Code (2024)
[76] California Penal Code (2024)

INCEST

The crime of incest is defined in section 285 of the California Penal Code.

Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who being 14 years of age or older, commit fornication or adultery with each other, are punishable by imprisonment in the state prison.[77]

Example of Incest

Hal and Harriet, brother and sister, have consensual sexual intercourse. Both Hal and Harriet are above the age of legal consent. In spite of the fact that there was no force, threat of force, or fraud, and both parties consented to the sexual act, Hal and Harriet could be charged with and convicted of incest in many jurisdictions, based on their family relationship.[78]

BESTIALITY

The crime of bestiality is defined in section 286.5 of the California Penal Code.

(a) Every person who has sexual contact with an animal is guilty of a misdemeanor.

> "Animal" means any nonhuman creature, whether alive or dead.
>
> "Sexual contact" means any act, committed for the purpose of sexual arousal or gratification, abuse, or financial gain, between a person and an animal involving contact between the sex organs or anus of one and the mouth, sex organs, or anus of the other, or, without a bona fide veterinary or animal husbandry purpose, the insertion, however slight, of any part of the body of a person or any object into the vaginal or anal opening of an animal, or the insertion of any part of the body of an animal into the vaginal or anal opening of a person.[79]

LEWD ACTS WITH CHILDREN

The crime of lewd acts with children is defined in section 288 of the California Penal Code.

(a) A person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.[80]

[77] California Penal Code (2024)
[78] University of Minnesota Libraries Publishing (2015)
[79] California Penal Code (2024)
[80] California Penal Code (2024)

ANNOYING OR MOLESTING CHILDREN UNDER 18

The crime of annoying or molesting children under 18 is defined in section 647.6 of the California Penal Code.

(a) (1) Every person who annoys or molests any child under 18 years of age shall be punished by a fine not exceeding five thousand dollars ($5,000), by imprisonment in a county jail not exceeding one year, or by both the fine and imprisonment.[81]

INDECENT EXPOSURE

The crime of indecent exposure is defined in section 314 of the California Penal Code.

Every person who willfully and lewdly, either:

1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or,

2. Procures, counsels, or assists any person so to expose himself or take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the view of any number of persons, such as is offensive to decency, or is adapted to excite to vicious or lewd thoughts or acts, is guilty of a misdemeanor.

> Upon the second and each subsequent conviction under subdivision 1 of this section, or upon a first conviction under subdivision 1 of this section after a previous conviction under Section 288, every person so convicted is guilty of a felony, and is punishable by imprisonment in state prison.[82]

CHAPTER SUMMARY

The crime of rape always involves a penis and a vagina. Gang rape occurs when at least two people, working together, sexually assault the victim. Unlawful sexual intercourse is a felony if the difference between the adult and the minor is more than three years. Sodomy always involves a penis and an anus. Sexual assault between male inmates, in a prison, is not rape. It is categorized as sodomy. Oral copulation involves the mouth of one person and the sex organ or anus of another person. To complete the crime of penetration with a foreign object, the object is defined as “Foreign object, substance, instrument, or device” shall include any part of the body, except a sexual organ. A degree of consanguinity is required to complete the crime of incest. Bestiality is defined as, “Every person who has sexual contact with an animal.” The animal can be either alive or dead. Committing a lewd act is classified as a felony crime. The crime of annoying or molesting children, under 18 years of age, shall be punished by a fine not

[81] California Penal Code (2024)
[82] California Penal Code (2024)

exceeding five thousand dollars ($5,000) or imprisonment in a county jail. Indecent exposure is a felony upon the second violation.

KEY TERMS

- Rape
- Duress
- Menace
- FBI Uniform Crime Reports (UCR)
- Gang Rape
- Acting in Consent
- Unlawful Sexual Intercourse
- Sodomy
- Oral Copulation
- Penetration with a Foreign Object
- Incest
- Consanguinity
- Bestiality
- Lewd Acts
- Annoying or Molesting Children under 18
- Indecent Exposure

REVIEW QUESTIONS

1. Identify the crime of rape from a provided scenario.
2. Explain the difference between rape and gang rape.
3. Recite the age differences related to misdemeanor and felony statutory rape (261. 5 PC)
4. Define the crime of sodomy.
5. Define the crime of oral copulation.
6. List what is considered foreign objects with regard to 289 PC – Penetration with a Foreign Object
7. What characteristic qualifies a crime as incest (285 PC)?
8. Discuss the crime of bestiality.
9. What actions by a perpetrator qualify as lewd acts with children (288 PC)?
10. What actions by a perpetrator qualify as annoying or molesting children under 18 (647.6 PC)?
11. Outline the elements of indecent exposure.

CHAPTER 9

WEAPONS LAW

LEARNING OBJECTIVES

- Review the most common weapons law in California.
- Understand the elements of weapons possessions laws.
- Summarize the crimes related to weapons.

UNLAWFUL POSSESSON

Sawed Off Shotgun

The crime of possession of a sawed-off shotgun is defined in section 33210 of the California Penal Code.

Except as expressly provided in Sections 33215 to 33225, inclusive, and in Chapter 1 (commencing with Section 17700) of Division 2 of Title 2, and solely in accordance with those provisions, no person may manufacture, import into this state, keep for sale, offer for sale, give, lend, or possess any short-barreled rifle or short-barreled shotgun. Nothing else in any provision listed in Section 16580 shall be construed as authorizing the manufacture, importation into the state, keeping for sale, offering for sale, or giving, lending, or possession of any short-barreled rifle or short-barreled shotgun.[83]

Figure 9.1 Lupara. Photographs taken on 2007-06-08License migration redundantGFDLCC-BY-SA-3.0-migratedCC-BY-SA-2.5,2.0,1.0Self-published work.

[83] California Penal Code (2024)

Illegal Weapons

The crime of possession of illegal weapons is defined in section 16590 of the California Penal Code.

As used in this part, “generally prohibited weapon” means any of the following:

(a) An air gauge knife, as prohibited by Section 20310.

(b) Ammunition that contains or consists of a flechette dart, as prohibited by Section 30210.

(c) A ballistic knife, as prohibited by Section 21110.

(d) A belt buckle knife, as prohibited by Section 20410.

(e) A bullet containing or carrying an explosive agent, as prohibited by Section 30210.

(f) A camouflaging firearm container, as prohibited by Section 24310.

(g) A cane gun, as prohibited by Section 24410.

(h) A cane sword, as prohibited by Section 20510.

(i) A concealed dirk or dagger, as prohibited by Section 21310.

(j) A concealed explosive substance, other than fixed ammunition, as prohibited by Section 19100.

(k) A firearm that is not immediately recognizable as a firearm, as prohibited by Section 24510.

(l) A large-capacity magazine, as prohibited by Section 32310.

(m) A leaded cane or an instrument or weapon of the kind commonly known as a billy, blackjack, sandbag, sandclub, sap, or slungshot, as prohibited by Section 22210.

(n) A lipstick case knife, as prohibited by Section 20610.

(o) Metal knuckles, as prohibited by Section 21810.

(p) A metal military practice hand grenade or a metal replica hand grenade, as prohibited by Section 19200.

(q) A multi-burst trigger activator, as prohibited by Section 32900.

(r) A shobi-zue, as prohibited by Section 20710.

(s) A short-barreled rifle or short-barreled shotgun, as prohibited by Section 33215.

(t) A shuriken, as prohibited by Section 22410.

(u) An unconventional pistol, as prohibited by Section 31500.

(v) An undetectable firearm, as prohibited by Section 24610.

(w) A wallet gun, as prohibited by Section 24710.

(x) A writing pen knife, as prohibited by Section 20910.
(y) A zip gun, as prohibited by Section 33600.[84]

Figure 9.1: A Rifle and Ammunition.[xii]

CRIMES INVOLVING GUNS

Commission of Street-Gang Crime While Armed

The crime of the commission of a Street-Gang Crime while armed is defined in section 12021.5 of the California Penal Code.

[84] California Penal Code (2024)

(a) Every person who carries a loaded or unloaded firearm on his or her person, or in a vehicle, during the commission or attempted commission of any street gang crimes described in subdivision (a) or (b) of Section 186.22, shall, upon conviction of the felony or attempted felony, be punished by an additional term of imprisonment pursuant to subdivision (h) of Section 1170 for one, two, or three years in the court's discretion. The court shall impose the middle term unless there are circumstances in aggravation or mitigation. The court shall state the reasons for its enhancement choice on the record at the time of sentence.

(b) Every person who carries a loaded or unloaded firearm together with a detachable shotgun magazine, a detachable pistol magazine, a detachable magazine, or a belt-feeding device on his or her person, or in a vehicle, during the commission or attempted commission of any street gang crimes described in subdivision (a) or (b) of Section 186.22, shall, upon conviction of the felony or attempted felony, be punished by an additional term of imprisonment in the state prison for two, three, or four years in the court's discretion. The court shall impose the middle term unless there are circumstances in aggravation or mitigation. The court shall state the reasons for its enhancement choice on the record at the time of sentence.

(c) As used in this section, the following definitions shall apply:

(1) "Detachable magazine" means a device that is designed or redesigned to do all of the following:

(A) To be attached to a rifle that is designed or redesigned to fire ammunition.

(B) To be attached to, and detached from, a rifle that is designed or redesigned to fire ammunition.

(C) To feed ammunition continuously and directly into the loading mechanism of a rifle that is designed or redesigned to fire ammunition.

(2) "Detachable pistol magazine" means a device that is designed or redesigned to do all of the following:

(A) To be attached to a semiautomatic firearm that is not a rifle or shotgun that is designed or redesigned to fire ammunition.

(B) To be attached to, and detached from, a firearm that is not a rifle or shotgun that is designed or redesigned to fire ammunition.

(C) To feed ammunition continuously and directly into the loading mechanism of a firearm that is not a rifle or a shotgun that is designed or redesigned to fire ammunition.

(3) "Detachable shotgun magazine" means a device that is designed or redesigned to do all of the following:

(A) To be attached to a firearm that is designed or redesigned to fire a fixed shotgun shell through a smooth or rifled bore.

(B) To be attached to, and detached from, a firearm that is designed or redesigned to fire a fixed shotgun shell through a smooth bore.

(C) To feed fixed shotgun shells continuously and directly into the loading mechanism of a firearm that is designed or redesigned to fire a fixed shotgun shell.

(4) "Belt-feeding device" means a device that is designed or redesigned to continuously feed ammunition into the loading mechanism of a machinegun or a semiautomatic firearm.

(5) "Rifle" shall have the same meaning as specified in Section 17090.

(6) "Shotgun" shall have the same meaning as specified in Section 17190.[85]

Two Arrested for Killing Six in California

The two suspects – Angel Joseph Uriate, 35, and Noah David Beard, 25, – were taken into custody by sheriff's deputies and federal agents after being under around-the-clock surveillance since Jan 23, Tulare County sheriff Mike Bordreaux said, Reuters reported.

Uriate was injured in a gun battle with agents of the US Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) after he opened fire on officers as they approached him in Goshen, California, the town where the killings took place on Jan 16, Bordreaux said. He underwent surgery at a local hospital and was expected to survive, the sheriff said in a news conference announcing the arrests. Beard was captured in nearby Visalia without incident, Bordreaux said. Last month's carnage raised the profile of rising gang violence and drug trafficking in some of California's more rural, isolated areas, as a state known for some of the strictest gun laws in the country faced a spate of deadly mass shootings. The Goshen murders came one week before the first of two more highly publicized rampages by shooters in California that left a total of 18 victims dead in the Los Angeles suburb of Monterey Park and the San Francisco Bay-area coastal town of Half Moon Bay.

By comparison, authorities said, the violence in Goshen was more calculated and deliberate. "This was clearly not a random act of violence," Bordreaux said. "This family was targeted by cold-blooded killers. "Many of the victims died of gunshots to the head.

The sheriff described both suspects as members of the Nortenos, a primarily Mexican-American gang network affiliated with the prison-based criminal organization known as Nuestra Familia, Spanish for "our family." Bordreaux said two members of the victims' family were also "well-known, validated" members of the Nortenos gang.

[85] California Penal Code (2024)

“This case is very dark, it comes from a very dark place,” ATF special agent Joshua Jackson told reporters. A criminal complaint filed by county prosecutors yesterday charged each suspect with six counts of murder, as well as firearms felonies, in the shooting deaths. The attack, carried out on a residential property occupied by nine people, most of them family members, struck fear in a rural agricultural community of about 5,400 residents roughly midway between Los Angeles and San Francisco.

Bordreaux said chilling video footage discovered by investigators showed one victim, a 16-year-old mother, running with her 10-month-old son clutched in her arms as she tried to escape the shootings. She hurriedly lifted the infant over a fence and placed the baby on the ground on the other side, then scaled the fence herself, before both the child and the mother were shot dead, according to the sheriff. The teen mother’s 72-year-old grandmother was also among the slain. Two women on the property survived by hiding in a trailer.

Bordreaux said the two suspects were identified and placed under 24-hour surveillance starting a week after the killings, and authorities kept close tabs on both men until investigators had gathered sufficient evidence to charge them. Bordreaux said the pair are suspected of being the sole perpetrators of the killings, and that the massacre is believed to have stemmed from organized gang activity, though a precise motive remained undetermined.

Authorities identified Beard as the suspect accused of physically shooting the 16-year-old girl and her infant son. The investigation, which involved searches and questioning of inmates in several state prisons, was continuing with assistance from various local law enforcement agencies, state police, the California corrections department, the FBI and ATF, officials said.[86]

Committing a Felony While Armed

The crime of committing a felony while armed is defined in sections 12022 and 12022.5 of the California Penal Code.

12022 (a) (1) Except as provided in subdivisions (c) and (d), a person who is armed with a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment pursuant to subdivision (h) of Section 1170 for one year, unless the arming is an element of that offense. This additional term shall apply to a person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm.

(b) (1) A person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense.

[86] Tasnim News Agency (2023)

12022.5 (a) Except as provided in subdivision (b), any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense.[87]

Figure 9.2: A Car with Bullet Holes.[xiii]

Drive By Shooting

The crime of committing a drive by shooting is defined in section 12022.55 of the California Penal Code.

Notwithstanding Section 12022.5, any person who, with the intent to inflict great bodily injury or death, inflicts great bodily injury, as defined in Section 12022.7, or causes the death of a person, other than an occupant of a motor vehicle, as a result of discharging a firearm from a motor vehicle in the commission of a felony or attempted felony, shall be punished by an additional and consecutive term of imprisonment in the state prison for 5, 6, or 10 years.[88]

1 Dead, 5 Injured in Shooting after Leaving California House Party: Police

The mass shooting occurred in the parking lot of an apartment complex in Chico, about 90 miles north of Sacramento, Chico Police Lt. Terry Tupper told ABC News. Police responded to the scene around 3:30 a.m. and found several victims struck by gunfire, police said.

[87] California Penal Code (2024)
[88] California Penal Code (2024)

A shooter had opened fire from a vehicle into a group of people in the parking lot, Tupper said.

"The actual shooting was not random," Tupper said, adding that it is unclear whether any of the six shooting victims were specifically targeted. All six victims had recently left a house party in the apartment complex that had been cleared by police, Tupper said.

The surviving victims all suffered non-life-threatening injuries and included 18-, 19-, 20- and 21-year-old men, as well as a 17-year-old female, police said. Police believe the shooting to be an "isolated incident" and there is no threat to the community, Chico Police Chief Billy Aldridge said during a press briefing Saturday. Investigators are "aggressively pursuing some substantial leads" in the search for a suspect in the shooting, Tupper said.

Chico police had responded to the party about 30 minutes prior to the shooting following reports of someone brandishing a firearm at the gathering, according to Aldridge. Responding officers located someone in possession of a firearm and took them into custody, Aldridge said.

That individual matched the description of a suspect from a separate incident that occurred several hours earlier at another house party in Chico, Aldridge said. Police responded to the scene around 12:30 a.m. following reports that several rounds had been discharged from a firearm, the chief said.

Responding officers learned a fight had broken out after an individual was asked to leave the party, during which one person was allegedly struck on the head with a firearm and another was allegedly hit over the head with a glass bottle, Aldridge said. Both victims suffered non-life-threatening injuries and were treated at an area hospital, police said. The individual later apprehended at the second party Chico police responded to was arrested for possession of a firearm and reckless discharge, Aldridge said.[89]

Armor Piercing Ammo and Bulletproof Vests (12022.2 PC)

The crime of possessing armor piercing ammo and bulletproof vests is defined in section 12022.2 of the California Penal Code.

(a) Any person who, while armed with a firearm in the commission or attempted commission of any felony, has in his or her immediate possession ammunition for the firearm designed primarily to penetrate metal or armor, shall upon conviction of that felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony, be punished by an additional term of 3, 4, or 10 years. The court shall order the middle term unless there are circumstances in aggravation or mitigation. The court shall state the reasons for its enhancement choice on the record at the time of the sentence.

[89] Tasnim News Agency (2023)

(b) Any person who wears a body vest in the commission or attempted commission of a violent offense, as defined in Section 29905, shall, upon conviction of that felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of one, two, or five years. The court shall order the middle term unless there are circumstances in aggravation or mitigation. The court shall state the reasons for its enhancement choice on the record at the time of the sentence.

(c) As used in this section, "body vest" means any bullet-resistant material intended to provide ballistic and trauma protection for the wearer.[90]

POSSESSION LAWS

Loaded Firearm

The crime of possessing a loaded firearm is defined in section 25850 of the California Penal Code.

(a) A person is guilty of carrying a loaded firearm when the person carries a loaded firearm on the person or in a vehicle while in any public place or on any public street in an incorporated city, city and county, or in any public place or on any public street in a prohibited area of an unincorporated area of a county or city and county.

(b) In order to determine whether or not a firearm is loaded for the purpose of enforcing this section, peace officers are authorized to examine any firearm carried by anyone on the person or in a vehicle while in any public place or on any public street in an incorporated city or prohibited area of an unincorporated territory. Refusal to allow a peace officer to inspect a firearm pursuant to this section constitutes probable cause for arrest for violation of this section.[91]

Concealed Firearm

The crime of possessing a concealed firearm is defined in section 25400 of the California Penal Code.

(a) A person is guilty of carrying a concealed firearm when the person does any of the following:

(1) Carries concealed within any vehicle that is under the person's control or direction any pistol, revolver, or other firearm capable of being concealed upon the person.

(2) Carries concealed upon the person any pistol, revolver, or other firearm capable of being concealed upon the person.

[90] California Penal Code (2024)
[91] California Penal Code (2024)

(3) Causes to be carried concealed within any vehicle in which the person is an occupant any pistol, revolver, or other firearm capable of being concealed upon the person.

(b) A firearm carried openly in a belt holster is not concealed within the meaning of this section.[92]

Unloaded Firearm

The crime of possessing an unloaded firearm is defined in section 26350 of the California Penal Code.

(a) (1) A person is guilty of openly carrying an unloaded handgun when that person carries upon his or her person an exposed and unloaded handgun outside a vehicle while in or on any of the following:

(A) A public place or public street in an incorporated city or city and county.

(B) A public street in a prohibited area of an unincorporated area of a county or city and county.

(C) A public place in a prohibited area of a county or city and county.

(2) A person is guilty of openly carrying an unloaded handgun when that person carries an exposed and unloaded handgun inside or on a vehicle, whether or not on his or her person, while in or on any of the following:

(A) A public place or public street in an incorporated city or city and county.

(B) A public street in a prohibited area of an unincorporated area of a county or city and county.

(C) A public place in a prohibited area of a county or city and county.

(b) (1) Except as specified in paragraph (2), a violation of this section is a misdemeanor.[93]

Weapons of Mass Destruction (WMD)

The crime of possessing a WMD is defined in section 11418 of the California Penal Code.

(a) (1) Any person, without lawful authority, who possesses, develops, manufactures, produces, transfers, acquires, or retains any weapon of mass destruction, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for 4, 8, or 12 years.

[92] California Penal Code (2024)
[93] California Penal Code (2024)

(2) Any person who commits a violation of paragraph (1) and who has been previously convicted of Section 11411, 11412, 11413, 11418, 11418.1, 11418.5, 11419, 11460, 18715, 18725, or 18740 shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for 5, 10, or 15 years.

(b) (1) Any person who uses or directly employs against another person a weapon of mass destruction in a form that may cause widespread, disabling illness or injury to human beings shall be punished by imprisonment in the state prison for life.

(2) Any person who uses or directly employs against another person a weapon of mass destruction in a form that may cause widespread great bodily injury or death and causes the death of any human being shall be punished by imprisonment in the state prison for life without the possibility of parole. Nothing in this paragraph shall prevent punishment instead under Section 190.2.

(3) Any person who uses a weapon of mass destruction in a form that may cause widespread damage to or disruption of the food supply or "source of drinking water" as defined in subdivision (d) of Section 25249.11 of the Health and Safety Code shall be punished by imprisonment in the state prison for 5, 8, or 12 years and by a fine of not more than one hundred thousand dollars ($100,000).

(4) Any person who maliciously uses against animals, crops, or seed and seed stock, a weapon of mass destruction in a form that may cause widespread damage to or substantial diminution in the value of stock animals or crops, including seeds used for crops or product of the crops, shall be punished by imprisonment in the state prison for 4, 8, or 12 years and by a fine of not more than one hundred thousand dollars ($100,000).

(c) Any person who uses a weapon of mass destruction in a form that may cause widespread and significant damage to public natural resources, including coastal waterways and beaches, public parkland, surface waters, ground water, and wildlife, shall be punished by imprisonment in the state prison for three, four, or six years.

(d) (1) Any person who uses recombinant technology or any other biological advance to create new pathogens or more virulent forms of existing pathogens for use in any crime described in subdivision (b) shall be punished by imprisonment in the state prison for 4, 8, or 12 years and by a fine of not more than two hundred fifty thousand dollars ($250,000).

(2) Any person who uses recombinant technology or any other biological advance to create new pathogens or more virulent forms of existing pathogens for use in any crime described in subdivision (c) shall be punished by imprisonment in the state prison for three, six, or nine years and by a fine of not more than two hundred fifty thousand dollars ($250,000).[94]

[94] California Penal Code (2024)

Switchblade Knives

The crime of possessing a switchblade knife is defined in section 21510 of the California Penal Code.

Every person who does any of the following with a switchblade knife having a blade two or more inches in length is guilty of a misdemeanor:

(a) Possesses the knife in the passenger's or driver's area of any motor vehicle in any public place or place open to the public.

(b) Carries the knife upon the person.

(c) Sells, offers for sale, exposes for sale, loans, transfers, or gives the knife to any other person.[95]

CHAPTER SUMMARY

No person may manufacture, import into this state, keep for sale, offer for sale, give, lend, or possess any short-barreled rifle or short-barreled shotgun. There is a punishment enhancement when a gang member carries a loaded or unloaded firearm on his person or in a vehicle during the commission of a crime. A person who is armed with a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment for one year, unless the arming is an element of that offense. A loaded and concealed firearm is classified as two misdemeanor crimes. It is a misdemeanor to openly carry an unloaded firearm without a CCW. The penalty for using a WMD is imprisonment for life without the possibility of parole. It is illegal to possess a switchblade over two inches in length.

KEY TERMS

- Short-barreled shotgun
- Flechette dart
- Dirk
- Dagger
- Shuriken
- Street gang
- Gang member
- Drive-by shooting
- Armor-piercing ammunition
- Open Carry
- WMDs
- Switchblade knife

[95] California Penal Code (2024)

REVIEW QUESTIONS

1. What is the legal minimum length for a shotgun?
2. Conduct internet research and locate an image of each of the illegal weapons included in 16590 PC and create a reference guide of each weapon.
3. Locate an incident of street-gang violence where a firearm was used. Identify the crimes involved in the case.
4. Find at least three movies where a drive-by shooting occurred. Describe what you noticed.
5. Explain the elements of 21510 PC.

CHAPTER 10

PERJURY, BRIBERY, WITNESS INTIMIDATION, CRIMINAL THREATS, HATE CRIMES, TERRORISM THROUGH SYMBOLS, AND HARRASSING PHONE CALLS

LEARNING OBJECTIVES

- Distinguish between the crime of bribery and the crime of gratuity.
- Identify the crime of perjury from a provided scenario.
- Recognize the crime of witness intimidation.
- Examine the crime of criminal threats.
- Recite the Corpus Delicti of hate crime.
- Summarize the crime of terrorism through symbols.
- Understand the crime of harassing phone calls.

BRIBERY

The crime of bribery is defined in sections 67 and 68 of the California Penal Code.

67 Every person who gives or offers any bribe to any executive officer in this state, with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer, is punishable by imprisonment in the state prison for two, three or four years, and is disqualified from holding any office in this state.

68(a) Every executive or ministerial officer, employee, or appointee of the State of California, a county or city therein, or a political subdivision thereof, who asks, receives, or agrees to receive, any bribe, upon any agreement or understanding that his or her vote, opinion, or action upon any matter then pending, or that may be brought before him or her in his or her official capacity, shall be influenced thereby, is punishable by imprisonment in the state prison for two, three, or four years and, in cases in which no bribe has been actually received, by a restitution fine of not less than two thousand dollars ($2,000) or not more than ten thousand dollars ($10,000) or, in cases in which a bribe was actually received, by a restitution fine of at

least the actual amount of the bribe received or two thousand dollars ($2,000), whichever is greater, or any larger amount of not more than double the amount of any bribe received or ten thousand dollars ($10,000), whichever is greater, and, in addition thereto, forfeits his or her office, employment, or appointment, and is forever disqualified from holding any office, employment, or appointment, in this state.

(b) In imposing a restitution fine pursuant to this section, the court shall consider the defendant's ability to pay the fine. [96]

Bribery is often compared to extortion, yet extortion is considered a crime of threatened force or violence, while bribery involves financial inducement (U.S. v. Adcock, 2011). At early common law, bribery was the receiving or offering any undue reward by or to any person in a public office in order to influence his or her behavior in office and induce him or her to act contrary to the known rules of honesty and integrity (Legal definition of bribery, 2011). In modern times, many criminal statutes define bribery as conferring, offering, agreeing to confer, or soliciting, accepting, or agreeing to accept any benefit upon a public official (criminal act) with the specific intent or purposely or the general intent or knowingly to form an agreement or understanding that the public official's vote, opinion, judgment, action, decision, or exercise of discretion will be influenced by the benefit (N.Y. Penal Law § 200.00, 2011; N.Y. Penal Law § 200.10).

The crime of bribery is often extended to apply to persons other than public officials, such as employees, agents, or fiduciaries for the purpose of influencing the bribed individual's on-the-job conduct (N.Y. Penal Law § 180.00, 2011). This type of bribery is typically called commercial bribery (N.Y. Penal Law § 180.00, 2011). Bribery can also cover members of a state legislature (Cal. Penal Code § 85, 2011; Cal. Penal Code § 86; Cal. Penal Code § 93), any judicial officer, juror, referee, umpire (Cal. Penal Code § 92, 2011), or witness (Or. Rev. Stat. § 162.265, 2011; Or. Rev. Stat. §162.275, 2011) when a bribe is conferred or offered, asked for, received, or agreed to be received to influence their vote or decision.

[96] California Penal Code (2024)

Figure 10.1: Someone handing money to another individual.[xiv]

Example of Bribery

Isabel, a defendant on trial for perjury, notices the judge presiding in her case shopping at Macy's department store. Isabel thereafter buys an expensive watch, has it wrapped, walks up to the judge, and offers it to him as a gift. Isabel has most likely committed bribery in this case. Although the judge did not accept Isabel's "gift," most states criminalize as bribery the offer of any benefit, so the act of bribery is complete when Isabel proffers the watch. In addition, based on these facts, Isabel's connection to the judge is only through her perjury prosecution, so her act appears calculated to influence his decision in that case, especially because the watch is expensive and not merely a token. Note that a prosecutor is required to prove beyond a reasonable doubt Isabel's specific intent or purposely or general intent or knowingly to enter into an agreement with the judge influencing his decision, which is challenging even under the obvious circumstances apparent in this case.[97]

GRATUITY

The crime of gratuity is defined in section 70 of the California Penal Code.

(a) Every executive or ministerial officer, employee, or appointee of the State of California, or any county or city therein, or any political subdivision thereof, who knowingly asks, receives, or agrees to receive any emolument, gratuity, or reward, or any promise thereof excepting such as may be authorized by law for doing an official act, is guilty of a misdemeanor.[98]

[97] University of Minnesota Libraries Publishing (2015)
[98] California Penal Code (2024)

A gratuity is the gift of an item to another person based solely on their occupation. A gratuity is most often given to officers by workers in the service industry, such as waiters and bartenders. Additionally, and problematically, gratuities are given for services expected and services already rendered; free coffees for law enforcement officers often come with strings attached, or at the very least, as an insurance policy to gain favors in the future should the need arise.

A cynic would argue that offering free coffee is not an altruistic gesture, but rather an insurance policy for security in the future. A law enforcement officer who receives free coffee from a restaurateur will likely be expected to provide extra service to the restaurant should it be required. Conversely, a law enforcement officer who removes a drunk person from a restaurant can often expect a free coffee after the drunk has been removed. Four main reasons that gratuities are given to law enforcement officers are:

1. Because of the theory of reciprocity, where people feel they owe something to the giver. In a law enforcement context, this will be collected after the gift (the free coffee) is given.

2. To ensure future cooperation, where the gift-giver may want the services of the officer in the future. This can include gaining biased support of officers in spite of the facts surrounding an issue.

3. To use the presence of police officers, attracted by free coffee, as an advertisement to potential patrons that the environment is safe.

4. To use the presence of police officers, attracted by free coffee, as a way to dissuade potentially problematic patrons from patronizing the restaurant.

Gratuities are often seen as the first step on the slippery slope toward major corruption (Coleman, 2004), and it is for this reason that accepting gratuities is always frowned upon by law enforcement agencies. Coleman argues that while each step is, on the slippery slope, individually insignificant, it is the cumulative effect of the steps that draws and pushes officers to more serious forms of unethical behaviors. Once an officer starts on the slippery slope, one step leads to another: the coffee leads to a coffee and a donut, which eventually leads to a free dinner. The cumulative effect of these gratuities, according to Coleman (2004), leads to a situation that is difficult for the officer to stop doing or turn around.

Coleman (2004) also identifies an absolutist perspective in which the free-coffee gratuity is viewed the same as receiving a thousand-dollar bribe. They are both wrong regardless of the financial gain received by the officer. It can be argued that the intent of the officer should be considered. If the officer's intent in receiving the free coffee is to build community cohesion and better relations with the police, that should always be considered. However, if the intent is

unethical, such as to save money by using the officer's power position, then this too should be considered.[99]

PERJURY

The crime of perjury is defined in section 118 of the California Penal Code.

(a) Every person who, having taken an oath that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which the oath may by law of the State of California be administered, willfully and contrary to the oath, states as true any material matter which he or she knows to be false, and every person who testifies, declares, deposes, or certifies under penalty of perjury in any of the cases in which the testimony, declarations, depositions, or certification is permitted by law of the State of California under penalty of perjury and willfully states as true any material matter which he or she knows to be false, is guilty of perjury.

(b) No person shall be convicted of perjury where proof of falsity rests solely upon contradiction by testimony of a single person other than the defendant. Proof of falsity may be established by direct or indirect evidence.[100]

Witness testimony is important in a variety of settings. Juries depend on witness testimony to reach a fair and impartial verdict in civil and criminal trials, and grand juries depend on witness testimony to indict defendants for criminal conduct. Thus, modern laws of perjury are calculated to ensure that witnesses testify truthfully so that justice can be done in each individual case.

In the Middle Ages, the witnesses were the jurors, so the criminalization of false witness testimony did not occur until the sixteenth century when the idea of a trial by an impartial jury emerged. The first common-law prohibition against witness perjury criminalized false testimony, given under oath, in a judicial proceeding, about a material issue. This definition was also incorporated into early American common law (Jrank.org, 2011).

In modern times, every state prohibits perjury, as well as the federal government (18 U.S.C. § 1621, 2011). Most state statutes or state common law, in states that allow common-law crimes, define perjury as a false material statement (criminal act), made with the specific intent or purposely to deceive, or the general intent or knowingly that the statement was false, in a judicial or official proceeding (attendant circumstance), under oath (attendant circumstance) (Ga. Code tit. 16 § 16-10-70, 2011).

[99] McCartney, S. and Parent, R. (2015).
[100] California Penal Code (2024)

Example of Perjury

Marcus testifies that he did not see Lindsay walked out of the Macy's department store without paying for the necklace because he does not want to admit that he was shopping for jewelry to buy his girlfriend. Anthony, who is Macy's civil trial attorney, cross-examines Marcus, and forces him to admit that he saw Lindsay steal the necklace, and that he was lying previously. Marcus has most likely committed perjury in this example. Marcus made a false statement, under a validly administered oath, in a judicial proceeding, with knowledge of its falsity. Marcus's statement was material because, if believed, it would have helped exonerate Lindsay in her civil case. In many jurisdictions, the trier of fact, which could be a judge or jury, determines whether or not the statement is material. Marcus's admission that he was lying is not a retraction that could serve as a defense because it was not made until the lie was about to be exposed. Thus, all the elements of perjury appear to be present, and Marcus may be subject to prosecution for and conviction of this offense.[101]

WITNESS INTIMIDATION

The crime of witness intimidation is defined in section 136.1 of the California Penal Code.

(a) Except as provided in subdivision (c), any person who does any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:

> (1) Knowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.
>
> (2) Knowingly and maliciously attempts to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.
> (3) For purposes of this section, evidence that the defendant was a family member who interceded in an effort to protect the witness or victim shall create a presumption that the act was without malice.

(b) Except as provided in subdivision

(c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:

> (1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge.

[101]University of Minnesota Libraries Publishing (2015)

(2) Causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof.

(3) Arresting or causing or seeking the arrest of any person in connection with that victimization.[102]

Judge Dresses Down Federal Prosecutors

William Ruehle was charged with criminal securities law violations. Mr. Ruehle's defense was that his actions were always made in good faith — that he did not act with criminal intent. That is an important aspect of the case. To take another example that most people can relate to, we all know the tax code is extremely complicated. People (including IRS employees) make honest mistakes about it all the time. Under the law, the government can only make a case for criminal tax evasion if it can persuade a jury that the person accused knew what the tax law required and proceeded to violate it anyway.

Crucial to Mr. Ruehle's defense were three witnesses whom he wanted to call on his behalf at trial. They were familiar with his business dealings and would support his good faith defense. That was the plan anyway.

In preparation for trial, prosecutors embarked on an outrageous mission to "flip" or destroy the defense witnesses. One lady was fired from her job after prosecutors called her employer and spread innuendo. Prosecutors then pressured her into pleading guilty to some offense that allegedly took place seven years earlier — a very peculiar prosecution under the surrounding circumstances. And then her plea deal was contingent upon this lady changing her story to support the prosecution, not Mr. Ruehle. Taking all this in, the judge said he had "absolutely no confidence that any portion of [this lady's] testimony was based upon her own independent recollection of events as opposed to what the government thought her recollection should be on those events. "And that is just one witness. It gets worse.

Here, in summary, is how Judge Cormac J. Carney viewed the case:

> I have a solemn obligation to hold the government to the Constitution. I'm doing nothing more and nothing less. And I ask my critics to put themselves in the shoes of the accused.
>
> You are charged with serious crimes and, if convicted of them, you will spend the rest of your life in prison. You only have three witnesses to prove your innocence, and the government has intimidated and improperly influenced each one of them. Is that fair? Is that justice? I say absolutely not.

[102] California Penal Code (2024)

Judge Carney proceeded to dismiss the case before the jury could begin its deliberations because the government's conduct was so egregious.
Some of the defense attorneys in the courtroom said that they had started their careers as prosecutors and that they understood there is a "cloak of credibility" when prosecutors represent events to employers, reporters, and judges. (Ask yourself what you would think if a prosecutor told you that "Mary Smith is an unindicted co-conspirator in our on-going investigation…") Watching this judge correct a miscarriage of justice, they said, was one of the most remarkable events they had witnessed in their legal careers. They hoped the judge's ruling would be heard "throughout the country."

The ruling is only about 15 pages, double spaced. Read the whole thing (pdf). (Really — do it this time!) I was obviously not present during the proceedings in this case, but it is an extraordinary move for a federal judge to dismiss a case, with prejudice, during a trial. It is my view that the conduct of the prosecution must have been truly blatant.

This seems like a true scandal. In a just world, the prosecutors would now be investigated for criminal witness intimidation and for professional misconduct by bar associations. Judge Carney's opinion should be reprinted verbatim in law school textbooks to teach future judges to keep their eyes open, to keep an open mind, to be impartial, and to beware of those with a "win-at-all-costs" mentality.[103]

CRIMINAL THREATS

The crime of criminal threats is defined in section 422 of the California Penal Code.

(a) Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison.

(b) For purposes of this section, "immediate family" means any spouse, whether by marriage or not, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household.

[103] Lynch, T. (2009)

(c) “Electronic communication device” includes, but is not limited to, telephones, cellular telephones, computers, video recorders, fax machines, or pagers.[104]

HATE CRIMES

Hate crime is defined in sections 422.6 of the California Penal Code.

(a) No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of this state or by the Constitution or laws of the United States in whole or in part because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55.

> 422.55. For purposes of this title, and for purposes of all other state law unless an explicit provision of law or the context clearly requires a different meaning, the following shall apply:
>
> > (a) “Hate crime” means a criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim:
> >
> > (1) Disability.
> > (2) Gender.
> >
> > (3) Nationality.
> >
> > (4) Race or ethnicity.
> >
> > (5) Religion.
> >
> > (6) Sexual orientation.
> >
> > (7) Association with a person or group with one or more of these actual or perceived characteristics.

(b) No person, whether or not acting under color of law, shall knowingly deface, damage, or destroy the real or personal property of any other person for the purpose of intimidating or interfering with the free exercise or enjoyment of any right or privilege secured to the other person by the Constitution or laws of this state or by the Constitution or laws of the United States, in whole or in part because of one or more of the actual or perceived characteristics of the victim listed in subdivision (a) of Section 422.55.[105]

[104] California Penal Code (2024)
[105] California Penal Code (2024)

TERRORISM THROUGH SYMBOLS

The crime of terrorism through symbols is defined in section 11411 of the California Penal Code.

a) It is the intent of the Legislature to criminalize the placement or display of the Nazi Hakenkreuz (hooked cross), also known as the Nazi swastika that was the official emblem of the Nazi party, for the purpose of terrorizing a person. This legislation is not intended to criminalize the placement or display of the ancient swastika symbols that are associated with Hinduism, Buddhism, and Jainism and are symbols of peace.

(b) A person who hangs a noose, knowing it to be a symbol representing a threat to life, on the private property of another, without authorization, for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that private property, or who hangs a noose, knowing it to be a symbol representing a threat to life, on the property of a school, college campus, public place, place of worship, cemetery, or place of employment, for the purpose of terrorizing a person who attends, works at, or is otherwise associated with the school, college campus, public place, place of worship, cemetery, or place of employment, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months or two or three years, by a fine of not more than ten thousand dollars ($10,000), or by both the fine and imprisonment, or in a county jail not to exceed one year, or by a fine not to exceed five thousand dollars ($5,000), or by both the fine and imprisonment for the first conviction.

(c) A person who places or displays a sign, mark, symbol, emblem, or other physical impression, including, but not limited to, a Nazi swastika, on the private property of another, without authorization, for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that private property, or who places or displays a sign, mark, symbol, emblem, or other physical impression, including, but not limited to, a Nazi swastika, on the property of a school, college campus, public place, place of worship, cemetery, or place of employment, for the purpose of terrorizing a person who attends, works at, or is otherwise associated with the school, college campus, public place, place of worship, cemetery, or place of employment, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months or two or three years, by a fine of not more than ten thousand dollars ($10,000), or by both the fine and imprisonment, or in a county jail not to exceed one year, by a fine not to exceed five thousand dollars ($5,000), or by both the fine and imprisonment for the first conviction.

(d) A person who burns or desecrates a cross or other religious symbol, knowing it to be a religious symbol, on the private property of another without authorization for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that private property, or who burns, desecrates, or destroys a cross or other religious symbol, knowing it to be a religious symbol, on the property

of a school, college campus, public place, place of worship, cemetery, or place of employment for the purpose of terrorizing a person who attends, works at, or is otherwise associated with the school, college campus, public place, place of worship, cemetery, or place of employment shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months or two or three years, by a fine of not more than ten thousand dollars ($10,000), or by both the fine and imprisonment, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed five thousand dollars ($5,000), or by both the fine and imprisonment for the first conviction.[106]

HARRASSING PHONE CALLS

The crime of harassing phone calls is defined in section 653m of the California Penal Code

(a) Every person who, with intent to annoy, telephones or makes contact by means of an electronic communication device with another and addresses to or about the other person any obscene language or addresses to the other person any threat to inflict injury to the person or property of the person addressed or any member of his or her family, is guilty of a misdemeanor. Nothing in this subdivision shall apply to telephone calls or electronic contacts made in good faith.

(b) Every person who, with intent to annoy or harass, makes repeated telephone calls or makes repeated contact by means of an electronic communication device, or makes any combination of calls or contact, to another person is, whether or not conversation ensues from making the telephone call or contact by means of an electronic communication device, guilty of a misdemeanor. Nothing in this subdivision shall apply to telephone calls or electronic contacts made in good faith or during the ordinary course and scope of business.

(c) Any offense committed by use of a telephone may be deemed to have been committed when and where the telephone call or calls were made or received. Any offense committed by use of an electronic communication device or medium, including the Internet, may be deemed to have been committed when and where the electronic communication or communications were originally sent or first viewed by the recipient.[107]

CHAPTER SUMMARY

Offering and accepting a bribe is a felony and may result in disqualification from holding any office in this state. For the crime of gratuity to be complete, there must be an expectation of reward. Perjury is the crime charged for lying under oath. However, the falsity must be directly related to evidence. More specifically, a witness lying about her age is not perjury provided the case in question is not related to age. Witness intimidation ranges from verbal action to assault. Any person who willfully threatens to commit a crime which will result in death or great bodily

[106] California Penal Code (2024)
[107] California Penal Code (2024)

injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out. Displaying a symbol such as a swastika to terrorize another is guilty of terrorism through symbols. Every person who, with intent to annoy, telephones or makes contact by means of an electronic communication device with another and addresses to or about the other person any obscene language or addresses to the other person any threat to inflict injury to the person or property of the person addressed or any member of his or her family, is guilty of a misdemeanor.

KEY TERMS

- Bribery
- Gratuity
- Perjury
- Witness Intimidation
- Criminal Threats
- Hate Crimes
- Terrorism through Symbols
- Swastika
- Harassing Phone Calls

REVIEW QUESTIONS

1. Identify the difference between the crime of bribery and the crime of gratuities, be specific.
2. Explain the crime of perjury as if the intended recipient had no background in studying law.
3. Create a list of possible ways a person can be charged with witness intimidation.
4. Describe the crime of criminal threats.
5. What key element differentiates a hate crime from any another crime?
6. When investigating a report of harassing phone calls, construct a list of steps you would take in the investigation.

IDEA FRAMEWORK

"Hate Speech" Laws Undermine Free Speech and Equality

Having no specific legal definition, "hate speech" is a vague term. It is generally understood to mean speech that expresses hateful or bigoted views about certain groups that historically have been subject to discrimination. Concerned by the impact of hate speech on vulnerable populations, social justice advocates see sense in restricting this type of speech.

However, these types of laws often fall hardest on the very people they are intended to protect. Nadine Strossen explores this idea in her new book, Hate Speech: Why We Should Resist It with Free Speech, Not Censorship. (Hereafter all page citations are to this book).

Strossen draws attention to the fact that prohibitions of "hate speech" are characterized by unavoidable vagueness and overbreadth. A law is "unduly vague" (and unconstitutional) when people "of common intelligence must necessarily guess at its meaning." "Hate speech" laws are inherently subjective and ambiguous in their language, with the use of words like "insulting," "abusive," and "outrageous." Specific to laws about speech, vagueness "inevitably deters people from engaging in constitutionally protected speech" (69).

One person's "hate speech" is another's "anti-hate speech." Strossen cites many examples in which certain religious views are assailed as "hate speech" against LGBT individuals, while critiques of those religious views are attacked as anti-religious "hate speech."

This issue is also prevalent on campus, exemplified by a situation at Harvard University in which a group of students hung a confederate flag from their dorm room. In response, other students hung swastikas from their windows.

Strossen notes the irony of the situation:

> Of course, the swastika is deeply identified with Hitler's anti-Semitic and other egregiously hateful ideas, not to mention genocide. However, the Harvard Students who hung the swastika were trying to convey the opposite message, condemning the racism that the Confederate flag connoted to them by equating it with swastika. So, should these swastika displays count as "hate speech"—or as anti- "hate speech" (78–79)?

Deciding what should count as "hate speech" leaves room for decision-makers to err or disagree about whether an expression constitutes "hate speech." This arbitrariness of these laws on campus means that "…all members of the campus community face enforcement that is unpredictable and inconsistent at best, and arbitrary, capricious, and discriminatory at worst" (77).

Moreover, "given the pervasiveness of individual and institutional bias," the government is likely to enforce "hate speech" laws, as it has other laws, to the disadvantage of the disempowered and those with unpopular ideas. David Cole, ACLU legal director reiterates this point:

> Here is the ultimate contradiction in the argument for state suppression of speech in the name of equality: it demands protection of disadvantaged minorities' interests, but in a democracy, the state acts in the name of the majority, not the minority. Why would disadvantage minorities trust representatives of the majority to decide whose speech should be censored (81)?

Strossen observes this phenomenon even in countries with established democratic governments. Take Canada, for example, which is more willing to restrict certain forms of speech than the United States. The Canadian Supreme Court explains the word "hatred," (as used in their laws) as "unusually strong and deep-felt emotions of detestation, calumny and vilification;" and "enmity and extreme ill-will … which goes beyond mere disdain or dislike." How confident would you be in distinguishing between speech that conveys "disdain," which not punishable, and speech that conveys "detestation" or "vilification," which is punishable? The consequence of this innate vagueness and overbreadth is illustrated in the following case: Canadian customs seized copies of a book being imported from the United States because it was dangerous, racist, and sexist. The book was Black Looks: Race and Representation by bell hooks, African-American feminist scholar who was then a professor at Oberlin College. hooks describe the impact of this decision in "Outlaw Culture: Resisting Representations":

> It seemed ironic that this book, which opens with a chapter urging everyone to learn to "love blackness," would be accused of encouraging racial hatred. I doubt that anyone at the Canadian border read this book: the target for repression and censorship was the radical bookstore, not me…it was another message sent to remind radical bookstores—particularly those that sell feminist, lesbian, and/or overtly sexual literature—that the state is watching them and ready to censor.

Thus, "hate speech" laws are enforced against the certain groups they try to protect. We must resist solutions that embrace censorship, as hate speech laws fall hardest on those they aim to protect. Instead, we should favor the liberal solution, more speech:

> Just as free speech always has been the strongest weapon to advance reform movements, including equal rights causes, censorship always has been the strongest weapon to thwart them. That general pattern applies to "hate speech" laws, even though they are adopted to advance equality (81).[108]

[108] Samples (2018)

CHAPTER 11

CRIMES AGAINST OFFICERS, CRIMES AGAINST PEACE, AND FALSE REPORTING OF A CRIME

LEARNING OBJECTIVES

- Distinguish between the felony and misdemeanor crime of resisting an officer.
- Review the crime of 836.6 PC – Escape from a Peace Officer.
- Explain the crime of lynching.
- Describe the crime of impersonating public officers.
- Summarize the crimes of unlawful assembly, rout, and riot.
- Examine the crime of looting.
- Classify the crime of falsely reporting a crime.

CRIMES AGAINST OFFICERS

Resisting an Executive Officer

The crime of resisting an executive officer is defined in section 69 of the California Penal Code.

(a) Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon the officer by law, or who knowingly resists, by the use of force or violence, the officer, in the performance of his or her duty, is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment pursuant to subdivision (h) of Section 1170, or in a county jail not exceeding one year, or by both such fine and imprisonment.[109]

Resisting an Officer

The crime of resisting an officer is defined in section 148 of the California Penal Code.

(a) (1) Every person who willfully resists, delays, or obstructs any public officer, peace officer, or an emergency medical technician, as defined in Division 2.5 (commencing with Section 1797) of the Health and Safety Code, in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars ($1,000), or

[109] California Penal Code (2024)

by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment.[110]

Resisting Arrest and Racism - the Crime of "Disrespect"

John Hill is a poor Black man, his body covered in burn scars. He was riding his bicycle down Alston Avenue in Durham, North Carolina to his job at a convenience store. As he neared the intersection at North Carolina Central University Law School where I teach, he saw the light was red. Having cycled through the intersection many times on his way to work, John timed his pedaling perfectly so that the light turned green as he entered the intersection. A Durham City Police Officer, Officer Daniels, saw John and initiated a traffic stop for entering the intersection while the red light was still red.

Officer Daniels was a member of Durham's High Enforcement Abatement Team (HEAT) charged with drug enforcement and investigations. He was not a regular traffic control or patrol officer. Officer Daniels' job was "handle crime hot spots,"' and not issue traffic tickets. Officer Daniels exited his vehicle and violated protocol when he did not have the audio microphone running on the recording equipment. But the video dash cam in his patrol vehicle captured the incident. As Officer Daniels approached John, John tried to explain that he did not run the red light. He told Officer Daniels he was on his way to work, and timed the entry into the intersection as it turned green. Officer Daniels informed John that a dash cam (video recorder) in his vehicle was recording their interaction. John suggested that they look at the video as proof he did not run the red light. Officer Daniels began yelling at John to sit down.

After yelling at John for 60 seconds, Officer Daniels threw John to the ground and placed him in a take-down hold. John began yelling, "I can't breathe!" Other officers arrived at the scene and piled on John. During the attack on John, officers busted his head and fractured his arm. Officer Daniels arrested John and searched his backpack, finding nothing. Then he took John to the Durham County jail where he was booked for two charges: running a red light on a bicycle and resisting, delaying, or obstructing a law enforcement officer in the performance of his duty. At trial, the officer testified he never heard John yell he could not breathe. He also said John Hill came at him and threatened his safety, but the video clearly showed that John stood on the curb and never approached the officer. Chief District Court Judge Morey dismissed the resisting charge on the grounds Officer Daniels used excessive force saying, "I don't see that there was any reason to place hands on him. I didn't see aggression. There was much inconsistency between what we could hear and what we could see. He was slammed."

The charge of "resisting, delaying, or obstructing" (RDO) is a law enforcement tool used to punish non-cooperative suspects. The offense is not used to protect officer safety or promote public safety, but instead officers use the Resisting charge as a discretionary tool to suppress dissent and penalize vulnerable arrestees. The Resisting charge epitomizes the way that policing of poor people and people of color is more about social control than public safety.

[110] California Penal Code (2024)

This kind of situation happens repeatedly in my community and around the country, sometimes with deadly consequences. It deserves careful attention and understanding from multiple points of view. It is layered with psychology, history, culture, economics, politics, and the law. The fundamental values at stake are described as "respect" or "trust," concerns of "officer safety" and "racial profiling," "equal protection of the law." Although people can demonstrate respect even when there is none, police can only earn real respect over time with demonstrated fair treatment and professional integrity.

Not all officers behave this way. Some of them do not stretch their authority to its limits, and then assert their power in arrogant disrespect. Unfortunately, some defenders of this police behavior minimize this symptom of systemic racialized oppression by individualizing the problem - police misconduct is a matter of "a few bad apples," they say. These apologists forget the full aphorism, "a few bad apples spoil the barrel." This behavior is not the result of a few "bad apples," it is police power used to control people of color, rather than keeping communities safe. Officer Daniels did not throw Mr. Hill to the ground and injure him for the sake of public safety. He did it to control Mr. Hill. Such contested police encounters offer an opportunity to not only explore and remedy some of the failures of our criminal justice system.[111]

ESCAPE FROM A PEACE OFFICER

The crime of escape from a peace officer is defined in section 836.6 of the California Penal Code.

(a) It is unlawful for any person who is remanded by a magistrate or judge of any court in this state to the custody of a sheriff, marshal, or other police agency, to thereafter escape or attempt to escape from that custody.

(b) It is unlawful for any person who has been lawfully arrested by any peace officer and who knows, or by the exercise of reasonable care should have known, that he or she has been so arrested, to thereafter escape or attempt to escape from that peace officer.

(c) Any person who violates subdivision (a) or (b) is guilty of a misdemeanor, punishable by imprisonment in a county jail not to exceed one year. However, if the escape or attempted escape is by force or violence, and the person proximately causes a peace officer serious bodily injury, the person shall be punished by imprisonment in the state prison for two, three, or four years, or by imprisonment in a county jail not to exceed one year.[112]

[111] Holmes (2017)
[112] California Penal Code (2024)

LYNCHING

The crime of lynching is defined in section 405a of the California Penal Code.

A person who participates in the taking by means of a riot of another person from the lawful custody of a peace officer is guilty of a felony, punishable by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years.[113]

PROVIDING FALSE INFORMATION TO AN OFFICER

The crime of providing false information to an officer is defined in section 148.9 of the California Penal Code.

(a) Any person who falsely represents or identifies himself or herself as another person or as a fictitious person to any peace officer listed in Section 830.1 or 830.2, or subdivision (a) of Section 830.33, upon a lawful detention or arrest of the person, either to evade the process of the court, or to evade the proper identification of the person by the investigating officer is guilty of a misdemeanor.[114]

Figure 11.1: A police officer in riot gear.[xv]

[113] California Penal Code (2024)
[114] California Penal Code (2024)

IMPERSONATING PUBLIC OFFICERS

The crime of impersonating public officers is defined in section 146a of the California Penal Code.

(a) Any person who falsely represents himself or herself to be a deputy or clerk in any state department and who, in that assumed character, does any of the following is guilty of a misdemeanor punishable by imprisonment in a county jail not exceeding six months, by a fine not exceeding two thousand five hundred dollars ($2,500), or both the fine and imprisonment:

(1) Arrests, detains, or threatens to arrest or detain any person.
(2) Otherwise intimidates any person.
(3) Searches any person, building, or other property of any person.
(4) Obtains money, property, or other thing of value.

(b) Any person who falsely represents himself or herself to be a public officer, investigator, or inspector in any state department and who, in that assumed character, does any of the following shall be punished by imprisonment in a county jail not exceeding one year, by a fine not exceeding two thousand five hundred dollars ($2,500), or by both that fine and imprisonment, or by imprisonment pursuant to subdivision (h) of Section 1170:

(1) Arrests, detains, or threatens to arrest or detain any person.
(2) Otherwise intimidates any person.
(3) Searches any person, building, or other property of any person.
(4) Obtains money, property, or other thing of value.[115]

Florida Man Caught impersonating U.S. Marshal After Running Red Light

Marion County Sheriff's Office (MCSO) Corporal Neil Rosaci arrested 52-year-old Derry Wayne Lambert for False Impersonation of a Law Enforcement Officer, Unlawful Use of Blue Lights, Unlawful Use of a Badge, Possession of a Firearm during the Commission of a Felony, Possession of Diazepam, and Introduction of Contraband into a Detention Facility. On Monday, at approximately 5:15 p.m., Corporal Rosaci was at the Marathon gas station near South Highway 301 and SE Highway 42. While fueling his agency patrol vehicle, he heard an unfamiliar emergency siren and observed a black pickup truck, equipped with flashing red and blue emergency lights, driving around cars and through a red light. Due to the unusual tone of the siren and the fact that there were no calls for service that would require such a response from law enforcement at that time, a traffic stop was conducted. Upon approaching the vehicle, Lambert was observed wearing a hat with the lettering "Police U.S. Marshal" and a Department of Justice seal. He also displayed a badge and claimed that he was a U.S. Marshal. Lambert advised he was responding to a shooting in Marion Oaks, but there were no reported shootings in the area. After several attempts to verify his law enforcement status yielded negative results. Corporal Rosaci contacted MCSO's U.S. Marshal Liaison, who responded to interview Lambert.

[115] California Penal Code (2024)

During the interview, Lambert provided inconsistent information, and it became apparent that Lambert was falsely impersonating a U.S. Marshal. A search of his vehicle revealed he had a full control panel for emergency sirens and lights, as well as a firearm. Lambert was arrested and transported to the Marion County Jail. At the jail, Detention Deputy Jarred Bryant located several Diazepam pills in a concealed compartment inside Lambert's wallet. Due to the nature of this incident, there is concern that this is not the only time Lambert has impersonated a law enforcement officer.[116]

CRIMES AGAINST PEACE

Unlawful Assembly

The crime of unlawful assembly is defined in section 407 of the California Penal Code.
Whenever two or more persons assemble together to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly.[117]

Rout

The crime of rout is defined in section 406 of the California Penal Code.
Whenever two or more people, assembled and acting together, make any attempt or advance toward the commission of an act which would be a riot if actually committed, such assembly is a rout.

Figure 11.2: A group of people rioting.[xvi]

[116] Wikipedia Commons
[117] California Penal Code (2024)

Riot

The crime of riot is defined in section 404 of the California Penal Code.

(a) Any use of force or violence, disturbing the public peace, or any threat to use force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot.

(b) As used in this section, disturbing the public peace may occur in any place of confinement. Place of confinement means any state prison, county jail, industrial farm, or road camp, or any city jail, industrial farm, or road camp, or any juvenile hall, juvenile camp, juvenile ranch, or juvenile forestry camp.

A riot is a relatively spontaneous outburst of violence by a large group of people. The term riot sounds very negative, and some scholars have used terms like urban revolt or urban uprising to refer to the riots that many U.S. cities experienced during the 1960s. However, most collective behavior scholars continue to use the term riot without necessarily implying anything bad or good about this form of collective behavior, and we use riot here in that same spirit.

Terminology notwithstanding, riots have been part of American history since the colonial period, when colonists often rioted regarding "taxation without representation" and other issues (Rubenstein, 1970). Between 75 and 100 such riots are estimated to have occurred between 1641 and 1759. Once war broke out with England, several dozen more riots occurred as part of the colonists' use of violence in the American Revolution. Riots continued after the new nation began, as farmers facing debts often rioted against state militia. The famous Shays's Rebellion, discussed in many U.S. history books, began with a riot of hundreds of people in Springfield, Massachusetts.

Rioting became even more common during the first several decades of the 19th century. In this period rioting was "as much a part of civilian life as voting or working" (Rosenfeld, 1997, p. 484), with almost three-fourths of U.S. cities experiencing at least one major riot. Most of this rioting was committed by native-born whites against African Americans, Catholics, and immigrants. Their actions led Abraham Lincoln to observe in 1837, "Accounts of outrages committed by mobs form the every-day news of the times…Whatever their causes be, it is common to the whole country" (quoted in Feldberg, 1980, p. 4).

Rioting continued after the Civil War. Whites attacked Chinese immigrants because they feared the immigrants were taking jobs from whites and keeping wages lower than they otherwise would have been. Labor riots also became common, as workers rioted to protest inhumane working conditions and substandard pay.

Race riots again occurred during the early 20th century, as whites continued to attack African Americans in major U.S. cities. A major riot in East St. Louis, Illinois, in 1917 took the lives of 39 African Americans and 9 whites. Riots begun by whites occurred in at least seven more cities in

1919 and ended with the deaths of dozens of people (Waskow, 1967). During the 1960s, riots took place in many Northern cities as African Americans reacted violently to reports of police brutality or other unfair treatment. Estimates of the number of riots during the decade range from 240 to 500 and estimates of the number of participants in the riots range from 50,000 to 350,000 (Downes, 1968; Gurr, 1989).[118]

LOOTING

The crime of looting is defined in section 463 of the California Penal Code.

(a) Every person who violates Section 459, punishable as a second-degree burglary pursuant to subdivision (b) of Section 461, during and within an affected county in a "state of emergency" or a "local emergency," or under an "evacuation order," resulting from an earthquake, fire, flood, riot, or other natural or manmade disaster shall be guilty of the crime of looting, punishable by imprisonment in a county jail for one year or pursuant to subdivision (h) of Section 1170.

For purposes of this subdivision, the fact that the structure entered has been damaged by the earthquake, fire, flood, or other natural or human-caused disaster shall not, in and of itself, preclude conviction.

(b) Every person who commits the crime of grand theft, as defined in Section 487 or subdivision (a) of Section 487a, except grand theft of a firearm, during and within an affected county in a "state of emergency" or a "local emergency," or under an "evacuation order," resulting from an earthquake, fire, flood, riot, or other natural or unnatural disaster shall be guilty of the crime of looting, punishable by imprisonment in a county jail for one year or pursuant to subdivision (h) of Section 1170. Every person who commits the crime of grand theft of a firearm, as defined in Section 487, during and within an affected county in a "state of emergency" or a "local emergency" resulting from an earthquake, fire, flood, riot, or other natural or unnatural disaster shall be guilty of the crime of looting, punishable by imprisonment in the state prison, as set forth in subdivision (a) of Section 489. Any person convicted under this subdivision who is eligible for probation and who is granted probation shall, as a condition thereof, be confined in a county jail for at least 180 days, except that the court may, in the case where the interest of justice would best be served, reduce or eliminate that mandatory jail sentence, if the court specifies on the record and enters into the minutes the circumstances indicating that the interest of justice would best be served by that disposition. In addition to whatever custody is ordered, the court, in its discretion, may require any person granted probation following conviction under this subdivision to serve up to 160 hours of community service in any program deemed appropriate by the court, including any program created to rebuild the community.

[118] University of Minnesota. (2016).

"State of emergency" means conditions that, by reason of their magnitude, are, or are likely to be, beyond the control of the services, personnel, equipment, and facilities of any single county, city and county, or city and require the combined forces of a mutual aid region or regions to combat.

"Local emergency" means conditions that, by reason of their magnitude, are, or are likely to be, beyond the control of the services, personnel, equipment, and facilities of any single county, city and county, or city and require the combined forces of a mutual aid region or regions to combat.

A "state of emergency" shall exist from the time of the proclamation of the condition of the emergency until terminated pursuant to Section 8629 of the Government Code.
"Evacuation order" means an order from the Governor, or a county sheriff, chief of police, or fire marshal, under which persons subject to the order are required to relocate outside of the geographic area covered by the order due to an imminent.[119]

FALSE REPORTING OF A CRIME

The crime of false reporting a crime is defined in section 148.5 of the California Penal Code.

(a) Every person who reports to any peace officer listed in Section 830.1 or 830.2, or subdivision (a) of Section 830.33, the Attorney General, or a deputy attorney general, or a district attorney, or a deputy district attorney that a felony or misdemeanor has been committed, knowing the report to be false, is guilty of a misdemeanor.

(b) Every person who reports to any other peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, that a felony or misdemeanor has been committed, knowing the report to be false, is guilty of a misdemeanor if (1) the false information is given while the peace officer is engaged in the performance of his or her duties as a peace officer and (2) the person providing the false information knows or should have known that the person receiving the information is a peace officer.[120]

CHAPTER SUMMARY

Resisting an officer becomes a felony when there is any threat or violence. It is unlawful for any person who is remanded by a magistrate or judge of any court in this state to the custody of a sheriff, marshal, or other police agency, to thereafter escape or attempt to escape from that custody. A person who participates in the taking by means of a riot of another person from the lawful custody of a peace officer is guilty of a felony. It is a crime to provide false information to a police officer. Any person who falsely represents himself or herself to be a public officer, investigator, or inspector in any state department and who, in that assumed character, does any of the following shall be punished by imprisonment in a county jail not exceeding one year,

[119] California Penal Code (2024)
[120] California Penal Code (2024)

by a fine not exceeding two thousand five hundred dollars ($2,500), or by both that fine and imprisonment. An unlawful assembly is a gathering of two or more persons who commit an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner. A rout is an attempted riot. Any use of force or violence, disturbing the public peace, or any threat to use force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot. Looting is prevalent in a state of emergency. Knowingly making a false report with the police is a misdemeanor.

KEY TERMS

- Resisting an Executive Officer
- Resisting an Officer
- Escape from a Peace Officer
- Lynching
- Impersonating Public Officers
- Unlawful Assembly
- Rout
- Riot
- Looting
- False Reporting of a Crime

REVIEW QUESTIONS

1. What are the differences between the felony and misdemeanor crime of resisting an officer?
2. Conduct an internet search on 836.6 PC and describe the crime.
3. What is lynching? Conduct research and locate an incident where the crime occurred.
4. In your opinion, what should happen to looters who are active during a natural disaster?
5. Should 148. 5 PC have a harsher punishment? Why or why not?

CHAPTER 12

DISTURBING THE PEACE, DISORDERLY CONDUCT, STALKING, BURGLARY, POSSESSION OF STOLENT PROPERTY AND ARSON

CHAPTER OBJECTIVES

- Identify the three categories of disturbing the peace.
- Summarize the ten categories of disorderly conduct.
- Examine the crime of stalking.
- Demonstrate an understanding of the crime of burglary.

DISTURBING THE PEACE

The crime of disturbing the peace is defined in section 415 of the California Penal Code.
Any of the following persons shall be punished by imprisonment in the county jail for a period of not more than 90 days, a fine of not more than four hundred dollars ($400), or both such imprisonment and fine:

(1) Any person who unlawfully fights in a public place or challenges another person in a public place to fight.
(2) Any person who maliciously and willfully disturbs another person by loud and unreasonable noise.
(3) Any person who uses offensive words in a public place which are inherently likely to provoke an immediate violent reaction.[121]

Fighting Words

Although the First Amendment protects peaceful speech and assembly, if speech creates a clear and present danger to the public, it can be regulated. Schenck v. U.S., 249 U.S. 47 (1919). This includes fighting words, or "those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace." See Chaplinsky v. New Hampshire, 315 U.S 568, 572 (1942).

[121] California Penal Code (2024)

Any criminal statute prohibiting fighting words must be narrowly tailored and focus on imminent rather than future harm. Modern US Supreme Court decisions indicate a tendency to favor freedom of speech over the government's interest in regulating fighting words, and many fighting words statutes have been deemed unconstitutional under the First Amendment or void for vagueness and overbreadth under the Fifth Amendment and Fourteenth Amendment due process clause. [122]

DISORDERLY CONDUCT

The crime of disorderly conduct is defined in section 647 (a) – (j) of the California Penal Code.

(a) An individual who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view.

(b)

(1) An individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with the intent to receive compensation, money, or anything of value from another person. An individual agrees to engage in an act of prostitution when, with specific intent to so engage, the individual manifests an acceptance of an offer or solicitation by another person to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in an act of prostitution.

(2) An individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with another person who is 18 years of age or older in exchange for the individual providing compensation, money, or anything of value to the other person. An individual agrees to engage in an act of prostitution when, with specific intent to so engage, the individual manifests an acceptance of an offer or solicitation by another person who is 18 years of age or older to so engage, regardless of whether the offer or solicitation was made by a person who also possessed the specific intent to engage in an act of prostitution.

(3) An individual who solicits, or who agrees to engage in, or who engages in, any act of prostitution with another person who is a minor in exchange for the individual providing compensation, money, or anything of value to the minor. An individual agrees to engage in an act of prostitution when, with specific intent to so engage, the individual manifests an acceptance of an offer or solicitation by someone who is a minor to so engage, regardless of whether the offer or solicitation was made by a minor who also possessed the specific intent to engage in an act of prostitution.

(4) A manifestation of acceptance of an offer or solicitation to engage in an act of prostitution does not constitute a violation of this subdivision unless some act, in addition to the manifestation of acceptance, is done within this state in furtherance of the commission of the act of prostitution by the person manifesting an acceptance of an offer

[122] Henderson (2022)

or solicitation to engage in that act. As used in this subdivision, “prostitution” includes any lewd act between persons for money or other consideration.

(5) Notwithstanding paragraphs (1) to (3), inclusive, this subdivision does not apply to a child under 18 years of age who is alleged to have engaged in conduct to receive money or other consideration that would, if committed by an adult, violate this subdivision. A commercially exploited child under this paragraph may be adjudged a dependent child of the court pursuant to paragraph (2) of subdivision (b) of Section 300 of the Welfare and Institutions Code and may be taken into temporary custody pursuant to subdivision (a) of Section 305 of the Welfare and Institutions Code, if the conditions allowing temporary custody without warrant are met.

(c) Who accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms.

(d) Who loiters in or about any toilet open to the public for the purpose of engaging in or soliciting any lewd or lascivious or any unlawful act.

(e) Who lodges in any building, structure, vehicle, or place, whether public or private, without the permission of the owner or person entitled to the possession or in control of it.

(f) Who is found in any public place under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, controlled substance, or toluene, in a condition that they are unable to exercise care for their own safety or the safety of others, or by reason of being under the influence of intoxicating liquor, any drug, controlled substance, toluene, or any combination of any intoxicating liquor, drug, or toluene, interferes with or obstructs or prevents the free use of any street, sidewalk, or other public way.

(g) If a person has violated subdivision (f), a peace officer, if reasonably able to do so, shall place the person, or cause the person to be placed, in civil protective custody. The person shall be taken to a facility, designated pursuant to Section 5170 of the Welfare and Institutions Code, for the 72-hour treatment and evaluation of inebriates. A peace officer may place a person in civil protective custody with that kind and degree of force authorized to effect an arrest for a misdemeanor without a warrant. A person who has been placed in civil protective custody shall not thereafter be subject to any criminal prosecution or juvenile court proceeding based on the facts giving rise to this placement. This subdivision does not apply to the following persons:

(1) A person who is under the influence of any drug, or under the combined influence of intoxicating liquor and any drug.

(2) A person who a peace officer has probable cause to believe has committed any felony, or who has committed any misdemeanor in addition to subdivision (f).

(3) A person who a peace officer in good faith believes will attempt to escape or will be unreasonably difficult for medical personnel to control.

(h) Who loiters, prowls, or wanders upon the private property of another, at any time, without visible or lawful business with the owner or occupant. As used in this subdivision, “loiter” means to delay or linger without a lawful purpose for being on the property and for the purpose of committing a crime as opportunity may be discovered.

(i) Who, while loitering, prowling, or wandering upon the private property of another, at any time, peeks in the door or window of any inhabited building or structure, without visible or lawful business with the owner or occupant.

(j) (1) A person who looks through a hole or opening, into, or otherwise views, by means of any instrumentality, including, but not limited to, a periscope, telescope, binoculars, camera, motion picture camera, camcorder, mobile phone, electronic device, or unmanned aircraft system, the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside. This subdivision does not apply to those areas of a private business used to count currency or other negotiable instruments.

(2) A person who uses a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another identifiable person under or through the clothing being worn by that other person, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person and invade the privacy of that other person, under circumstances in which the other person has a reasonable expectation of privacy. For the purposes of this paragraph, “identifiable” means capable of identification, or capable of being recognized, meaning that someone, including the victim, could identify or recognize the victim. It does not require the victim’s identity to actually be established.

(3) (A) A person who uses a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, or record by electronic means, another identifiable person who may be in a state of full or partial undress, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, in the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which that other person has a reasonable expectation of privacy, with the intent to invade the privacy of that other person. For the purposes of this paragraph, “identifiable” means capable of identification, or capable of being recognized, meaning that someone, including the victim, could identify or recognize the victim. It does not require the victim’s identity to actually be established.[123]

Disorderly conduct, also called disturbing the peace, criminalizes conduct that negatively impacts the quality of life for citizens in any given city, county, or state. Although disorderly

[123] California Penal Code (2024)

conduct is typically a low-level offense, the enforcement of disorderly conduct statutes is important to preserve citizens' ability to live, work, and travel in safety and comfort.

Example of Disorderly Conduct Act

David and Daniel leave a party in a quiet neighborhood at three in the morning. Both are inebriated. After walking a couple of blocks and telling stories, they begin singing loudly with their arms wrapped around each other. David stumbles and trips Daniel, who falls heavily to the sidewalk. Daniel gets up and starts screaming and swearing at David, challenging him to fight. David yells back, "Bring it on!" David pushes Daniel, he pushes back, and they begin punching and kicking. In this instance, David and Daniel have probably committed three separate disorderly conduct offenses. When David and Daniel began singing at three in the morning on a quiet street, they made a loud and unreasonable noise. When they challenged each other to fight, they uttered threats or stated fighting words. When they engaged in a fistfight, they committed fighting, or created a hazardous condition. Thus, David and Daniel are most likely subject to a prosecution for and conviction of three counts of disorderly conduct in many jurisdictions.[124]

STALKING

The crime of stalking is defined in section 646.9 of the California Penal Code.

a) Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

(b) Any person who violates subdivision (a) when there is a temporary restraining order, injunction, or any other court order in effect prohibiting the behavior described in subdivision (a) against the same party, shall be punished by imprisonment in the state prison for two, three, or four years.

(c)

(1) Every person who, after having been convicted of a felony under Section 273.5, 273.6, or 422, commits a violation of subdivision (a) shall be punished by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment, or by imprisonment in the state prison for two, three, or five years.

[124] University of Minnesota Libraries Publishing (2015)

(2) Every person who, after having been convicted of a felony under subdivision (a), commits a violation of this section shall be punished by imprisonment in the state prison for two, three, or five years.

For the purposes of this section, "harasses" means engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose.

For the purposes of this section, "course of conduct" means two or more acts occurring over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct."

For the purposes of this section, "credible threat" means a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat. The present incarceration of a person making the threat shall not be a bar to prosecution under this section. Constitutionally protected activity is not included within the meaning of "credible threat."

For purposes of this section, the term "electronic communication device" includes, but is not limited to, telephones, cellular phones, computers, video recorders, fax machines, or pagers. "Electronic communication" has the same meaning as the term defined in Subsection 12 of Section 2510 of Title 18 of the United States Code.[125]

[125] California Penal Code (2024)

Figure 12.1: Someone Typing on a Computer with Encrypted Code.[xvii]

Cyberstalking

Cyberstalking is one of the more dangerous and negative examples of surveillance. "Cyberstalking is the repeated unwanted relational pursuit of an individual through communication technologies, such as computers, tablets, and smart phones" (Tokunaga & Aune, 2017, p. 1453). Cyberstalking is a prime example of peer surveillance but to a violent extent. According to Ellison and Akdeniz (1998), "It may involve electronic sabotage, in the form of sending the victim hundreds or thousands of junk e-mail messages (the activity known as 'spamming') or sending computer viruses" (pp. 30-31). They also argue cyberstalking includes indirect forms of harassment such as a stalker impersonating his or her victim online and sending abusive e-mails or fraudulent spams under their name (Ellison & Akdeniz).

With the increase in electronic communication and surveillance systems, cyberstalking has become much more prevalent. It is easier for someone to hide behind a screen and harass someone than it is to harass someone face-to-face. Melander (2010) discovered that many stalking behaviors in college relationships are tied to Internet use. Moreover, having or pursuing relationships through technology makes cyberstalking convenient and even enticing for perpetrators (Melander). Social media is a huge enabler for this kind of crime. Anybody can make a fake profile on Facebook or Instagram and use it to stalk someone else.

Furthermore, it is difficult for law enforcement to define and investigate cyberstalking. Bocij and McFarlane (2002) explain, "the challenge faced by law enforcement, clinicians, researchers and victims is that of producing a definition of cyberstalking that can be used to formulate legislation, direct research, inform treatment and protect victims" (p. 32). Technology is so complex and has many different channels that allow for violent/dangerous surveillance like cyberstalking.

Cynthia Armistead's case offers an example of cyberstalking. She received thousands of offensive telephone calls after a stalker posted a fake advertisement on a Usenet discussion group which offered services as a prostitute with her address and phone number attached. She received humiliating and vulgar phone calls and texts for weeks. (Ellison and Akdeniz 1998). Not only is this an annoyance, but it can also lead to more serious effects such as anxiety and fear.[126]

BURGLARY

The crime of burglary is defined in section 459 of the California Penal Code.

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, floating home, as defined in subdivision (d) of Section 18075.55 of the Health and Safety Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined in Section 243 of the Vehicle Code, vehicle as defined by the Vehicle Code, when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not. A house, trailer, vessel designed for habitation, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises.[127]

Although burglary is often associated with theft, it is actually an enhanced form of trespassing. At early common law, burglary was the invasion of a man's castle at nighttime, with a sinister purpose. Modern jurisdictions have done away with the common-law attendant circumstances and criminalize the unlawful entry into almost any structure or vehicle, at any time of day.

Example of Burglary Act

Jed uses a burglar tool to remove the window screen of a residence. The window is open, so once Jed removes the screen, he places both hands on the sill, and begins to launch himself upward. The occupant of the residence, who was watching Jed from inside, slams the window down on Jed's hands. Jed has probably committed the criminal act element required for burglary in many jurisdictions. When Jed removed the window screen, he committed a breaking. When Jed placed his hands on the windowsill, his fingers intruded into the residence, which satisfies the entry requirement. Thus, Jed may be subject to a prosecution for burglary rather than attempted burglary, even though he never actually damaged or broke the barrier of the residence or managed to gain complete access to the interior.[128]

[126] Szarka (2019)
[127] California Penal Code (2024)
[128] University of Minnesota Libraries Publishing (2015)

POSSESSION OF STOLEN PROPERTY

The crime of possession of stolen property is defined in section 496 of the California Penal Code.

(a) Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170. However, if the value of the property does not exceed nine hundred fifty dollars ($950), the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year, if such person has no prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290.

ARSON

The crime of arson is defined in section 451 of the California Penal Code.

A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property.

(a) Arson that causes great bodily injury is a felony punishable by imprisonment in the state prison for five, seven, or nine years.

(b) Arson that causes an inhabited structure or inhabited property to burn is a felony punishable by imprisonment in the state prison for three, five, or eight years.

(c) Arson of a structure or forest land is a felony punishable by imprisonment in the state prison for two, four, or six years.

(d) Arson of property is a felony punishable by imprisonment in the state prison for 16 months, two, or three years. For purposes of this paragraph, arson of property does not include one burning or causing to be burned his or her own personal property unless there is an intent to defraud or there is injury to another person or another person’s structure, forest land, or property.

(e) In the case of any person convicted of violating this section while confined in a state prison, prison road camp, prison forestry camp, or other prison camp or prison farm, or while confined in a county jail while serving a term of imprisonment for a felony or misdemeanor conviction,

any sentence imposed shall be consecutive to the sentence for which the person was then confined.[129]

Arson is one of the most destructive crimes in the United States, costing billions of dollars per year in lost or damaged homes, businesses, and real property. Many jurisdictions punish arson as a high-level felony that could merit a punishment of life in prison and mandatory registration requirements similar to serious sex offenses (730 ILCS 148 § 10, 2011).

At early common law, arson was primarily a crime against habitation, rather than a crime against property. The elements of arson at common law were the malicious or intentional burning of a dwelling owned by another. Modern statutes criminalize burning almost anything, including the defendant's own property in many instances.

Clark and Manny are bored and decide to light a fire in the woods near their houses. The grass is damp from a recent rain, so the fire does not spread and burns only a small circle of grass. Clark and Manny give up and walk home. Clark and Manny have probably committed the criminal act element required for arson in most jurisdictions. Although a large destructive fire was not set by Clark and Manny, the two did burn or damage real property and start a fire, which satisfies the criminal act requirement in most jurisdictions and under the Model Penal Code.[130]

CHAPTER SUMMARY

The crime of disturbing the peace includes fighting in public, making a loud noise (usually in the form of music), and using offensive words likely to cause an immediate and violent reaction. Disorderly conduct encompasses prostitution, begging, loitering, lewd acts, and public intoxication. To accomplish the crime of stalking, there must be willful, malicious, and repeated following or willful and malicious harassment of another person. Lastly, there must be a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family. Every person who enters a structure as defined by 459 PC, with the intent to commit a theft or any felony is guilty of burglary. In order to arrest someone for possession of stolen property, there must be evidence to show the individual knew the property was, in fact, stolen. Arson is one of the most destructive crimes in the United States, costing billions of dollars per year in lost or damaged homes, businesses, and real property.

[129] California Penal Code (2024)
[130] University of Minnesota (2015)

KEY TERMS

- Disturbing the Peace
- Offensive Words
- Disorderly Conduct
- Lewd
- Soliciting Alms
- Public Intoxication
- Loitering
- Stalking
- Course of Conduct
- Cyberstalking
- Burglary
- Possession of Stolen Property
- Arson

REVIEW QUESTIONS

1. Explain the crime of disturbing the peace. Make sure to address all three categories and create a scenario for each one.
2. Create a table of definitions for each subpoint of disorderly conduct. In your table, be sure to include an example for each.
3. Conduct internet research and locate a “real life” stalking case. Summarize the case and show how each of the elements apply.
4. There are several types of structures included in the crime of burglary. Make a list of each type of structure that meets the qualifications for the crime.
5. A person is guilty of arson when he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property.

CHAPTER 13

TYPES OF THEFT, BAD CHECKS, EMBEZZLEMENT, AND COUNTERFEITING

LEARNING OBJECTIVES

- Define theft as stated in the California Penal Code.
- Distinguish between misdemeanor theft and grand theft.
- Summarize the crime of defrauding an innkeeper.
- Examine the crime of embezzlement.
- Research the impact passing bad checks has on businesses.
- Review the crime of counterfeiting.

TYPES OF THEFT

Definition of Theft

Theft is defined in section 484 of the California Penal Code.

(a) Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft.

In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of services received the contract price shall be the test. If there is no contract price, the reasonable and going wage for the service rendered shall govern.

For the purposes of this section, any false or fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was

committed on any date during the particular period in question. The hiring of any additional employee or employees without advising each of them of every labor claim due and unpaid and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud.[131]

Classifications of Theft

Grand Theft

The crime of grand theft is defined in section 487 of the California Penal Code.

Grand theft is theft committed in any of the following cases:

(a) When the money, labor, real property, or personal property taken is of a value exceeding nine hundred fifty dollars ($950), except as provided in subdivision (b).

(b) Notwithstanding subdivision (a), grand theft is committed in any of the following cases:
(1) (A) When domestic fowls, avocados, olives, citrus or deciduous fruits, other fruits, vegetables, nuts, artichokes, or other farm crops are taken of a value exceeding two hundred fifty dollars ($250).
(B) For the purposes of establishing that the value of domestic fowls, avocados, olives, citrus or deciduous fruits, other fruits, vegetables, nuts, artichokes, or other farm crops under this paragraph exceeds two hundred fifty dollars ($250), that value may be shown by the presentation of credible evidence which establishes that on the day of the theft domestic fowls, avocados, olives, citrus or deciduous fruits, other fruits, vegetables, nuts, artichokes, or other farm crops of the same variety and weight exceeded two hundred fifty dollars ($250) in wholesale value.
(2) When fish, shellfish, mollusks, crustaceans, kelp, algae, or other aquacultural products are taken from a commercial or research operation which is producing that product, of a value exceeding two hundred fifty dollars ($250).
(3) Where the money, labor, real property, or personal property is taken by a servant, agent, or employee from their principal or employer and aggregates nine hundred fifty dollars ($950) or more in any 12 consecutive month period.

(c) When the property is taken from the person of another.

(d) When the property taken is any of the following:
(1) An automobile.
(2) A firearm.

(e) If the value of the money, labor, real property, or personal property taken exceeds nine hundred fifty dollars ($950) over the course of distinct but related acts, the value of the money,

[131] California Penal Code (2024)

labor, real property, or personal property taken may properly be aggregated to charge a count of grand theft, if the acts are motivated by one intention, one general impulse, and one plan.[132]

Shoplifting

The crime of shoplifting is defined in section 459.5 of the California Penal Code.

(a) Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with intent to commit larceny is burglary. Shoplifting shall be punished as a misdemeanor, except that a person with one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290 may be punished pursuant to subdivision (h) of Section 1170.

(b) Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.[133]

Pineville Police Sergeant Kills Unarmed Shoplifting Suspect

The Pineville Police Department (PPD) on Wednesday afternoon released its version of events in an incident that saw an off-duty PPD sergeant shoot and kill an unarmed man suspected of shoplifting on the border of Pineville and Charlotte Tuesday afternoon.

Pineville Police confirmed that the officer was in uniform, working security in the McMullen Creek Market shopping center in Pineville when he engaged with a man who was believed to be shoplifting from a Food Lion in the nearby Johnston Road Plaza.

According to the department, the unnamed sergeant first confronted the man, identified as 46-year-old Dennis Bodden, in the parking lot, where Bodden allegedly refused to stop before crossing Johnston Road to the Berkshire Place apartments in Charlotte, where a physical confrontation occurred. The sergeant reportedly used his Taser on Bodden, who continued to walk away. A back-up Pineville Police officer then arrived and reportedly used his Taser as well, which had “little to no effect on Bodden,” according to the release.

According to the Pineville Police Department statement, “[Bodden] lunged towards our sergeant and tried to grab his service weapon, ending up with the use of deadly force.” The department states that Bodden was well known to Pineville Police officers as a “chronic shoplifting suspect” from that Food Lion specifically and for having “violent tendencies towards police and the public.” PPD’s familiarity with Bodden has caused some community members to

[132] California Penal Code (2024)
[133] California Penal Code (2024)

question whether more could have been done to de-escalate the situation, especially considering the nonviolent nature of the original call.

Pineville Police have not said whether the sergeant who shot Bodden was wearing a body camera, which could confirm the threat that the sergeant claims he faced. PPD officers do wear body-worn cameras while on duty, which means the back-up officer who arrived before the shooting was likely wearing one. Robert Dawkins with community advocacy and police accountability organization Action NC said he will be pushing for the release of any footage of the incident in the coming week.

“If the police department can set conditions around police serving as security off-duty, one of those should be on wearing body-worn cameras,” Dawkins told Queen City Nerve.
Because the killing occurred in Charlotte, CMPD is leading the criminal homicide investigation, while PPD says it is overseeing its own internal/administrative investigation. Because the sergeant was off-duty at the time of the killing, the NC State Bureau of Investigation will not lead an investigation into the incident.[134]

Petty Theft

The crime of petty theft is defined in section 490.1 of the California Penal Code.
(a) Petty theft, where the value of the money, labor, real or personal property taken is of a value which does not exceed fifty dollars ($50), may be charged as a misdemeanor or an infraction, at the discretion of the prosecutor, provided that the person charged with the offense has no other theft or theft-related conviction.

(b) Any offense charged as an infraction under this section shall be subject to the provisions of subdivision (d) of Section 17 and Sections 19.6 and 19.7.

A violation which is an infraction under this section is punishable by a fine not exceeding two hundred fifty dollars ($250).[135]

Miscellaneous Thefts

The crime of theft of copper material is defined in section 487j of the California Penal Code.
Every person who steals, takes, or carries away copper materials of another, including, but not limited to, copper wire, copper cable, copper tubing, and copper piping, which are of a value exceeding nine hundred fifty dollars ($950) is guilty of grand theft. Grand theft of copper shall be punishable by a fine not exceeding two thousand five hundred dollars ($2,500), by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment, or by imprisonment pursuant to subdivision (h) of Section 1170 and a fine not exceeding ten thousand dollars ($10,000).[136]

[134] Pipkin (2024)
[135] California Penal Code (2024)
[136] California Penal Code (2024)

Impact of Copper Wire Theft

Copper wire thefts have also become increasingly common in the US. With copper prices at $3.70 a pound as of June 2007, compared to $0.60 a pound in 2002, people have been increasingly stealing copper wire from telephone and power company assets. People have even been injured and killed in power plants while trying to obtain copper wire. Other sources of stolen copper include railroad signal lines, grounding bars at electric substations, and even a 3,000-pound (1,400 kg) bell stolen from a Buddhist temple in Tacoma, Washington, which was later recovered.

For example, Georgia, like many other states, has seen enough copper crime that a special task force has been created to fight it. The Metro Atlanta Copper Task Force is led by the Atlanta Police Department and involves police and recyclers from surrounding metro areas, Georgia Power, and the Fulton County District Attorney's office.

Many states around the nation have passed – or are exploring – legislation to combat the problem. A new Georgia law took effect in July 2007 making it a crime to knowingly buy stolen metal. It allows prosecutors to prosecute for the actual cost of returning property to original conditions, as many of these thefts dramatically hurt the surrounding property value.[137]

Defrauding an Innkeeper

The crime of defrauding the innkeeper is defined in section 537 of the California Penal Code.

(a) Any person who obtains any food, fuel, services, or accommodations at a hotel, inn, restaurant, boardinghouse, lodging house, apartment house, bungalow court, motel, marina, marine facility, auto camp, ski area, or public or private campground, without paying therefor, with intent to defraud the proprietor or manager thereof, or who obtains credit at an hotel, inn, restaurant, boardinghouse, lodging house, apartment house, bungalow court, motel, marina, marine facility, auto camp, or public or private campground by the use of any false pretense, or who, after obtaining credit, food, fuel, services, or accommodations, at an hotel, inn, restaurant, boardinghouse, lodging house, apartment house, bungalow court, motel, marina, marine facility, auto camp, or public or private campground, absconds, or surreptitiously, or by force, menace, or threats, removes any part of his or her baggage therefrom with the intent not to pay for his or her food or accommodations is guilty of a public offense punishable as follows:

(1) If the value of the credit, food, fuel, services, or accommodations is nine hundred fifty dollars ($950) or less, by a fine not exceeding one thousand dollars ($1,000) or by imprisonment in the county jail for a term not exceeding six months, or both.

(2) If the value of the credit, food, fuel, services, or accommodations is greater than nine hundred fifty dollars ($950), by imprisonment in a county jail for a term of not more than one year, or in the state prison.[138]

[137] Wikipedia

[138] California Penal Code (2024)

Theft of a Shopping Cart

The crime of theft of a shopping cart is defined in section 22435.2 of the California Business and Professional Code.

Figure 13.1: A person in handcuffs holding money.[xviii]

EMBEZZLEMENT

The crime of embezzlement is defined in section 503 of the California Penal Code. Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted.[139]

Tran sells an automobile to Lee. Tran's automobile has personalized license plates, so he offers to apply for new license plates and thereafter sends them to Lee. Lee agrees and pays Tran for half of the automobile, the second payment to be made in a week. Lee is allowed to take possession of the automobile and drives it to her home that is over one hundred miles away. Tran never receives the second payment from Lee. When the new license plates arrive, Tran phones Lee and tells her he is going to keep them until Lee makes her second payment. In some jurisdictions, Tran has not embezzled the license plates. Although Tran and Lee have a relationship, it is not a relationship based on trust or confidence. Tran and Lee have what is called a debtor-creditor relationship (Lee is the debtor and Tran is the creditor). Thus, if the jurisdiction in which Tran sold the car requires a special confidential relationship for embezzlement, Tran may not be subject to prosecution for this offense.[140]

[139] California Penal Code (2024)
[140] University of Minnesota (2015)

BAD CHECKS

The crime of passing bad checks is defined in section 476a of the California Penal Code.
(a) Any person who, for himself or herself, as the agent or representative of another, or as an officer of a corporation, willfully, with intent to defraud, makes or draws or utters or delivers a check, draft, or order upon a bank or depositary, a person, a firm, or a corporation, for the payment of money, knowing at the time of that making, drawing, uttering, or delivering that the maker or drawer or the corporation has not sufficient funds in, or credit with the bank or depositary, person, firm, or corporation, for the payment of that check, draft, or order and all other checks, drafts, or orders upon funds then outstanding, in full upon its presentation, although no express representation is made with reference thereto, is punishable by imprisonment in a county jail for not more than one year, or pursuant to subdivision (h) of Section 1170.

(b) However, if the total amount of all checks, drafts, or orders that the defendant is charged with and convicted of making, drawing, or uttering does not exceed nine hundred fifty dollars ($950), the offense is punishable only by imprisonment in the county jail for not more than one year, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290. This subdivision shall not be applicable if the defendant has previously been convicted of three or more violations of Section 470, 475, or 476, or of this section, or of the crime of petty theft in a case in which defendant's offense was a violation also of Section 470, 475, or 476 or of this section or if the defendant has previously been convicted of any offense under the laws of any other state or of the United States which, if committed in this state, would have been punishable as a violation of Section 470, 475 or 476 or of this section or if he has been so convicted of the crime of petty theft in a case in which, if defendant's offense had been committed in this state, it would have been a violation also of Section 470, 475, or 476, or of this section.

(c) Where the check, draft, or order is protested on the ground of insufficiency of funds or credit, the notice of protest shall be admissible as proof of presentation, nonpayment, and protest and shall be presumptive evidence of knowledge of insufficiency of funds or credit with the bank or depositary, person, firm, or corporation.[141]

COUNTERFEITING

The crime of counterfeiting is defined in section 476 of the California Penal Code.
Every person who makes, passes, utters, or publishes, with intent to defraud any other person, or who, with the like intent, attempts to pass, utter, or publish, or who has in his or her possession, with like intent to utter, pass, or publish, any fictitious or altered bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for the payment

[141] California Penal Code (2024)

of money or property of any real or fictitious financial institution as defined in Section 186.9 is guilty of forgery.[142]

CHAPTER SUMMARY

Regarding theft, the worth of property stolen is determined by fair market value. When the money, labor, real property, or personal property taken is of a value exceeding nine hundred fifty dollars ($950), it is a felony. Petty theft, where the value of the money, labor, real or personal property taken is of a value which does not exceed fifty dollars ($50), may be charged as a misdemeanor or an infraction, at the discretion of the prosecutor, provided that the person charged with the offense has no other theft or theft-related conviction. The theft of copper wire is prolific in the United States. Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted. Passing bad checks requires knowledge at the time the check was fraudulent. The crime of counterfeiting is punishable under section 476.

KEY TERMS

- Theft
- Grand Theft
- Petty Theft
- Shoplifting
- Copper Wire Theft
- Embezzlement
- Check Fraud
- Counterfeiting

REVIEW QUESTIONS

1. Summarize the definition of theft, in your own words.
2. The crime of grand theft has several subsections. Create a reference list of all the distinctions along with the values each requires to make it a felony crime.
3. Reproduce the crime of defrauding an innkeeper and create a brief scenario illustrating what the crime looks like.
4. What is embezzlement?
5. Review the crime of passing bad checks (476a PC) and propose some ways a business can implement to avoid receiving a fraudulent check.
6. Conduct internet research on counterfeiting and identify how it is violated across the world.

[142] California Penal Code (2024)

IDEA FRAMEWORK

A Government Credit-Rating Monopoly?

The country is engaged in an ongoing reckoning about its history of racial inequality. One way in which this sad legacy continues to manifest itself is in consumer finances. Decades after the enactment of the Equal Credit Opportunity Act (ECOA) and a battery of federal programs aimed at improving the well-being of the least well off, black families on average continue to have — relative to white families — lower credit scores, less wealth, less financial stability, and less access to mainstream credit products such as mortgages and credit cards.

Closing the racial wealth gap by enabling more minority families to access high-quality financial services is a moral and economic imperative. Remedying this gap begins with recognizing the sordid historical role of the federal government in promoting "redlining" and other discriminatory practices, and how state and federal regulation blocked efforts by private companies to provide greater choice and competition to traditionally underserved communities. Other facially race-neutral policies, such as usury ceilings and competitive barriers to the entry of new banks and credit unions, also disproportionately harmed Black families relative to whites.

But instead of learning from these decades of examples of how ill-conceived federal regulation harmed the least well-off, the Biden administration and some members of Congress want to destroy the single greatest success story in American history of breaking down discrimination and promoting financial inclusion: the consumer credit reporting system. Under a proposal inspired by the left-wing activist group Demos, the current competitive system (dominated by Experian, Equifax, and TransUnion) would be replaced with a government-run monopoly operated by the Consumer Financial Protection Bureau (CFPB). This proposal ignores the history of the credit reporting system in opening doors to minorities and others who were traditionally excluded from the financial mainstream and threatens to undo many of the beneficial consequences of that history.

Rise of Credit Bureaus

Easy access to quality financial services — bank accounts, credit cards, and mortgages — traditionally was limited to middle-aged white men. Lending was done according to the so-called "five Cs" of lending: character, capacity, capital, collateral, and conditions. But often more important was a sixth C: "connections." Bank officers preferred customers with whom they played golf and went to church, usually middle-aged white men like themselves. Although a single woman could get a bank account and charge card at the local department store, her credit history was merged with her husband's when they married. Minorities and immigrants need not bother applying because they were foreclosed from the high-class downtown department stores. Instead, they shopped for overpriced goods in local stores in their neighborhoods, primarily because those were the only merchants that would extend them credit. Once tied to this local network of retailers offering credit, financial exclusion became a self-reinforcing dynamic, blocking minority families from access to the financial mainstream.

The emergence of comprehensive credit reporting democratized financial access. For the first time, creditworthiness was based on a proven record of personal financial responsibility, not the applicant's race, sex, golf handicap, or chumminess with the bank manager or loan officer. As economic historian Louis Hyman observed in his 2012 book Debtor Nation, the traditional "five Cs" of lending has given rise to another: the computer. Little wonder that the architects of the ECOA pushed for reliance on credit reporting as the vehicle for overcoming traditional disparate lending patterns and improving access to credit for previously excluded Americans.

The results have been profound, especially for lower-income Americans, who have experienced transformative growth in access to financial services. According to Federal Reserve data, in 1970 only 16% of American households had general-purpose credit cards, but that number rose to 73% by 2001. Whereas only 2% of low-income households had credit cards in 1970, by 2001 that figure stood at 45%. Card ownership by working-class families increased from 9% to 65% of households over that same time frame. The Federal Reserve also found that, from 1983 to 2004, the prevalence and ownership of general credit cards increased by at least 25 percentage points across every racial and ethnic group, and the gap between Black people and White people for all types of credit narrowed during that period. Even more startling, by enabling more accurate and more personalized assessments of customers' risk, the adoption of credit scoring enabled private lenders to take on new customers while reducing loss rates. Credit cards not only became available to more people, the development of risk-based pricing made them less expensive: from 1990 to 1994 alone, the proportion of all revolving balances in the United States being assessed an annualized percentage rate greater than 18% fell from 70% to 44%.

Are Persistent Disparities a Problem?

Yet, there are calls today to abolish the traditional competitive credit reporting system and replace it with a government-run monopoly credit bureau. The justification for doing so is simply that, under the current credit reporting system, Black families on average have lower credit scores and more-blemished credit reports than white families. Washington's proposed solution? To tinker with the credit reporting and credit scoring systems to make sure that the credit scores come out "right," which is to say that Black people and White people should have similar credit scores and the only reason they don't must be because of "systemic racism." Rather than serving as an unbiased prediction of an individual's creditworthiness based on economic variables and personal financial record, a government credit bureau could be harnessed to the political goal of promoting "racial equity."

The ECOA's guiding principle of basing lending decisions on economic and financial variables that accurately predict ability and willingness to repay is sound. A congressionally mandated comprehensive study by the Federal Reserve in 2007 definitively found that the use of credit scores in underwriting and pricing consumer credit is not a subterfuge for discrimination. Asian-Americans, on average, have higher credit scores and more access to credit than whites. Indeed, despite differences in average income, men and women have virtually identical credit scores.

Persistent disparities in credit scores among different races reflect a variety of factors, including the unfortunate legacy of government policies such as redlining and usury ceilings that blocked minority access to mainstream financial products for decades. But replacing the objective system of credit underwriting with a race-based one treats the symptoms of decades of financial exclusion but ignores the underlying cause. And if we learned anything from the 2008 financial crisis, it is that helping people obtain access to more credit than they can afford will not help them in the long run. Closing the gap in credit scores among different subgroups in American society requires well-conceived policies to build individual capability (such as better-designed financial literacy programs) and wealth, not counterproductive fixes such as political manipulation of credit reporting.

Subordinating credit reports to politics will harm those it is intended to help. Information is the currency of credit, and corrupting the relevance and accuracy of information contained in credit reports raises the costs to providers of discerning a customer's creditworthiness. "Connections" or other proxies for creditworthiness will once again become an important part of credit when objective creditworthiness is difficult to ascertain. This echoes the effects of the well-intentioned "Ban the Box" policy of striking questions about criminal records from employment applications: it has actually exacerbated racial disparities in hiring. Simply put, degrading the accuracy of credit reports would be likely to increase the cost of credit for everyone, but especially for lower-income and minority borrowers.

Underwriting and pricing loans require very nuanced estimations of borrower risk. Absent the ability to drill down into particular borrowers' finances at low cost, lenders will either eschew certain categories of consumers entirely (such as higher-risk consumers) or increase prices in order to compensate for the inability to accurately estimate risk. While this might increase the amount of lending capital available to lower-risk borrowers, enabling them to get lower prices than they otherwise would, this windfall will be subsidized by higher-risk borrowers. Of course, lower-risk borrowers demographically are more likely to be upper-class — and therefore typically white — families than higher-risk borrowers. And many consumers will pay higher prices for credit to offset the increased loss rates that would result from not being able to estimate risk accurately.

Innovations in the Private Market

Instead of creating a lumbering new government-run public utility, a better way forward would be to start by eliminating existing barriers to competition and unleashing the forces of competition and innovation. For instance, make it easier for financial services providers to use new models and alternative data to underwrite credit. Whereas traditional credit reporting models rest on narrow but reliable data sources such as whether a person is paying his current debts, alternative data models consider a wider array of potentially predictive variables, such as verified cash-flow data (such as whether you maintain positive balances in your checking account over time) or payments on bills such as utilities, rent, cell phone, and other non-debt obligations. Use of alternative data is a particular boon to so-called "thin file" consumers who

lack sufficient depth or duration of credit experience to have an established credit rating and credit score. For example, a 2020 study by the Department of Housing and Urban Development found that reporting rent payments of HUD-assisted families would increase the number of these families with credit scores above 620 from 54% to 65% percent.

Alternative data proved its mettle during the pandemic when traditional debt payment obligations and collections on accounts such as mortgages, student loans, and auto loans were suspended. During that period, there were many households that needed short-term credit to bridge the time until they received government stimulus checks or state unemployment insurance. Reliance on alternative data provided a means to identify creditworthy households and get them the short-term funds they needed to make ends meet, especially by new and nimble "fintech" lenders that use these models.

Economic studies have found that the entry of fintech lenders into a market dramatically increases competition and reduces disparities in the pricing of credit between Black and White borrowers. This is to be expected: if minority, younger, and immigrant consumers have less of the traditional markers of creditworthiness than established white borrowers, the use of additional reliable information that provides a fuller picture of a consumer's financial condition would tend to benefit the former disproportionately. Competition once again seems to be an effective means of promoting inclusion and breaking down remaining unjustified demographic disparities in access and terms.

The primary obstacles to still greater use of alternative data for underwriting are regulatory uncertainty and fear of litigation, particularly for alleged violations of anti-discrimination laws. One explanation for the continued market dominance of the traditional credit reporting models is that they have been verified by regulators and judges as nondiscriminatory. Risk-averse lenders seeking to avoid the legal and public relations opprobrium of being labeled "predatory lenders" can thus rely on those time-tested models without fear of adverse consequences. Fintechs, by contrast, must survive a thicket of regulatory scrutiny and potential liability to prove that their models do not have a discriminatory effect — risks that existing credit reporting models do not face.

Another source of regulatory uncertainty involves risks to so-called "furnishers" of the raw material that comprises credit reporting models. In the United States, furnishing information to credit bureaus is voluntary. While traditional financial services providers are familiar with the ins and outs of providing information to credit bureaus, furnishers of information that is not traditionally used as part of credit underwriting (such as information from landlords) are not. Furnishing information makes the overall credit reporting system more accurate and useful, but that benefit is shared among all users of the credit reporting system. Providing this information to credit bureaus, however, can bring the furnisher under CFPB scrutiny and increase regulatory and litigation risk — a risk for which the furnisher bears all the costs. Given this asymmetry between costs and benefits, the incentives for furnishers to participate in the system are tenuous already. Additional cost or scrutiny, such as increased regulatory costs or litigation

risks, could further deter potential furnishers from providing information or cause current furnishers to reduce their participation.

Conclusion

Historically, the federal government has been a primary obstacle to greater financial inclusion and wealth building by Black families in America. Sometimes this discrimination was intentional, as with the government's policy of racial redlining in housing markets in the post–World War II era. Sometimes such policies were well-intentioned, but they still ended up harming those they were supposed to help — often the financially most vulnerable. Politicizing the country's consumer credit reporting system and returning race to the center of the credit underwriting decision in the name of progressive politics may seem like a way of closing the racial wealth gap. In practice, however, it is almost certain to backfire. More competition, not a government monopoly, is the remedy for financial exclusion.[143]

[143] Zywicki (2022)

CHAPTER 14

LOTTERIES, BINGO GAMES, CHAIN LETTERS AND PYRAMID SCHEMES, GAMING, BOOKMAKING, AND CRIMINAL PROFITEERING

LEARNING OBJECTIVES

- Review the definition of a lottery.
- Recognize when a bingo game is illegal, based on the corpus delicti.
- Identify the characteristics of a Ponzi scheme.
- Summarize the crime of illegal gaming.
- Examine the crime of bookmaking and explain the elements.
- Dissect the potential crimes involved in criminal profiteering activity.

LOTTERIES

A lottery is defined in section 319 of the California Penal Code.
A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known.[144]

Rent-Seeking Games

The world is full of strange contests: cockroach racing, toe wrestling, cow-chip tossing. To date, no contest has been held for Best Example of Public Choice Theory. But if one ever does take place, the dispute over "skill games" will be a championship contender. Skill games resemble slots but include just enough non-random elements to avoid being labeled outright gambling and thus fall under state gambling regulations (and prohibitions). States do not like them. This past summer, for example, the Virginia Lottery sent a financial report to the governor warning darkly of a revenue threat on the horizon — namely, "an aggressive expansion" of

[144] California Penal Code (2024)

“untaxed, unlicensed, and unregulated machines” allowing users to wager money. “By our unofficial count,” the report said, “nearly 4,300 of these unregulated games-of-skill machines now operate in” — here comes the pinch point — “1,350 Lottery licensed retailers,” or “one-quarter of our retail locations.”

You can see the problem right away. For much of their existence, state lotteries have enjoyed something close to a monopoly on licit gambling. Some states have allowed horse racing and expanded into pari-mutual wagering, and some have gone full-bore into casino gambling, and the internet offers another outlet for those who want to wager. But outside of the occasional office betting pool or basement poker game, anybody who wants to take a socially acceptable risk with a few dollars is pretty much stuck with some sort of state-controlled racket.

The result of this market dominance has been a fire hydrant of cash. In Virginia, the Lottery had $2.29 billion in ticket sales — and $650 million in profits — in just the last fiscal year. That is a profit margin of 28% which is well above the average profit margin for the ostensibly rapacious pharmaceutical industry.

But if “untaxed, unlicensed, and unregulated machines” begin to horn in on the state’s gambling business, the result could be — gulp! — a loss of revenue. Indeed, the Richmond Times-Dispatch reported that Virginia’s secretary of finance, Aubrey Layne, had heard that some businesses had replaced their lottery machines with skill games. “We’re going to have to come to grips with this,” Layne said.

He is not alone in this worry. In Pennsylvania, state lawmaker Tommy Tomlinson has introduced legislation targeting skill-game machines. According to news accounts, “There are 5,050 machines being used at convenience and liquor stores, gas stations, thrift shops, and shopping malls throughout the state, each diverting $2,284 from the lottery each month.” The horror. Pennsylvania devotes its lottery proceeds to medical benefits for seniors’ ineligible for Medicaid. “These machines are picking the pockets of Pennsylvania senior citizens,” Tomlinson insists. He notes that the gaming devices are often “placed next to a lottery machine to mislead the public into thinking these machines are actually Lottery machines.” To the contrary, he says, “they are illegal gambling devices.”

That might seem like splitting an exceptionally fine hair, but lotteries bill themselves as good, clean fun that serves a worthy cause. Virginia’s proceeds, for instance, go to public schools. Or at least they do in theory. In practice, the money frees up funds that legislators otherwise would spend on K–12 education. Governmental alarm over the prospect of gambling competition surely contains a degree of institutional self-dealing, and that is where the public-choice angle comes in. Public choice theory holds that government agents are not purely disinterested actors pursuing the general welfare at all times; like everyone else, they are motivated at least in part by self-interest.

And indeed, from a completely disinterested perspective, the optimal gambling regime would be one that allows the greatest number of people to pursue their own best interests as they

define them. If people would rather play games of skill than games of chance, then the state should not stand in their way. States, however, are not likely to take this view. And with so much money on the line, why would they?

To be fair, states have no monopoly on self-seeking in this realm (or any other). Game machine provider Queen of Virginia Skill & Entertainment is certainly not making any kind of case for laissez-faire. “We agree that there are many gambling machines masquerading as skill devices across the Commonwealth and those illegal machines must be cleaned up,” a company spokesperson told the Times-Dispatch. Tom Lisk, a lobbyist for the company, notes that “it would benefit us to have some sort of regulatory structure.” Michael Barley, spokesperson for Queen of Virginia’s parent company, Pace-O-Magic, is even more direct: “Our goal in every market we’re in is to get more of a regulated system,” he says. Naturally. If you can’t beat ‘em in the game of rent-seeking, the best strategy is to join ‘em.[145]

Figure 14.1: Bingo Chips.[xix]

BINGO GAMES

The crime of participating in an illegal bingo game is defined in section 326.5 of the California Penal Code.

(a) Neither the prohibition on gambling (commencing with Section 330) applies to any bingo game that is conducted in a city, county, or city and county pursuant to an ordinance enacted under Section 19 of Article IV of the State Constitution, if the ordinance allows games to be conducted only in accordance with this section and only by organizations exempted from the payment of the bank and corporation tax by Sections 23701a, 23701b, 23701d, 23701e, 23701f, 23701g, 23701k, 23701w, and 23701l of the Revenue and Taxation Code and by mobile home

[145] Hinkle (2020)

park associations, senior citizens organizations, and charitable organizations affiliated with a school district; and if the receipts of those games are used only for charitable purposes.

(b) It is a misdemeanor for any person to receive or pay a profit, wage, or salary from any bingo game authorized by Section 19 of Article IV of the State Constitution. Security personnel employed by the organization conducting the bingo game may be paid from the revenues of bingo games, as provided in subdivisions (j) and (k).

(c) A violation of subdivision (b) shall be punishable by a fine not to exceed ten thousand dollars ($10,000), which fine is deposited in the general fund of the city, county, or city and county that enacted the ordinance authorizing the bingo game. A violation of any provision of this section, other than subdivision (b), is a misdemeanor.

(d) The city, county, or city and county that enacted the ordinance authorizing the bingo game may bring an action to enjoin a violation of this section.

(e) Minors shall not be allowed to participate in any bingo game.

(f) An organization authorized to conduct bingo games pursuant to subdivision (a) shall conduct a bingo game only on property owned or leased by it, or property whose use is donated to the organization, and which property is used by that organization for an office or for performance of the purposes for which the organization is organized. Nothing in this subdivision shall be construed to require that the property owned or leased by, or whose use is donated to, the organization be used or leased exclusively by, or donated exclusively to, that organization.

(g) All bingo games shall be open to the public, not just to the members of the authorized organization.

(h) A bingo game shall be operated and staffed only by members of the authorized organization that organized it. Those members shall not receive a profit, wage, or salary from any bingo game. Only the organization authorized to conduct a bingo game shall operate such a game, or participate in the promotion, supervision, or any other phase of a bingo game. This subdivision does not preclude the employment of security personnel who are not members of the authorized organization at a bingo game by the organization conducting the game.

(i) Any individual, corporation, partnership, or other legal entity, except the organization authorized to conduct a bingo game, shall not hold a financial interest in the conduct of a bingo game.

(j) With respect to organizations exempt from payment of the bank and corporation tax by Section 23701d of the Revenue and Taxation Code, all profits derived from a bingo game shall be kept in a special fund or account and shall not be commingled with any other fund or account. Those profits shall be used only for charitable purposes.

(k) With respect to other organizations authorized to conduct bingo games pursuant to this section, all proceeds derived from a bingo game shall be kept in a special fund or account and shall not be commingled with any other fund or account. Proceeds are the receipts of bingo games conducted by organizations not within subdivision (j). Those proceeds shall be used only for charitable purposes, except as follows:

(1) The proceeds may be used for prizes.

(2) (A) Except as provided in subparagraph (B), a portion of the proceeds, not to exceed 20 percent of the proceeds before the deduction for prizes, or two thousand dollars ($2,000) per month, whichever is less, may be used for the rental of property and for overhead, including the purchase of bingo equipment, administrative expenses, security equipment, and security personnel.

(B) For the purposes of bingo games conducted by the Lake Elsinore Elks Lodge, a portion of the proceeds, not to exceed 20 percent of the proceeds before the deduction for prizes, or three thousand dollars ($3,000) per month, whichever is less, may be used for the rental of property and for overhead, including the purchase of bingo equipment, administrative expenses, security equipment, and security personnel. Any amount of the proceeds that is additional to that permitted under subparagraph (A), up to one thousand dollars ($1,000), shall be used for the purpose of financing the rebuilding of the facility and the replacement of equipment that was destroyed by fire in 2007. The exception to subparagraph (A) that is provided by this subparagraph shall remain in effect only until the cost of rebuilding the facility is repaid, or January 1, 2019, whichever occurs first.

(3) The proceeds may be used to pay license fees.

(4) A city, county, or city and county that enacts an ordinance permitting bingo games may specify in the ordinance that if the monthly gross receipts from bingo games of an organization within this subdivision exceed five thousand dollars ($5,000), a minimum percentage of the proceeds shall be used only for charitable purposes not relating to the conducting of bingo games and that the balance shall be used for prizes, rental of property, overhead, administrative expenses, and payment of license fees. The amount of proceeds used for rental of property, overhead, and administrative expenses is subject to the limitations specified in paragraph (2).

(l)

(1) A city, county, or city and county may impose a license fee on each organization that it authorizes to conduct bingo games. The fee, whether for the initial license or renewal, shall not exceed fifty dollars ($50) annually, except as provided in paragraph (2). If an application for a license is denied, one-half of any license fee paid shall be refunded to the organization.

(2) In lieu of the license fee permitted under paragraph (1), a city, county, or city and county license is denied, one-half of the application fee shall be refunded to the organization. An additional fee for law enforcement and public safety costs incurred by the city, county, or city and county that are directly related to bingo activities may be imposed and shall be collected monthly by the city, county, or city and county issuing

the license; however, the fee shall not exceed the actual costs incurred in providing the service.

(m) A person shall not be allowed to participate in a bingo game, unless the person is physically present at the time and place where the bingo game is being conducted.
(n) The total value of prizes available to be awarded during the conduct of any bingo games shall not exceed five hundred dollars ($500) in cash or kind, or both, for each separate game which is held.

(o) As used in this section, "bingo" means a game of chance in which prizes are awarded on the basis of designated numbers or symbols that are marked or covered by the player on a tangible card in the player's possession and that conform to numbers or symbols, selected at random and announced by a live caller. Notwithstanding Section 330c, as used in this section, the game of bingo includes tangible cards having numbers or symbols that are concealed and preprinted in a manner providing for distribution of prizes. Electronics or video displays shall not be used in connection with the game of bingo, except in connection with the caller's drawing of numbers or symbols and the public display of that drawing, and except as provided in subdivision (p). The winning cards shall not be known prior to the game by any person participating in the playing or operation of the bingo game. All preprinted cards shall bear the legend, "for sale or use only in a bingo game authorized under California law and pursuant to local ordinance." Only a covered or marked tangible card possessed by a player and presented to an attendant may be used to claim a prize. It is the intention of the Legislature that bingo as defined in this subdivision applies exclusively to this section and shall not be applied in the construction or enforcement of any other provision of law.

"Commission" means the California Gambling Control Commission.
"Department" means the Department of Justice.
"Person" includes a natural person, corporation, limited liability company, partnership, trust, joint venture, association, or any other business organization.[146]

CHAIN LETTERS AND PYRAMID SCHEMES

The crime of participating in chain letters and pyramid schemes is defined in section 327 of the California Penal Code.

Every person who contrives, prepares, sets up, proposes, or operates any endless chain is guilty of a public offense, and is punishable by imprisonment in the county jail not exceeding one year or in state prison for 16 months, two, or three years.

As used in this section, an "endless chain" means any scheme for the disposal or distribution of property whereby a participant pays a valuable consideration for the chance to receive compensation for introducing one or more additional persons into participation in the scheme or for the chance to receive compensation when a person introduced by the participant

[146] California Penal Code (2024)

introduces a new participant. Compensation, as used in this section, does not mean or include payment based upon sales made to persons who are not participants in the scheme and who are not purchasing in order to participate in the scheme.[147]

Figure 14.2: How Pyramid Schemes Work Diagram.[xx]

Ponzi Schemes

A Ponzi scheme is a form of fraud that lures investors and pays profits to earlier investors with funds from more recent investors. The scheme leads victims to believe that profits are coming from product sales or other means, and they remain unaware that other investors are the source of funds. A Ponzi scheme can maintain the illusion of a sustainable business if new investors contribute new funds, and as long as most of the investors do not demand full repayment and still believe in the non-existent assets they are purported to own.
Ponzi Schemes

Typically, Ponzi schemes require an initial investment and promise above-average returns. They use vague verbal guises such as “hedge futures trading “, “high-yield investment programs “, or “offshore investment” to describe their income strategy. It is common for the operator to take

[147] California Penal Code (2024)

advantage of a lack of investor knowledge or competence, or sometimes claim to use a proprietary, secret investment strategy to avoid giving information about the scheme.
The basic premise of a Ponzi scheme is “to rob Peter to pay Paul. “Initially, the operator pays high returns to attract investors and entice current investors to invest more money. When other investors begin to participate, a cascade effect begins. The schemer pays a “return” to initial investors from the investments of new participants, rather than from genuine profits. Often, high returns encourage investors to leave their money in the scheme, so that the operator does not actually have to pay very much to investors. The operator simply sends statements showing how much they have earned, which maintains the deception that the scheme is an investment with high returns. Investors within a Ponzi scheme may even face difficulties when trying to get their money out of the investment.

Operators also try to minimize withdrawals by offering new plans to investors where money cannot be withdrawn for a certain period of time in exchange for higher returns. The operator sees new cash flows as investors cannot transfer money. If a few investors do wish to withdraw their money in accordance with the terms allowed, their requests are usually promptly processed, which gives the illusion to all other investors that the fund is solvent and financially sound.

Ponzi schemes sometimes begin as legitimate investment vehicles, such as hedge funds that can easily degenerate into a Ponzi-type scheme if they unexpectedly lose money or fail to legitimately earn the returns expected. The operators fabricate false returns or produce fraudulent audit reports instead of admitting their failure to meet expectations, and the operation is then considered a Ponzi scheme.

A wide variety of investment vehicles and strategies, typically legitimate, have become the basis of Ponzi schemes. For instance, Allen Stanford used bank certificates of deposit to defraud tens of thousands of people. Certificates of deposit are usually low-risk and insured instruments, but the Stanford certificates of deposit were fraudulent.

According to the U.S. Securities and Exchange Commission (SEC), many Ponzi schemes share similar characteristics that should be “red flags” for investors. The warning signs include:

- High investment returns with little or no risk. Every investment carries some degree of risk, and investments yielding higher returns typically involve more risk. Any “guaranteed” investment opportunity is often considered suspicious.
- Overly consistent returns. Investment values tend to go up and down over time, especially those offering potentially high returns. An investment that continues to generate regular positive returns regardless of overall market conditions is considered suspicious.
- Unregistered investments. Ponzi schemes typically involve investments that have not been registered with the SEC or with state regulators. Registration is important because it provides investors with access to key information about the company’s management, products, services, and finances.

- Unlicensed sellers. Federal and state securities laws require that investment professionals and their firms be licensed or registered. Most Ponzi schemes involve unlicensed individuals or unregistered firms, the few exceptions usually being the aforementioned investment vehicles that started out as legitimate operations but failed to earn the expected returns.
- Secretive or complex strategies. Investments that cannot be understood or do not give complete information.
- Issues with paperwork. Excuses are given regarding why clients cannot review information in writing about an investment. Also, account statement errors and inconsistencies are frequently signs that funds are not being invested as promised.
- Difficulty receiving payments. Clients have failures to receive a payment or have difficulty cashing out their investments. Ponzi scheme promoters routinely encourage participants to "roll over" investments and sometimes promise even higher returns on the amount rolled over.

Theoretically it is not impossible at least for certain entities operating as Ponzi scheme to ultimately "succeed" financially, at least so long as a Ponzi scheme was not what the promoters were initially intending to operate. For example, a failing hedge fund reporting fraudulent returns could conceivably "make good" its reported numbers, for example by making a successful high-risk investment. Moreover, if the operators of such a scheme are facing the likelihood of imminent collapse accompanied by criminal charges, they may see little additional "risk" to themselves in attempting cover their tracks by engaging in further illegal acts to try and make good the shortfall (for example, by engaging in insider trading). Especially with lightly regulated and monitored investment vehicles like hedge funds, in the absence of a whistleblower or accompanying illegal acts any fraudulent content in reports is often difficult to detect unless and until the investment vehicles ultimately collapse.

Typically, however, if a Ponzi scheme is not stopped by authorities, it usually falls apart for one or more of the following reasons:

1. The operator vanishes, taking all the remaining investment money. Promoters who intend to abscond often attempt to do so as returns due to be paid are about to exceed new investments, as this is when the investment capital available will be at its maximum.
2. Since the scheme requires a continual stream of investments to fund higher returns, if the number of new investors slows down, the scheme collapses as the operator can no longer pay the promised returns (the higher the returns, the greater the risk of the Ponzi scheme collapsing). Such liquidity crises often trigger panics, as more people start asking for their money, similar to a bank run.
3. External market forces, such as a sharp decline in the economy, can often hasten the collapse of a Ponzi scheme (for example, the Madoff investment scandal during the market downturn of 2008), since they often cause many investors to attempt to withdraw part or all of their funds sooner than they had intended.

Actual losses are extremely difficult to calculate. The amounts that investors thought they had were never attainable in the first place. The wide gap between "money in" and "fictitious gains" make it virtually impossible to know how much was lost in any Ponzi scheme.

In the United States, individuals can halt a Ponzi scheme before its collapse by reporting to the SEC. Under the SEC Whistleblower Program, individuals can receive monetary awards for reporting violations of the federal securities laws, including information about Ponzi schemes, if their information leads to a successful SEC enforcement action in which over $1,000,000 in sanctions is ordered. To report a Ponzi scheme and qualify for an award under the program, the SEC requires that whistleblowers or their attorneys report the tip online through the SEC's Tip, Complaint or Referral Portal or mail/fax a Form TCR to the SEC Office of the Whistleblower.[148]

GAMING

The crime of participating in gaming is defined in section 330 of the California Penal Code.

Every person who deals, plays, or carries on, opens, or causes to be opened, or who conducts, either as owner or employee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noire, rondo, tan, fan-tan, seven-and-a-half, twenty-one, hokey-pokey, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or other representative of value, and every person who plays or bets at or against any of those prohibited games, is guilty of a misdemeanor, and shall be punishable by a fine not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000), or by imprisonment in the county jail not exceeding six months, or by both the fine and imprisonment.[149]

BOOKMAKING

The crime of bookmaking is defined in section 337a of the California Penal Code.

(a) Except as provided in Section 336.9, every person who engages in one of the following offenses, shall be punished for a first offense by imprisonment in a county jail for a period of not more than one year or in the state prison, or by a fine not to exceed five thousand dollars ($5,000), or by both imprisonment and fine:

(1) Pool selling or bookmaking, with or without writing, at any time or place.

(2) Whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any room, shed, tenement, tent, booth, building, float, vessel, place, stand or enclosure, of any kind, or any part thereof, with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, any purported bet or bets, wager or wagers, any purported wager or wagers,

[148] Klingensmith (2022)
[149] California Penal Code (2024)

selling pools, or purported pools, upon the result, or purported result, of any trial, purported trial, contest, or purported contest, of skill, speed or power of endurance of person or animal, or between persons, animals, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever.

(3) Whether for gain, hire, reward, or gratuitously, or otherwise, receives, holds, or forwards, or purports or pretends to receive, hold, or forward, in any manner whatsoever, any money, thing or consideration of value, or the equivalent or memorandum thereof, staked, pledged, bet or wagered, or to be staked, pledged, bet or wagered, or offered for the purpose of being staked, pledged, bet or wagered, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of person or animal, or between persons, animals, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever.

(4) Whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of person or animal, or between persons, animals, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever.

(5) Being the owner, lessee or occupant of any room, shed, tenement, tent, booth, building, float, vessel, place, stand, enclosure or grounds, or any part thereof, whether for gain, hire, reward, or gratuitously, or otherwise, permits that space to be used or occupied for any purpose, or in any manner prohibited by paragraph (1), (2), (3), or (4).

(6) Lays, makes, offers or accepts any bet or bets, or wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed, or power of endurance of person or animal, or between persons, animals, or mechanical apparatus.[150]

CRIMINAL PROFITEERING

The crime of participating in criminal profiteering is defined in section 186 of the California Penal Code.

186. This act may be cited as the “California Control of Profits of Organized Crime Act.”
186.2. For purposes of this chapter, the following definitions apply:

[150] California Penal Code (2024)

(a) “Criminal profiteering activity” means an act committed or attempted or a threat made for financial gain or advantage, which act or threat may be charged as a crime under any of the following sections:

(1) Arson, as defined in Section 451.

(2) Bribery, as defined in Sections 67, 67.5, and 68.

(3) Child pornography or exploitation, as defined in subdivision (b) of Section 311.2, or Section 311.3 or 311.4, which may be prosecuted as a felony.

(4) Felonious assault, as defined in Section 245.

(5) Embezzlement, as defined in Sections 424 and 503.

(6) Extortion, as defined in Section 518.

(7) Forgery, as defined in Section 470.

(8) Gambling, as defined in Sections 320, 321, 322, 323, 326, 330a, 330b, 330c, 330.1, 330.4, 337a to 337f, inclusive, and Section 337i, except the activities of a person who participates solely as an individual bettor.

(9) Kidnapping, as defined in Section 207.

(10) Mayhem, as defined in Section 203.

(11) Murder, as defined in Section 187.

(12) Pimping and pandering, as defined in Section 266.

(13) Receiving stolen property, as defined in Section 496.

(14) Robbery, as defined in Section 211.

(15) Solicitation of crimes, as defined in Section 653f.

(16) Grand theft, as defined in Section 487 or subdivision (a) of Section 487a.

(17) Trafficking in controlled substances, as defined in Sections 11351, 11352, and 11353 of the Health and Safety Code.

(18) Violation of the laws governing corporate securities, as defined in Section 25541 of the Corporations Code.

(19) Offenses contained in Chapter 7.5 (commencing with Section 311) of Title 9, relating to obscene matter, or in Chapter 7.6 (commencing with Section 313) of Title 9, relating to harmful matter that may be prosecuted as a felony.

(20) Presentation of a false or fraudulent claim, as defined in Section 550.

(21) False or fraudulent activities, schemes, or artifices, as described in Section 14107 of the Welfare and Institutions Code.

(22) Money laundering, as defined in Section 186.10.

(23) Offenses relating to the counterfeit of a registered mark, as specified in Section 350, or offenses relating to piracy, as specified in Section 653w.

(24) Offenses relating to the unauthorized access to computers, computer systems, and computer data, as specified in Section 502.

(25) Conspiracy to commit any of the crimes listed above, as defined in Section 182.

(26) Subdivision (a) of Section 186.22, or a felony subject to enhancement as specified in subdivision (b) of Section 186.22.

(27) Offenses related to fraud or theft against the state’s beverage container recycling program, including, but not limited to, those offenses specified in this subdivision and those criminal offenses specified in the California Beverage Container Recycling and Litter

Reduction Act (Division 12.1 (commencing with Section 14500) of the Public Resources Code).

(28) Human trafficking, as defined in Section 236.1.

(29) A crime in which the perpetrator induces, encourages, or persuades a person under 18 years of age to engage in a commercial sex act. For purposes of this paragraph, a commercial sex act means any sexual conduct on account of which anything of value is given or received by any person.

(30) A crime in which the perpetrator, through force, fear, coercion, deceit, violence, duress, menace, or threat of unlawful injury to the victim or to another person, causes a person under 18 years of age to engage in a commercial sex act. For purposes of this paragraph, a commercial sex act means any sexual conduct on account of which anything of value is given or received by any person.

(b) (1) "Pattern of criminal profiteering activity" means engaging in at least two incidents of criminal profiteering, as defined by this chapter, that meet the following requirements:

(A) Have the same or a similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics.

(B) Are not isolated events.

(C) Were committed as a criminal activity of organized crime.

(2) Acts that would constitute a "pattern of criminal profiteering activity" shall not be used by a prosecuting agency to seek the remedies provided by this chapter unless the underlying offense occurred after the effective date of this chapter and the prior act occurred within 10 years, excluding any period of imprisonment, of the commission of the underlying offense. A prior act shall not be used by a prosecuting agency to seek remedies provided by this chapter if a prosecution for that act resulted in an acquittal.

(c) "Prosecuting agency" means the Attorney General or the district attorney of any county.

(d) "Organized crime" means crime that is of a conspiratorial nature and that is either of an organized nature and seeks to supply illegal goods or services such as narcotics, prostitution, pimping and pandering, loan-sharking, counterfeiting of a registered mark in violation of Section 350, the piracy of a recording or audiovisual work in violation of Section 653w, gambling, and pornography, or that, through planning and coordination of individual efforts, seeks to conduct the illegal activities of arson for profit, hijacking, insurance fraud, smuggling, operating vehicle theft rings, fraud against the beverage container recycling program, embezzlement, securities fraud, insurance fraud in violation of the provisions listed in paragraph (34) of subdivision (a), grand theft, money laundering, forgery, or systematically encumbering the assets of a business for the purpose of defrauding creditors. "Organized crime" also means crime committed by a criminal street gang, as defined in subdivision (f) of Section 186.22. "Organized crime" also means false or fraudulent activities, schemes, or artifices, as described in Section 14107 of the Welfare and Institutions Code, and the theft of personal identifying information, as defined in Section 530.5.

(e) “Underlying offense” means an offense enumerated in subdivision (a) for which the defendant is being prosecuted.[151]

Organized Crime

Organized crime refers to criminal activity by groups or organizations whose major purpose for existing is to commit such crime. When we hear the term “organized crime,” we automatically think of the so-called Mafia, vividly portrayed in the Godfather movies and other films, that comprises several highly organized and hierarchical Italian American “families.” Although Italian Americans have certainly been involved in organized crime in the United States, so have Irish Americans, Jews, African Americans, and other ethnicities over the years. The emphasis on Italian domination of organized crime overlooks these other involvements and diverts attention from the actual roots of organized crime.

What are these roots? Simply put, organized crime exists and even thrives because it provides goods and/or services that the public demands. Organized crime flourished during the 1920s because it was all too ready and willing to provide an illegal product, alcohol, that the public continued to demand even after Prohibition began. Today, organized crime earns its considerable money from products and services such as illegal drugs, prostitution, pornography, loan sharking, and gambling. It also began long ago to branch out into legal activities such as trash hauling and the vending industry.

Government efforts against organized crime since the 1920s have focused on arrest, prosecution, and other law-enforcement strategies. Organized crime has certainly continued despite these efforts. This fact leads some scholars to emphasize the need to reduce public demand for the goods and services that organized crime provides. However, other scholars say that reducing this demand is probably a futile or mostly futile task, and they instead urge consideration of legalizing at least some of the illegal products and services (e.g., drugs and prostitution) that organized crime provides. Doing so, they argue, would weaken the influence of organized crime.[152]

CHAPTER SUMMARY

A lottery (or lotto) is a form of gambling that involves the drawing of numbers at random for a prize. Some governments outlaw lotteries, while others endorse it to the extent of organizing a national or state lottery. It is common to find some degree of regulation of lottery by governments. The most common regulations are prohibition of sale to minors and licensing of ticket vendors. It is a misdemeanor for any person to receive or pay a profit, wage, or salary from any bingo game. Security personnel employed by the organization conducting the bingo game may be paid from the revenues of bingo games. Every person who contrives, prepares, sets up, proposes, or operates any endless chain is guilty of a public offense, and is punishable

[151] California Penal Code (2024)
[152] University of Minnesota. Social Problems (2015)

by imprisonment in the county jail not exceeding one year or in state prison for 16 months, two, or three years. Illegal gaming punishable by a fine of not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000). According to the crime of bookmaking, it is illegal to receive bets on agreed upon odds. “Criminal profiteering activity” means an act committed or attempted or a threat made for financial gain or advantage, which act, or threat may be charged as a crime several circumstances including, but not limited to, arson and human trafficking.

KEY TERMS

- Lotteries
- Bingo Games
- Chain Letters
- Pyramid Schemes
- Ponzi Schemes
- Gaming
- Bookmaking
- Criminal Profiteering
- Organized Crime

REVIEW QUESTIONS

1. Summarize what a lottery is and explain how it should be conducted.
2. Describe the elements of the crime of participating in an unlawful bingo game.
3. Conduct an internet search on Bernie Madoff and write a detailed summation of his crimes.
4. Locate a “real world” incident involving bookmaking.
5. Create a detailed study guide on criminal profiteering.

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