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## LAW SUMMARIES

### Criminal Law

George E. Dix

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# Criminal Law

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Nineteenth Edition

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

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Printed in the United States of America

ISBN: 978-1-63459-385-4

# Capsule Summary

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## I. INTRODUCTION

### A. IN GENERAL

#### 1. Crime Defined

A crime is an act or omission prohibited by law for the protection of the public, the violation of which is prosecuted by the state and punishable by fine, incarceration, and/or other restriction of liberty.

#### 2. Sources of Criminal Law

The definition of the basic crimes and defenses are taken from the English common law. Criminal matters are now largely governed by statute, but the interpretation of statutes often refers to the common law cases.

### B. CLASSIFICATIONS OF CRIMES

#### 1. Felonies and Misdemeanors

Except for treason, crimes traditionally have been classified as felonies or misdemeanors. At common law, felonies are those offenses punishable by forfeiture of property. Statutory felonies are generally those offenses punishable by *death or incarceration in a prison for more than one year*. Misdemeanors are those offenses that are not classified as felonies.

#### 2. Malum in Se and Malum Prohibitum

Malum in se crimes are *inherently* dangerous, bad, or immoral (e.g., the common law felonies). Malum prohibitum offenses are not prohibited because of any basic immorality but out of *necessity* to regulate the general welfare (e.g., prohibition against driving on the wrong side of the road).

### C. BURDEN OF PROOF AND RELATED MATTERS

#### 1. Proof Beyond a Reasonable Doubt

Due process and the defendant's Sixth Amendment right to a jury trial require that the prosecution prove *each element beyond a reasonable doubt* before a jury. An element may not be withdrawn from jury consideration and decided as a matter of law by the court.

#### 2. Defensive Matters

Due process permits placing the burden to prove most defenses on the defendant.

#### 3. Presumptions and Inferences Modifying Burden of Proof

Presumptions and permissive inferences may so interfere with the prosecution's burden of proof as to violate due process. Presumptions regarding elements of crime, such as intent, may improperly relieve the prosecution of its burden of proof.

##### a. Permissive Inferences

Due process is not violated if a jury is instructed that it may, but need not, infer one fact from another if the ultimate fact to be inferred more likely than not flows from the fact.

#### 4. Homicide Prosecutions—Allocating Burdens Regarding Provocation

##### a. Burden of Proof on Provocation by Presuming Malice

If the jury in a murder prosecution is permitted to presume malice aforethought from the killing itself, thus requiring the defendant to prove a sudden provocation in order to reduce the crime to voluntary manslaughter, due process is violated. The presumption of malice relieves the prosecution of its burden of proving the mental state for murder.

##### b. Burden of Proof on Extreme Emotional Disturbance

When intent to kill must be proved by the prosecution, the defendant's due process rights are *not* violated by requiring him to prove that he acted under extreme emotional disturbance which would reduce the killing to manslaughter. If the prosecution is required to prove the mental state for murder, the defendant can be required to prove "defensive facts" such as provocation.

## II. THE CRIMINALIZATION DECISION

### A. JUSTIFICATIONS FOR PUNISHMENT

#### 1. Specific Prevention

Punishment may prevent an offender from committing future crimes through *deterrence* (fear of penalty) or *incapacitation* (restraint) of the offender, and by affording her the opportunity for *treatment and possible rehabilitation*.

#### 2. General Prevention

Penalizing offenders also may prevent others from committing crimes by *generally deterring* them through anticipation of similar punishment, by *educating* the public as to the *moral wrong* of crime, by *creating social solidarity*, and by *keeping others from taking the law into their own hands*.

#### 3. Retribution

The fact that the defendant committed a crime is *itself* reason to punish her.

### B. COSTS VS. BENEFITS

The benefits to be gained from making conduct criminal depend on the extent to which the social interests justifying criminalization will be furthered. But any benefits must be weighed against the direct costs of criminalization (e.g., costs of law enforcement, imprisonment), the incidental costs (e.g., improper searches and seizures), and the impact on society.

## III. BASIC LEGAL LIMITS UPON CRIMINAL LAW

### A. CONSTITUTIONAL RIGHT OF PRIVACY

Although the Constitution does not expressly mention a right of privacy, the Supreme Court has found such a right implied in several constitutional provisions. Therefore, a person may not be convicted for engaging in conduct falling within the scope of this federal right (e.g., the use of contraceptives, the private possession of obscenity, and private and consensual homosexual activity).

### B. DUE PROCESS PROHIBITION AGAINST VAGUENESS

#### 1. General Rule—Criminal Statute Must Be Precise

The Due Process Clauses of the Fifth and Fourteenth Amendments require that criminal statutes be precise so as to give *notice* as to what conduct is criminal and to *discourage arbitrary enforcement*.

## 2. Criteria for Evaluating Vagueness

A criminal statute is unconstitutionally vague if it fails to define the offense with sufficient definiteness so that ordinary people can understand what is prohibited and so as to discourage arbitrary and discriminatory enforcement of the statute.

## 3. Curing Vagueness by “Scienter”

A statute that would otherwise be unconstitutionally vague may be upheld if it requires that the offense be committed with “scienter,” that is, prior knowledge or intent.

# C. CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment prohibition against cruel and unusual punishment is binding on the states via the Fourteenth Amendment and imposes a number of different limits on criminal law.

## 1. Inherently Impermissible Punishments

*Inherently* barbaric or degrading punishment is prohibited. Torture, death by painful or lingering methods, and forfeiture of citizenship are probably also prohibited.

## 2. Disproportionate Penalties

Penalties that are so *grossly and outrageously disproportionate* to the defendant’s conduct are also prohibited.

## 3. Death Penalty

The death penalty is constitutionally permissible if it is imposed under a procedure that adequately assures evenhanded determinations as to whether the penalty is appropriate in a particular case. The death penalty is an unconstitutionally disproportionate penalty for the rape of an adult woman, or the rape of a child (at least when the defendant did not intend to kill the victim). Murderers who are younger than 18 or mentally impaired generally cannot be executed.

# D. MULTIPLE LIABILITY FOR IDENTICAL OR RELATED CRIMINAL ACTS

## 1. In General—Overlapping Criminal Liability

Overlapping liability may be incurred when the *same act constitutes several crimes* (e.g., murder and battery) and when acts constituting *different offenses are committed closely together* and for *related reasons* (e.g., burglary as a means to commit a larceny). Such overlapping criminal liability is sometimes criticized as resulting in disproportionately severe punishment.

## 2. Common Law Doctrine of Merger

At common law, if the same act was both a felony and a misdemeanor, the misdemeanor merged into the felony and there could be *no conviction* for the misdemeanor. The merger doctrine did *not* apply if *both* crimes were misdemeanors or felonies. Today there is no *common law* merger in the United States.

## 3. Unit of Prosecution Analysis

### a. Legislative Intent

The unit of prosecution for a crime is the standard intended by the legislature to determine whether one or more commissions of the crime arise from a single course of conduct.

### b. “Single Larceny” Rule

The taking of multiple items at or about the same time constitutes only one larceny.

### c. Assaultive Crimes—One Crime Per Victim

The homicide and assaultive crimes generally permit one prosecution for each victim killed or injured.

#### 4. Fifth Amendment Prohibition Against Double Jeopardy

The constitutional prohibition against double jeopardy primarily applies to repeated prosecutions for the same or perhaps related crimes but also imposes some limit on conviction for several crimes in one prosecution.

##### a. No Bar to Legislatively-Intended Multiple Convictions in One Proceeding

If a legislature makes the same conduct two crimes, a defendant *may* be convicted in *one proceeding* of both offenses as long as this was the *legislative intent*.

##### b. Determining Legislative Intent—*Blockburger* Rule

A legislature is presumed to have intended to prohibit punishing a defendant for two crimes arising from the same conduct unless *each crime* requires proof of an *additional fact* that the other does not.

##### (1) Caveat

The *Blockburger* rule is a means of determining intent. If there is *direct* evidence that Congress did intend double punishment, *Blockburger* does not apply.

#### 5. State Double Jeopardy Prohibitions

Many state constitutions contain prohibitions against double jeopardy similar to the federal provisions. State courts may construe these provisions more stringently, thus giving defendants broader protection than the federal provision. For example, state double jeopardy provisions may bar punishment for related crimes unless those crimes are designed to protect different social interests.

#### 6. Statutory Bars to Multiple Conviction or Punishment

State statutes sometimes prohibit multiple convictions for a *single act*. Some courts have interpreted “single act” to include several crimes related in their commission and committed pursuant to a *single and primary objective*.

#### 7. Modern Merger of Offenses as Matter of Legislative Intent

Courts sometimes hold that a defendant cannot be convicted of related crimes because one offense “merges” into another. However, this is *not* the application of the *common law* merger rule but rather a determination of legislative intent barring convictions for both crimes. Courts often apply the *Blockburger rule* (*supra*) as a guide to such intent.

### IV. ELEMENTS OF CRIMES

#### A. IDENTIFYING, DISTINGUISHING, AND CATEGORIZING ELEMENTS OF CRIMES

Careful analysis of criminal law issues requires that with regard to any crime, all of the elements of that crime be identified and distinguished.

##### 1. Categories of Elements

Elements of crimes may be divided into four categories: (i) *conduct, act, or omission* (e.g., burglary requires an act amounting to “entry”); (ii) *a result* (e.g., a homicide requires proof that the victim died as a result of the defendant’s conduct); (iii) *circumstances* (e.g., burglary sometimes requires that the place entered be the dwelling of another); and (iv) *mens rea or culpable mental state*.

#### B. CRIMINAL ACTS—ACTUS REUS

An *affirmative act*, or occasionally an omission or *failure to act*, is necessary for the commission of a crime. Mere thoughts are not enough.

## 1. Constitutional Limitation

A *status* (e.g., being an alcoholic) may not be made a criminal offense. However, there is no constitutional bar to making acts related to a status criminal (e.g., public drunkenness).

## 2. “Acts” Sufficient for Criminal Liability—Affirmative vs. Negative “Acts”

Acts that will support a conviction vary with the crime itself; an act may be an affirmative act or a failure to act. Some crimes are defined specifically in terms of what acts are required. Other crimes (e.g., homicide) do not particularize the requisite acts, and thus any act or omission that meets the general concepts of a criminal act is sufficient.

### a. Affirmative Acts (Acts of Commission)

An affirmative act will suffice for criminal liability if it involves some *conscious* and *volitional movement*.

#### (1) Exceptions

Although criminal liability cannot ordinarily be based on unconscious movements, a defendant may be held liable if she *caused her unconsciousness* or *was aware of pending unconsciousness*.

### b. Negative Acts (Acts of Omission)

A defendant’s failure to act may support criminal liability *if*:

- (i) She was under a *legal duty to act*,
- (ii) She had the requisite *knowledge*, and
- (iii) It was *possible* for her to act.

#### (1) Situations Giving Rise to Legal Duties

A legal duty to act may arise from: (i) a relationship between the parties (e.g., parent-child); (ii) a particular statute; (iii) a contract; (iv) the voluntary undertaking of a task; or (v) creating a situation of peril. Also, if the defendant has a duty to control the conduct of others (e.g., as an employer), she may be obliged to act. Note that a *moral obligation* is *not* enough.

#### (2) Knowledge Required for Liability

In omission cases, a probable majority of courts hold that a defendant must be *aware of the facts* giving rise to a legal duty to act. Some jurisdictions require in addition that a defendant be *aware of the law* that creates a duty. In some circumstances, knowledge of this sort may be required by due process.

#### (3) Act Must Be Capable of Performance

For criminal liability to attach, it must have been *possible* for the defendant to have done the act. There is no liability where the omission was due to the fact that she lacked the means or ability to perform.

## C. ATTENDANT CIRCUMSTANCES

In addition to the requisite elements, many crimes require proof that certain circumstances existed at the time of the act in question. Without a showing of these facts, the defendant’s actions are not criminal.

## D. CRIMINAL STATE OF MIND—MENS REA

### 1. General Requirement of Mens Rea

Crimes generally require “mens rea” or some *culpable mental state*. Unlike other kinds of legal liability, criminal law considers (and even emphasizes) what the defendant was actually thinking



when she committed the crime. Thus, criminal liability is generally subjective in nature. “Mens rea” should be distinguished from motive, which refers to the *reason* for acting and *generally is not essential* for criminal liability. Likewise, proof of a good motive will not prevent conviction.

**a. Modern Analysis Focusing on Elements**

Modern analysis requires consideration of what if any awareness is required concerning each element of a crime

**b. Object and Quality Dimensions**

Modern analysis requires separate consideration of what objects the culpable mental state must involve and then what quality or level of awareness must be proved.

**2. Constitutional Considerations**

The Supreme Court has never made clear what, if any, culpable mental states are required for crimes as a matter of federal constitutional law. Some of the Court’s decisions suggest the federal constitutional requirement of due process of law might require some minimal awareness by one accused of a crime.

**3. Mens Rea Analysis and Terminology**

Traditional mens rea analysis often used a number of specialized terms—“general intent,” “specific intent,” “scienter,” “malice,” “willfulness,” etc.—that were sometimes not carefully defined. The terms often have little utility under modern statutory analysis.

**a. “General” Versus “Specific” Intent**

Traditional criminal law analysis sometimes distinguished “general intent” from “specific intent.” The significance of the distinction is that, traditionally, the application of certain defenses hinged on the determination of whether the crime was a “general” or “specific” intent crime (*e.g.*, voluntary intoxication was sometimes held available as a defense only to specific intent crimes).

**(1) Focus on Conduct or Actus Reus**

*General intent*, some courts explain, need not be specifically proven but can be inferred from the fact that the defendant engaged in the conduct constituting the crime. On the other hand, *specific intent*, courts sometimes say, could not be inferred from the commission of the actus reus of the crime and thus was more difficult to prove.

**(2) Focus on Elements of the Crime**

Courts often use the term *general intent* to refer to the culpable mental state(s) required *concerning the nonmental elements of a crime*—the conduct, any result, and any circumstances required. Courts so defining general intent often use the term *specific intent* to refer to any culpable mental state that *concerns something that itself is not the conduct, result, or circumstance* that must be proved.

**b. Criminal Negligence**

Liability for certain crimes (*e.g.*, involuntary manslaughter, battery) may be based on a showing of criminal negligence. In such cases, the defendant acted with *gross lack of care*. But note that the negligence must involve a *higher probability of harm* and a *greater degree of unreasonableness* than is necessary for civil liability purposes.

**c. Malice**

Some crimes require malice, which is usually construed as requiring the commission of a volitional act *without legal excuse or justification*. Ill will or hatred need *not* be shown.

**(1) But Note**

Malice may be given a different meaning in relation to certain crimes (*e.g.*, malice aforethought for murder).

**d. “Willfully,” “Deliberately,” “Feloniously”**

These terms, as used in criminal statutes, are often equated with general intent (*supra*).

**e. Knowledge of Law Sometimes Required**

Some crimes require that the defendant be aware of the law and that his conduct violated it (*e.g.*, federal tax crimes).

**f. Proof of Intent—Federal Constitutional Requirements**

When a crime requires proof of intent, the prosecution must prove intent beyond a reasonable doubt. A presumption relieving the prosecution of this burden violates the defendant’s right to due process.

**4. Strict Liability Crimes**

A few crimes entirely dispense with a mens rea requirement in regard to some or all of the elements.

**a. Interpreting Federal Crimes**

The Supreme Court construes federal statutory crimes that contain no explicit culpable mental state requirement as demanding proof of “broadly applicable scienter requirements.” This “presumption of scienter,” however, requires federal courts to read into such a crime only that culpable mental state necessary to separate wrongful conduct from “otherwise innocent conduct.”

**b. Identifying Strict Liability Crimes**

Whether a crime imposes strict liability is a matter of *legislative intent*. Such intent will most likely be found if (i) the crime is a “new” statutory offense; (ii) the crime does *not* infringe on other person’s rights; (iii) the crime is part of a *regulatory scheme*; (iv) the crime imposes a relatively *light penalty*; and (v) it appears that requiring proof of mens rea would *impede implementation* of the legislative purpose.

**c. Application**

Based on the above guidelines, *public welfare offenses* are likely to be strict liability crimes. However, despite those guidelines, *bigamy* and *statutory rape* are common law crimes that have been traditionally regarded as serious strict liability crimes.

**d. Constitutional Limitations**

Due process prohibits strict liability in some situations, particularly if a serious penalty is involved and the crime resembles a traditional common law offense for which mens rea has usually been required.

**5. Modern Classifications of State of Mind**

The modern trend is for statutes to adopt the Model Penal Code approach, which distinguishes four levels of state of mind.

**a. Different States of Mind**

**(1) “Purpose”**

A *desire* to engage in certain conduct or cause a certain result.

(2) **“Knowledge”**

An *awareness* that something will occur or does exist.

(3) **“Recklessness”**

An *awareness* of a *substantial and unjustifiable risk* that something will occur or does exist.

(4) **“Negligence”**

A situation in which a person *should have been aware* of a substantial and unjustifiable risk that a certain result would occur or that a certain circumstance would exist.

(a) **Distinguish—Recklessness**

Recklessness requires a *conscious awareness* of the risk involved. Negligence involves circumstances in which a *reasonable person would have been aware* of the risk.

b. **General Requirement—At Least Recklessness**

Under the Model Penal Code and many modern statutes, unless specifically provided otherwise, a showing of at least recklessness is required as to *all elements* of the offense.

6. **Interpreting Culpable Mental State Under Modern Statutory Crimes**

Modern statutory crimes sometimes pose difficult questions of interpretation regarding those nonmental elements of the crime to which the required culpable mental state applies. *Example:* A federal statute provides that “[a] person commits an offense if the person knowingly uses, without lawful authority, a means of identification of another person.” The question becomes whether the courts will apply the explicitly required culpable mental state—“knowingly”—to only the conduct element following that term knowingly (*i.e.*, “uses [something]”) or whether they will apply knowingly to some or all of the remaining nonmental elements.

a. **Relationship to Strict Liability Analysis**

If the culpable mental state required for an offense does not apply to all material nonmental elements of the crime, the crime imposes “limited” or “partial” strict liability. Factors suggesting strict liability, therefore, weigh in favor of construing such a culpable mental state as not applying to one or more nonmental elements of the offense.

b. **Elemental Approach**

The Model Penal Code assumes that the policies of criminal law suggest a required culpable mental state should ordinarily apply to all material nonmental elements of a crime. Thus, the required culpable mental state will apply to all those elements unless a contrary legislative intent “plainly appears.”

c. **Ordinary English Usage Approach**

The United States Supreme Court has relied on what it described as ordinary English grammar and general usage. This suggests that when a federal statutory crime contains a required culpable mental state (as when it specifies that the crime must be committed “knowingly”), that culpable mental state often and perhaps generally applies to all the subsequently listed elements of the crime. Several Justices, however, cautioned against applying this approach if the context or policy considerations suggest that Congress intended a less demanding culpable mental state.

**d. Elements Separating Wrongful from Innocent Conduct**

Some courts, including the Supreme Court, have indicated that a crime will often be construed as requiring a culpable mental state regarding only those elements that distinguish criminal conduct from conduct that is not criminal at all.

**e. Penalty Elements**

Courts are often unwilling to require a culpable mental state concerning an element of a crime that determines only the grade of the offense or the penalty imposable on conviction.

**7. “Transferred Intent”—Responsibility for Unintended Results**

Ordinarily, for criminal liability to attach, a defendant must have *intended the actual harm done*. However, if the defendant intends to harm one person or item of property and does *very similar harm* to another person or item, he will be treated as if he had, in fact, intended the result that occurred (*i.e.*, the intent is transferred) and criminal liability will attach.

**E. CONCURRENCE OF ACTUS REUS AND MENS REA**

The defendant’s act and intent must concur; *i.e.*, the act or result must be *attributable* to the culpable state of mind.

**1. Concurrence Between Mens Rea and Act**

Generally, the defendant must have had the requisite intent *at the moment he performed* the act.

**2. Concurrence Between Mens Rea and Result**

If proof of a result is required, the occurrence of the result must be *attributable* to the mens rea. However, it is *not* essential that the intent and result concur in point of time.

**3. Special Problem—Mistake of Death Cases**

Special problems arise where the defendant mistakenly believes he has caused death and then, without intent to kill, takes other action which actually does cause death. Jurisdictions are split, with some refusing to find liability because there is no intent, and others finding liability because the defendant’s behavior was all part of a single scheme.

**F. CAUSATION**

If a crime is one that requires proof of a result, the defendant’s conduct must be shown to have been the *legal cause* of that result. Two kinds of causation must exist: factual and proximate.

**1. “Direct” and Intervening Event Causation**

Causation may involve intervening factors between the defendant’s act and the occurrence of the result. If no such intervening factors are involved, the causation can be said to be “direct.”

**2. Factual Causation—“But For” Test**

The prosecution must show that “*but for*” the defendant’s actions, the result would not have occurred *when and as it did*.

**a. Substantial Factor Requirement**

Some courts require, in addition, that the defendant’s actions be a substantial factor in bringing about the result.

**b. Speeding up Result**

Where the defendant has simply speeded up an *inevitable result*, most courts find factual causation.

**c. Exception—Concurrent Sufficient Cause**

An exception to the general “but for” requirement applies when two factors acting concurrently cause a result and either alone would have been sufficient to cause that result. *Both* factors will be considered as factual causes.

**2. Proximate Causation**

In addition to factual causation, there must be proof that the defendant's action is the proximate cause of a result. Generally, proximate cause is present when the result occurs as a *natural and probable consequence* of the defendant's act *and* there is *no intervening factor* sufficient to break the chain of causation (*i.e.*, a superseding factor). To constitute a superseding factor, an intervening factor must meet four requirements.

**a. Intervening Factor**

An intervening factor can be superseding only if it is “intervening,” that is, one set in motion *after* the defendant's act. Therefore, a preexisting condition will not break the chain of causation.

**b. Unforeseeable**

The intervening factor must have been *unforeseeable* by the defendant at the time of the act.

**c. Sole Direct Cause**

The intervening factor must also be the *sole major cause* of the result.

**d. Independent**

The intervening factor must be *independent of the defendant's original act*.

**V. SCOPE OF CRIMINAL LIABILITY**

**A. COMPLICITY IN THE CRIME**

**1. “Parties” to the Crime**

Liability for a crime is not limited to the actual perpetrator of the criminal act, but generally extends to anyone who has *encouraged* (incited) *or assisted* (abetted) the commission of the crime or, at common law, *hindered apprehension* of the perpetrator.

**2. Common Law Classification of Participants—“Party” Rules**

**a. Parties to Felonies**

Parties are classified according to their role in the perpetration of the crime and whether they were present at its commission.

**(1) Principal in the First Degree**

This is the person who *actually perpetrates* the crime by his own acts, by the acts of an innocent person, or by means of an inanimate agency.

**(2) Principal in the Second Degree**

This classification includes a person who *incites or abets* the commission of a crime and who is *actually or constructively present* at its commission (*e.g.*, a lookout).

**(3) Accessory Before the Fact**

This is a person who *incites or abets* the principal but who is *not actually or constructively present* at the commission of the crime.

#### **(4) Accessory After the Fact**

This is one who receives or assists another, *knowing* that the other has committed a felony, in order to *hinder* the arrest, prosecution, or conviction of the perpetrator. Note that at common law a *wife* could *not* be an accessory after the fact.

#### **b. Significance of Party Rules**

At common law, a person charged as an accessory could *not* be convicted as a principal, and vice versa. Also, an accessory could *not* be convicted *unless the principal was convicted*, nor could an accessory be convicted of a *higher offense* than the principal.

#### **c. Misdemeanors and Treason**

No distinction is made among parties to these offenses; *all parties* are liable as *principals*. But note: There is *no liability* for aiding a person after the commission of a *misdemeanor*.

### **3. Classification of Participants Under Modern Statutes**

Modern statutes tend to abandon the categories of participants and simply make *all who aid and abet* the commission of a crime *guilty of that crime*.

#### **a. Inciters and Abettors**

Many statutes make inciters and abettors principals, and the Model Penal Code provides that a person is guilty as an *accomplice* if she commits it herself *or* if she is *legally accountable* for the conduct of the accused.

#### **b. Accessory After the Fact**

One who would be an accessory after the fact at common law is generally now punished for the commission of a *separate and distinct offense*; no liability is incurred for the crime of the principal.

#### **c. Effect of Modern Changes**

Procedural limitations accompanying the common law party rules no longer exist under most statutory schemes. Thus, the procedural aspects of the law of complicity have been substantially simplified.

#### **(1) Conviction of Principal No Necessary**

An aider and abettor can be convicted even if the principal has not been convicted and even if the principal has been tried and acquitted.

### **4. Accomplice Liability**

Accomplice liability attaches to those who aid or encourage the commission of a crime.

#### **a. Requirements for Accomplice Liability**

The defendant must have incited or abetted the perpetration of the crime *with the requisite mens rea*, and the person incited or abetted must *actually have committed the offense*.

#### **(1) “Abetting”**

One abets the commission of a crime if he provides assistance in *any significant way*.

#### **(2) “Inciting”**

One incites the commission of a crime if he *encourages* (i.e., provides any inducement to) another to commit it. However, the *perpetrator must be aware* of the encouragement.

### (3) Mens Rea Requirement

Authorities agree that an accomplice *must have the mens rea required for the crime*. However, courts are *divided* as to whether an accomplice must *intend* that his efforts effectively assist or encourage the successful commission of the crime *or* whether awareness that the offense will be committed by the person aided or encouraged will suffice. (The modern trend is to require that the accomplice act with *purpose*.)

### (4) Perpetrator Must Have Committed Crime

The person encouraged or aided must have committed the offense (although unlike at common law conviction of the perpetrator is *not necessary*). Jurisdictions are *split* on whether an accomplice can assert the *perpetrator's defenses*.

#### b. Scope of Liability

The scope of accomplice liability is a controversial subject. The *traditional rule* holds accomplices liable for *all probable consequences* of their conduct, *i.e.*, all crimes incited or abetted *and* all crimes committed by the perpetrator that were *reasonably foreseeable results* of the contemplated crime. A *minority view* limits accomplice liability only to those crimes of the perpetrator that the accomplice actually *anticipated and intended*.

#### c. Possible Defenses to Accomplice Liability

##### (1) Withdrawal

One who incites or abets another can avoid accomplice liability by *effective and timely* withdrawal before the crime is committed. If the defendant is an *inciter*, he must *communicate a renunciation* to the perpetrator; however, if the defendant is an *abettor*, he must also deprive his aid of its *effectiveness* (*e.g.*, where accomplice lent his gun to the perpetrator, he must retrieve the gun).

#### d. Situations Where Accomplice Liability Inapplicable

If the participant is (i) within a special *class of persons intended to be protected* by the statute (*e.g.*, a prostitute in a Mann Act prosecution), (ii) a *victim* of an offense, or (iii) a person *inherently necessary* to commission of the crime (*e.g.*, buyer of cocaine), she is not liable as an accomplice.

##### (1) Distinguish—Accomplice Unable to Commit Crime as Perpetrator

The fact that an accomplice cannot commit a crime by his own actions does not preclude liability as an accomplice to that crime. Thus a husband can incur liability as an accomplice to the traditional rape of his wife.

### 5. Liability of Post-Crime Aiders (Accessories After the Fact)

At common law, a defendant is liable as an accessory after the fact if she *knew* the person she assisted committed a *felony*, and aid was given for the purpose of *impeding enforcement* of the law. However, *modern statutes* either retain the category of accessory after the fact but make it a *separate offense* with a penalty unrelated to the perpetrator's penalty, or else establish an entirely *new offense* (*e.g.*, hindering prosecution).

## B. VICARIOUS LIABILITY

### 1. Definition—Liability for Acts of Others

Vicarious liability exists when one person is held guilty of a crime committed by another simply *because of the relationship* between the two persons. No affirmative participation is required.

## 2. When Vicarious Liability Is Imposed—Legislative Intent

In practice, vicarious liability is usually limited to *employer-employee* relationships. However, in all cases, legislative intent determines whether to apply vicarious liability. Absent an expressed legislative intent, the courts look for the existence of certain circumstances (e.g., a business activity, light penalties, no personal fault requirement).

### a. Disregard of Instructions

There is a split of authority on the propriety of imposing vicarious liability when a crime was committed in *disregard of the defendant's (usually employer's) instructions*. Some courts have *compromised* by allowing the defendant to *prove lack of fault*.

## 3. Constitutional Limits on Vicarious Liability

Vicarious liability may violate Fourteenth Amendment due process or the Eighth Amendment prohibition against cruel and unusual punishment if the defendant had *no ability to control* the actual perpetrator or if conviction would impose a *severe penalty*.

# C. CRIMINAL LIABILITY OF CORPORATIONS AND ASSOCIATIONS

## 1. Background

At *common law*, corporations and associations could *not* be convicted of a criminal offense. The *modern rule* is to impose *corporate liability*, although certain *policy considerations* continue to cause controversy.

## 2. Requirements for Corporate Liability

Liability is now often imposed on corporations for the acts and omissions of corporate employees if consistent with the *legislative intent* and dependent on the *nature of the crime* involved (i.e., severity of the crime). If the crime is a *minor* one, a corporation is usually held liable merely upon proof that the employee was acting in the *course of his employment*. If the crime is *serious*, there is disagreement concerning the requirements: Some courts require only that the offense have been committed by an *employee in the course of the employment*. Others adopt the Model Penal Code approach, which permits conviction only if the perpetration of the offense was *authorized, performed*, or at least *recklessly tolerated* by the board of directors or a high managerial agent. Other jurisdictions require proof that the corporation gave the actual perpetrator *enough authority to act for it* in the specific activities related to the criminal conduct.

## 3. No Effect on Individual Liability

Corporate liability has *no* effect on the actual perpetrator's criminal responsibility.

## 4. Liability of Unincorporated Associations

Generally, partnerships and other unincorporated associations are *not* subjected to criminal conviction for crimes of their individual partners or employees. However, some jurisdictions recognize the *entity theory* of partnership under which partnerships can sue and be sued in their own name. This may lead to criminal prosecutions of such associations in the future.

# VI. DEFENSES

## A. GENERAL CONSIDERATIONS

### 1. "True" Defenses

A "true" defense must be distinguished from a defendant's ability to challenge the prosecution's proof of one or more elements of the offense, particularly the culpable mental state element.

### 2. Burden of Proof

Those true defenses on which the defendant has the burden of proof are often called "affirmative" defenses.



## B. INFANCY

### 1. Common Law

At common law, a child *under age seven* is *conclusively* presumed incapable of forming criminal intent and thus cannot be guilty of a crime. Between the *ages of seven and fourteen* a child is *rebuttably* presumed incapable of forming criminal intent. Children aged *fourteen and older* are treated as adults.

### 2. Modern Statutes

Under both common law and modern statutes, the *chronological age at the time of the crime controls*. However, modern statutes vary in their treatment of the infancy defense and may depart from the common law rules.

### 3. Juvenile Court Jurisdiction

All American jurisdictions have juvenile court legislation under which children are “adjudicated delinquent” (rather than “convicted”) in a juvenile court proceeding. Under some statutes, however, children may under certain circumstances be tried as adults.

## C. INSANITY

### 1. In General

A defendant is entitled to acquittal if he was *so impaired by mental illness or retardation at the time of the crime* as to be “insane” within the meaning of the law.

#### a. Distinguish—Incompetency to Stand Trial

Incompetency to stand trial concerns the defendant’s state of mind *at the time of the trial* and is *not* a defense; it may, however, postpone the proceedings.

#### b. Distinguish—Diminished Capacity

The diminished capacity rule allows proof of mental illness or retardation to show that the defendant *lacked the required mens rea* for the crime.

### 2. Condition Giving Rise to Insanity

Although all insanity tests require the defendant to have some sort of mental impairment, not all impairments give rise to insanity.

#### a. Mental Illness or “Disease”

A traditional mental illness (*e.g.*, psychosis) can support an insanity defense.

##### (1) “Psychopathic Personality”

Some courts hold that the insanity defense does not extend to “psychopaths,” *i.e.*, persons whose abnormality is manifested only by repeated criminal or other antisocial conduct.

#### b. Developmental Disability

Developmental disability, formerly called mental retardation, if it satisfies the applicable test, may render a defendant legally insane.

### 3. Tests for Insanity

The basic issue giving rise to different approaches to an insanity defense is whether the defense should be limited to cognitive impairments or should also include impairments of control.

#### a. M’Naghten Rule—The Traditional Approach

Under this test, a defendant may be acquitted if at the time of the crime and as a result of his mental impairment, he did *not know* (i) *the nature and quality of his act* or (ii) that his