SIXTH EDITION

THE GLANNON GUIDE TO CRIMINAL LAW

Learning Criminal Law Through
Multiple-Choice Questions and Analysis

Laurie L. Levenson, *Loyola Law School, Los Angeles*

A powerful combination of well-written explanations, multiple-choice questions, analyses, and exam-taking tips, *THE GLANNON GUIDE TO CRIMINAL LAW: Learning Criminal Law Through Multiple-Choice Questions and Analysis* prepares you to take any type of exam that might be offered in a Criminal Law course. Written by one of the nation's leading Bar lecturers, it also provides an invaluable review of the core concepts tested in Criminal Law on both the multistate and essay sections of the Bar exam.

The sixth edition of this popular title has been completely updated, including recent case law on insanity, required mental states, duress, self-defense, sexual assaults, attempted manslaughter, and causation; analysis of the Supreme Court's decisions in Elonis v. United States and Kahler v. Kansas; and evaluation of recent involuntary manslaughter convictions for encouraging suicide. In addition, new multiple-choice questions have been added, including questions comparing common law and Model Penal Code standards, as well as cases involving police misconduct.

Honing your understanding of concepts and your ability to apply the rules, Laurie L. Levenson presents a comprehensive, thoughtful review of course content that shows you how to effectively analyze and answer exam questions.

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I dedicate this book to my children, Solly, Havi, and Daniela, and to my infinitely patient husband, Douglas Mirell.

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The Glannon Guide to Criminal Law

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A Very Short Introduction

There are few better measures of the concern a society has for its individual members and its own well being than the way it handles criminals.

Criminal law is one of the most important classes you will take in law school. For some students, it is important because they want to become prosecutors, defense lawyers, or judges. However, a course in criminal law is also important for those students who see their futures in civil practice. Especially in today's society, it is not unusual for clients from all walks of life to have problems that implicate the criminal justice system. For example, a simple business transaction may trigger questions regarding fraud, or a family law case can raise issues regarding criminal abuse. In the final analysis, criminal law is important because it teaches you how to read statutes, interpret them in light of hundreds of years of common law, and argue their application in light of today's policy concerns.

This book provides a short, clear, efficient review of basic topics in criminal law, organized around the format of multiple-choice questions. In each chapter, the individual sections explain fundamental principles of a topic — such as mens rea, homicide, or defenses — and illustrate them with a series of multiple-choice questions. After each question, I explain which answer is correct, and why the wrong answers are incorrect. These short explanations allow me to discuss the black-letter rules in the context of the questions. Hopefully, this format will engage you in the study process, so you'll develop a stronger understanding of the basics of criminal law. This process will also help you at the time of your criminal law exam, regardless of whether your professor relies on multiple-choice or essay questions.

When working with this book, keep in mind that the individual criminal laws of jurisdictions may differ. However, in a basic law school course on criminal law, your professor's focus is on the general concepts of the law and how they operate. Therefore, the goal of this book is to assist you in learning these principles and knowing how to apply them in analyzing a fact pattern. In that regard, multiple-choice questions are not that different from essay questions. Both of these types of questions require you to understand a fact pattern and to analyze it using correct legal principles.

I have tried to make my multiple-choice questions as fair as possible in that they have only one correct answer. However, ambiguities inevitably arise. Therefore, it is important that you learn to analyze questions for the "best possible answer." Your professor's exam is sure to have ambiguities as well. The more comfortable you feel with analyzing multiple-choice questions, the better you will do even if there are ambiguities on the exam.

This book is designed to follow the order of topics ordinarily covered by criminal law professors. Of course, your professor may choose a different path. If he or she does, feel free to review the chapters in a different order than they are presented. Each chapter is self-sufficient. You should be able to understand the concepts of that chapter and integrate them to your overall understanding of the course.

In using this book, you have a choice. You can either read the introductory material and then attempt the multiple-choice questions, or you may try your hand at the multiple-choice questions (the answers are listed at the back of the chapter under **Levenson's Picks**) and then use the introductory material, in conjunction with the explanations after the questions, to learn the material. Either way, the questions will keep you honest by helping you focus on what you do and do not understand about the criminal law topic being discussed.

I welcome your comments on how this book worked for you. I hope it will be the one learning aid that helps you both master the material and learn how to take an exam so that you can display your mastery. Please let me know your thoughts. I can be reached at Laurie.Levenson@lls.edu.

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Nature of Criminal Law

Without shared ideas on politics, morals, and ethics, no society can exist . . .
—from Lord Patrick Devlin, *The Enforcement of Morals*

CHAPTER OVERVIEW

Criminal law is the study of offenses against society. A defendant who is convicted of a crime must make amends to society, as well as to his individual victim. Criminal laws are frequently designed to enforce the moral standards of society. While American criminal law is now governed primarily by statutory law, English common law forms the basis of much of our statutory law. The operation of criminal law, under either statutes or common law, is tied to its theoretical underpinnings—why do we punish?

A. Criminal law versus tort law

In law school, you will study both tort law and criminal law. At first glance, the topics may seem very similar. Both address what happens when a person harms

another person. Both use similar terms, such as "recklessness," to describe the defendant's mental state when the harmful action is taken. However, there are key differences between criminal law and tort law. It is important to keep these differences in mind when studying criminal law.

First, a crime is an offense against the entire community, not just the victim who is directly hurt by the defendant's actions. For example, if a defendant hits a victim, the victim may sue the defendant for the tort of battery. However, the state or other governmental authority may also charge the defendant with the crime of assault because the defendant has violated society's code of conduct. Society, as well as the individual victim, has an interest in ensuring that the defendant is punished for his actions.

Second, if the defendant is found liable, the consequences of committing a tort are ordinarily that the defendant must compensate the victim for his injuries or loss by paying damages. However, in criminal prosecutions, the consequences are often more severe than monetary payments. The standard punishment for violating a criminal law is incarceration. A criminal defendant may also be ordered to pay a fine or restitution to the victim.

Third, violations of the criminal laws carry a stigma not ordinarily shared by being labeled a "tortfeasor." A criminal is marked as an individual who has violated the laws of society and should be morally condemned by others in the community.

The additional consequences of being convicted of a crime create differences in the meaning of terms that may also be used in your tort class. For example, criminal negligence is different from the negligence required for torts. Criminal negligence requires more than mere carelessness — it requires the type of carelessness for which society is willing to label the defendant a "criminal."

Finally, the labels affixed to someone who has been held responsible for harm are different under the criminal and tort systems. Under tort law, a defendant who has been found responsible for harm is "liable" for damages. Under criminal law, a guilty defendant is "culpable" for the crime.

In analyzing the question that follows, consider these differences between criminal and tort law in deciding which answer describes the defendant's culpability.

QUESTION 1. **Don't drink and drive.** Eric was thrilled that he had just finished his first law school examination. He went out and celebrated with his friends. After several beers, Eric headed home to tell his parents the good news. Unfortunately, he hit Lynn's car on his drive home and totaled it. Eric's actions may make him

A. culpable of the tort of destroying Lynn's car, but not guilty of a crime because Lynn was not hurt.

B. liable for destroying Lynn's car, but not guilty of a crime because Lynn was not hurt.

C. subject to imprisonment for the tort of destroying Lynn's car.
D. liable for damages for destroying Lynn's car and subject to imprisonment for the crime of drunk driving.

ANALYSIS. Don't be fooled by **A**. Although Eric may certainly be responsible for destroying Lynn's car, his tort responsibility would make him "liable" for damages. Moreover, if the criminal law prohibited drunk driving, it would not matter that Lynn was not hurt. Eric would also be culpable of the crime of drunk driving.

How about **B**? **B** sounds appealing because it used the right term, *liable,* to describe Eric's responsibility in tort for destroying Lynn's car. However, it is still wrong because it does not take into account that Eric's single act may cause both a civil and criminal cause of action.

C is just plain wrong because torts do not subject a defendant to imprisonment, no matter how bad they may be. At worst, and as discussed in more detail in your torts class, an intentional tort may subject the defendant to punitive damages. However, imprisonment is a punishment reserved for the criminal justice system.

D takes the prize. It accurately reflects that one harmful act may subject a defendant to both a tort lawsuit, and prosecution and punishment for a criminal offense.

B. Criminal law versus criminal procedure

The study of criminal law focuses on the substantive law that defines what crimes are and what defenses there are to those crimes. Criminal procedure is a separate area of the law that examines the procedures by which a criminal case goes through the criminal justice system. Police investigative techniques and the handling of cases in the courtroom ordinarily are explored in a separate criminal procedure course. However, a basic understanding of the criminal justice system is important to comprehending criminal law.

There are many key participants in the criminal justice system. The police investigate cases. In doing so, they have considerable discretion in deciding whom to apprehend. Prosecutors decide which defendants they will charge and what charges they will bring against them. Prosecutors may seek formal charges either through the grand jury process or by filing a complaint. If the grand jury issues charges, the formal filing is called an indictment. If prosecutors file a complaint, a preliminary hearing is ordinarily held to determine if there is sufficient evidence (known as probable cause) to require the defendant to stand trial.

Most criminal cases are resolved by plea bargains. However, if a case proceeds to trial, the defendant is entitled to have a jury decide his guilt. In 2020,

the Supreme Court held that the Sixth Amendment requires a unanimous jury verdict for conviction. *Ramos v. Louisiana*, 140 S.Ct. 1397 (2020). In doing so, the Court overruled its prior decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), in which it had held that only a substantial majority of the jurors must agree for a guilty verdict.

With the consent of the prosecution, the defendant may waive a jury trial and have the court decide the case. A trial before the judge only is called a "bench trial." The Supreme Court has held that a defendant does not have an absolute right to waive a jury trial without the consent of the prosecution. *Singer v. United States*, 380 U.S. 24 (1965).

In a criminal case, the burden of proof is on the prosecution to prove each element of a crime, including intent, beyond a reasonable doubt. *Patterson v. New York,* 432 U.S. 197 (1997). "[T]he presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of our criminal law'—the Due Process Clause of the United States Constitution requires the prosecutor to persuade the factfinder beyond a reasonable doubt of every fact necessary to constitute the crime charged." *In re Winship*, 397 U.S. 353 (1970). However, the burden of proof to prove an affirmative defense may be placed on the defendant without violating due process. *Leland v. Oregon*, 343 U.S. 790 (1952). As discussed in Chapters 16 to 20, typical affirmative defenses are insanity, self-defense, duress, necessity, intoxication, and entrapment.

Jurors have the inherent power to disregard the law and render a verdict contrary to it. This is referred to as *jury nullification*. Although jurors have this power, defendants are not entitled in most jurisdictions to a jury instruction advising jurors of their power to nullify. *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972).

If a jury returns a guilty verdict, the trial court has the power to overturn that verdict and enter an acquittal based upon insufficiency of the evidence. The trial court may also grant a new trial based upon procedural or evidentiary errors at trial. The most common errors relate to incorrect jury instructions. Jury instructions are the means by which the court advises the jurors of the requirements of the law related to the criminal charges in the case. They are, in essence, the "black-letter" criminal law.

The defendant may also appeal a guilty verdict. The appellate court reviews a case for legal errors. It does not have the power to reassess a witness's credibility. In determining whether there was sufficient evidence to convict the defendant, the appellate court must construe all inferences and make all credibility findings in favor of the government. It is only when no rational jury could have found the defendant guilty on the evidence presented that the appellate court may vacate or overturn a jury's verdict. *Jackson v. Virginia*, 443 U.S. 307 (1979).

The appellate court also reviews the trial to determine if the jury was properly instructed on the applicable law. If the jury was incorrectly instructed, the

defendant is entitled to a new trial with proper instructions. For example, if the jury is given the wrong elements for a crime or incorrectly instructed that the defendant must prove he didn't intend to commit an offense, the defendant's conviction is likely to be reversed. Likewise, if the court has incorrectly precluded witnesses for the defense because it has wrongly decided that a proffered defense does not apply, the defendant is entitled to a new trial in which he can present evidence of that defense. While the defendant's conviction may be reversed, that does not mean that the defendant walks free. Rather, the defendant receives a new trial in which the law and evidence are correctly presented to the finder of fact.

The government does not have the right to appeal a not guilty verdict because of the Fifth Amendment's guarantee against double jeopardy. However, if the trial court dismisses a case before trial because of an improper interpretation of the law, the government may appeal. The government may also appeal before trial if the court grants a defendant's suppression motion. However, the defense must wait until after trial to appeal if the court denies its motion to suppress.

QUESTION 2. Bad verdict. Glenn was charged with helping with a bank robbery. Prosecutors claimed that Glenn knowingly loaned his car to Roger to use in the robbery. At trial, the prosecution called Roger as a witness. Roger had pled guilty and agreed to testify against Glenn in exchange for leniency at his own sentencing. At trial, Glenn tries to argue that Roger frequently borrows cars from friends for all his errands, not just bank robberies, but the trial court insists on instructing the jury that a person who loans his car is conclusively presumed to know the illegal purposes for which the car will be used. Which of the following is the best basis for Glenn's appeal?

A. No rational jury could believe an accomplice witness who has been given leniency in exchange for his testimony.
B. The police abused their discretion in arresting Glenn.
C. It was improper for the court to instruct the jury to presume Glenn's criminal intent.
D. There was insufficient evidence for Glenn's conviction.

ANALYSIS. Although you may be eager to help Glenn out of his predicament, it is important to remember the procedural limitations on a criminal defendant's right of appeal. Even if you personally do not believe Roger, it cannot be said that no rational jury could believe his testimony. Therefore answer **A** is incorrect. Appellate courts are stuck with the credibility decisions made by the jury.

Answer **B** goes too far. Remember that the police have broad discretion in arresting suspects. They need not have proof beyond a reasonable doubt to make an arrest. Mere probable cause — which roughly equates with a strong suspicion — is sufficient.

Answer **D** is incorrect for the same reason that Answer **A** was incorrect. It is not up to the appellate court to reweigh the evidence. If the jury believed the accomplice, as we must infer that they did, there was sufficient evidence for the guilty verdict.

Answer **C** is the best answer. Criminal intent is one of the elements of the offense that the prosecution must prove beyond a reasonable doubt. As such, a jury instruction directing the jury to presume that element unconstitutionally relieves the prosecution of its duty to prove intent. *Sandstrom v. Montana*, 442 U.S. 510 (1979). Glenn's best chance of success on appeal would be to challenge this instruction.

C. Common law and statutory law

U.S. criminal law is derived from English common law. The common law was established through a series of case decisions creating principles of law. This development of law is called *stare decisis* or *case precedent.*

Except in rare circumstances, the common law no longer governs in the United States. Statutory law now governs both state and federal courts. However, the common law remains important because U.S. statutes typically incorporate common law principles and terminology. For example, all U.S. jurisdictions prohibit "murder." The definition of murder is ordinarily set forth in common law terms, such as requiring that the defendant have acted with "malice."

Many jurisdictions have modeled their criminal laws on a model criminal code drafted by the American Law Institute (ALI). The Model Penal Code is a model statute drafted by the ALI that sets forth basic principles of criminal law. It is not binding on legislatures or courts, but is a tool frequently used to teach criminal law in law school.

Crimes were classified at common law according to their seriousness. Typically, crimes were divided into *felonies* and *misdemeanors*. Felonies were those offenses that carried serious punishment. Under federal law, felonies are generally now classified as crimes that carry a possible sentence of more than one year in jail. Less serious offenses are referred to as misdemeanors. There is also a third category of offenses that have developed since the common law. Referred to as regulatory offenses or *infractions*, they are the least serious types of crimes and typically carry only a fine as punishment.

Another way that crimes may be categorized is *malum in se* or *malum prohibitum*. *Malum in se* crimes are inherently immoral or dangerous, such as murder and fraud. *Malum prohibitum* crimes violate a specific prohibition of

the law, but do not necessarily carry with them moral opprobrium. A traffic offense is a classic example of a *malum prohibitum* crime.

The classification of crimes is important in the criminal justice system in two ways. First, a crime's classification may help to identify the intent requirement, if any, required for that crime. Regulatory crimes, because they carry such minimum punishment, may not require a criminal intent and therefore may be classified as "strict liability" crimes. Second, a crime's classification may trigger certain procedural rights for a defendant. For example, a defendant who does not face jail time for a minor offense may not be entitled to counsel, or if a defendant faces less than six months in prison, there may be no right to trial by jury.

QUESTION 3. Dr. Death. Assume that crimes in your jurisdiction are statutorily defined, but the legislature has thus far refused to pass a law making it a crime to assist another person in committing suicide. Dr. Death films himself handing poison to an ailing patient who then drinks it and dies. Viewers are appalled. Local law enforcement reacts by charging Dr. Death with assisting a suicide.

As to this charge, Dr. Death is

A. guilty because it is *malum in se* to help another person end his life.
B. guilty if the common law prohibited assisting a suicide.
C. guilty if the Model Penal Code prohibits assisting a suicide.
D. not guilty.

ANALYSIS. I know you are eager to convict Dr. Death, but be careful. Criminal law today is governed by statutory law. There is no law in the jurisdiction that prohibits assisting a suicide. Unless a jurisdiction has a "savings clause statute" prohibiting any offense that was illegal at common law, Dr. Death may be morally wrong by his conduct but not guilty of a criminal offense.

A is wrong because even though some people believe it is inherently wrong to help someone end his life, Dr. Death is guilty only if there is a specific statute prohibiting his conduct. Likewise, **B** is wrong because the jurisdiction has expressly refused to adopt the common law on this issue.

C is not the correct answer because the Model Penal Code is not enforceable by itself. Although it has had a strong influence on jurisdictions that have redrafted their codes since 1962, it is not by itself a separate legal basis for finding a violation of the law.

D is therefore the best answer. Dr. Death is not guilty of the charge against him. As we will learn, in some jurisdictions, assisting in another's death may constitute murder. However, here Dr. Death was charged with "assisting a suicide," which was not a crime in that jurisdiction.

In addition to reviewing an area of criminal law, this question offers important hints on how to analyze a multiple-choice question.

- First, read the question very carefully. Do not presume facts. You must go with the facts as presented in the question. For example, if the question states that there is no statutory law prohibiting the defendant's behavior, you must answer your question based upon that fact.
- Second, do not look for the "right" answer when answering a multiple-choice question. Instead, analyze each possible answer for why it may be incorrect. By doing so, you will be forced to apply your knowledge of the law. This process of elimination is more likely to lead you to the correct answer than reacting quickly based upon your instincts.

D. Purposes of punishment

Warning! Many professors love to discuss purposes of punishment because they form the theoretical basis for all criminal law. Therefore, whether or not you are a theory person, it is imperative that you understand the basic purposes of punishment, including the problems with each theory.

Most books refer to the four purposes of punishment: retribution, deterrence, rehabilitation, and incapacitation. The *retributivist theory* holds that a defendant "deserves" to be punished because he has violated the rules of society. Punishment constitutes the defendant's "just desserts" or "payback" for having committed the offense. Retribution is often associated with the ancient concept of *lex talionis*, or "eye for an eye." This theory holds that a defendant should be punished regardless of whether other persons will be deterred because society must send a message that its moral norms cannot be violated.

Retributivism is criticized for legitimizing vengeance and inflicting pain even when it cannot be shown that punishment will promote the greater good. Philosophers like Immanuel Kant support a retributivist theory of punishment.

By contrast, *deterrence* is a *utilitarian* theory of punishment that holds that we must punish criminals to deter other individuals from committing the same crime. The deterrence theory is premised on the belief that criminals weigh the advantages and disadvantages of their acts before committing a crime. Punishment increases the costs of criminal behavior and thereby provides a disincentive to commit future crime. This theory is informed by philosopher Jeremy Bentham's principles of utilitarianism.

There are two types of deterrence: general and specific. General deterrence is punishment inflicted to deter others from committing the defendant's crime. Specific (or "special") deterrence is punishment inflicted to discourage that individual defendant from repeating his criminal behavior.

The deterrence theory is criticized for being ineffective in those cases in which a criminal is motivated by emotions, not rational decision. Moreover, it is questionable whether it is just to punish one person to control the behavior of others.

There are two other utilitarian purposes of punishment. *Rehabilitation* is a theory that calls for a defendant to be punished so that he can be trained not to commit crimes. Many jurisdictions abandoned this theory because it is costly and proceeds on the assumption that human beings in prison can and will change their behavior if given the opportunity and incentive to do so. In reality, the prison setting can often teach inmates even more criminal behavior.

The final theory of punishment—*incapacitation*—also has a strictly utilitarian purpose. It holds that defendants should be incarcerated or executed to prevent them from doing further harm to society. The three strikes law that mandates life imprisonment for certain offenders is an example of a law based upon the theory of incapacitation. Incapacitation is a costly theory that presumes that defendants will not continue their criminal activities while incarcerated.

In any given case, one or more of the theories of punishment may be at play. At the time of sentencing, courts will try to gauge the application of these purposes of punishment by examining the severity of the offense, the defendant's prior history of criminal behavior, and other aggravating and mitigating factors that reflect on the need for punishment.

Importantly, the purposes of punishment not only form the basis for sentencing decisions, but are also the theoretical underpinnings determining what is classified as a crime and what defenses are allowed.

QUESTION 4. Fraternity party. James Chow, a 21-year-old college junior, is arrested for driving under the influence on his way home from a weekend fraternity party. James pleads guilty to the offense, but the judge sentences him to the maximum six months in the county jail. At the sentencing hearing, the judge addresses James regarding the sentence: ''I'm doing this to teach you a lesson, so that for the rest of your life you'll never get behind the driver's wheel if you've been drinking.''

Which of the following theories of punishment has the court primarily relied on in sentencing James Chow?

A. retribution.
B. general deterrence.
C. Specific deterrence.
D. rehabilitation.
E. incapacitation.

ANALYSIS. Let's go through the answers in order. **A** is wrong because a truly retributivist sentence would not depend on whether the court was trying to control the defendant's future behavior. Rather, the court could have simply stated, "Mr. Chow, what you did was wrong and you must be punished for it, regardless of whether you or anyone else might make the same mistake again."

B is also wrong because the court's message is directed specifically at Mr. Chow, not other possible, future offenders. If the judge had stated, "Mr. Chow, I'm going to use you to set an example for all your fraternity buddies so they'll think twice before they pull the same stunt as you," **B** would have been the correct answer.

C is the correct answer because the judge is trying to teach Chow a lesson. The court states that the punishment is meant to serve as specific deterrence so that Chow will not commit the same offense again in the future.

D is wrong because there is no mention by the court that having Chow serve time in jail will somehow make him a better person or less likely to drink and drive. If the court had stated, "Son, you need help with your alcohol problem and I know just the place to get it — jail," the applicable purpose of punishment would have been rehabilitation.

Finally, **E** is wrong because the court has not stated that Chow is being imprisoned specifically so he cannot hurt other people. Be careful about reading this into the answer. Instead, before you choose "incapacitation" as your answer, look for statements by the court such as, "Mr. Chow, you are a menace on the road and the only way I can keep us all safe is by keeping you in jail."

E. Legality and overcriminalizing

It should come as no surprise that the criminal laws are based upon society's view of what is moral and immoral behavior. For this reason, there are so-called "victimless" crimes such as prostitution and drug use. However, not all harmful or immoral acts are crimes. The principle of legality requires that conduct be specifically prohibited by the criminal laws before it may be punished. Additionally, the principle of legality prohibits laws that are so vague that a person does not have fair notice as to when his behavior constitutes a crime.

The principle of legality serves many purposes: (1) It provides notice as to what conduct is unlawful; (2) it confines the discretion of the police in their enforcement of the laws; (3) it prevents judges and juries from arbitrarily creating new crimes; and (4) it ensures that the criminal law only operates prospectively. It is also a principle that has some constitutional roots in the prohibition against bills of attainder[1] and ex post facto laws.[2] (See U.S. Const. art. I, §§9 and 10, and the Due Process Clause, Fifth and Fourteenth Amendments.)

1. A bill of attainder is a legislative act that inflicts punishment without a criminal trial.
2. Ex post facto laws are laws that seek to make criminal an act that was innocent when done.

Without the principle of legality, the dangers of overcriminalizing behavior would become even more pronounced. Unused laws would engender disrespect for the laws, limited police and prosecutorial resources would be diverted to the wrong cases, there would be a serious invasion of people's personal privacy, and there would be the increased possibility of discriminatory enforcement of the laws.

Criminal law casebooks may use the following two cases to illustrate the principle of legality. In *Commonwealth v. Mochan*, 177 Pa. Super. 454, 110 A.2d 788 (1955), the defendant was charged with intending to "debauch and corrupt, and [further embarrass and vilify the victim]" by making filthy, disgusting and indecent phone calls to her. No specific statute prohibits such conduct, but a savings clause in Pennsylvania law provided that all offenses punishable by common law remained punishable in Pennsylvania. Based upon that clause, the court upheld the conviction. The case illustrates the importance of the principle of legality. Without specificity in the laws, a broad range of conduct can be punished and defendants are not on notice as to whether their conduct is prohibited.

In a second case, *Keeler v. Superior Court*, 2 Cal. 3d 619 (1970), the defendant stomped on his ex-wife's pregnant stomach, causing her to deliver the fetus stillborn. He was charged with murder. Keeler successfully moved to block the prosecution, claiming that the law did not provide sufficient notice of what constituted a "human being" for California's murder law. Later, California amended its murder statute to provide that "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought." Cal. Penal Code §187(b). Again, this case highlights how important it is that the legislature specifically defines the scope of criminal conduct so laws will not be applied in an arbitrary or vindictive manner.

Recently, some casebooks have focused on the issue of whether actions that cause mostly emotional harm should be criminalized, such as in-person or online bullying. This is a frontier area of criminal law. It may be included in your book to prompt class discussion regarding the role of criminal law and its limitations for addressing significant social harms. In the end, even if such actions are criminalized, they must meet the requirements of legality by giving sufficient notice of what exact actions constitute a criminal offense; they cannot be so broadly defined as to unduly limit people's rights of association and free speech.

The "rule of lenity" is also an aspect of legality. Under this rule, if there is an ambiguity in a statute criminalizing a person's behavior, the interpretation of the statute must be resolved in the defendant's favor. *See United States v. Dauray*, 215 F.3d 257 (2d Cir. 2000). In other words, the tie goes to the defendant, but only if a statute can be interpreted in two ways and the legislative intent of the statute is otherwise unclear.

With the principles of legality in mind, let's try the next question. Keep in mind that while common law continues to influence the interpretation of criminal laws, it is up to the legislature to define what constitutes a crime.

QUESTION 5. Sex directories. Mr. Shaw is accused of selling copies of his little black book that lists the phone numbers of all the prostitutes in town. He is charged with ''conspiring to corrupt public morals.'' No statute details the meaning of ''corrupting public morals.'' Prosecutors argue that the jury should decide whether Shaw's activities violated society's norms.

If Shaw argues that his case should be dismissed because it violates the principle of legality, his motion should be

A. denied because the jury has been given the responsibility to decide society's morals.
B. denied because all criminal laws are based upon public morals.
C. granted because imprecise statutory language violates principles of legality.
D. granted because the statute does not provide sufficient notice as to what behavior constitutes the corruption of public morals.

ANALYSIS. Although all jury decisions somehow reflect society's morality, **A** is wrong because the principle of legality still requires that the defendant be given notice as to what specific behavior is considered criminal conduct.

Likewise, **B** is wrong because even though criminal laws are based upon public morals, the principle of legality still requires that the laws specify what public morality will be criminally enforced.

C is the wrong answer because it goes too far. Not all imprecise statutory language violates the principle of legality. For example, statutes commonly use common law terms, such as *negligently* and *recklessly,* without defining those terms. As long as there is a statute that identifies the prohibited criminal behavior and generally provides notice to the defendant as to what conduct crosses the line, the principle of legality does not bar the charge.

D is correct. Under basic principles of legality, a defendant may not be convicted unless his conduct was defined as criminal at the time it was committed so that the defendant could have notice that his behavior was illegal.

F. The Closer: Proportionality and purposes of punishment

In each chapter I include a "Closer," a fairly challenging example to push the analysis and your understanding. For this first chapter, we look at the concept of "proportionality." The concept of proportionality plays a role throughout criminal law. For example, in deciding whether a defendant was permitted to

use force in self-defense, the law looks at whether the force used by the defendant was proportional to the force with which he was threatened.

The doctrine of proportionality also arises in sentencing issues. Under current Supreme Court law, the test for determining whether a sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment is whether the sentence imposed is "grossly disproportional" to the offense committed. In deciding whether a sentence is grossly disproportionate, the court examines three factors: (1) the gravity of the offense compared to the severity of the penalty; (2) penalties imposed for other crimes in that jurisdiction ("intra-jurisdictional" analysis); and (3) penalties imposed in other jurisdictions for that same offense ("inter-jurisdictional" analysis). See *Solem v. Helm,* 463 U.S. 277 (1983). See also *Harmelin v. Michigan*, 501 U.S. 957 (1991). Chapter 24 focuses on sentencing and analyzes this use of proportionality in more detail.

For now, however, let's try a final question to determine how firmly you understand the purposes of punishment and the role of proportionality in applying those standards.

QUESTION 6. **Life in prison is a long time.** Andretti was convicted of shoplifting six children's videotapes from Q-Mart Discount Store. The total value of the stolen videotapes was less than $100. Nonetheless, because Andretti has been convicted before of two relatively minor felonies (burglarizing a home when no one was present and using marijuana), he is sentenced under the jurisdiction's three strikes law to life imprisonment without parole. Andretti complains that his sentence is improper. He notes for the judge that under common law, petty theft did not result in lengthy prison terms. Moreover, he notes that he is not really a danger to the community and that he has already paid back Q-Mart Discount Store for its losses. What would Andretti's best argument be for overturning his sentence?

A. Andretti's sentence does not serve any purpose of punishment.
B. The victim has suffered no permanent injury from Andretti's actions.
C. Andretti's sentence does not comport with common law practices.
D. Andretti's sentence was per se cruel and unusual punishment.
E. None of the above.

ANALYSIS. **D** seems like a reasonable answer to this question: Life in prison for a few children's videotapes is a long time. However, **D** is not the correct answer. The Supreme Court held in *Lockyer v. Andrade*, 538 U.S. 63 (2003), and *Ewing v. California*, 538 U.S. 11 (2003), that three strikes sentences do not *per se* violate the Eighth Amendment. Applying purposes of punishment is a far more subtle exercise than just asking whether you would have imposed

the same sentence. It requires discipline to critically analyze each purpose of punishment to determine whether there is an argument that the sentence was not disproportional to the crime. Therefore, it is best for us to start with the possible answers in order, since **A** requires us to examine the purposes of punishment as applied to this question.

Which, if any, purpose of punishment may Andretti's sentence serve? In fact, an argument could be made for all four purposes of punishment. First, if Andretti's crime is not characterized as simply shoplifting, but "shoplifting by a career criminal," there seems to be a stronger argument for a long sentence as retribution to Andretti for his life of crime. Second, it is important to deter people like Andretti who continue to commit crimes. Perhaps the only way such individuals can be deterred is by threatening them with extremely long sentences. Third, Andretti continues to pose a threat to society. Although he is only a shoplifter, he does not seem to be able to control his criminal impulses. Thus, incapacitation may be in order. Finally, Andretti definitely needs rehabilitation. He needs to change from his life of crime. Of course, there are problems with each of these theories of punishment. For example, even if retribution is warranted, how much jail time properly serves this purpose? Moreover, once he is sentenced to life imprisonment, rehabilitation will not matter. Despite these problems, an argument could be made that one or more of the purposes of punishment support Andretti's sentence. Therefore, **A** is the wrong answer.

B is also a wrong answer because criminal law does not require that there be an identifiable victim or that that victim suffer a permanent injury. Conspiracy and attempt are classic crimes in which a victim does not suffer an injury. Moreover, as Chapter 22 discusses, it is no defense to a theft crime that the defendant offers to pay back the victim after he is apprehended. Unlike tort law, the issue in criminal law does not focus heavily on what damage the victim suffered. Rather, the focus is on the defendant's actions and criminal intent.

C is wrong, as well. Common law can be used to interpret statutory law, but it does not supersede it. Thus, when the law is clear as to the nature of a crime and applicable sentence, it is the statutory law that governs.

Finally, we end the analysis the way we began it. A three strikes law, although harsh, is not per se cruel and unusual punishment. **D** is incorrect. It is up to the defendant to argue why the sentence is disproportionate to the crime. Therefore, for this closer problem, **E** is the correct answer.

Even though **E** is the best answer, you should be aware that the Supreme Court left open the possibility in *Ewing* that some three strikes sentences might violate the constitutional prohibition against cruel and unusual punishment. For example, the Ninth Circuit in *Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004), found that a defendant who had shoplifted a video cassette recorder and then immediately returned it, and who had no other prior offenses other than shoplifting offenses, could not be sentenced to 25-years to life imprisonment.

What is the difference between *Ramirez* and the facts of Question 6? All of Ramirez's prior offenses were shoplifting. By contrast, Andretti, like the petitioner in *Andrade, supra,* had prior drug and burglary convictions.

In general, it is very rare for a court to overturn a sentence within the statutory maximum. A great deal of deference is given to the legislature to decide when the purposes of punishment dictate harsh sentences for repeat offenses. Only in the rare case, like that of *Ramirez*, is there a chance of having the court strike down the sentence for violating the Eighth Amendment.

Levenson's Picks

1. Don't drink and drive	**D**
2. Bad verdict	**C**
3. Dr. Death	**D**
4. Fraternity party	**C**
5. Sex directories	**D**
6. Life in prison is a long time	**E**

3

Elements of a Crime

A.R. + *M.R.* + *??* = *Crime*

CHAPTER OVERVIEW

- **A. Actus reus: Culpable conduct**
  - **1. Voluntary affirmative acts**
  - **2. Omissions**
  - **3. Status crimes**
  - **4. Possession crimes**
- **B. Mens rea: Culpable mental state**
  - **1. Common law terminology**
    - **a. Maliciously**
    - **b. Intentionally**
    - **c. Negligently**
    - **d. Willfully**
  - **2. Model Penal Code terms**
    - **a. Purposely**
    - **b. Knowingly**
    - **c. Recklessly**
    - **d. Negligently**
- **C. Specific intent versus general intent**
- **D. Concurrence of Elements**
- **E. The Closer: Euthanasia — Positive act or omission? Motive versus intent**

 **Levenson's Picks**

Crimes are like mathematical formulas, although often not as precise. Before a defendant is found guilty, the prosecution must prove the required "elements" of the crime. All crimes require that the defendant engage in culpable conduct. "Conduct" is really a misnomer. Either the defendant engaged in affirmative misbehavior or failed to do something required by the law and is therefore guilty because of that omission. However, bad acts alone ordinarily are not enough for criminal culpability.

The heart of most crimes is the mens rea requirement. For a defendant to be found guilty, she must commit the wrongful act with a culpable mental state. Mere accidents may be enough to trigger tort liability, but they are rarely enough to make the defendant a criminal. For the defendant to be guilty of a crime, she must have the culpable mental state at the time she commits the actus reus. This is known as "concurrence of the elements."

As you go through the next sections, keep in mind that the burden is on the prosecution to prove each of the elements of a crime. Therefore, if an element is missing, because, for example, the defendant was clueless, the defendant is not guilty of a crime. The challenge of mastering topics such as mistake of fact lies in discerning what a defendant must know or not know to be guilty of a crime.

The key to understanding criminal law is mastering how each of these elements of a crime work. Once you do, you should be able to analyze any criminal statute to determine what elements the prosecution must prove to show that the defendant is guilty of the crime.

A. Actus reus: Culpable conduct

1. Voluntary affirmative acts

As a general rule, all crimes require that a defendant commit a voluntary criminal act—an actus reus. The actus reus may be a positive act, such as hitting another, or an omission, which is a failure to act when there is a legal duty to do so, such as when a parent fails to seek medical care for her child.

The purpose of the actus reus requirement is to ensure that people are not punished for bad thoughts alone. Each crime includes an actus reus. It is the "verb" of the crime. For example, homicide is defined as the "killing of another human being." The actus reus for this crime is killing.

There may be many different types of physical action that satisfy the actus reus of a crime. Think of all the ways you can kill someone. You can stab, poison, shoot, smother, choke, bomb, etc. All of these would qualify as the actus reus for a homicide charge.

How about words alone? Contrary to popular lore, words alone can constitute the "actus reus" of a crime. For example, the crimes of treason, sedition,

solicitation, conspiracy, and aiding and abetting may all be accomplished by verbal conduct.

For a physical act to qualify as an actus reus, it must be voluntary. Be careful. The criminal law's notion of what is voluntary may be very different from your own. Under the criminal law, as long as the person is engaged in conscious and volitional movement, the act is considered voluntary. All this really means is that the person's brain was engaged at the time of the act. It doesn't mean that the defendant really wanted to do the act or got great satisfaction out of it. For example, a person who is forced with a gun at her head to rob a bank has a "voluntary" actus reus of robbing the bank, although she may have a separate defense of duress down the road.

Because most of our actions are considered voluntary for purposes of proving the actus reus, it is probably easier to remember what is considered an "involuntary" act. The Model Penal Code identifies four situations in which many jurisdictions are willing to say that the defendant did not act voluntarily. They are (1) reflex or convulsion; (2) bodily movement during unconsciousness or sleep; (3) bodily movement under hypnotic suggestion;[1] and (4) bodily movement not otherwise the product of the effort or determination of the actor, either conscious or habitual. In other words, when a person is acting like an automaton because her brain is not engaged with the body, the person may have a claim that her act was not voluntary. (MPC §2.01.)

As noted in the Model Penal Code, acts done out of habit are still considered to be voluntary, even though the defendant may not have given it much thought before engaging in the act. For example, some people routinely speed down the same street on the way to work because they know that the police never monitor that street. The defendant's act of speeding would still be voluntary because absentmindedness and habit are not the same as involuntary acts.

The trick in many criminal cases is to define when the period of the actus reus began and ended. Defendants want to limit the actus reus to a narrow period of time when the defendant may have unconsciously engaged in wrongful behavior. For example, an epileptic who has a seizure while driving and crashes into another person will claim that the act was involuntary. However, prosecutors want the period of time for the actus reus to be stretched out to include some period of voluntary action by the defendant, such as when the epileptic, knowing that he might have a seizure, nonetheless decided to drive the car. Under Model Penal Code §2.01(1), as long as the defendant's action "includes" a voluntary act, the defendant is culpable.

Here's a fairly straightforward question to illustrate these points.

1. Beware. Many jurisdictions have rejected this category of involuntary acts because they believe that a person who is under hypnosis still has the power to control her behavior.

QUESTION 1. Home invasion. Martin is sitting in his living room chair drinking his eighth beer of the night when the police arrive. They demand that he go outside to talk to them about a claim that he stole his neighbor's garden gnome. Martin has no recollection of taking the garden gnome. When Martin refuses to go outside with the officers, the police physically pick him up and carry him outside. While he is standing outside, Martin has a seizure. His body convulses and his arm hits one of the officers. Martin is charged with stealing his neighbor's garden gnome, being drunk in public, and assaulting an officer. Which of the following is false?

A. Martin cannot be guilty of stealing his neighbor's garden gnome because he acted involuntarily.
B. Martin cannot be guilty of being drunk in public because he was in public involuntarily.
C. Martin cannot be guilty of assaulting an officer because he acted involuntarily.
D. Martin cannot be guilty of assaulting an officer because his body acted convulsively.

ANALYSIS. Be careful. First, this is the type of multiple-choice question often included on exams that asks you to find the answer that is untrue. Therefore, you must resist the temptation to jump at the "right" answer. By the very nature of the question, there will be several correct statements included among the answers. You want to find the statement that analyzes the problem incorrectly.

A is definitely an option. There are no facts to indicate that Martin was acting involuntarily when he allegedly stole his neighbor's garden gnome. Nothing indicates that at the time of that crime, Martin was not in control of his bodily motions. Therefore, **A** is an incorrect statement and the likely answer to choose. However, as is best when answering all multiple-choice questions, one must also review the other options to see if they are also possibilities.

B is a correct statement of the law. Martin is only in public because he was involuntarily carried there by the police officers. His body did not act of its own volition. Therefore, Martin would not have a voluntary actus reus for the crime of being drunk in public.

C is also a correct statement. When Martin hit the officers, he was not in control of his bodily movements. His body acted by convulsion, one type of involuntary act. It is not the same type of involuntariness that excuses his crime of being drunk in public, but it is nonetheless an involuntary act and therefore he cannot be guilty of the assault.

D is just another way of stating that Martin did not have a voluntary actus reus for the assault. **D** is a more detailed explanation of the answer in **C**. Sometimes professors will want the more detailed answer, but that is not the

call of this question. The professor is looking for which option is an incorrect statement of the law, not a more specific statement of the law.

Given that **B**, **C**, and **D** are correct statements of the law, you can be even more certain that **A** is the correct answer; only **A** is an incorrect statement of the law as applied to this problem. Even though **A** is the best answer to choose for this multiple choice question, if this issue was on an essay exam, you might be expected to argue whether Martin's acts "included" the voluntary act of getting drunk in his home before he was carried out by the officers.

2. Omissions

The general rule in the United States is that there is no duty to help another or to rescue a person from harm. For many caring people, this rule does not sit well. It means that we are not a nation of good Samaritans. However, it is the standard for criminal law. Therefore, a defendant ordinarily is not guilty simply for allowing harm to come to another, even if the defendant could easily have helped prevent that harm.

A tragic example of this rule occurred in New York in the famous Kitty Genovese case. In 1964, over the course of 35 minutes, Genovese was stabbed to death while numerous witnesses watched and failed to help. While morally troubling, the spectators' failure to assist was not a criminal actus reus.

Likewise, in the famous case of *Pope v. State*, 284 Md. 309 (Md. Ct. App. 1979), Mrs. Pope was charged with child abuse for failing to come to the rescue of an infant who was being severely beaten by its mother. The court held that Pope was not guilty because she had no specific duty to come to the child's aid.

Although the general rule is that omission is not an actus reus, an omission may satisfy the actus reus requirement for a crime if the defendant has a duty to act and fails to do so. The duty to act may arise from several sources: (1) a statute; (2) a status relationship; (3) a contractual agreement; or (4) voluntarily assuming the care of another. In each of these situations, the failure to act may constitute an actus reus for a crime.

Let's examine each of these duties. Statutes, criminal or civil, may create a duty to act. For example, tax statutes create a duty to file tax returns. Failure to file returns constitutes the actus reus for a tax offense. Similarly, a statute may require that educators help children who are being harmed. If a teacher fails in this duty, there may be criminal culpability. Moreover, some jurisdictions have gone so far as to create general Good Samaritan laws that require individuals to assist others or at least report crimes they see others commit. Failure to provide this assistance is considered in itself a criminal act.

A duty to help may also be created by a person's status relationship with the victim. It has been traditionally held that parents owe a duty of care to children, employers to employees, spouses to each other, owners to customers, innkeepers to guests, and captains to passengers. In these situations, the defendant does not have the freedom to ignore the victim's need for help. Thus, if a

parent allows a child to starve to death, the parent may be guilty of homicide; the actus reus for that crime is failing to feed the child.

By contractual agreement, a defendant may assume the duty to help another. Two classic examples are babysitters and caretakers. In each of those situations, the defendant has agreed to assist another person. If the defendant fails in that agreement, the defendant may have criminal exposure because of her omission. Thus, if a babysitter watches a small child about to walk into traffic, the babysitter is responsible for harm to that child if she does nothing to stop the child.

Finally, a defendant has a duty to help if she has voluntarily assumed the care of another. In these situations, the defendant has often isolated the victim from the help of others. If the defendant indicates that she will care for the victim and then abandons that duty, the defendant has an actus reus for the crime. Consider, for example, a person who sees a person fall off his bicycle and then takes the injured person into her home, telling others that she will call for help. In fact, the defendant does not call for help or otherwise assist the victim. If the victim dies due to the defendant's neglect, the defendant may have criminal responsibility for the death.

In some situations, a defendant's duty may be based on several of these categories. For example, a law enforcement officer may have a statutory, status, and contractual duty to help others.

Before we try a question related to the rule of omissions, let's examine two other aspects of the law of actus reus. First, although there may be a duty to help, a defendant is ordinarily excused from that duty unless she can fulfill it without harming herself. Thus, if a victim is in a burning house, the babysitter need not die trying to rescue the child if there is no safe way for the babysitter to assist.

Second, you should realize that some fact situations can be analyzed as either positive acts or omissions. For example, what if a defendant rapes a young girl who then jumps into the river out of despair? The defendant then watches the child drown instead of throwing her a life vest. See *Jones v. State,* 43 N.E.2d 1017 (Ind. 1942). There are two ways to analyze this situation. You can stretch out the affirmative physical acts that led to the child's death to include the defendant's initial assault. In such a case, there is a voluntary act that constitutes the actus reus. Alternatively, this situation could be analyzed as one in which the defendant put the victim in peril and therefore had a duty to help the victim. In essence, this is a fifth category of situations in which the defendant must help the victim. Most of the time, the distinction between an affirmative act and the failure to fulfill a duty makes no difference. However, in the area of euthanasia, this distinction can be important. In many jurisdictions, only the affirmative act of "pulling the plug" constitutes euthanasia. By contrast, failure to continue to provide life support is considered passive euthanasia and not criminal conduct. See *Barber v. Superior Court*, 147 Cal. App. 3d 1006 (Cal. Ct. App. 1983).

Now you are ready for a hypothetical to test your understanding of omissions as a form of actus reus.

QUESTION 2. Save me. John, Mike, Sue, and Roger are at a pool party. During the party, a toddler falls into the pool and starts to drown. Everyone sees what is happening, but no one stops to help. John is the toddler's father, Mike is the hired lifeguard, Sue is an off-duty police officer, and Roger is a guest at the party. The prosecution files criminal charges against all four defendants for failing to help the child. Which of the following is correct?

A. None of the defendants is guilty because there is no general duty to help another person.
B. Only John is guilty because he is the only defendant related to the child.
C. Mike and Roger are guilty if they were capable of saving the child without putting themselves at risk.
D. All of the defendants are guilty if they were capable of saving the child without putting themselves at risk.
E. John and Mike are guilty if they are capable of saving the child without putting themselves at risk.

ANALYSIS. The easiest way to sort out the answer to this problem is to consider the culpability of each defendant before looking at the possible answers to the question. Go through each defendant — John, Mike, Sue, and Roger — and ask the question: "Did this defendant have a duty to try and help the toddler?"

John had a duty because he is the child's father. Students often ask whether it matters if the defendant knows he is related to the victim. In other words, what if the toddler was John's unknown illegitimate child? It does matter if the defendant knows. The duty based upon status relationship depends on the defendant knowing of that relationship. Assuming that John knows he is the child's father, he had a duty to help.

Mike has a contractual duty to help the child because he is a hired lifeguard. Sue may or may not have a duty to help the child. Many jurisdictions have a statute or contract provision that requires even off-duty officers to assist others. If there is such a statute or provision, Sue has a duty. Without it, it is much more questionable.

Roger has no duty to help. He is just a bystander. Although it would be a morally good thing for Roger to assist the child, without a duty, his failure to act does not constitute criminal conduct by omission.

Based upon this analysis, it is clear that John and Mike certainly have a duty to help; Sue may have a duty; Roger has no duty. Once this is ascertained, answering the question becomes easy. **A** is wrong because some defendants do have a duty to help. **D** is wrong because not all the defendants have a duty.

That leaves us with **B**, **C**, and **E**. **B** is wrong because Mike also has a duty to rescue. **C** is wrong because Roger has no duty to rescue. The correct answer is **E**. From the facts, we know for sure that John and Mike had a duty to help and failure to do so was a criminal omission.

3. Status crimes

In *Robinson v. California,* 370 U.S. 660 (1962), the United States Supreme Court held that the illness of drug addiction could not, by itself, be considered a criminal offense. Thus, it struck down the application of a California law making addiction an offense punishable by incarceration for 90 days to one year. The Court held that although a legislature could criminalize the manufacture, sale, purchase, and possession of narcotics, the mere status of being a drug addict could not be criminalized. It held that "even one day in prison" for a violation of California's statute would be a violation of the Eighth Amendment. Accordingly, *Robinson* is often cited for the principle that the mere status of an individual cannot be a criminal offense.

Yet *Robinson* should not be read too broadly. Six years later, in *Powell v. Texas,* 392 U.S. 514 (1968), the Supreme Court upheld a conviction for being intoxicated in public. The Court distinguished *Robinson* by noting that Powell was being punished for conduct — that is, being in public while drunk on a particular occasion — not for his status as an alcoholic.

Today, *Robinson* still stands for the principle that a person cannot be punished for her status alone. However, very little conduct is needed before criminal punishment may be imposed.

There is some conduct that is constitutionally protected and therefore cannot be punished. In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court overturned its previous decision in *Bowers v. Hardwick,* 478 U.S. 186 (1986), and held that there was a constitutional right to engage in private, consensual homosexual acts. Thus, neither the status of being a homosexual, nor private, consensual homosexual acts, may be considered to be a criminal offense.

QUESTION 3. The nymphomaniac. Barbara admits that she is a nymphomaniac. A nymphomaniac is a person obsessed with having sex. The police arrest Barbara for solicitation for prostitution. Can she be prosecuted for this offense?

A. Yes, because the Supreme Court has never held that the status of being a nymphomaniac is a protected status.
B. Yes, because Barbara is being prosecuted for her conduct, not her status as a nymphomaniac.
C. No, because Barbara has a constitutional right to engage in sexual conduct.
D. No, because Barbara cannot be prosecuted for her status of being a nymphomaniac.

ANALYSIS. The difference between status and conduct becomes pretty clear in this question. If the authorities were coming after Barbara just because she is a known nymphomaniac, the prosecution would likely be barred. However, Barbara is engaging in the specific conduct of solicitation of prostitution. The criminal law can prohibit such behavior.

Let's look at the options to see which one most accurately answers the question. **A** is wrong. Although the Supreme Court has never specifically addressed the issue of nymphomania, it did hold in *Robinson* that status alone could not be criminalized. It is unlikely that courts would limit that ruling to just the status of being a drug addict.

By now, your instincts should be telling you that Barbara's actions go beyond a mere status offense. She is actually engaged in some conduct, that is, solicitation of prostitution. Under *Powell v. Texas,* the authorities can criminalize conduct, even if it is done by people with a particular status or condition. Therefore, **B** certainly looks like the correct answer.

Let's check **C** and **D** just to be sure. **C** is wrong because this question involves more than just engaging in sexual conduct. It involves soliciting money to engage in sexual conduct. Moreover, the Supreme Court still has not said that all consensual sexual acts are permissible. For example, sex with a minor and incest most likely can still be prohibited. **D** is also wrong because she is not being prosecuted just for her status. Therefore, **B** is the correct answer.

4. Possession crimes

Possession itself may be a crime, but the Model Penal Code requires that the defendant at least be aware that she is in control of the item illegally possessed and have sufficient time to terminate possession. MPC §2.01(4). In a way, this rule of actus reus begins to incorporate mental state requirements that we will discuss in the next section. It is not enough for a defendant to be found with contraband. For the actus reus component, the defendant must be aware that she has the contraband and does not try to discard it.

Before we try the next question, let's consider a simple example. Defendant is charged with illegal possession of a counterfeit. Unknown to the defendant, someone has slipped some fake $100 bills into her purse. There will be two ways to analyze the defendant's guilt. First, under the Model Penal Code, one can argue that the defendant did not have a voluntary act for the crime because she was unaware of the counterfeit. Alternatively, as we will see in section B, even if the defendant possessed the counterfeit, she did not have a culpable mental state for the crime.

QUESTION 4. Alarm clock. Obama hears a clicking in his luggage. He believes that it is the travel alarm clock that he packed. Little does he realize that someone has mysteriously substituted a ticking bomb for his alarm clock. When airport security inspects Obama's luggage, they

discover the bomb. They charge him with illegally possessing an explosive device. Is Obama guilty of the offense?

A. Yes, because Obama had a bomb in his luggage.
B. Yes, because Obama owned the luggage with the bomb.
C. No, because only the person who put the bomb into the luggage could have possessed it.
D. No, because he was unaware that the illegal item was in his possession.

ANALYSIS. When it comes to possession crimes, the Model Penal Code does not even consider the defendant to have a voluntary act unless he is aware an item is in his possession. Thus, the mere fact that the bomb was found in Obama's luggage will be insufficient to convict him of a crime.

A is wrong because Obama is unaware that he actually has possession of the illegal item. It was slipped into his luggage.

B is wrong because it doesn't really matter who legally owns the luggage. What matters is that the person charged with possessing the item is aware that he has it.

C is wrong because it goes too far. Certainly, the person who put the bomb in the luggage would be guilty of possessing the explosive material, but so would anyone who realized he received it. The problem here is that Obama doesn't know he has the illegal article.

Therefore, **D** is the correct answer. The key word in the answer is "unaware." Again, under the Model Penal Code standard, there is no actus reus unless the person possessing the contraband is aware that he has it.

Now that you have a sense of how the actus reus for a crime works, it is time to examine the mens rea requirement for crimes. Instead of focusing on the defendant's actions, we focus on the defendant's intent. Instead of just focusing on whether the defendant was "aware" of certain facts, as we did when we discussed possession as a voluntary act, we will examine the various levels of culpable mental states defendants may have when committing crimes.

B. Mens rea: Culpable mental state

Ordinarily, acts alone do not constitute a criminal offense, even if they cause harm. The classic maxim is *actus non facit reum, nisi mens sit rea*. It means "there is no crime without a vicious will." A vicious will is the mental state required for the crime. This mental state is also referred to as the "mens rea" for the crime. Culpability is the extent to which a defendant's mental state shows the defendant deserves to be punished for his acts.

Different crimes require different mental states. However, not all possible mental states are relevant under the law. For example, it is generally irrelevant whether a defendant acts regretfully or arrogantly. The mens rea requirement focuses on levels of awareness and intention with which the defendant acted, for example, did the defendant purposely cause a harm or was the harm the result of the defendant's carelessness?

The purposes of punishment that we reviewed in Chapter 2 rely heavily on the premise that the more a defendant intends to commit a wrongful act, the more that person should be punished. For example, the person who purposely harms another is most deserving of punishment under a retribution theory of punishment. Moreover, because that person is considering her acts before committing them, the person who acts purposefully should be subject to deterrence. Accordingly, the most serious crimes ordinarily require that the defendant acted intentionally in committing the crime; the less serious crimes may impose criminal responsibility for careless, but unintentional, conduct.

Even when a statute does not state a specific mens rea requirement, the overall principle that criminal culpability, unlike for civil liability, requires a culpable state of mind means that courts will interpret statutes to require a scienter requirement.[2] Thus, in *Elonis v. United States*, 135 S.Ct. 2001 (2001), the Supreme Court interpreted a statute that prohibited making threats on the internet to require a minimum of recklessness to be guilty of the offense. As you will see, the Model Penal Code takes the same approach as common law cases in which antiquated language, such as "maliciously," was interpreted to require at least reckless conduct. Absent a statute that clearly indicates otherwise, criminal violations require a defendant act with at least a reckless state of mind.

One of the most difficult things to master in criminal law is mens rea terminology. Common law developed a variety of terms to describe the mental state required for different types of crimes. These terms, however, were often confusing and used inconsistently by the courts. As a result, the Model Penal Code developed a set of terms to define more precisely the culpability/mental state required for different types of crimes. In some jurisdictions, both sets of terms are used throughout the statutes. Accordingly, it is important to learn both the common law and Model Penal Code terminology for describing the defendant's required mental state for a crime.

1. Common law terminology

At common law, courts used a variety of terms to describe the mental state required for crimes. Many of these terms have survived to the present. These terms are often puzzling because they don't mean in legal terms what their ordinary dictionary definitions would suggest. Rather, over the years, they have developed specialized legal meanings. Thus, many students feel like they are enrolled in a foreign language course while they are learning mens rea for

2. For discussion of strict liability crimes that are the exception to this rule, see Chapter 4.

their criminal law class. However, these terms can be mastered and the best way to do so is not only to learn a definition for the terms, but also to understand how they apply in different factual scenarios.

a. Maliciously. Let's start with the term *maliciously*. Older cases and statutes, especially in England, refer to a defendant acting *maliciously*. Although the term seems to suggest that the defendant must act in a wicked manner or with ill will, that is not the legal definition of the term. Rather, *maliciously* simply means that the defendant realizes the risks her conduct creates and engages in the conduct anyway. As we will see in the next section, the Model Penal Code term for this level of intent is *recklessness*.

Odds are that your casebook will use one of two cases to explain what maliciously means. The first is *Regina v. Cunningham,* 2 Q.B. 396 (1957). In *Cunningham*, a young man tore a gas meter off a wall to try to recover the coins that were in it. In those days, people would put money in a gas meter on the wall and it would dispense gas for heating and cooking in the apartment. Short of cash, Cunningham thought he would help himself to the money. When he tore the meter off the wall, he didn't realize gas would seep into the apartment next door. Well, it did, and almost asphyxiated the woman in that unit. The issue in the case was whether the defendant acted with the intent necessary for the crime, that is, did he "maliciously" asphyxiate the woman? Cunningham held no ill will toward the woman. He didn't really want to harm her. Nonetheless, his actions almost killed her. The court found that Cunningham did act maliciously because in criminal law the term simply means that the defendant foresaw that his acts might cause harm, but he nevertheless engaged in them.

Another classic case used to explain what maliciously means is *Regina v. Faulkner*, 13 Cox. Crim. Cas. 550 (1887). It is literally the story of a drunken sailor. Faulkner was a sailor who went into a ship's hold to steal some rum. While he was there, he lit a match to see where he was going, causing the rum and ship to catch fire. Did Faulkner act maliciously? Although he had no evil design to burn the ship, he would have been acting maliciously if he knew he was taking a risk of causing a fire and he disregarded it.

b. Intentionally. Another confusing term is *intentionally*. The reason it is confusing is that courts have used it in different ways. In some situations, it has meant that the defendant had the purpose to cause a specific harmful result. For example, if a defendant wants to kill her competitor and she plants a bomb on his plane, the defendant has acted intentionally. However, the term *intentionally* can also refer to situations in which the defendant is aware of the harm she is likely to cause, although that harm is not her primary aim. For example, if a defendant wants to destroy the briefcase her competitor is carrying and she plants a bomb on the competitor's plane to do so, the defendant has still acted intentionally as to the competitor's death.

c. Negligently. Even the term *negligently* can be confusing when used in the criminal context. Criminal negligence is generally different from civil negligence. Before someone is labeled a "criminal" by the law, the courts require a

higher showing of carelessness than in tort law. Although the common law is vague as to what degree of negligence is required, it generally means not exercising the standard of care a reasonable person would under the circumstances, for example, letting a small child play with a boa constrictor. That could easily be considered criminal negligence if the child is killed. However, serving rancid sushi to one's guests, although not a good thing to do and something that may lead to a tort, may not be enough for criminal liability depending on why the mistake was made.

Courts can take different approaches to defining the term "negligence" in criminal cases. For example, in *State v. Hazelwood*, 946 P.2d 875 (Alaska 1997) (also known as the "Exxon Valdez" case), the court held that ordinary negligence, rather than gross negligence, was sufficient. By contrast, most courts, like the court in *Santillanes v. New Mexico*, 849 P.2d 358 (N.M. 1993), require "criminal negligence" or "gross negligence" in criminal cases.

d. Willfully. Finally, the word *willful* is often used at common law. Sometimes, it means doing an act with the purpose of violating the law. For example, the person who decides she doesn't believe in the tax laws, and wants to protest them, acts willfully if she does not file a tax return. However, willfully can also cover those situations in which the defendant doesn't necessarily want to protest the laws, but intentionally does an act that has illegal consequences. For example, the person who has no complaint against the tax laws, but knows that she should pay her taxes, also acts willfully if she does not file her tax returns.

Section C will discuss more common law terms, but it would be helpful to test our knowledge of the ones we have learned so far. Therefore, here is a hypothetical that sets forth problems relating to a defendant's mens rea for a crime.

QUESTION 5. Light my fire. Stanley is charged with arson. The crime of arson requires that a defendant maliciously set fire and cause damage to property. Stanley's house caught fire when he was setting off fireworks in his yard. Part of the house burned before firefighters could extinguish the fire. What would the prosecution have to prove for Stanley to be guilty of arson?

A. Stanley knew he could set his house on fire but ignored the risk and set off the fireworks too close to his home.
B. Stanley's purpose in setting off the fireworks was to burn down his home.
C. Stanley always hated his home and therefore wanted to burn it down, so he set off the fireworks.
D. Stanley carelessly burned down his home.

ANALYSIS. This problem requires that you understand what the common law term *maliciously* means. It does not mean, as suggested by **B**, that Stanley

had to have as his goal or aim to burn down his home. Certainly, if Stanley did have that as his goal, he would be acting *maliciously*, but the standard of maliciously does not require that high level of intent. Therefore, **B** is the wrong answer.

Likewise, maliciously does not require that Stanley had an evil motive when he burned down his home. Therefore, **C** is a wrong answer. It is important to distinguish between motive and intent. Mens rea refers to a defendant's intent, not motive. Although each crime will require that the defendant act with a certain intent, it is generally not required that the defendant have a certain motive for his criminal behavior. Motive is the underlying reason a defendant engages in criminal behavior. Common motives include hatred, jealousy, and greed. A defendant may be guilty of a crime even with a good motive as long as the defendant has the necessary intent for the crime. For example, if a defendant's ailing wife begs him to kill her to end her misery and the defendant does so, the defendant has intentionally killed his wife, even if he did not act with a bad motive. Motive may help prove the defendant's intent, but it is not a separate element of a crime. It can become very relevant, however, in deciding on the appropriate sentence for the defendant once the defendant is convicted. Going back to this problem, it doesn't matter whether Stanley hated his house or loved it. If he acted with the necessary intent for arson, he is guilty.

Finally, **D** is a wrong answer because the legal standard of maliciously requires more than that the defendant acted carelessly. If a defendant acts in an unthinking manner, the defendant may act negligently or carelessly. However, the minimum intent required for most crimes is the standard of recklessly or maliciously. In other words, the defendant must actually consider the risk that he might burn property and disregard that risk. Therefore, the correct answer to this problem is **A**.

2. Model Penal Code terms

Because of the difficulty in interpreting and applying common law mens rea terms, many legislatures and courts have started using the Model Penal Code's language to describe a defendant's mens rea. Model Penal Code §2.02 refers to four levels of culpability. In essence, these four levels reflect four types of intent or mens rea: purposely, knowingly, recklessly, and negligently.

a. Purposely. A person acts *purposely* if it is the defendant's goal or aim to engage in particular conduct or achieve a certain result. MPC §2.02(2)(a). For example, a defendant who points the trigger at a victim and shoots to kill him has purposely killed the victim. The phrase "intent to" is often used in criminal statutes to indicate that the defendant must have a specific purpose in mind when she commits an unlawful act. Burglary is one such crime. Burglary is often defined as "entering a building with the intent to commit a crime therein." Therefore, to be guilty of burglary the defendant must enter a building with the purpose of committing a crime in the building. If the

defendant does not enter with that purpose, she may be guilty of trespass, but not burglary. If the phrase "specific intent to" is used in a statute, that is also a signal that the level of mens rea is purposely. Most crimes do not require the highest mens rea standard of purposely. A lower level of intent will satisfy. However, there are a few crimes, like premeditated murder or treason, that require that defendants have a specific purpose in mind when they commit their criminal acts.

b. Knowingly. *Knowingly* is the next highest level of intent. A person acts knowingly if she is virtually or practically certain that her conduct will lead to a particular result. MPC §2.02(2)(b). For example, if a defendant shoots at a car with the purpose of breaking its window, but knows that she is virtually certain to kill the occupant of the car, the defendant has acted knowingly with respect to the occupant's death. The mens rea standard of knowingly is often used in statutes prohibiting "knowing possession of narcotics." To prove this crime, prosecutors must show that the defendant knew that the substance in her possession was a narcotic. The issue often arises as to whether it is enough that the defendant suspects it is a narcotic, or whether the defendant must know for sure. For example, what if a stranger offers a defendant $10,000 to transport a suitcase to another country? The defendant suspects the suitcase contains cocaine, but intentionally does not look inside so that she can claim she did not "know" what she was transporting. The law has developed a doctrine to deal with this situation. It is called the *deliberate/willful ignorance doctrine* or the *ostrich defense*. In such situations, the courts will often recognize that conscious avoidance of confirming the contents of the suitcase is the equivalent of knowing the contents and therefore the defendant's willful blindness is not a defense. See *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976).

c. Recklessly. *Recklessly* is the next level of intent. A person acts recklessly if she realizes that there is a substantial and unjustifiable risk that her conduct will cause harm but consciously disregards the risk. MPC §2.02(2)(c). For example, a defendant is late to work and therefore takes a shortcut by driving her car through a local playground. She hits one of the many children playing on the playground. It may not have been the defendant's purpose to kill a child; the defendant also may not have been virtually certain that she would do so. Nonetheless, the defendant subjectively realized that there was a risk of hitting a child and took that risk anyway. This gross deviation from the conduct of a law-abiding person when the defendant knew she was taking a risk makes the defendant's intent reckless. *Recklessness is the minimum mens rea standard for most crimes*. It is also referred to as "general intent" or, as we have seen, "maliciousness."

d. Negligently. Finally, some crimes, especially those that cause grave harm to other persons, only require that the defendant act *negligently*. A person acts negligently if she is unaware of and takes a risk that an ordinary person would

not take. MPC §2.02(2)(d). For example, if a defendant is unaware that her child is suffering from a life-threatening illness, but an ordinary person would be aware, that defendant acts negligently if she does not seek medical treatment for the child. Negligence is an objective standard. The focus is not on the defendant's state of mind, but on what an ordinary person would have known and done in the defendant's situation.

To test your understanding of the Model Penal Code's approach to mens rea, try the following problem.

QUESTION 6. Poisoning Mrs. Wade. Consider again the case of *Regina v. Cunningham*, 2 Q.B. 396 (1957), where the defendant almost asphyxiated his neighbor by ripping a gas meter from the wall and thereby allowing gas to seep into the victim's room. If Cunningham claimed that he didn't realize that breaking a gas meter would cause gas to seep and the jury believed him, would he be guilty of the crime of recklessly asphyxiating his neighbor?

A. Yes, because an ordinary person would have realized that breaking a gas meter would allow the gas to seep into his neighbor's apartment.
B. Yes, because the defendant should have considered the risks to his neighbor when he broke the gas meter.
C. No, because the defendant did not have the purpose to kill his neighbor.
D. No, because the defendant never realized that he might harm his neighbor.

ANALYSIS. Let's go through the answers in order. **A** is wrong because it describes the mens rea standard of negligently. The crime, however, requires that the defendant act recklessly. It is not enough that an ordinary person would have realized the risk. The recklessness standard requires that the defendant subjectively realize the risk to his neighbor and disregard it.

B is also wrong because it states the defendant "should have" considered the risk. Once again, that is the language of negligence. Recklessness requires that the defendant "did" consider the risk and disregarded it.

C is wrong because it sets too high a standard for the crime. The crime does not require that the defendant act purposely. Recklessly is enough. Certainly, if the defendant did act purposely, that would be enough to meet the lower standard of recklessly, but that is not demonstrated by the facts. Rather, the defendant argues that he not only didn't have the purpose to poison his neighbor, he didn't realize that he might do so.

D, then, is the correct answer. If the jury finds that the defendant did not consider the risk to his neighbor, the defendant has not acted recklessly. Accordingly, he has not met the mens rea (intent) requirement of the crime for which he was charged.

In addition to knowing what the Model Penal Code terms mean, it is also important to understand how the mens rea requirements are to be applied. This issue is covered in more detail in Chapter 5 (Mistake of Fact). However, let's take an initial look at the principles of statutory construction under the Model Penal Code.

First, according to MPC §2.02(4), if a statute defining an offense "prescribes the kind of culpability that is sufficient for the commission of the offense, without distinguishing among the material elements thereof," a court should interpret the designated level of culpability as applying to every material element of the offense "unless a contrary purpose plainly appears." In other words, if a statute provides, for example, that "[i]t is a crime to knowingly restrain another unlawfully," the defendant must knowingly restrain the victim and know that the restraint is unlawful. MPC §212.3. See MPC Commentaries, Part I, Vol. 1, at 245-246.

However, if the statute provides for different culpability levels for different clauses of the statutory provision, then the court should follow the language of the statute. For example, if a statute states that "[a] person is guilty of theft if he *purposely* receives, retains, or disposes of movable property of another *knowing* that it has been stolen," MPC §223.6 (emphasis added), then the defendant must *purposely* receive the property, but only needs to *know* it is stolen.

It's time for a problem to see how well you understand this basic principle of statutory construction under the Model Penal Code.

QUESTION 7. Switcheroo. Bob Brozio is the deputy in charge of the local jail. He hears that the ACLU is going to review the records of the jail in order to investigate whether there has been an escalation of guard attacks on inmates. Since he is the keeper of the inmates' books and is concerned that he might be in trouble because of the problems at the jail, Bob decides to delete two of the recent entries about inmate beatings. Bob is charged with tampering with records, in violation of MPC §224.4. The statute provides that a person commits that offense, "if, knowing that he has no privilege to do so, he falsifies, destroys, removes or conceals any writing or record, with purpose to deceive or injure anyone or to conceal any wrongdoing." When prosecuted for violating MPC §224.4, Bob claims that he believed he had complete discretion to change the information in the records. If Bob is believed, would he be guilty of the crime charged?

A. Yes, because he clearly had the purpose of concealing wrongdoing in the jail.
B. Yes, because he did not have authority to change the records.
C. No, because he believed he had the authority to remove information from the records.
D. No, because he did not have the purpose to conceal any wrongdoing.

ANALYSIS. This hypothetical requires you to accurately determine the culpability level of each requirement of the crime. Therefore, the evidence must show that Bob *knew* he could not change the records and that he changed the records with the *purpose* of concealing wrongdoing. In making this assessment, you must take the facts as given to you in the problem. With the facts given, **C** would be the correct answer.

A is wrong because it is not enough that Bob had the purpose of concealing wrongdoing if he did not know that he lacked the authority to change the records. While we would not be thrilled with Bob's behavior even if he thought he had authority to change the records, the statute clearly sets forth the culpability requirement that he "know" that he could not change the records. You should look for an answer that expressly states that the defendant met this culpability requirement.

For the same reason, **B** is wrong. While it may have been true that Bob did not have the authority to change the records, the statute requires more. It requires that Bob "know" he lacked the authority. Once again, this answer falls short because it does not indicate that Bob knew that he did not have the authority to change the records.

D is wrong because the facts clearly demonstrate that the reason Bob changed the records was that he had the goal or aim to cover up misconduct at the jail. Therefore, he *did* have the purpose to conceal wrongdoing.

C is the correct answer. Bob would not be guilty if the jury believed his claim that he thought he had authority to change the records for whatever reason — good or bad. Simply by reading each clause of the statute, and assessing the appropriate level of culpability attached to each, you can accurately determine a defendant's guilt or innocence of a crime.

C. Specific intent versus general intent

Many jurisdictions attempt to distinguish crimes as requiring either specific or general intent. This distinction is particularly difficult because there is no precise definition of either specific or general intent. As a result, this area of the law can be extremely confusing. Nonetheless, there are some general principles you can keep in mind when trying to distinguish between the two types of mental states.

General intent crimes are those that only require that the defendant intend to commit the act that causes the harm. The defendant need not, however, intend the consequences of her acts. For example, consider the case of a defendant who has been charged with battery for hitting a victim. Battery is a general intent crime. Therefore, it is sufficient that the prosecution prove that the defendant intentionally swung her arms in a manner that might hurt someone. The prosecution need not prove that the defendant intended to inflict a particular harm on the victim when she swung her arms. By acting in a reckless manner, the defendant has satisfied the requirements of general intent.

Specific intent, by contrast, refers to crimes that require a higher level of intent. For these crimes, the prosecution must prove that the defendant acted either with the specific purpose to cause the harm or while knowing the harm would result. Many statutes use the words "with intent to" to describe the crime as a specific intent offense. A good example of a specific intent crime would be burglary. To be guilty of burglary, a defendant must enter a building with the intent to commit a felony inside. The requirement that the defendant have a specific purpose when she engages in her unlawful conduct makes the crime a specific intent crime.

The question of whether a crime is a specific or general intent crime becomes most important when the defendant raises a defense, such as intoxication or diminished capacity, in which the defendant claims she could not have formed the purposeful intent required to be guilty of the charged offense. For example, the defendant charged with burglary may claim that because she was drunk at the time she entered the building, she could not and did not form the specific intent for that crime. On the other hand, a defendant who assaults another person when she is drunk would not have a defense. Assault is a general intent crime and even the drunk can form the intent to engage in the physical act of swinging her arm.

Although the distinction between general and specific intent crimes is discussed in more detail under defenses (see Chapters 19 and 20), the following questions will help you reach a basic understanding of the distinction between general and specific intent crimes.

QUESTION 8. Felon with a firearm. George is charged with being a felon in possession of a firearm. Under the applicable statute, ''any person who has been convicted of a felony and who has in his possession, custody or control any firearm, is guilty of an offense.'' George is arrested when the police conduct a search of his home and find an old shotgun hanging on the mantel of George's fireplace. George tries to explain to the officers that the weapon is never loaded and that it is just a family heirloom left to him by his grandfather, but he is arrested anyway. The officers disregard George's argument that he should not be charged because he did not realize it was illegal for him to possess that particular weapon.

Before trial, the court finds that in this jurisdiction, being a felon in possession of a weapon is a general intent crime. Given this ruling, George should be

A. convicted because he knew he had a weapon.
B. convicted because he knew he had a weapon and that he was a felon.
C. convicted because he was required to and had the specific intent to violate the law.
D. acquitted.

ANALYSIS. In analyzing this question, you must start with the definition of the crime and the court's ruling that it is a general intent crime. As we learned, general intent ordinarily means that the prosecution does not need to prove the defendant intended to violate the law. Rather, if George intended to do the act of possessing a firearm, knowing that he was a felon, that is sufficient intent for the offense. If the court had ruled it was a specific intent offense, the prosecution would have to prove that not only did George know he had the weapon and was a felon, but also that he knew it was illegal for a felon to have such a weapon. Since it appears that George did not have such knowledge, he would not be guilty if this were a specific intent crime. Unfortunately for George, the court has ruled it is a general intent, not specific intent offense.

Given this analysis, let's look at the choice of answers:

A seems on the right track, but it is only halfway there. One of the confusing things about general intent crimes is how much the defendant needs to know. Here, as in most jurisdictions, it may not be enough for the defendant to know he has a weapon. He also needs to know he is a convicted felon. While that won't be hard to prove, it is part of the general intent requirement here. For that reason, **A** is not correct.

B is a better answer because it includes all of the general intent that George needs for the crime. He may not need to know he is violating a law by being a felon in possession of a firearm, but he does need to know he is a felon and that he has a firearm. **B**, therefore, seems like the correct answer. Before making a final selection, it is always best to look at the other options.

C is incorrect on its face. The court has ruled that this is a general intent, not specific intent crime, and the evidence indicates that George did not intend to violate the law. Thus, on both legal and factual grounds, **C** is incorrect.

Finally, there is **D**. As is frequently the case, multiple-choice questions can be pared down to two possible answers. The ultimate choice depends on the student's confidence in her knowledge of this area of the law. Here, if you understand that George had all the intent he needs for a general intent crime, **B** is clearly the answer. If you think that a general intent crime requires more, you will pick **D**, which is incorrect.

Since the distinction between general intent and specific intent crimes is a particularly muddy area, let's try another example to see how the distinction works and what difference it may make in a case. Take a look at Question 9.

QUESTION 9. **Ruling on the robber.** Rick is charged with robbery. Robbery is defined as "taking money, by force or violence, from another person with the intent to permanently deprive that person of the property." At the time of the alleged robbery, Rick was under the influence of drugs. He claims that he is at most guilty of assault (defined as using unlawful force against another person), but that he never

intended to keep the property he took. Assuming that the jury believes Rick, the court should rule that

A. Rick has a possible defense to both robbery and assault.
B. Rick has a possible defense to robbery only.
C. Rick has a possible defense to assault only.
D. Rick has no defense to the charges he faces.

ANALYSIS. This question requires that you differentiate between a specific intent and a general intent crime. Before looking at the answer options, examine each crime to determine whether it appears to require that the defendant have a specific intent or goal in mind when he committed the offense. The crime of robbery requires that the defendant act "*with the intent to* permanently deprive that person of the property." This language is a signal that robbery is a specific intent crime and that there may be a defense if Rick could not form the specific intent for that crime. On the other hand, assault only requires that the defendant use force against another person. No specific intent is required. Therefore, it is unlikely that the defendant will be able to argue that he could not form the general intent for the crime. Now, look at the options.

A and **C** are wrong because Rick's drug use is not a defense to assault. However, it is hypothetically a defense to robbery if the jury finds that the defendant was so under the influence that he did not intend to permanently deprive the victim of her property. If so, he could raise this defense. Therefore, **B** is the correct answer. **D** is wrong because the question includes a specific intent crime.

D. Concurrence of Elements

For there to be a crime, a defendant must have a culpable mens rea at the time she commits her actus reus. Ordinarily, this is not an issue. However, occasionally a defendant may plan to commit a crime, but not commit an actus reus until she no longer has a culpable mens rea. For example, consider a defendant who intends to kill her neighbor. She then borrows a cup of sugar from the victim and changes her mind because they instantly become friends. The next day, the defendant is driving into her driveway. Unfortunately, she doesn't see her neighbor as the neighbor unexpectedly dashes in front of defendant's car. Defendant is horrified when she realizes she has hit and killed her neighbor.

In this scenario, there is no concurrence of actus reus and mens rea. At the time the defendant wanted to kill her neighbor, she did not commit the actus reus of killing. That did not occur until defendant no longer had the intent to harm her neighbor. Accordingly, there was not a concurrence of actus reus and mens rea for murder. Defendant is not guilty.

Try the next problem for another example of how actus reus and mens rea must be concurrent.

QUESTION 10. Time to steal. Yaron decides to break into his neighbor's house to watch his neighbor's new flat screen television. After Yaron breaks into the house, he decides to steal the television. Yaron is charged with burglary which requires "breaking and entering into a home with the intent to steal property."

Is Yaron guilty of burglary?

A. Yes, because he broke into his neighbor's house.
B. Yes, because he stole the television.
C. No, because he never had the intent to steal.
D. No, because he lacked concurrence of actus reus and mens rea.

ANALYSIS. The answer to this question is **D**. While Yaron had the intent to steal, he did not form it until after he broke into his neighbor's home. The crime of burglary requires that a defendant have the intent to steal at the time he breaks and enters into the home. Accordingly, he did not have concurrence between his actus reus and mens rea. Answer **A** is wrong because just breaking into his neighbor's home was not enough for burglary.[3] **B** is wrong because stealing the television was not the actus reus for the crime of burglary. **C** is wrong because he did have the intent to steal. Remember you must always analyze a crime for its actus reus and mens rea, and then make sure these elements occur concurrently.

E. The Closer: Euthanasia — Positive act or omission? Motive versus intent

This chapter focused on the fundamental elements of criminal law: actus reus and mens rea. Although these elements are the building blocks of criminal law, there is nothing simple about them. Sometimes, it is difficult to distinguish between an affirmative act and an omission. Likewise, there may be a thin line between the motive for a crime and the defendant's intent. A prime example of where the lines in these doctrines begin to blur is the crime of euthanasia.

3. For more discussion of burglary, see Chapter 23.