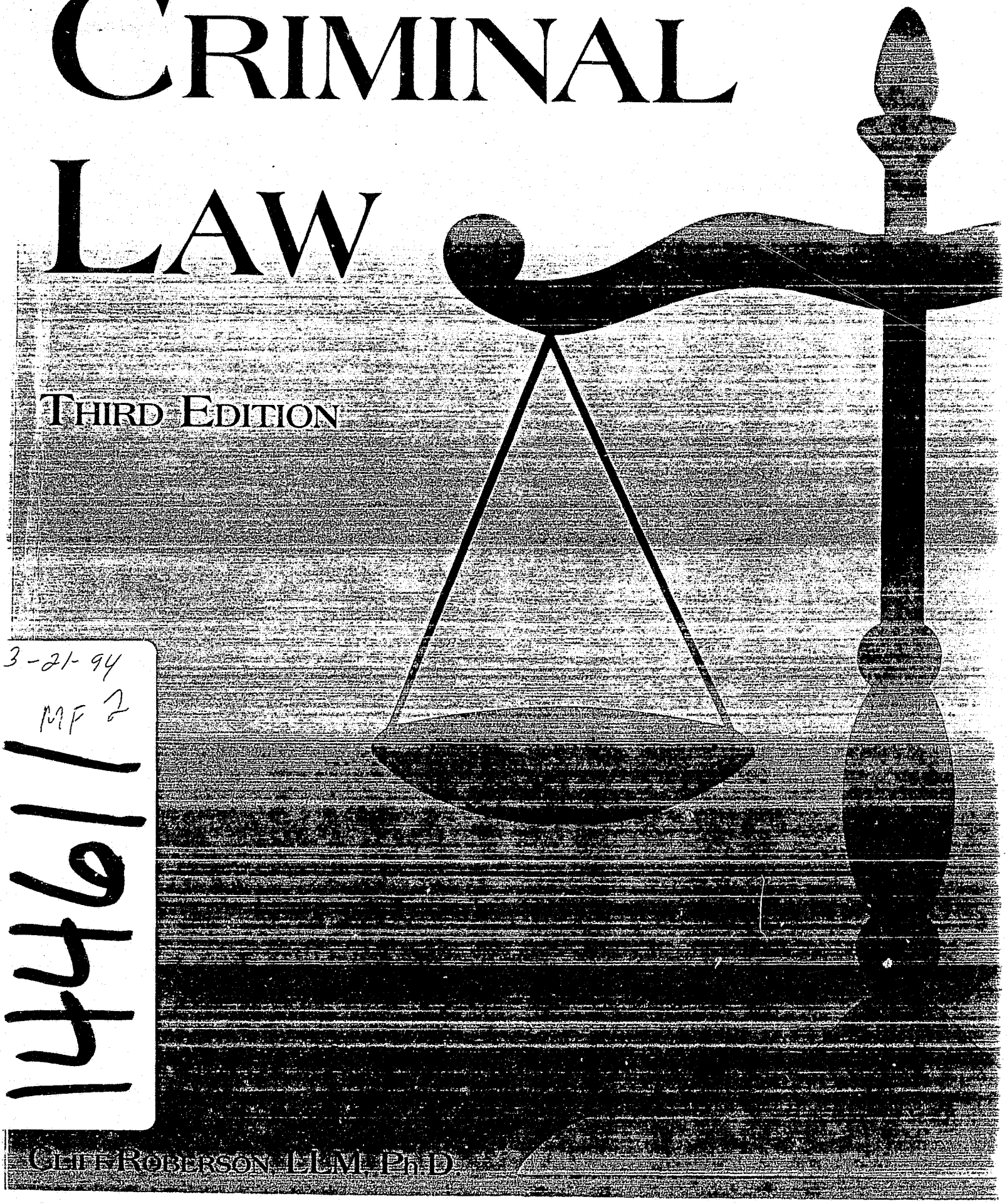
CALIFORNIA CRIMINAL LAW



THIRD EDITION

CLIFF ROBERSON, LL.M., Ph.D.

California
CRIMINAL LAW

Third Edition

Cliff Roberson LL.M. Ph.D.

COPPERHOUSE PUBLISHING COMPANY

1590 Lotus Road
Placerville, California 95667
(916) 626-1260

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Developmental Editor - Derald Hunt

Library of Congress Catalog Number 88-72096
ISBN 0-942728-56-4 Paper Text Edition

Printed in the United States of America.

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Preface

Whatever views one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. (Wechsler, "The Challenge of a Model Penal Code." 65 Harvard Law Review 1097)

The study of criminal law should not be considered as the memorization of a set of rules, but as an examination of a cluster of ideas, principles, concepts and questions about human conduct and the control of human behavior. Criminal law should be viewed as a flexible system of values and principles about which reasonable people can and do disagree (Katkin, *The Nature of Criminal Law*).

This text has several goals: (1) to provide a comprehensive review of California criminal law, (2) to aid students in understanding what conduct constitutes criminal behavior, and (3) to provide a reference for the administration of justice professional.

This text is written for criminal justice students and as a reference source for the non-lawyer criminal justice professional. An objective of the text is to present the complicated and technical subject of criminal law in an easy to understand language and format.

All books are biased to some degree. In many cases, the biases are unintentional and are caused by the author's background and frame of reference. This text may have a "conviction" bias, in that it is written from a law enforcement viewpoint based on the author's background. Despite this bias, there is still included a deep respect for the individual rights of all persons.

To aid in understanding and as reference points, selected penal code provisions are included in the text. Code sections are presented as enacted by the legislature. At certain places, however, portions of the statutes are deleted. The omitted portions are indicated by ellipsis points (. . .). In other places, to assist the reader in understanding the statutes, editorial comments are added by the author. The editorial comments are enclosed in brackets [ ] and are not a part of the code.

Case citations are also included to assist those readers who may need a more in-depth treatment of a particular point. The abbreviations used in the citations are explained in Chapter 1. A decimal system is used within the text to allow easy reference to individual paragraphs. The first number of a paragraph will indicate the chapter in which the paragraph is located.

At the end of each chapter, class discussion questions and self-study quizzes are included. After studying the chapter, readers should test their understanding of the material by answering the self-study quizzes and consider the possible issues and answers presented in the discussion questions.

DEDICATION

I dedicate this book to a very special woman
Diane Marie Kowaleski Roberson.

ACKNOWLEDGMENTS

The author wishes to acknowledge his debt to the following individuals:

For reading and commenting on the original manuscript; Professors Dean Ray, Max Futrell, Otto Tocchio, John Burge, and Raymond Hill.

For assistance in updating and revising the second and third edition, I thank Professors Robert Perez, Harvey Wallace, and Lance Parr.

Cliff Roberson

Chapter 1

Law and Crime

Human control of contingent human behavior is the purpose of criminal law. (Clark and Marshall, On Crime)

1.1 Purpose of Law in Society

What is a crime?
Why do we need criminal laws?
What purposes do they serve in our society?

Laws are principles which are created by our government for the orderly functioning of our society. Criminal law is an attempt by society to eliminate or control harmful human behavior. It establishes standards of conduct and provides for punishment for those who are convicted of violating those standards. The greatest freedom for all is only possible through an organized society with a system of criminal law which protects our basic rights. A crime is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, a criminal punishment. Note: for the criminal law to work, the great majority of people must have confidence that it is fair and just. Does our system have that confidence?

1.2 General and Specific Sources of Law

The criminal law in California comes from three primary sources;

1. Federal and state constitutions
2. Statutory law
3. Case law

Generally, constitutions provide rights and protection for individuals and restrictions of the power of the government to prosecute or punish. Statutes contain the substantive acts and procedural requirements for prosecution. Case law contains interpretations of constitutional and statutory provisions.

Constitutional Law

Both the U.S. Constitution and the Constitution of the State of California are sources of criminal law for the courts in California. Constitutions provide the framework for criminal law by:

1. Limiting the power of the government.
2. Establishing individual rights.
3. Providing for the establishment of a judicial system.

As noted earlier, constitutions generally leave the creation and definition of crimes to statutory enactments. The U.S. Constitution, for example, defines criminal acts in only two sections, Article III, Section 3 on treason and Amendment 13 which forbids involuntary servitude except as punishment for crime. The state constitution defines criminal acts in a few more areas, but for the most part, the state constitution, like the federal, focuses on individual rights and limitations of governmental power.

Statutory Law

In California, there are two types of statutory law, (1) statutes which are passed by the legislators and (2) initiatives which are passed by the voters. Under most circumstances, the power to designate

state criminal offenses and provide for the punishment of prohibited acts is reserved to the state legislature and cannot be delegated (*People v. Knowles* 35 C 2d 175). In establishing the elements of a crime, the legislature may depart from the norm or common law concepts as long as the elements do not conflict with federal or state constitutions or federal law (*People v. Perini* 94 C 573).

Many of the state crimes are set forth in the Penal, Health and Safety and Vehicle Codes. Other state codes that contain numerous crimes are the Welfare and Institutions Code, Business and Professions Code, Fish and Game Code, and Government Code.

In California, the voters have the power via the initiative petition process to propose and approve statutes and amendments to the state constitution. An initiative measure is started by presenting a petition to the Secretary of State that has been signed by the number of voters that is equal to at least 5 percent of the number that voted in the last gubernatorial election for all the candidates for governor. The Secretary of State is then required to submit the measure at the next general election held at least 31 days after the petition is certified or a special election may be called (Cal. Const. Art II, sec. 8). A simple majority of votes is sufficient to pass the measure and it takes effect the day after the election unless the measure provides otherwise. Initiative measures should be interpreted liberally to give full effect to its objective and the needs of the people (*Mills v. Trinity County* 108 CA 3d 656).

All laws of a general nature have uniform operation within the state. A local or special statute is invalid in any case if a general statute can be made applicable (Cal. Const. Art. IV sec. 16). A statute or initiative must embrace only one subject, which shall be expressed in its title. If a statute or initiative embraces more than one subject or the subject is not embraced in its title, the provision is void (Cal. Const. Art. IV, sec. 9). The one subject limitation must, however, be interpreted liberally to uphold legislation whose various parts are reasonably germane to the subject contained in its title (*Fair Political Practices Com. v. Superior Court* 25 C 3d 33).

Substantive and Procedural Laws

Laws relating to criminal conduct may be divided into two general areas, substantive and procedural. Substantive law defines crimes and establishes punishments. Procedural law sets forth the rules and requirements that must be followed during the investigation, apprehension and trial of individual defendants. That portion of the penal code that prohibits theft of another's property (larceny) is substantive in nature, whereas, the Evidence Code is a procedural code.

Case Law

"Case law" is the phrase used to indicate appellate court interpretations of the law. A substantial majority of "law" is case law, i.e. court opinions which interpret the meaning of constitutions and statutes. Case law, also, helps clarify and narrow statutory law. For example, the U.S. Constitution (Amendment XIV) provides that no state shall deprive any person of life, liberty, or property, without due process of law. What constitutes "due process of law" is decided almost daily in the courts. There are hundreds of published opinions issued by federal and state appellate and supreme courts each year.

Court decisions interpret the relationship of one code provision to another, the meaning of words used in the code provision, the legislative intent in enacting the code provision, the scope and effect of the code provision and whether or not the provision violates any constitutional restrictions.

Precedent is used when a legal principle has been decided by a court. The court decision is then precedent (guide) for similar situations. There are two basic types of precedent, mandatory and persuasive. Under mandatory precedent, when a higher appellate court renders a decision on an issue, the lower courts under the supervision of that court must follow the ruling or face reversal on appeal. For example, if the California Supreme Court decides an issue, then state appellate courts in California must follow that precedent. Persuasive precedent indicates a court decision that is not binding on a second court but is persuasive to the second court. For example, a court in California is faced with an issue that has never been decided by

a California court. There is however a court in Nevada that has considered the same issue. The Nevada court decision is not binding on the California court, but is of some persuasive authority. Precedent is based on the principle of "stare decisis" which is discussed below.

Common Law

> Common law is that body of law and juristic which was originated, developed and formulated and is administered in England .... common law comprises the body of principles and rules of action ... which are derived from usages and customs of immemorial antiquity. *(Black's Law Dictionary)*

Most of the California criminal law principles are traceable to the common law of England. This is especially true of the underlying philosophy of criminal law. There are, however, no "common law crimes" in the state. Accordingly, to be a crime in California, there must be in existence some statute, ordinance or regulation prohibiting the conduct in question prior to the commission of the act (*People v. Whipple* 100 CA 261). The common law principles regarding the interpretation of criminal statutes are still used (17 Cal Jur 3d (Rev.), Part 1, Sec. 15). For example, in defining a crime, the legislature may use words that are well known and defined by criminal law (*Re Application of Lockett* 179 C 581).

1.3 Development of common law and stare decisis

Development of Common Law

Common law was the earliest source of criminal laws. It originated during the period of time that William the Conqueror was the King of England. At the time of the conquest (1066), there was no uniform criminal law in England. Individual courts were dominated by sheriffs who enforced the village rules as they saw fit. In order to reduce the arbitrary aspects of the law, William decreed that all prosecutions would be conducted in the name of the King. (Note: a similar practice exists in California today where all cases are prosecuted in the name of the People of the State of California.)

At that time in England, very few people could read or write. The king, the judges and the church authorities determined the elements and the scope of criminal offenses. In some cases, they even created new crimes. As William unified England as a nation, rather than isolated villages, the judges developed familiarity with the general customs, usages and moral concepts of the people. Judicial decisions began to be based on these general customs, usages and moral concepts.

By the 1600s, the primary criminal law of England was based on the mandatory rules of conduct laid down by the judges. These rules became the common law of England. Prior decisions were accepted as authoritative precepts and were applied to future cases. When the English settlers came to America in the 1600s, they brought with them the English common law. Except for few modifications, English common law became the common law of the colonies. During the American Revolution, there was a great deal of hostility toward the English in America. This hostility extended to the common law system. Accordingly, most of the new states enacted new statutes defining criminal acts and establishing criminal procedures. The statutes, however, basically enacted into statutory law what was formerly English common law.

As noted earlier, many aspects of California's present day criminal law system is based on English common law. All states except Louisiana can trace their legal systems to the English common law system. Louisiana, whose system was originally based on the French and Spanish codal law concept, officially adopted the common law of England as the basis for their system in 1805.

Stare Decisis

"Stare Decisis" is a Latin word meaning "to abide by, or adhere to, decided cases." The doctrine provides that when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where the facts are substantially the same (*Moore v. City of Albany* 98 N.Y. 396). Stare decisis is a policy founded on the

theory that security and certainty require that accepted and established legal principles, under which rights may accrue, be recognized and followed (*Otter Tail Power Co. v. Von Bank* 72 N.D. 497).

1.4 Repeal/Amendment

Repeal of Statute Government Code 9606

Any statute may be repealed at any time, except when vested rights would be impaired. Persons acting under any statute act in contemplation of this power.

Termination or Suspension of Law Creating Criminal Offense Government Code 9608

The termination or suspension (by whatsoever means effected) of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so terminated or suspended, unless the intention to bar such indictment or information and punishment is expressly declared by an applicable provision of law.

Discussion

Criminal statutes are repealed or amended by other legislation either directly or by implication (*People v. Dobbins* 73 C. 257). A statute is repealed directly by legislation expressly repealing the statute in question.

Repeal by Implication

Repeal by implication is not favored by the courts (*People v. Armstrong* 100 CA 2d Supp 821). A statute is repealed or amended by implication when a later statute is enacted that is inconsistent with it. Normally a general statute will not be considered as repealed by a special or statute of limited applicability unless the intent of the legislature is clear (*People v. Deibert* 117 CA 2d 410).

It is assumed that the legislature did not intend to repeal a former statute by a later statute if, by a fair and reasonable construction, effect can be given to both statutes (*People v. Armstrong* 100 CA 2d Supp 852). Note: if two general statutes are clearly in conflict with each other, the presumption is that the latest enacted statute prevails (Gov. Code 9605).

Effect of Repeal

The repeal of a statute under which a person has been convicted does not affect the conviction if the conviction is final. Government Code 9608 (quoted above) is the "general saving clause" for repealed criminal statutes. It modifies common law by allowing for the prosecution of acts which were criminal at the time of commission even though the statute which made them criminal has since been repealed. Its purpose is to authorize prosecution under a former statute in order to avoid a situation where the defendant could not be prosecuted under any law, simply because the legislature has modified the statute in question between the time that the act was committed and the time of trial (*Re Estrada* 63 CA 2d 740). The California Supreme Court decided in 1893, that a person should be punished under the state law as it existed at the time of the commission of the offense rather than subsequent amendment to such law. This principle has since been upheld by the U. S. Supreme Court (*McNulty v. California* 149 US 645).

The above rules apply even where the act is no longer a criminal offense. For example, if California were to repeal its traffic laws as of January 1, 19XX; an accused could be convicted and punished on January 3, 19XX on a traffic violation that occurred prior January 1.

1.5 The Nature and Classifications of Crimes

Crimes are classified as "mala in se" or "mala prohibita" crimes. Other classifications include "crimes involving moral turpitude," "infamous crimes" and "high crimes."

Mala in Se and Mala Prohibita Crimes

> An act is said to be malum in se when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without regard to the fact that it is a violation of the law. (*State v. Shedoudy* 45 N.M. 516)
>
> Mala Prohibitum: A wrong prohibited; a thing which is wrong because prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly

forbidden by positive law. *(Black's Law Dictionary)*

At common law, crimes were classified as either "mala in se" or "mala prohibita". Mala in se crimes involve conduct that is inherently and essentially wrong and injurious. Crimes such as murder, rape, incest, arson, etc. are considered as mala in se crimes. Mala prohibita crimes are wrong only because they violate legislative acts and not because they are inherently and essentially wrong in themselves. Most mala prohibita crimes involve traffic, social and economic behavior. **Criminal violation of a rent control statute is an example of a mala prohibitum crime.**

Moral Turpitude

Moral turpitude is a classification used to describe acts that are contrary to justice, honesty, modesty, or good morals (*Marsh v. State Bar of California* 210 C 303). It has also been defined as an act of baseless, vileness, or depravity in the private and social duties which one person owes to others, or to society in general (*Traders & General Ins. Co. v. Russell* S.W. 2d 1079). Crimes that suggest a lack of honesty, or that imply immoral conduct are considered as crimes involving moral turpitude. For example, perjury, theft, and rape are considered as crimes involving moral turpitude. Note that crimes involving moral turpitude may also be considered as mala in se crimes.

Conviction of a crime involving moral turpitude may disqualify a person from holding a professional qualification such as an "attorney at law" (*Re Application of Westenberg* 167 C 309). The conviction of an attempt to commit a crime involving moral turpitude has the same disqualifications attached as a conviction of the actual offense (*Re O'Connell* 184 C 584).

Infamous Crimes

While various crimes are referred to as infamous crimes in the California Constitution and statutes, there is no statutory definition of it. An infamous crime is one that entails infamy upon the one who committed the crime (*Butler v. Wentworth* 24 A. 456). At common law, the term infamous was applied to those crimes upon the conviction of which, the person became incompetent to testify as a witness on the theory that they were so depraved as to be unworthy of credit *(Black's Law Dictionary)*. It was not the character of the crime that determined whether or not it was an infamous crime, but the punishment that may be imposed for conviction of it (*Brede v. Powers* 263 U.S. 4).

Crimen Falsi

"Crimen falsi" is a phrase used to describe those crimes that involve the element of falsehood and includes everything which has a tendency to injuriously affect the administration of justice by the introduction of falsehood and fraud *(Black's Law Dictionary)*. The phrase is, also, used as a general designation of a class of offenses involving fraud and deceit. Crimen falsi crimes include forgery, perjury, using false weights or measurements and counterfeiting.

High Crimes

High crimes is a phrase used to describe those crimes that if convicted of, will disqualify the offender from holding public office or making the person incompetent to act as a juror (Cal. Code of Civ. Pro. 199 (b)). High crimes include bribery, perjury, forgery, and malfeasance in office by a public official.

1.6 Crimes Without Victims

Crimes without victims or "victimless crimes" are those crimes that have no adverse impact on persons other than the actor. They can also be considered as "consensual crimes". Gambling, prostitution and drug abuse have traditionally been considered by some as victimless crimes. One problem with the enforcement of victimless crimes is that the police will often not have an aggrieved victim to testify against the offender. Criminologists have traditionally debated as to whether or not acts between consensual adults should be considered as criminal. The justification for imposing criminal sanctions for the violation of those statutes on victimless crimes are that there are at least "moral victims" to those crimes and that society in general is a victim in those situations.

1.7 Federal Constitutional Provisions

U.S. Constitution, Amendment 14, Section 1

... No State shall make, or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of the life, liberty, or property, without due process of law ....

Discussion

The U. S. Constitution provides certain rights and protection for individuals and restricts the power of the states to criminally punish individuals. The "due process" clause of the 14th Amendment has been interpreted by the U.S. Supreme Court to place certain limitations on the power of states to prosecute individuals. Since the limitations are placed on the states by the U. S. Constitution, the U.S. Supreme Court makes the final decision on whether or not state actions violate those limitations. There are similar protections contained in the California State Constitution. The general limitations on state action imposed by the federal constitution are included below.

Ex Post Facto Laws

An "ex post facto law" is one that:

1. makes an act occurring before the enactment of the law a crime,
2. aggravates a crime or makes it greater than it was when committed,
3. increases the punishment after the offense was committed, or
4. changes the rules of evidence or procedure to require less or different evidence than was required at the time the offense was committed.

Ex post facto laws are prohibited by both the U.S. and the state constitution. An example of an ex post facto law would be the enactment of a statute on January 1, making an act committed three weeks earlier a crime. A more likely case is where the punishment for the crime is increased after the commission of the offense. For example, an individual is arrested in 1985 for driving under the influence. He is prosecuted in 1986. On January 1, 1986 the punishment for driving under the influence was increased. The accused in this case is subject only to the punishment that was in effect in 1985, the time the offense was committed.

Bill of Attainder

Neither the U.S. Constitution nor the state constitution defines the phrase "bill of attainder" even though both prohibit it. The judicial interpretation of "bill of attainder" includes those cases where the punishment is legislatively inflicted on a particular person or class. For example, passing a law punishing a certain person by name would be a bill of attainder. Note: different punishments can be inflicted on a class of persons if there is a legitimate reason for doing so. For example, persons who have prior convictions can by legislative mandate be punished more severely than those who have not been convicted of any prior offenses.

Certainty

Criminal statutes must be certain and definite in order that a person will know what conduct is prohibited and what is not. The certainty must be such that a person of ordinary intelligence would recognize what conduct is prohibited by reading the statute (*People v. Pace* 73 CA 548). The purpose of this requirement is to prevent the accidental commission of prohibited conduct. A criminal statute which prohibited "picketing" was too vague and therefore unconstitutional (*Re Application of Harder* 9 CA 2d 153).

Equal Protection

The U.S. Constitution prohibits any state from denying to any person within its jurisdiction the equal protection of the laws (U.S. Const. Amend. 14). In addition, the state constitution prohibits the legislature from enacting any special statute if a general statute can be made applicable (Cal. Const. Art. IV, sec. 16). In addition, the state constitution requires that all laws of a general nature must have a uniform operation. The equal protection clauses, however, do not prohibit the legislature from fixing different penalties for different offenses or from permitting courts to impose variations in punishment for the conviction of the same offense by different individuals (*People v. Dawson* 210 C 366).

1.8 Police Power of the State

Police power is the power and responsibility of a political unit, such as a county or city, to promote and provide for public health, safety and morals within its jurisdictional limits. The U.S. Supreme Court noted that police power comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community (*Kovacs v. Cooper* 336 U.S. 77).

The California constitution provides that counties and cities may establish ordinances that regulate local, police, and sanitary procedures and conduct within their respective geographic limits. The ordinances may not conflict with general laws (Cal. Const. Art. XI, Sec. 7). Any ordinance which penalizes conduct already covered by a general law is void (*Arfsten v. Superior Court* 20 CA 269). The police power, also, may not be used by municipalities to legislate subject matter that is of such statewide concern that it can no longer be considered as only a local concern.

A state or political subdivision of a state cannot act arbitrarily in the use of the police power. In addition, the state or municipality must be able to show that there is a compelling public need to regulate the conduct in question. The statute must also not infringe on any individual right secured by the constitution. Cases where the courts have struck down statutes based on police power include:

1. A statute that required all persons to attend the church of their choice every Sunday. (This statute violates the First Amendment and is not within the police power of a state.)
2. A statute forbidding unmarried persons of the opposite sex from living together in the same house or apartment. (No legitimate state concern.)

Cases where the use of the police power has been upheld include:

1. Requiring motorcycle riders to wear protective headgear. (Note: several state supreme courts have struck down similar statutes. For example, the Ohio Supreme Court stated that "liberty" included the right to be foolish as long as others would not be injured. See *State v. Betts* 252 N.E. 2d 866.)
2. Gun control legislation.
3. Requiring the use of seat belts in automobiles.

1.9 Doctrine of Preemption

As noted above, a local ordinance will be invalidated if it directly conflicts with state law. In some cases, however, even where there are no conflicts between state law and local ordinances, the local ordinance will be void if it appears that the legislative purposes of the state law was to fully regulate the field (50 Cal. L. Rev. 740). This is based on the "doctrine of preemption". Accordingly, the doctrine provides that in those areas where the state sees fit to adopt a general scheme of laws for the regulation of a particular area, whatever aspects covered by state law ceases to be subjects that may be controlled by local legislation (*In re Lane* 58 C 2d 99).

The factors used to determine if state law preempts the local regulations are:

1. Has the subject matter been fully covered by state law so as to indicate that it has become exclusively a matter of state concern?
2. Are the state statutes couched in terms to indicate that clearly a paramount state concern will not tolerate further or additional local control?
3. Is the subject matter such that the adverse effects of a local ordinance on transient citizens of the state outweighs any benefits of local control? (53 Cal. L. Rev. 902)

1.10 Dual Federalism

Dual federalism refers to the fact that in California, there are two separate criminal law systems (state and federal) operating together and in many situations overlapping each other. The federal government is restricted by the U.S. Constitution to only those powers set forth or implied by the constitution. It is, therefore, a limited criminal law system. The majority of criminal cases involve the violation of state penal codes and are tried in state criminal cases. For example, Los Angeles County courts, alone, try more criminal

cases each year than are tried in the entire federal system. (Despite this fact, there are presently over 2800 federal crimes.)

Federal crimes fall within three broad classifications:

1. Crimes affecting interstate commerce. The constitution gives Congress the exclusive power to regulate interstate commerce. Such crimes include the Mann Act (taking a female across state lines for immoral purposes), Dyer Act (transporting stolen automobiles across state lines), Lindberg Act (kidnaping where the victim is taken across state lines or the presumption that the victim has been taken across state lines) and the Fugitive Felon Act.
2. Crimes committed beyond the jurisdiction of any state. This includes crimes committed on American ships on the high seas or at overseas military bases.
3. Crimes which interfere with the activities of the federal government. This broad category includes the robbery of a federally insured bank, federal income tax fraud, attempts to overthrow the U.S. Government or robbery of a post office.

As noted in Chapter 3, the conduct of a person may result in the violations of both a federal and a state law, and thus be convicted in both federal and state courts.

For a federal court to become involved in the trial of a state court, there must be a "federal issue". Accordingly, if a person commits murder under a state penal code, the case will be decided by state courts unless a federal issue is involved. In this situation, however, the accused by claiming that his/her conviction violates one of the rights protected by the U.S. Constitution induces a federal issue (violation of federal constitution). If this occurs, then a federal court would have jurisdiction to decide the federal issues involved.

1.11 Legal Research and Methodology

Researching legal issues and cases is different from standard literature research. Once the student has mastered the concepts and methodology, legal issues, case law and statutes can be located quickly and efficiently.

In conducting legal research, the researcher should:

1. Research the subject systematically going sequentially from one source (e.g. statutes, court decisions, or law reviews) to the next.
2. Check to insure that the latest available information has been consulted. For example, use only the latest copy of the penal code. Using only the latest references is essential because legal information and points of authority change frequently as the results of statutory modifications and new court decisions.
3. In researching legal questions, be patient and thorough. To many questions, the law frequently does not yield easy "yes or no" answers. At times, the answers will be considered as ambiguous and conflicting.

Legal Citations

Legal citations are a form of shorthand to assist in locating the legal sources. Appellate court decisions are published in case law books, more popularly known as "reporters". The basic rules of legal citation are as follows:

1. In most citation formats, the volume or title number is presented first.
2. Next is the standardized abbreviation for the legal reference source.
3. Next, in the case of court cases, is the page number of the first page of the decision. In the case of statutory references, it is the section number of the statute.

For example, the citation, 107 C. 468, refers to the case starting on page 468 of volume 107 of California Reports.

The standard abbreviations used in citing federal and state authorities include:

1. Court decisions:
   U S (United States Reports) [Contains U.S. Supreme Court decisions.]
   C or Cal. (California Reports) [Contains California Supreme Court decisions.]

C 2d or C 3d (California Reports second or third series) [A continuation of California Supreme Court decisions.]
CA or Cal. App. (California Appellate Reports) [Contains California Courts of Appeal decisions.]
CA 2d or CA 3d (California Appellate Reports, second or third series) [A continuation of California Courts of Appeal decisions.]
CA 3d Supp. (California Appellate Reports, third series, supplement edition) [A continuation of California Courts of Appeal decisions.]
P (Pacific Reporter)
P 2d (Pacific Reporter, second series)
Cal. Rptr. (West's California Reporter)

2. Statutes
U. S. C. (United States Code)
Ev C (California Evidence Code)
P C (California Penal Code)
Veh C (California Vehicle Code)
H & S C (California Health and Safety Code)
B & P C (California Business and Professions Code)
W & I C (California Welfare and Institutions Code)

Note: United States Reports (U S), reports only decisions of the U.S. Supreme Court and California Reports (C, C 2d or C 3d), reports only decisions of the California Supreme Court. California Courts of Appeal decisions are reported in California Appellate Reports (CA, CA 2d, or CA 3d).

Legal Digests

Legal digests are not legal authorities. They are used as research tools. Legal digests identify and consolidate similar issues by topical arrangement. The most popular legal digest for California (*West's California Digest*) is published by West Publishing Company. It divides the entire body of law into seven main divisions, thirty-two subheadings and approximately four hundred topics. A digest is published for each series of case reporters. Each topic is assigned a digest "key" number. For example, Crim Law 625 is the key number for the legal issue of "exclusion from criminal trial".

The key number is the same for each digest published. Legal points from court decisions are published with a brief statement of the legal point involved and the case citation for the court decision being digested. If, for example, a point being researched is located in a digest under Crim Law 625, then reference to other digests using the same key number (Crim Law 625) will help locate other court decisions on the same or similar issues.

Shepard's Citations

Shepard's Citations, started in 1873 by Frank Shepard, are widely used to ascertain the current status of a statute or court decision. Shepard's Citations, more popularly known as citators, analyze each appellate court decision as to; the history of the case, other decisions where that decision has been cited and whether or not the rule of the case has been modified, overruled or approved by other cases. A similar analization is used for statutes. For a detailed explanation of how to use Shepard's Citations, read the first pages of any citator volume.

Legal Dictionaries and Encyclopedias

Like Shepard's Citations and legal digests, legal dictionaries and encyclopedias are not legal authorities, but research tools. The most popular legal dictionary is Black's Law Dictionary.

Legal encyclopedias provide discussions on various legal points in encyclopedic form based on court decisions and statutes. They are arranged by broad legal topics and subdivided by individual areas. The most popular encyclopedia used in California is *California Jurisprudence, Third Edition (Revised)*. It provides a detailed discussion on state legal issues. It is cited as Cal Jur 3d (Rev). For example, the citation "17 Cal Jur 3d (Rev) 125" refers to volume 17 of California Jurisprudence, Third Edition (Revised), section 125. The cited section deals with robbery and it provides a detailed discussion on it.

Witkin's California Law

A popular series on California Law is Witkin's. In the criminal law area, there is the

California Crimes (two volumes) and *California Criminal Procedure* (two volumes). The crimes volumes contain a critical textbook treatment of the entire field of California criminal law, and the procedure volumes does the same for California criminal procedural law. Witkin, also, has a multi-volume series on California civil law and civil procedure.

Law Reviews

The major law schools in California publish law reviews. In general, the law reviews contain scholarly articles of various aspects of California law. They are not legal authority, but are often cited as persuasive authorities. The five most popular law reviews in California are:

University of California Law Review (Cal. L. Rev.)
Hastings Law Journal (Hast. L. J.)
Stanford Law Review (Stan. L. Rev.)
University of California, Los Angeles Law Review (U.C.L.A. L. Rev.)
University of Southern California Law Review (So. Cal. L. Rev.)

Law reviews are cited similar to court cases. For example, an article in volume 50 of the Standard Law Review which begins on page 192 would be cited as: 50 Stan. L. Rev. 192.

CALJIC

California Jury Instructions--Criminal (CALJIC) is a series of volumes containing standard jury instructions that a judge may use to instruct the jury regarding elements of crimes, defenses and other matters relating to the trial.

LARMAC

LARMAC is a consolidated alphabetized index to the constitution and laws of California. It includes all twenty-eight codes and the general laws of California. It is the most complete index available on California law.

1.12 Attorney General Opinions

Government Code 12510 **Department of Justice**

The Attorney General is head of the Department of Justice.

Government Code 12511 **State Legal Matters**

The Attorney General has charge, as attorney, of all legal matters in which the State is interested, except the business of The Regents of the University of California and of such other boards or officers as are by law authorized to employ an attorney.

Government Code 12519 **Opinions on Questions of Law**

The Attorney General shall give his opinion in writing to the Legislature or either house thereof, and to the Governor, the Secretary of State, Controller, Treasurer, State Lands Commission, Superintendent of Public Instruction, any state agency prohibited by law from employing legal counsel other than the Attorney General, and any district attorney when required, upon any question of law relating to their respective offices.

Discussion

As required by statutes, the Attorney General provides written conclusions on the legal questions submitted by the Governor, State Senate, Assembly, or any of the other state officials. The opinions are generally of two types, formal and informal. Formal opinions concern legal questions that are of general statewide concern. They are published in *Opinions of the Attorney General.* Informal opinions normally concern problems that are of local interest only. Informal opinions are not usually published, but many are available to the public from the Attorney General's Office. Informal opinions are generally issued in letter format.

Attorney General opinions are considered as "quasi-judicial" in character. While they do not have the force and effect of statutes or court decisions, they are entitled to great weight and are persuasive to the courts (*D'Amico v. Medical Examiners* 6 CA 3d 716 and *People v. Berry* 147 CA 2d 33).

CLASSROOM DISCUSSION QUESTIONS

1. What is the function of procedural law? Substantive law?
2. Distinguish between constitutions (state or federal) and statutory law as sources of criminal law.

3. Since common law crimes have been abolished in California, why is it important to understand common law concepts?
4. What do the below legal citations refer to:
   a. 210 C 366 b. 10 USC 43
   c. 177 US 1020 d. P.C. 285
5. Why is it important to use the latest available information on the subject that you are researching?
6. Distinguish between "crimen falsi" and "high crimes."
7. What are some of the problems involved in prosecuting "victimless crimes?"
8. Define "bill of attainder."
9. Why is it necessary for criminal statutes to be certain and definite?
10. Define "police power" of the state.

SELF STUDY QUIZ

True/False

1. In legal research, it is not important to check the latest available information since statutes are rarely modified.
2. In legal citation formats, the name of the volume being referred to always precedes the volume number.
3. The page number contained in a case citation is the page on which the court opinion starts.
4. In the citation, 18 USC 431, the statute in question can be found in title 18, U.S. Code, page 431.
5. United States Reports (U S), reports only decisions issued by the U.S. Supreme Court.
6. Legal digests are legal authorities and may be cited in court.
7. The Attorney General issues two types of opinion, formal and informal.
8. Informal attorney general opinions are generally issued in letter format.
9. In California, there are two types of statutory law, statutes passed by the legislature and initiatives.
10. Most state crimes are contained in the penal and motor vehicle codes.
11. General laws have uniform operation within the state.
12. Constitutions generally leave the creation and definition of crimes to statutory enactments.
13. The phrase "case law" refers to the body of appellate court decisions which interpreted the meanings of constitutions and statutes.
14. There are two basic types of precedent, mandatory and persuasive.
15. Procedural law defines crimes and establishes punishments.
16. Most of the California criminal law principles are traceable to the common law of England.

Chapter 2

The Nature of Law

Justice is the right to the maximum of individual independence compatible with the same liberty for others. (Henri-Frederic Amiel, 1870)

2.1 Definition of Crime

Penal Code 15 **Definition of "Crime" or Public Offense**

A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments:

1. Death,
2. Imprisonment,
3. Fine,
4. Removal from Office; or,
5. Disqualification to hold and enjoy any office of honor, trust or profit in this state.

Discussion

While the word "crime" may comprehend every violation of a public law, the statutory definition is much narrower (17 Cal.Jur. 3rd (Rev.) 1). To set forth a crime, a statute must first describe the conduct that is prohibited and second provide a punishment for violation of the act. There are two types of statutes in the penal code, (1) enabling statutes and (2) criminal statutes. If the statute does not attach a punishment for the violation of it, it is an enabling statute. The enabling statutes are considered as explanatory in nature.

A prohibited act is not a crime unless the statute provides a punishment (*People v. McNulty* 93 C 427). If the statute, however, states that the prohibited act shall be punished as a felony, misdemeanor or infraction, but does not include a specific penalty provision for its violation, then the general punishment section of the Penal Code applies (Re Application of Gohike 72 CA 536). In California, the words "crime" and "public offense" are considered as synonymous (*Burks v. United States* 287 F 2d 117).

If the statute prohibits a certain act or omission and provides a punishment for the violation, it is a crime. There is no requirement that the statute expressly declare the act or omission of a crime. The infliction of harm to someone or damage to property, also, is not required unless expressly declared to be an element by the legislation (*People v. Morrison* 54 CA 469).

All crimes are prosecuted in the state courts in the name of "The People of the State of California" and by written complaint (P C 740). Crimes are considered as crimes against the "People of the State of California," in general, and not against persons individually. Accordingly, individual persons (except officials in the performance of their duties) have no official voice in making decisions on whether or not to prosecute for the violation of a criminal offense (*People v. Weber* 84 CA 2d 126).

2.2 Purpose of Criminal Law

A U.S. District Court expressed the objective

and purpose of criminal law in *U.S. v. Watson* (146 F. Supp. 258) as follows:

> The object of the criminal law is to protect the public against depredations of a criminal. On the other hand, its purpose is also to prevent the conviction of the innocent, or the conviction of a person whose guilt is not established beyond a reasonable doubt. The court must balance all these aims at the trial.

One of the functions of criminal law is to punish persons who have committed criminal offenses. Why punishment is considered necessary was discussed by the Chief Justice of the Pennsylvania Supreme Court in 1930 (*Commonwealth v. Ritter* 13 D & C 285). He stated:

> Generally speaking, there have been advanced four theories as the basis upon which society should act in imposing penalties upon those who violate its laws. These are: (1) To bring about the reformation of the evil-doer; (2) to effect retribution or revenge upon him; (3) to restrain him physically, so as to make it impossible for him to commit further crimes; and (4) to deter others from similarly violating the law.

U.S. Criminal Code Reform Act of 1973 (93d Cong.,1st Sess., March 27, 1973)

The general purposes of this title are:

(a) to define conduct which indefensibly causes or threatens harm to those individuals or public interests for which federal protection is appropriate.

(b) to prescribe sanctions for engaging in such conduct which will: (1) assure just punishment for such conduct; (2) deter such conduct; (3) protect the public from persons who engage in such conduct; and (4) promote the correction and rehabilitation of persons who would engage in such conduct . . .

There are many scholarly works on the purpose of criminal law. The most basic reasons attributed by most of the works are to:

1. Provide a framework of behavior that can be repeatedly applied with sufficient uniformity that the desired end will be continuously reproduced within tolerated limits (Witkin, California Crimes, Sec. 1).
2. Deter criminal behavior.
3. Award good behavior.

This is accomplished when bad behavior is punished. Persons who have not committed offenses for which they could be punished are awarded by not being punished (passive rewards). If no behavior was punished, then non-punishment would not be a reward.

2.3 Construction of Penal Statutes

Penal Code 4 **Construction According to Fair Import**

The rule of common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.

Penal Code 5 **Construction as to Existing Laws**

The provisions of this code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments.

Penal Code 7 **Statutory Meaning of Various Words** [part of first paragraph only]

Words used in this code in the present tense include the future as well as the present; words used in the masculine gender include the feminine and neuter; the singular number includes the plural and the plural includes the singular; the word "person" includes a corporation as well as a natural person; the word "county" includes "city and county"; writing includes printing and typewriting . . . .

Discussion

As stated above, the common law rule that penal statutes are to be strictly construed has been modified in California. Instead, penal statutes are construed according to their normal usage with a view toward the objectives of the statute in question. Despite this rule, there is still the requirement to give the defendant the benefit of any reasonable doubt (*Carlos v. Superior Court* 35 C

3d 35). Accordingly, when a statute is capable of two reasonable constructions, the one most favorable to the defendant should be used (*People v. Ralph* 24 C 2d 575).

The general rules of construction for criminal statutes are:

The codes of the state are to be read as a single unified whole, as if they were a single statute (*Re Porterfield* 28 C 2d 91).

Words used in a statute will be construed in accordance with their commonly understood meanings (*Re Newbern* 53 C 2d 786).

If a statute is capable of being reasonably construed in more ways than one, the most restricted meaning will normally be used (*People v Kelly* 27 CA 2d Supp 771).

A statute should be construed with reference to its purpose (*People v. King* 115 CA 2d Supp 875).

If a special and general statute both proscribe the same criminal act, the presumption is that the special statute will prevail (17 Cal Jur 3d (Rev) 14).

Where the constitutional right or privilege of an individual is concerned, there should be a liberal, but reasonable, construction in favor of the individual (*Ex parte Cohen* 104 C 524).

If the common law meaning is not repugnant to due process, it shall be used, unless the terms are defined by constitutional or statutory provisions or prior judicial decisions (*Re Application of Lockett* 179 C 581).

Words and phrases must be construed according to the context and approved usage of the language; but technical words and phrases, and such other as may have acquired a peculiar and appropriate meaning in law, must be construed according to such peculiar and appropriate meaning (P C 7).

Statutory Meanings of Various Words

The statutory meanings of various words are contained in section 7 of the Penal Code. Listed below are some of the key words defined in that section:

The word "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.

The words "neglect," "negligence," "negligent," and "negligently" import a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.

The word "corruptly" imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person.

The word "malice" and "maliciously" import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law.

The word "knowingly" imports only a knowledge that the fact exists which brings the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission.

The word "bribe" signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his or her action, vote, or opinion, in any public or official capacity.

The word "property" includes both real and personal property.

The word "month" means a calendar month, unless otherwise expressed; the word "daytime" means the period between sunrise and sunset, and the word "nighttime" means the period between sunset and sunrise. [Note: "nighttime" is a meaningless distinction in most modern day criminal statutes, especially in California. At common law, the fact that the crime occurred during "nighttime" was an aggravating factor.]

2.4 Conflicts Between Laws U. S. Constitution, Article VI [second paragraph only]

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;

and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. [This clause is commonly known as the "Supremacy Clause".]

The Supreme Law of the Land

As stated above, the United States Constitution is the supreme law of the land. Any state constitution, statute or court ruling which is in conflict with it is unconstitutional. In the U.S. Constitution, there are 23 individual rights guaranteed to U.S. residents. Of these, 12 pertain to criminal law and procedure. Most of the rights are contained in the amendments to the constitution. There are only two sections of the federal constitution which forbids or defines conduct as criminal. They are Article III, Section 3, which defines treason and Amendment XIII, Section 1, which forbids slavery or involuntary servitude.

Each criminal law enacted in California must be tested to ensure that it does not violate the rights contained in the federal constitution. The U. S. Supreme Court makes the final decision on whether or not a state constitution or enactment conflicts with the federal constitution and is thus unconstitutional.

The federal constitution also provides that federal laws and treaties are part of the supreme law of the land. Accordingly, in case of conflicts, first in supremacy is the U.S. Constitution followed by federal statutes and U.S. treaties. If any part of the California Constitution or a California Code is in conflict with any of those three laws, the California enactment is unconstitutional.

The California Constitution

The first part of the California Constitution is a Declaration of Rights. The declaration reflects many of the same rights as set forth in the U. S. Constitution. Any state statute which conflicts with the safeguards contained in the California Constitution is unconstitutional. The California Supreme Court makes the final decision on whether or not a state criminal law is in conflict with the state constitution.

Independent State Grounds

Most of the safeguards in the state constitution are also contained in the U.S. Constitution, and the U.S. Supreme Court makes the final determination on federal constitutional issues. If however, the issue is not a federal one and is decided on "independent state grounds", the California courts make the final decision on the question. For example, since 1974 the prosecution under federal law has been allowed to impeach an accused's in court testimony by use of a prior out of court statement of the accused obtained without proper warnings. Until 1988, however, the statements could not be used in California state courts on the theory that their use violated the California Constitution and thus the admissibility was decided by the state courts on "independent state grounds."

Statutory Conflicts

If the conflict is between a local ordinance and a state statute, then the local ordinance is void and without affect. For example, if there is a municipal ordinance and state statute which penalizes the same conduct, the ordinance is void to the extent that it is not in harmony with the statute (*Ex parte Solomon* 91 C 440). Note: even if the ordinance is in harmony with the statute, it may be void based on the concept that the state has pre-empted the subject.

If two general state statutes are in direct conflict with each other, the last statute enacted will be controlling based on the principle of repeal by implication. Repeal by implication is not a favored principle with the courts. If by reasonable construction both statutes can be given effect, then the courts will presume that the legislature intended that construction. As the court stated in *People v. Armstrong* (100 CA 2d Supp 852) it will be presumed that the legislature did not intend by a later act to repeal a former one if, by a fair and reasonable construction, effect can be given to both. Note: in situations involving repeal by implication, only that portion of the earlier statute which is in direct conflict with the latter statute is considered repealed.

2.5 Criminal and Civil Liability

> In general, the courts say that, if an act is merely a threat to private interest or offends it, then the act is only a civil wrong — not a crime. Because of our ideas of dual responsibility, (liability both for civil and criminal) the wrongdoer may "be made to answer" in both a criminal prosecutionand in a civil lawsuit for damages. (Gammage & Hemphill — *Basic Criminal Law*)

The basic difference between a civil law wrong and a crime is that the civil law wrong is a wrong against an individual, whereas, a crime is considered as a wrong against all of society. While the crime of assault may be directed toward an individual victim, the wrong is still considered against all of society. Civil cases are prosecuted by a plaintiff who is the person or persons alledgely injured by the alleged wrongful acts of the defendant(s). Note: in the State of California, all crimes are prosecuted in the name of "The People of the State" and are alleged to be violations "against the peace and dignity of the state."

Torts

"Torts," a French word meaning wrong, is used to describe civil wrongs. Most torts involve either negligent conduct or intentional wrongs. Note: some conduct is both a civil tort and a criminal act. For example, if an individual assaults a victim, the individual has committed both the tortuous act of assault and the criminal act of assault. The individual may be prosecuted for the criminal act and, at the same time in a separate court case, sued by the victim in civil court for the tortuous conduct.

In a civil case, the standard of proof required to establish a right to recovery is preponderance of proof whereas in a criminal case in order to convict an accused, the proof must be beyond a reasonable doubt. Preponderance of proof is a much lessor standard or requirement. This difference in standards can produce different results when the same issue is tried in both civil and criminal courts. For example, if a suspect is tried and acquitted of rape in a criminal court, he can still be sued by the victim in civil court for the tort of sexual assault. The fact that he was acquitted in criminal court is immaterial. If Gary pleads guilty to rape and admits that he committed the crime, however, his statement that he committed the acts necessary to establish the crime of rape could be used against him in civil court to help establish the tort.

One major difference between civil and criminal trials is that in civil trials the defendant does not have the right to refuse to testify. Protection against unreasonable searches and seizures, also, do not apply in civil cases. In addition, the civil defendant is not provided with an attorney if he/she can not afford one.

In California, state civil cases are started by the plaintiff filing a complaint or petition in municipal (justice court in rural areas) or superior court. If the amount in controversy is small, the complaint may be filed in the small claims division of municipal or justice court.

2.6 Doctrine of Judicial Review

The doctrine of judicial review is an established principle of law in the United States. This doctrine provides the courts with the authority to review all statutory enactments, judicial decisions of lower courts, and administrative determinations within their jurisdiction. The principle, based on common law, was adopted by the U.S. Supreme Court in the famous case of *Marbury v. Madison,* 2 L.Ed. 60 (1803). In this case, Chief Justice John Marshall stated that it is the duty of the courts to say what the law is and that when the courts apply the rule to particular cases, they must of necessity expound and interpret that rule. The Chief Justice then stated that if two laws conflict, the courts must decide on the operation of each. Every state supreme court has accepted the principles set forth by the Chief Justice in *Marbury v. Madison.*

At the time that the decision was issued, Thomas Jefferson objected to the concept of judicial review. In a letter in 1820, Jefferson stated " . . . to consider the judges as the ultimate arbiters of all constitutional questions; a dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy." He correctly

pointed out that the concept of judicial review is not contained in our federal constitution.

2.7 Jurisdiction and Venue

U.S. Constitution, Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .

Penal Code 681 **Legal Conviction Prerequisite to Punishment**

No person can be punished for a public offense, except upon a legal conviction in a court having jurisdiction thereof.

Penal Code 777 **Crimes in General**

Every person is liable to punishment by the laws of this State, for a public offense committed by him therein, except where it is by law cognizable exclusively in the courts of the United States; and except as otherwise provided by law the jurisdiction of every public offense is in any competent court within the jurisdictional territory of which it is committed.

Discussion

Jurisdiction is the authority by which courts and judicial officers take cognizance of and decide cases. There are two types of jurisdiction; (1) of the subject matter and (2) of the person. Venue refers to the physical or geographical location of the court in which trial will be or has been tried. In the Penal Code, the term "territory jurisdiction" is used in place of the common law word "venue." In most cases, the two are considered as interchangeable.

Jurisdiction

Jurisdiction is the power of a court to try a case and to issue an order. Jurisdiction cannot be conferred by consent (*Griggs v. Superior Court* 16 C 3d 341). Jurisdiction must be alleged in the accusatory pleadings (*People v. Smith* 231 CA 2d 140). Jurisdiction may, however, be established by a preponderance of the evidence and circumstantial evidence is sufficient to establish jurisdiction (*People v. Cavanaugh* 44 C 2d 252). The two important types of jurisdiction are "subject matter jurisdiction" and "jurisdiction over the person."

Subject Matter Jurisdiction

Subject matter jurisdiction refers to the power of a court to try the offense. There are three basic aspects to subject matter jurisdiction. These are:

1. The offense in question must be one that the state has the power to prosecute. The power of a state to prosecute is restricted to the crimes that occur wholly within the state, partially within the state or has an effect within the state.
2. The court must be competent to try the crime. For example, a superior court has no jurisdiction over a case charging only misdemeanors in a county with a municipal court (*People v. Smith* 231 CA 2d 140).
3. If exclusive federal jurisdiction exists or the offense is only a federal crime, then a state court in California has no subject matter jurisdiction.

Jurisdiction of Person

Jurisdiction of the person is also a basic requirement in criminal proceedings. Presence in court usually establishes jurisdiction over the person. In most cases, the defendant must be present at the start of his/her felony criminal trial. In misdemeanor cases, if the state takes personal jurisdiction over an accused by arresting or citing him/her to appear at a certain time and date, the failure of the accused to appear at the time set for trial can be considered as a waiver by the defendant of his/her right to appear.

Venue

Normal venue of a criminal case is in the county and the district within which the crime was alleged to have been committed. A change of venue from a court of one county to the same court in another county does not affect the latter court's jurisdiction over the subject matter of the case (*People v Richardson* 138 CA 404).

Unlike subject matter jurisdiction, the parties to a trial can consent to venue. For example, by pleading guilty to the sale of a controlled substance, the accused admits every essential element of the crime charged except subject matter jurisdiction. (*People v. Tabucchi* 64 CA 3d 133). In this case, the accused plead guilty to a crime that was

alleged to have occurred in Stanislaus County. Later, he attempted to get the conviction reversed because the offense did not occur in Stanislaus County, therefore; he could not be tried by the Superior Court in that county. The California Supreme Court upheld his conviction.

The general rules regarding the proper court for venue are:

1. For crimes in general, in the county where the crime was committed (P C 777).
2. For nonsupport of child, in the county where the child is cared for or in the county where the parent is apprehended (P C 777a).
3. For perjury committed outside of the state that is punishable in California, in the county where the proceeding was being conducted (P C 777b). Note: this situation would normally occur when a false document is made outside of the state to be used in court proceedings within the state.
4. For offenses planned outside the state and committed within the state, in the county in which the offense is completed (P C 778).
5. For offenses planned within the state and committed outside the state, in the county in which the offense was planned (P C 778a).
6. For offenses committed in more than one venue, may be tried in any county in which any of the acts were committed or effects of the crime were felt (P C 781).
7. For offenses committed within 500 yards of any county boundary or on the boundary line, in either county (P C 782).
8. For offenses committed on trains, airplanes, ships, motor vehicle in transit, in any county over which the vehicle traveled in the course of the trip (P C 783).
9. Abduction, kidnaping and seduction, in any county in which the offense occurred or to which the victim was taken (P C 784).
10. For child concealment, in any county in which the child was taken, detained, concealed, found, or where the victimized person resides or agency deprived of custody is located.
11. For bringing or receiving stolen goods, in any county in which the goods were taken or received or in the county in which they were stolen (P C 786).
12. For criminal homicide, in any county where the crime was committed or in the county in which the body was found.

Establishing Venue

Venue represents a question of fact, and therefore must be alleged in the pleadings. This is normally accomplished by alleging that the offense occurred in X county. The burden of proof is on the prosecution to establish proper venue of the court. Failure of the prosecution to enter any evidence of venue in a "not guilty" case will cause the conviction to be overturned on appeal (*People v. Pollock* 26 CA 2d 602). The courts, however, can make reasonable inferences from the evidence to establish venue. For example, the accused was charged with robbing a service station in Fresno. The names of the streets where the station was located were entered into evidence, but not the city. The victim testified that he lived in Fresno and the Fresno Police Department investigated the robbery. The court, in upholding the conviction, stated that a reasonable inference was that the crime had occurred in the City of Fresno and that, venue unlike elements of the offense, is not required to be proven beyond a reasonable doubt (*People v. Arline* 13 CA 3d 200).

Change of Venue

While the accused has a right to be tried in the county where the crime occurred, often it is to the accused's advantage to be tried elsewhere. Most common reasons are that he/she will be unable to receive a fair trial in the local county or that trial in a different county will be more convenient, i.e. family and witnesses are located in a different county. The defense must request, by motion, prior to trial for a change of venue.

CLASSROOM DISCUSSION QUESTIONS

1. Discuss the statutory meaning of the below words; do the statutory meanings vary with the common everyday usage?
   a. knowingly b. malice
   c. neglect d. property
2. What is the importance of judicial review?
3. Distinguish between venue and jurisdiction.
4. Explain the meaning of the "Supremacy Clause."
5. What is the meaning of the phrase "independent state grounds?"
6. If a federal law conflicts with a state constitution, which will prevail?
7. If two state statutes are in direct conflict with each others, which one will prevail?
8. What is the basic difference between a civil law wrong and a crime.
9. Define "tort."
10. When is a prohibited act a crime?

SELF STUDY QUIZ

True/False

1. There are two types of penal statutes, criminal and enabling.
2. If the statute does not attach a punishment for the violation of it, it is an enabling statute.
3. All crimes are prosecuted in the name of the prosecutor.
4. There is a substantial difference between a crime and a public offense.
5. One of the functions of criminal law is to punish persons who have committed criminal offenses.
6. In California, penal statutes are strictly construed.
7. The codes of the state are to be considered as a single unified whole.
8. The U.S. Constitution is considered as the supreme law of the land.
9. If a federal law conflicts with the California Constitution, the federal law must be unconstitutional.
10. If there is a conflict between a local ordinance and a state statute, the last one passed controls.
11. In a civil trial, the accused has a right to a government appointed counsel.
12. Venue refers to the geographical or physical location of the court in which trial will be or has been tried.
13. Subject matter jurisdiction requirement may be waived by the accused.
14. The normal venue of a criminal case is in the county where the crime occurred.
15. For offenses committed in more than one county, the correct venue is in the county where most of the acts occurred.

Chapter 3

Classification of Crimes

No one is entirely useless. Even the worst of us can serve as horrible examples. (Anonymous, in a state prison newspaper.)

3.1 Distinction Between Felonies, Misdemeanors and Infractions

Penal Code 17 **Felony and Misdemeanor Defined**

(a) A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.

(b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

(1) After a judgment imposing a punishment other than imprisonment in the state prison.

(2) When the court, upon committing the defendant to the Youth Authority, designates the offense to be a misdemeanor.

(3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.

(4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge a felony complaint.

(5) When, at or before the preliminary examination or prior to filing an order pursuant to Section 872 [that section pertains to holding the accused over to answer for a felony], the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint.

(c) When a defendant is committed to the Youth Authority for a crime punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in county jail, the offense shall, upon the discharge of the defendant from the Youth Authority, thereafter be deemed a misdemeanor for all purposes. [Subparagraph (d) omitted.]

Penal Code 19.4 Public Offenses With No Prescribed Penalty—Misdemeanor

When an act or omission is declared by a statute to be a public offense, and no penalty for the offense is prescribed in any statute, the act or omission is punishable as a misdemeanor.

Penal Code 19.7 Application of Misdemeanor Law to Infractions

Except as otherwise provided by law, all provisions of law relating to misdemeanors shall apply to infractions, including but not limited to powers of peace officers, jurisdiction of courts, periods for commencing action and for bringing a case to trial and burden of proof.

Discussion

Crimes and public offenses are classified as felonies, misdemeanors or infractions. The highest and most serious crime in California is a felony. A felony is any crime that is punishable by death or imprisonment in a state prison. Next, in terms of seriousness, is a misdemeanor. A misdemeanor is a crime that is punishable by fine and/or imprisonment in a county jail for not more than one year. The lowest type of crime is an infraction. An infraction is a crime that is punishable only by a fine. (Note: a person charged only with an infraction is not entitled to a jury trial.) If a statute provides for imprisonment but does not specify the place of confinement, the crime is a misdemeanor (*Union Ice Co. v. Rose* 11 CA 357).

The label that the legislature affixes to a crime does not determine its classification. The classification is based on the nature of the offense and its authorized punishment. In one case the statute deemed the act a felony, but only authorized punishment in the county jail and/or a fine. The court held that the offense was a misdemeanor not a felony (*People v. Sacramento Brothers' Butchers' Protective Assoc.* 12 CA 471).

Wobblers

In most cases, it is not the punishment awarded by a court that determines whether or not a crime is a felony, misdemeanor or infraction; but the punishment that could have been imposed. There are some offenses, however, that are considered as "wobblers". Wobblers are offenses that are either felonies or misdemeanors depending on the sentences awarded at court or action by the court after conviction. Wobblers are treated as felonies until sentencing time unless the crimes are formally charged as misdemeanors.

For example, Penal Code 524 provides that an attempted extortion may be punished by imprisonment in the county jail or in a state prison. Accordingly, it is a "wobbler." If the accused on conviction receives a jail term, then it is a misdemeanor conviction. If he or she receives a prison term, then it is a felony conviction. Note: the district attorney can charge it as a felony or misdemeanor. If the DA charges the offense as a felony offense, at the preliminary hearing the judge may reduce it to a misdemeanor offense.

3.2 Punishments

Penal Code 12 **Duty to Determine and Impose Punishment**

The several sections of this code which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the court authorized to pass sentence, to determine and impose the punishment prescribed.

Penal Code 13 **When Punishment Left Undetermined**

Whenever in this code the punishment for a crime is left undetermined between certain limits, the punishment to be inflicted in a particular case must be determined by the court authorized to pass sentence, within such limits as may be prescribed by this code.

Penal Code 19.2 Confinement in County Jail Not to Exceed One Year

In no case shall any person sentenced to confinement in a county or city jail . . . except on the conviction of more than one offense when consecutive sentences have been imposed, be committed for a period in excess of one year; provided that the time allowed on parole shall not be considered as part of the period of confinement.

Penal Code 19.6 Infractions Not Punishable by Imprisonment

An infraction is not punishable by imprisonment. A person charged with an infraction shall not be entitled to a trial by jury...[or] counsel appointed at public expense....

Discussion

When an act or omission is declared by a statute to be a crime and punishment is provided for, but no specific penalty is prescribed in the statute, then the general punishment statutes prevail. In California, even in jury trials, the judge has the duty to impose sentences.

In capital cases with a jury, however, the jury must make a finding as to whether special circumstances exist and if so, do they outweigh the mitigating circumstances before the death penalty

can be imposed. Note: there are 19 special circumstances listed in Penal Code 190.2 that permit the imposition of the death penalty. They are discussed in Chapter 9. For example, if the accused with no prior criminal record intentionally kills his girlfriend by administering poison, the jury must decide that the special circumstances (death by poisoning) outweigh the mitigating circumstances (no prior criminal record) before the death penalty may be imposed.

Concurrently or Consecutively

When the accused is convicted of two or more crimes, the judge is required to make a determination as to whether or not the sentences will be served concurrently or consecutively. Sentences that are served concurrently are served at the same time. Consecutive sentences are served one at a time; one following the other. For example, the defendant is convicted of two crimes, arson and robbery. If he received two years for each offense and the sentences are served concurrently, he will serve a maximum of two years. If the sentences run consecutively, he will first serve one sentence and when that sentence is completed, then the other (two years plus two years for a maximum of four years). Note: if the accused has pending confinement from a previous court, the court should also indicate whether the present sentence will be served concurrently or consecutively with the sentence given in the prior court.

Maximum Jail Term

The maximum time that an accused may serve in a county jail on the conviction of one offense is one year. If, however, the accused is convicted of more than one offense and the sentences are not served concurrently, the one year maximum time does not apply.

Indeterminate Sentencing

Indeterminate sentencing refers to those situations where the court does not fix a term of imprisonment as punishment. The sentence of imprisonment as awarded by the court, therefore, is an indeterminate one. In 1917, California adopted the Indeterminate Sentencing Act. The act divested the trial judge of the authority to fix the term of imprisonment for offenses punishable by imprisonment in a state prison. The power to fix the length of sentence was given to the Adult Authority, an administrative agency. The Indeterminate Sentencing Act was repealed in 1977 and applies now only to persons serving sentences for crimes committed period to July 1, 1977.

Determinate Sentencing

For offenses committed on or after July 1, 1977, the Determinate Sentencing Act (P.C. 1170-1170.95) applies. Under this act, if the court gives a sentence that includes confinement in a state prison, the court must fix a specified term of imprisonment. Note: the act also requires the judge under most circumstances to pronounce sentence within 28 days after a verdict of guilty or the acceptance of a guilty plea (P C 1191). (The accused may and often does waive this 28 day requirement.)

If the statute specifies three possible terms of punishment, the court shall order imposition of the middle term (often referred to as "mid-term"), unless there are circumstances in aggravation or mitigation of the crime (P C 1170). For example, the stated penalty for extortion is imprisonment in a state prison for two, three or four years (P C 520). The "mid-term is three years. If this is the first offense, the court will probably impose only the two year term (the "mitigated term"). If the offense is an aggravated one, the court may impose the four year term (the "aggravated term"). Aggravated factors include harm or hardship imposed on victim, prior record of the accused, etc.

The general objectives of punishment in California under the Determinate Sentencing Act include (*Judicial Council, Rules of Court,* Rule 410):

1. Protecting society
2. Punishing the defendant.
3. Encouraging the defendant to lead a law abiding life in the future.
4. Deterring others from criminal conduct by demonstrating its consequences.
5. Preventing the defendant from committing new crimes by isolating him for the period of incarceration.

6. Securing restitution for the victims of crime.
7. Achieving uniformity in sentencing.

3.3 Prior Convictions

Prior convictions have three main effects on the sentences given by the courts:

1. Establish certain minimum penalties.
2. Provide for increased sentences.
3. May provide for the adjudication of the accused as a habitual criminal.

Prior convictions are considered as punishment "enhancements," referring to their effects on the punishments given by the courts. (Note: there are other enhancements contained in the Penal Code such as the use of a gun in committing a crime.) The enhancements based on prior convictions are found in P C 666 through P C 668. The general provisions of P C 668 permit the use of convictions in other states subject to certain limitations as a sentence enhancement.

3.4 Lesser and Included Offenses

Penal Code 1159 **Conviction of Offense Included in Charge**

The jury, or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense.

Discussion

As stated in the above code, the defendant may be convicted of any offense, the commission of which is necessarily included in the crime with which he/she was charged. A defendant, however, can not be convicted of an included offense which is barred by the statute of limitations, even if the statute has not expired for the greater offense charged (*People v. Miller* 12 C 291). If the defendant is charged with two offenses in separate counts and one is necessarily included in the other, he/she can not be sentenced for both (*People v. Sutton* 35 CA 3d 264). For example, assault is a necessarily included offense to battery. Accordingly, for one act that amounts to a battery, the accused may not be sentenced for both the assault (which is included in the battery) and the battery.

Test For Lesser and Included Offense

The test to determine if one offense is a necessarily included offense of another is that when one offense cannot be committed without committing the other offense, then the latter offense is a necessarily included offense. For example, an accused could not be convicted of both an assault and a battery for the same act of striking a victim in the face with his fist. The assault is a necessarily included offense of the battery. It is not an included offense if additional evidence is required to convict the accused of the lessor offense. For example, speeding is not a necessarily included offense of driving under the influence, because an individual may be driving under the influence without exceeding the speed limit. Note: a single act may violate two separate statutes and therefore constitute two separate crimes. For example, the accused may be speeding and also driving under the influence. The act of driving, therefore, constitutes two separate crimes.

3.5 Double Jeopardy

U. S. Constitution, Amendment 5 [partial]

[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .

Constitution of the State of California, Article I, Section 15 [partial]

Persons may not twice be put in jeopardy for the same offense.

Definition

The constitutional guarantee against double jeopardy involves three separate protections:

1. Protecting an accused from being prosecuted for the same offense after acquittal.
2. Protecting an accused from being prosecuted for the same offense after conviction.
3. Protecting an accused from multiple punishments for the same criminal conduct. (*United States v. Di Francesco* 449 U S 117)

Discussion

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all of its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty (*Green v. United States* 355 US 184).

The purpose of the doctrine is to protect an accused from the harassment of multiple trials. Accordingly, to be placed in jeopardy for a second time, the accused must be placed on trial for a second time (*People v. Thomas* 121 CA 2d 754). Double jeopardy does not apply where the trial is bifurcated (separated into two separate proceedings) by the defendant who enters both "not guilty" and "not guilty by reason of insanity" pleas (*People v. Coen* 205 C 596).

Identity of Offenses

For double jeopardy to apply, the prosecution must be for the same offense as that involved in the earlier proceedings. For purposes of double jeopardy, offenses are considered the same if one is necessarily included in the other.

Waiver

Since double jeopardy is not a jurisdictional issue, the accused must assert the bar against prosecution. The double jeopardy bar is regarded as waived unless the defense raises it during pleading. If the defense is asserted, the defense has the burden to establish the validity of the former jeopardy claim (*People v. Eggleston* 255 CA 2d 337).

Double jeopardy as a bar to prosecution must be specifically pleaded in the form prescribed by the Penal Code. The pleas must indicate the time, place and court of the alleged former jeopardy. A general plea of not guilty does not raise the issue (*People v. Barry* 153 CA 2d 193).

Different Crimes

If the same act is made punishable by different provisions of the California statutes, it may be punished under any of them. In no case, however, may the accused be punished under more than one, and an acquittal or conviction and sentence under one bars (prevents) the prosecution under another provision (*People v. Manago* 230 CA 2d 645). Note: if either crime requires the proof of a different fact additional to those involved in the other, there is no double jeopardy (*People v. Coltrin*, 5 C 2d 649). For example, the accused may be charged with the possession of an illegal firearm and robbery involving the use of a firearm. This is based on the fact that to establish robbery, additional facts are needed other than the possession of a firearm. In addition, to establish illegal possession of a firearm, the prosecution must establish that possession of the weapon was illegal; a fact that is not required for the robbery charge. A defendant's conviction for reckless driving did not prevent the state from trying him for manslaughter committed by the same conduct since different elements were required to be established for each crime (*People v. Herbert* 6 C2d 541)

Res Judicata

Double jeopardy is not the same as "res judicata." Res judicata, a Latin phrase meaning "stands decided," is based on a final adjudication of the same issue involving the same parties to the trial. Double jeopardy attaches in most cases prior to final adjudication and unlike "res judicata" is a constitutionally protected right. In addition, "res judicata" applies also to civil proceedings, whereas double jeopardy, applies only to criminal cases.

Protection against double jeopardy does not apply to civil or administrative proceedings. Accordingly, a gun owner's acquittal on criminal charges involving firearms does not bar a subsequent prosecution in forfeiture proceedings (civil action) against the firearms (*U.S. v. One Assortment of Firearms* 79 L Ed 2d 361). Note: res judicata did not apply because there are different parties involved. In the criminal case, the accused

was the principal party and in the civil case being "in rem" the case was against the guns. ("In rem" proceedings refers to the fact that the action in the case is against an object, not a person.)

Attachment of Jeopardy

As noted above, double jeopardy does not apply unless the accused has previously been put in jeopardy. Listed below are some of the cases involving the question of whether or not the accused has been placed in jeopardy:

1. he accused is acquitted based on a variance between the pleading and the evidence entered at trial. No double jeopardy if the acquittal is based on mere variance rather than on an entire want of evidence. This is based on the concept that since he could not be convicted on the pleadings, he never was in jeopardy. If the variance, however, is immaterial and the accused could have been convicted, then the double jeopardy bar would apply (*People v. Webb* 38 C 467)
2. Jeopardy attaches in a jury case, when the jury has been impaneled and sworn (*People v. Hinshaw* 194 C 1).
3. Jeopardy attaches in a judge alone case, when the trial has been "entered upon" (*People v. Beasley* 5 CA 3d 617). A trial has been "entered upon" when either the first witness is sworn or evidence is entered against the accused.
4. Jeopardy does not attach if the pleading are invalid (*People v. Webb* 38 C 467).

After Jeopardy Attaches

In certain situations, the accused may be tried again even if jeopardy has attached. Listed below are some common situations involving the question of whether or not the accused may be tried a second time.

1. A double jeopardy bar prevented prosecution when the first case was dismissed after the jury was sworn without the consent of the accused and when not authorized by law (*Cardenas v. Superior Court* 56 C2d 273).
2. Discharge of the jury prior to the jury rendering a verdict without the consent of the accused and not required by law is tantamount to an acquittal and bars a retrial (*People v. Webb* 38 C 467).
3. A mistrial granted on motion of the defense is not a bar to a second trial. A mistrial, however, granted by the court to protect the rights of the accused is a bar to a second trial unless the accused consents to the mistrial or a mistrial is required by the law (*People v. McNeer* 8 CA 2d 676).
4. A mistrial granted when the jury is unable to reach a verdict is within the discretion of the judge and absent abuse of discretion by the judge, it is not a bar to a second trial (*Curry v. Superior Court* 2 C 3d 707 and P C 1140).
5. A mistrial granted where because of sickness of a jury member or an accident prevents the jury from reaching a verdict is not a bar to a second trial (P C 1141).
6. A mistrial granted on motion of the defendant is no bar to a second prosecution (*Oregon v. Kennedy* 456 U S 667). When an accused requests a mistrial or appeals a court judgment, the motion or appeal is considered as a waiver of the double jeopardy bar. The one exception to this rule is when the conviction is reversed on appeal based on insufficient evidence to support the conviction as a matter of law. In this latter case, double jeopardy protection is a bar to retrial (*Burks v. U.S.* 437 U S 1).
7. The double jeopardy protection prevents the state from appealing an acquittal. If, however, the state successfully appeals a court order dismissing an indictment or information prior to jeopardy attaching, the accused may be re-tried (*People v. Petti* 149 CA 3d 1).

Dual Sovereignty Doctrine

Dual sovereignty doctrine applies when the same conduct constitutes crimes against more than one state or the federal government. In these situations, the accused has violated the criminal statutes of two different sovereigns (normally state and federal) and therefore he/she may be tried by both governments. For example, robbing

a federally insured bank in the state is a violation of both state and federal law and the accused may be prosecuted by both. Note: the restrictions imposed in California by Penal Code 794 (discussed below).

Statutory Bar

"Statutory Bar" is a phrase sometimes used by the courts if the bar to prosecution is created by statute and not by constitution. There are several provisions in the Penal Code which bar prosecution in cases where the constitutional protection of double jeopardy does not. For example, Penal Code 794 provides that when an act is also a criminal act in another state or country, the acquittal by a court in the other state or country will bar prosecution in the State of California.

3.6 Statute of Limitations

Penal Code 799 **No Limitation for Commencement of Prosecution**

Prosecution for an offense punishable by death or imprisonment in the state prison for life or for life without the possibility of parole, or for the embezzlement of public money, may be commenced at any time.

Penal Code 800 **Six-Year Limitations**

Except as provided in Section 799, prosecution for an offense punishable by imprisonment in the state prison for eight years or more shall be commenced within six years after the commission of the offense.

Penal Code 801 **Three-Year Limitation**

Except as provided in Sections 799 and 800, prosecution for an offense punishable by imprisonment in the state prison shall be commenced within three years after commission of the offense. [A felony]

Penal Code 801.5 **Three-Year Limitation — Fraudulent Insurance Claims**

Notwithstanding Section 801 or any other provision of the law, prosecution for a violation of Section 556 of the Insurance Code shall be commenced within three years after discovery of the commission of the offense.

Penal Code 802 **One Year Limitation; Exceptions**

(a) Except as provided in subdivision (b), prosecution for an offense not punishable by death or imprisonment in the state prison shall be commenced within one year after commission of the offense. [A misdemeanor.]

(b) Prosecution for a misdemeanor violation of Section 647.6 or former Section 647a [those sections pertain to misdemeanor child molesters, i.e. annoying or molesting a child under circumstances not amounting to a felony], committed with or upon a minor under the age of 14, shall be commenced within two years aftger the commission of the offense.

Penal Code 804 **When Prosecution for an Offense is Commenced**

For the purpose of this chapter, prosecution for an offense is commenced when any of the following occurs:

(a) an indictment or information is filed.

(b) A compliant is filed with an inferior court charging a public offense of which the inferior court has original trial jurisdiction.

(c) A case is certified to the superior court.

(d) An arrest warrant or bench warrant is issued, provided the warrant names or describes the defendant with the same degree of particularity required for an indictment, information, or complaint.

Definition

The statute of limitations sets forth the period of time after the commission of the crime within which prosecution against the accused must be started. Failure to start the prosecution within the required time period acts as a "bar" to prosecution. Note: as indicated in P C 799, some crimes like murder have no statute of limitations.

Discussion

The statute of limitations requires that criminal prosecutions commence within a certain period of time after the crime occurred. There are time periods, however, which are excluded in determining whether or not prosecution was started within the required time. The excluded time periods are noted below. The statute of limitations is a jurisdictional requirement.

Accordingly, failure to begin prosecution within the required time bars the state from prosecuting the accused (*People v. Doctor* 257 CA 2d 105). In addition, the accused may assert the bar of limitations at any time during the trial (*People v. Witt* 53 CA 3d 154).

Offenses with a six-year statute of limitations include:

1. Rape (P C 261)
2. Child molesting (P C 288)
3. Sodomy by force or fear (P C 286d)
4. Oral copulation by force or fear (P C 288a)

Offenses with a three year statute of limitations include:

1. Grand theft (P C 487)
2. Felony welfare fraud (W & I 11483)
3. Forgery (P C 470)
4. Manslaughter (P C 192.1 or .2)
5. Perjury (P C 118)

Note: there is no statute of limitations for murder, embezzlement of public money, and kidnapping for ransom.

Prosecution, for statute of limitations purposes, is normally started with an arrest of the defendant on a warrant or the filing of a sworn information, complaint, or indictment. The information, complaint, or indictment must indicate on its "face" that the statute has not expired (ranout). This requirement is normally accomplished by pleading the date on which the offense occurred. By looking at that date and the date on which the information or indictment was filed is normally sufficient to indicate that the statute of limitations does not bar prosecution. When the pleadings are sufficient, then the question as to whether the statute of limitations bars prosecution is an evidentiary question for the courts to decide (*People v. Padfield* 136 CA 3d 218).

Time is computed by excluding the first day (date the crime was committed) and including the last (when prosecution starts) (*People v. Twedt* 1 C 2d 392). In the case of a continuing offense, the last day that the offense was committed or continued is the date used as the first day.

There are certain periods of time are that are excluded in computing the statute of limitations. The term used is that the statute of limitations is "tolled" during that period of time. Listed below are the most common events that either tolls or delays the running of the statute of limitations:

1. During the period of time that the accused is absent from the jurisdiction of the state (for a maximum of three years) (P C 803(e). Note: the absence may be established by circumstantial evidence such as a fruitless search for the defendant (*People v. McGill* 10 CA 2d 159).
2. In many cases, the statute of limitations does not start until the discovery of the offense or when it should have been discovered (P C 803).
3. During the period of time that the accused is being prosecuted or prosecution is pending for the same conduct in any California state court (P C 803 (b)). For example, the defendant is charged with the commission of an offense within the time period. If all charges are later dismissed, the period of time that the charges were pending is excluded in computing the time period.

If the defendant is accused of an offense for which the statute does not bar prosecution, he/she cannot be convicted of a lessor included offense for which the statute does bar prosecution. For example, in *People v. Rose* (28 CA 3d 415) the defendant was indicted for murder many years after the crime was committed. (Note: there is no limitation period for this offense.) The court held that he could not be convicted of manslaughter (a lessor included offense) because the statute of limitations barred prosecution for the manslaughter charge. Note: a court, however, held in one case that an accused could be convicted of conspiracy to commit a misdemeanor (a felony) even though the statute of limitations barred prosecution on the subject misdemeanor (*People v. Lilliock* 265 CA 2d 419).

Modification of Statute of Limitations

If the statute of limitations bars the prosecution of a crime, the later modification of the statute does not extend the period of time to prosecution. If, however, the statute of limitations does not presently bar prosecution, the legislature may

extend it for previously committed crimes (*Sobiek v. Superior Court* 28 CA 3d 846). In that case, the accused was charged with forgery committed before the legislature extended the statute of limitations. The court stated that the legislature could extend a still operative period of limitations but could not revive a period that has already expired.

CLASSROOM DISCUSSION QUESTIONS

1. Explain the test for lessor included offenses.
2. Under what circumstances may an accused be placed in jeopardy twice for the same conduct?
3. What are the purposes of the protection against double jeopardy?
4. What periods of time are excluded in determining whether or not the statute of limitations bars prosecution in a case?
5. An accused commits the crime of murder on September 1, 1988. He leaves the state the next day. When does the statute of limitations start to run?
6. What is a "wobbler?" How do you recognize one?
7. Under what circumstances may an accused be confined in a county jail in excess of one year?
8. When would a court normally impose the "mid-term" sentence?
9. What are the three main effects of prior convictions on sentences imposed by the courts?
10. What is an "enhancement?"

SELF STUDY QUIZ

True/False

1. Felonies and misdemeanors are punishable by imprisonment in the state prison.
2. If the crime is punishable by imprisonment in a state prison or in county jail, it is a "wobbler."
3. When an act is declared to be a crime, and the punishment is not otherwise defined, it is considered a misdemeanor.
4. The label that the legislature puts on a crime determines whether or not it is a felony, misdemeanor or infraction.
5. In no case, may a person be sentenced to confinement in a county jail for a period in excess of one year.
6. Crimes committed during this calendar year are prosecuted under the Indeterminate Sentencing Act.
7. It is always to the advantage of the accused to have his periods of confinement to run consecutively.
8. The purpose of the statute of limitations is to protect an accused from harassment of multiple trials.
9. The protection against double jeopardy also applies to civil proceedings.
10. A second trial may not be held when the first trial ends in a mistrial because of a jury member's sickness.
11. Some crimes, such as murder, have no statute of limitations.
12. The statute of limitations sets forth the time in which the accused must be convicted.
13. In some cases, the statute of limitations does not start to run until the offense has been discovered.
14. In computing the period of time for purposes of determining if the statute of limitations has run, the day that the offense was committed is excluded.
15. The period that an accused is absent from the state (up to a maximum of three years) is excluded for the time period for statute of limitations purposes.

Chapter 4

Corpus Delicti and Capacity

The first prison I ever saw had inscribed on it: "Cease to do evil: learn to do well." The inscription, however, was on the outside of the wall, and the prisoners could not read it. (George Bernard Shaw —On Imprisonment)

4.1 Role of Corpus Delicti

Corpus delicti literally means "the body of the crime." Corpus delicti of a criminal offense is the required elements of the crime. A person, therefore, cannot be convicted of a crime unless the prosecution establishes the corpus delicti, i.e. that a crime has been committed,

Identity of the offender is not an essential element of corpus delicti. To successfully prosecute, however, the prosecution must establish that the accused was the one who committed all the elements of the crime. Note: corpus delicti can not be established solely from the confessions of the accused. There must be other independent evidence to establish that the crime did occur (In re Robert P. 121 CA 3d 36).

4.2 Act and Intent

Penal Code 20 **Unity of Act and Intent or Negligence**

In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence.

Discussion

In order to constitute criminal conduct, there must be a unity in time of the act and the intent or criminal negligence. A frequently used equation to illustrate this is: Crime • Criminal Act (or actus reus) • Criminal Intent (or mens rea). Both the act and the intent must be joined together in time for at least a brief period. For example, burglary requires the entering of a building with the intent to commit larceny or a felony therein. In order to be burglary, the accused must have had the intent to commit either larceny or a felony therein *at the time of the entry*. Accordingly, if the accused enters a room and *after entry*, forms the intent to steal, he or she may be guilty of larceny but not burglary since the intent (to steal) and the act (entry) were not connected in time.

Criminal Act

Criminal acts are usually affirmative and voluntary acts of the defendants. Criminal acts, however, may be:

1. Verbal acts or words as in perjury.
2. A failure to act when there is a duty to act.
3. The act of agreement in a conspiracy.
4. The act of possession in crimes involving illegal possession.

Passive Participation

Passive participation is where a person allows an act to occur but no active act is involved. In cases where the passive individual has a duty to act, passive participation is sufficient to constitute the criminal act. For example, a mother who fails to feed her infant resulting in death to the infant has committed a criminal act. The security guard who deliberately allows company materials to be

stolen may be a passive participate in the crime. Note: mere presence at the scene of a crime and failure to take steps to prevent it is not normally criminal conduct (*People v. Vernon* 89 CA 3d 853).

4.3 Intent

Penal Code 21 Intent Manifested by Circumstances

(a) The intent or intention is manifested by the circumstances connected with the offense.

(b) In the guilt phase of a criminal action or a juvenile adjudication hearing, evidence that the accused lacked the capacity or ability to control his conduct for any reason shall not be admissible on the issue of whether the accused actually had any mental state with respect to the commission of any crime. This subdivision is not applicable to Section 26. [Section 26 deals with persons incapable of committing crime.]

Discussion

There are two general types of intent used in criminal law; specific intent and general criminal intent. The legislature determines the type of intent required for the commission of a particular crime. If the language of the statute is unclear as to the type of intent required for conviction, often the courts look to common law for guidance. In the trial of the case, the presence or absence of the required intent is a question of fact. The trial court's determination as to the presence or absence of the required intent, if based on substantial evidence, will not be disturbed on appeal (*People v. Armstrong* 100 CA 2d Supp 852).

The Penal Code provides that intent is manifested by the circumstances connected with the offense. Note: certain persons are considered as incapable of committing certain crimes because of a lack of requisite mental state e.g. very young children and insane persons. The lack of capacity to commit a crime is discussed later in this chapter.

General Intent

General intent is the intent that is inferred by the doing of an act or the failure to act. To constitute general criminal intent, it is not necessary that there should exist an intent to violate the law (*People v. Williams* 102 CA 3d 1018). In general intent crimes, there is no requirement to establish that the accused knew his/her act was wrongful. All that is necessary is that the act was done volitionally or willfully. For example, driving 55 m.p.h. in a school zone is a crime. It does not matter that the accused was unaware that he was in a school zone or the fact that his speedometer was broken which prevented him from knowing that he was driving in excess of the speed limit. To successfully prosecute, the state would need only to establish that the accused was willfully driving, and his speed was in excess of the legal limit.

Specific Intent

Some crimes require more than a general criminal intent. To commit a specific intent crime, the accused must have contemplated the ultimate act (*People v. Armentrout* 118 CA Supp 761). For example, larceny is a specific intent crime. Before an accused can be convicted of larceny, the state must establish that he/she had a specific intent to steal at the time that the property was taken. For example, Jerry leaving a restaurant sees a coat that looks like his. Thinking that the coat is his, he takes it. Even though the taking of the coat was wrong, he is not guilty of larceny (a specific intent crime) since there was no specific intent to steal the coat.

The California Supreme Court discussed the differences between general and specific intent in *People v. Hood* (1 C 3d 857). The Court stated: "When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent. There is no real difference, however, only a linguistic one, between an intent to do an act already performed and intent to do that same act in the future."

Transferred Intent

Transferred intent, also referred to as constructive intent, applies where there is a difference between the criminal act intended and the

act actually committed. For example, a person intending to kill one person by mistake kills another. In this case, the doctrine of transferred intent would be used to imply a willful killing of the actual victim (*People v. Buenaflore* 40 CA 2d 713). The doctrine of transferred intent is most often applied to murder and assault with the intent to kill cases.

As one judge stated (*Gladden v. State* 273 Md. 383), "The fact that the person actually killed was killed instead of the intended victim is immaterial, and the only question is what would have been the degree of guilt if the result intended had actually been accomplished. The intent is transferred to the person whose death has been caused."

4.4 Criminal Negligence

Negligent conduct in some situations constitutes criminal behavior. In those cases, the negligent conduct is a substitute for criminal intent. To determine whether or not the negligent conduct is sufficient to replace criminal intent, the following rules apply:

1. Negligence is not a substitute for specific intent (*People v. Becker* 94 CA 2d 434). (Note: specific intent is discussed later in this chapter.)
2. Negligence must amount to a "gross" or "culpable" departure from the standard of due care. Mere simple negligence is not sufficient (*People v. Penny* 44 C 2d 861). To be criminal, the negligent conduct must show an indifference to the consequences, and require knowledge, actual or implied, that the conduct tends to endanger another's life (*People v. Peabody* 46 CA 3d 43).
3. Whether or not the negligent conduct is criminal must be determined from the conduct itself and not from the resultant harm (*People v. Brain* 110 CA 3d Supp 1).
4. What obligation or responsibility does the defendant have toward proper conduct?
5. What is the standard of proper conduct expected of an ordinary, reasonable, prudent person under the same conditions?
6. What standard of conduct was violated?
7. There must be a direct connection between the negligent conduct and the injury or harm.
8. There must be injury or harm resulting from the negligent conduct.

4.5 Proximate Cause

Causation problems normally arise in criminal law only in those offenses involving homicide. As in tort law, to be legally responsible for the injury, death or other harm which constitutes the crime; the defendant's act must be the proximate cause of it. Proximate cause (also called "legally responsible cause") is established where the act is directly connected with the resulting injury, and there are no intervening independent forces (Witkin, *California Crimes,* Section 78-80). If there are no other concurrent or contributing causes, normally it is immaterial that the results were not reasonably foreseeable.

Concurrent or Contributing Cause

In some cases, the defendant is criminally liable for the results of his/her act, even though there is another contributing cause (*People v. Lewis* 124 C 551). For example, the accused shoots the victim. The victim dies as the results of negligent medical treatment. The accused may be guilty of criminal homicide. In this case, the accused could reasonable foresee that a victim may receive less than adequate medical treatment.

If the intervening cause is so disconnected and unforeseeable, the defendant's act will not be considered as the proximate cause. For example, the defendant steals a car of the victim. The victim, then borrows his son's car. The victim is killed in a car wreck because of faulty brakes on the son's car. In this case, the defendant cannot be convicted of criminal homicide because the results are so disconnected and unforeseeable.

4.6 Strict Liability/ Crimes Without Intent

Under many statutes enacted for the protection of the public health and safety, e.g. trafficand food and drug regulations, criminal sanctions are relied upon even if there is no wrongful intent. These offenses usually involve

> light penalties and no moral obloquy or damage to reputation. Although criminal sanctions are relied upon, the primary purpose of the statutes is regulation rather than punishment or correction. The offenses are not crimes in the orthodox sense, and wrongful intent is not required in the interest of enforcement. (*People v. Vogel* 46 C 2d 798)

For certain criminal acts, the defendant may be punished without proof of any criminal intent. These offenses normally are public welfare offenses and generally deal with sales of food, beverages and drugs. The most common of the absolute liability crimes are:

1. Illegal sale of liquor.
2. Sale of impure or adulterated food.
3. Violation of vehicle registration requirements.
4. Sale of misbranded merchandise.
5. Violation of sanitary regulations.
6. Sale of adulterated drugs.
7. Sale of illegally subdivided land.
8. Failure to file state income tax return.

4.7 Capacity to Commit a Crime

Penal Code 26 **Persons Capable of Committing Crime**

All persons are capable of committing crimes except those belonging to the following classes:

One — Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness.

Two — Idiots.

Three — Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent.

Four — Persons who committed the act charged without being conscious thereof.

Five — Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.

Six—Persons (unless the crime be punishable with death) who committed the act or made the omission under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.

Discussion

All persons are presumed to have the ability to commit crimes except those listed above in section 26 of the code.

Children

The age referred in Section 26 (above) is chronological age not mental or moral age. This section creates a rebuttable presumption that a child under the age of 14 is incapable of committing a criminal offense (*In re Gladys R.* 1 C3d 855). The "clear proof" standard is the same as "clear and convincing evidence" (*In re Michael B.* 149 CA 3d 1073). Note: juvenile court has primary jurisdiction over youths under the age of 18 who commit criminal offenses.

If appropriate, the juvenile court may refer the case to adult criminal court (W & I Code 707). The criteria used to determine if the case should be referred to adult criminal court are:

1. The degree of criminal sophistication exhibited by the minor.
2. Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.
3. The minor's previous delinquent history.
4. Success of previous attempts by the juvenile court to rehabilitate the minor.
5. The circumstances and gravity of the offense alleged to have been committed by the minor.

Idiots

An idiot is a person who is totally without understanding or mentality. An idiot does not know right from wrong, and therefore does not realize the nature of his/her wrongful act. (Note: insanity is discussed later in this chapter.)

Mistake of Fact

The mistake referred to under "three," above, is a mistake of fact, not of law. A mistake of law (ignorance) is not normally an excuse for committing a criminal act. For example, the accused takes

someone else's coat by mistake. He/she is not guilty of larceny (mistake of fact). The accused thinking that the speed limit is 55 mph drives 50 mph in a 40 mph zone. No excuse, since this is not a mistake of fact. In the latter situation, the accused is mistaken as to the legal speed limit, i.e. the law. Ignorance was not a defense in the case involving a nurse in charge of a private hospital who thought she had the authority to possess narcotics (*People v. Marschalk* 206 CA 2d 346). A mistake of law is no excuse even where based on advise of an attorney (*People v. Flumerfelt* 35 CA 2d 495).

For specific intent crimes and those crimes that require a special mental element, normally an "honest" mistake of fact is sufficient if the mistake negates the specific intent or special mental element (*People v. Navarro* 99 CA 2d Supp 1). For general intent crimes, in most cases an "honest and reasonable" mistake of fact is required to excuse criminal liability (*Re Application of Ahart* 172 C 762).

Accident/Misfortune

If the act causing the injury or harm was committed by accident or misfortune not involving criminal negligence, the injury or harm is considered to be "an act of God," and the actor is not criminally responsible for the resultant harm. "Public safety" crimes, discussed later in this chapter, are an exception to this general rule. An example of an accident would be where an automobile driver is driving with normal caution and not speeding when a young child darts out from between two parked cars. If the driver, without being at fault, hits the child, the resulting injury would be considered as "an act of God." The driver would not be criminally at fault for the injury.

Unconsciousness

Subdivision Five refers to persons who would otherwise have sufficient capacity but are incapable of committing criminal acts because of somnambulists, or persons suffering with delirium from fever or drugs (*People v. Methever* 132 C 326). For example, a person may defend a murder accusation based on unconsciousness following a blow to the head by the assailant (*People v. Cox* 67 CA 2d 166). A criminal act committed while a person is "sleep walking" (somnambulism) is covered by this subdivision. Unconsciousness is a complete defense to the crime. It does not, however, include mental illness.

The Subdivision does not cover insanity or voluntary intoxication (*People v. Taylor* 31 CA 2d 723). If the voluntary intoxication, over a period of time, causes permanent brain damage, the issue of insanity may be present. (See discussion on insanity later in this chapter.)

Involuntary intoxication, however, appears to be covered by this subdivision. Involuntary intoxication exists when a person becomes intoxicated by taking a substance or drink without realizing that the substance or drink contains alcohol or drugs. The defendant in *People v. Velez* (175 CA 3d 785) could not use the defense of unconsciousness as the result of involuntary intoxication based on the fact that he did not know the marijuana he was smoking was laced with PCP. The court stated that the defendant's act of smoking the marijuana, an intoxicating substance, prevented him from raising the unconsciousness defense.

Duress

If the defendant committed the criminal act under duress, the duress may be a complete defense. For duress under Subdivision Six to constitute a defense, there must be:

1. a reasonable and
2. actual belief
3. that a life is in danger or serious bodily injury is threatened, and
4. that the danger is present and immediate. (*People v. Coleman* 53 CA 2d 18)

The following threats of duress are not sufficient:

1. threats of future harm
2. threats to damage reputation or profession
3. unreasonable beliefs

Note: duress is not a defense to a capital crime. In cases involving aggravated assault or battery, if the duress is not sufficient to constitute a defense, it may still reduce the crime to a simple assault or battery.

4.8 Mitigating Factors and Other Defenses

Diminished Capacity

Proposition 8 (passed June, 1982) abolished the "diminished capacity" defense in California. This defense was used in the past to negate the necessary intent in specific intent crimes. For example, in many cases, the accused would enter evidence to establish that he or she was too intoxicated to form the necessary intent to commit murder in the first degree. Presently, evidence of diminished capacity may be considered by the court only at the time of sentencing or other disposition or commitment of the defendant (Penal Code 25). As discussed below, evidence of mental disorder may be used to establish that the defendant is not guilty by reason of insanity.

Entrapment

The purpose of the entrapment defense is to prevent the government from "manufacturing" crime (Loewy, Criminal Law 2d ed., page 187). Therefore, the defense of entrapment is available only in those cases where the crime was notcontemplated by the defendant, but was actually planned and instigated by the police (*People v. Benford* 53 C 2d 1). The entrapment defense does not prevent the police from setting a trap for the unwary criminal (*Sherman v. U.S.* 356 US 369). The police may provide a person who is predisposed to commit a crime with the opportunity to commit the crime. For example, it is not entrapment to set up a drug buy from a person who is predisposed to sell drugs. Note: the entrapment defense is aimed at governmental misconduct. Thus, the entrapment defense is not available if the entrapment is accomplished by a private person not associated with the government (*People v. Wirth* 186 CA 2d 68).

The one test for entrapment is the "innocence" test (*People v. Benford* 53 C 2d 1). Was the crime the result of "creative activity" by the police or did the police merely offer an opportunity for a willing criminal to commit a criminal offense? The test currently being used in state cases is set forth in *People v. Barranza* (23 C 3rd 675). The test is: "Was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit a criminal offense?"

Consent of the Victim

Consent of the victim is not a defense to criminal prosecution, except in those cases where lack of consent of the victim is an element of the crime (Witkin, *California Crimes*, 163). Listed below are some of the common situations involving the question of consent:

1. Assault and battery — Consent is not a defense to assault and battery. It is a consent to ordinary physical contact involved in sporting events.
2. Rape — In most cases, sexual intercourse is not rape if the victim consents. Note: the victim must be legally capable of giving consent. This aspect is discussed in Chapter 10.
3. Theft and Robbery — Valid consent to taking of the property is a defense to theft and robbery crimes. Note: failure to take action to prevent the taking of the property (passive conduct) is not considered as consent.
4. To constitute consent on the part of the victim, the consent must be freely and voluntarily given and not under the influence of fraud, threats, force or duress.

4.9 Insanity

Penal Code 25 (b)

In any criminal proceeding, including any juvenile court proceedings, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense.

Discussion

The doctrine of partial insanity is not recognized in California (*People v. Troche* 206 C 35). Insanity is either a complete defense or no defense at all. There is no middle ground in California

criminal law (*People v. Perry* 195 C 623). Prior to 1978, California used the M'Naghten Test as the test for insanity. [M'Naghten Test is that a person is insane if, when the offense was committed, the person was laboring under such a mental disease or defect that he or she did not know the nature and quality of the act, or, if accused did know it, the accused did not know that what he or she was doing was wrong.] In 1978, the California Supreme Court in *People v. Drew* (22 C 3d 333) adopted the American Law Institute Test as the standard for California. Proposition 8 (June, 1982), however, reinstated the M'Naghten Test (*People v. Horn* 158 CA 3d 1014). Note: the M'Naghten Test is also referred to as the right from wrong test.

The leading case in California on insanity is *People v. Skinner* (39 C 3d 765). In that case, the court held that if the mental illness is manifested in delusions which render the individual incapable either of knowing the nature and character of his act, or of understanding that it is wrong, in moral rather than legal sense, he is legally insane.

In California state trials, the issue of insanity must be specially plead. This is accomplished by pleading "not guilty by reason of insanity." Note: to raise the issue of not guilty of the crime and the issue of insanity, the accused must plead both "not guilty" and "not guilty by reason of insanity." The law presumes that an individual is sane, and the burden of proof to establish the insanity defense by a preponderance of evidence is on the accused (*People v. Loomis* 170 C. 347). The hearing on the issue of insanity will be conducted after a finding that the accused committed the offense.

Temporary Insanity

Temporary insanity existing at the time of the act may be sufficient to meet the legal test of insanity (*People v. Donegan* 32 CA2d 716). If the defendant is insane at the time that the act was committed, it is immaterial that the insanity lasted several months or merely a number of hours (*People v. McCarthy* 110 CA 3d 296).

4.10 Capital Crimes

In cases in which the death penalty may be imposed, the trial must be tried in separate phases (P C 190.1). First, the question of the accused's guilt shall be determined. At the same time, the truth of the alleged special circumstances shall be determined. If the defendant is found guilty of first degree murder and one or more of the special circumstances, further proceedings are held on the question of the penalty to be imposed.

At the additional proceedings, evidence may be presented by both the prosecution and the defense as to any matter relevant to aggravation, mitigation, and sentence including, but not limited to, the nature and circumstances of the present offense, any prior felony conviction or convictions, and the defendant's character and background (P C 190.3). No evidence, however, shall be admissible regarding other criminal activity of the accused which does not involve the use or attempted use of force or violence or the express or implied threat to use force or violence.

The purpose of the special proceedings is to determine whether the penalty shall be death or confinement in state prison for life without the possibility of parole. After hearing the evidence at the special proceedings, the jury must weigh the evidence and determine if the mitigating circumstances outweigh the aggravating circumstances. If so, life imprisonment shall be imposed (P C 190.3).

Special Circumstances

The special circumstances that must be alleged and established before the accused is subject to capital punishment are set forth in Section 190.2 of the Penal Code and include:

1. Intentional murder, carried out for financial gain.
2. Previous conviction of murder in the first or second degree.
3. Conviction of multiple murders in the present proceedings.
4. Murder committed by means of a destructive device, bomb, or explosive planted, hidden or concealed in any place where the defendant knew or should have known that the act would create a great risk of death to person or persons.
5. Murder committed to prevent arrest or in

an attempted or completed escape from lawful custody.

6. Murder committed by mail bomb.
7. Victim was a fireman, peace officer, or federal law enforcement officer engaged in official duties or in retaliation for the performance of official duties.
8. Victim was a witness and killed to prevent his or her testimony in any criminal proceedings.
9. Victim was a prosecutor, assistant prosecutor, former prosecutor, or judge and the murder was carried out in retaliation for or to prevent the performance of official duties.
10. The murder was especially heinous, atrocious or cruel.
11. Murder was intentionally committed by lying in wait.
12. Victim was killed because of his or her race, color, religion, nationality or country of origin.
13. Murder was committed during or attempting one of the below listed crimes:
    a. robbery in violation of Section 211
    b. kidnaping in violation of Section 207 or 209
    c. rape in violation of Section 261
    d. sodomy in violation of Section 286
    e. burglary in the first or second degree in violation of Section 460
    f. performance of lewd or lascivious acts on a child under the age of 14 in violation of Section 288
    g. oral copulation in violation of Section 288a
    h. arson in violation of Section 447
    i. train wrecking in violation of Section 219
14. Victim was intentionally killed by torture. (This section requires proof of the infliction of extreme physical pain no matter how long its duration.)
15. Murder by poison.

4.11 Malice

Penal Code 7 (4)

The words "malice" and "maliciously" import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law.

Discussion

Malice as used in the above statute has a different meaning from the general usage definition. Malice under the Penal Code, Section 7(4) can be classified as "malice in fact" and "malice in law." Malice in fact (or actual malice), similar to the general usage definition, is referred to in the first part of the statute by the words "import a wish to vex, annoy, or injure another person." Malice in law is set forth by the words "an intent to do a wrongful act."

Malice in law may exist in addition to or independent of malice in fact. Malice in fact has been described as the intentional doing of a wrongful act without just reason or excuse for the conduct (*Davis v. Hearst* 160 C 143).

There is a third type of malice referred to in the Penal Code, "malice aforethought." The definition of it is contained in Penal Code 188, immediately after the crime of murder. It has no general application, and is limited only to those crimes which has "malice aforethought" as an element of the crime. Malice aforethought is discussed in Chapter 9 which covers homicide.

4.12 Motive

Motive is the cause or reason that an act is committed (*People v. Lane* 100 C 379). It is the moving cause or the ulterior purpose of the offender (*People v. Durrant* 116 C 179). Except for crimes involving "heat of passion" or "sudden and sufficient provocation," motive is not normally an element of the crime and need not be proved by the prosecution (*People v. Woo* 181 C 315). Often evidence of motive is used to establish or rebut malice when malice is an element of the crime.

There is a difference between motive and intention. Intention to commit a crime may exist with or without a motive for doing it. In most cases, motive precedes intent. The classical example of the difference between motive and intent is when A kills B to get B's money. A's intent

was to commit murder. A's motive was to get the money.

4.13 Intoxication

Penal Code 22 **Voluntary Intoxication**

(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation or malice aforethought, with which the accused committed the act.

(b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.

(c) Voluntary intoxication includes the voluntary ingestion, injection, or taking by any other means of any intoxicating liquor, drug, or other substance.

Discussion

In most cases, voluntary intoxication is not a defense to or an excuse for criminal conduct. An exception to the above general rule is where the voluntary intoxication causes insanity. Insanity even though caused by voluntary intoxication is a defense (*People v. Kelly* 10 C 3d 565).

Evidence of voluntary intoxication may not be admitted to negate the capacity to form the criminal intent regarding:

1. knowledge
2. premedication
3. deliberation
4. purpose,
5. intent, and
6. malice aforethought.

Specific Intent Crimes

With crimes involving specific intent, evidence that the accused was too intoxicated and therefore did not form the required specific intent is admissible to establish that the crime was not committed. For example, an accused may establish that he or she did not have the necessary criminal intent to commit the crime of burglary because of voluntary intoxication. In this situation, the accused is not entering evidence to negate the capacity to commit the crime, but to establish that the crime was not committed. Note: voluntary intoxication is not a defense to, nor legal excuse for, general intent crimes.

4.14 Parties to a Crime

Penal Code 30 **Classification**

The parties to crimes are classified as:

1. Principals and
2. Accessories.

Penal Code 31 **Principals**

All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or not being present, have advised and encouraged its commission; and all persons counseling, advising or encouraging children under the age of fourteen, lunatics or idiots, to commit any crime, or who, by fraud, contrivance or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command or coercion, compel another to commit any crime, are principals in any crime so committed.

Penal Code 32 **Accessories**

Every person who, after a felony had been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

Discussion

In California, there are only two parties to a crime; principals and accessories. The common law classifications of "accessory before the fact" and "principal" are merged into "principals" and the common law classification of "accessory after the fact" is an accessory. To be a principal, one must be involved in either the planning or commission of the offense. Unlike common law, a principal does not need to be present at the scene

of the crime. All principals are equally guilty and thus, are subject to the same punishment.

An accessory is one who after a felony has been committed harbors, conceals or aids the principal to evade punishment or detection. The punishment for an accessory can include imprisonment in a state prison or a county jail.

Principal

To be a principal one must either:

1. commit the crime,
2. aid in the commission of the crime,
3. advise or encourage another to commit the crime,
4. command, threaten, or force another to commit a crime,
5. get another person drunk so that person will commit a crime.

Accessory

To be guilty as an accessory:

1. a felony must have been committed;
2. must have aided, concealed or harbored the principal; and
3. must have intent that the principal avoid or escape arrest, prosecution or punishment.

Assume that A, B, and C rob a bank. C takes part in the planning of the robbery and plans to receive a portion of the loot. C is not present at the scene of the crime. A and B actually go into the bank and commit the robbery. After the robbery, D hides A, B, and C. D did not know prior to the robbery that one was being planned. In this example, A, B, and C are all principles. (Note: at common law, since C was not present at the scene of the crime, he would be an assessory before the fact.) D, not taking part in the robbery nor the planning for it, is an assessory.

Accomplice

An accomplice is one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given. Penal Code, Section 1111, provides that one may not be convicted upon the testimony of an accomplice unless there is other corroborating evidence which connect the defendant with the commission of the offense.

4.15 Attempts

An attempt to commit a crime is also a crime (P C 664). A person may be convicted of an attempt to commit a crime, although it appears by the evidence that the crime intended or attempted was actually completed (P C 663). The elements of an attempt are:

1. A specific intent to commit a particular crime. (Note: even if the attempted crime is a general intent crime, the accused must have the specific intent to commit that particular crime, i.e. "specific intent" (*People v. Rupp* 41 C 2d 527).
2. A direct but unsuccessful act toward completion of the intended crime. To be an attempt, the act or acts committed must go further than mere preparation (*People v. Werner* 16 C 2d 216).
3. An apparent ability to commit the intended crime.
4. The crime must be legally possible to commit.

In some cases, a person may in an unsuccessful attempt to commit one crime, commit another crime. In this case, he or she may be punished for the attempt to commit the intended crime or the other crime (P C 665). For example, a husband attempts to kill his wife. He actually kills someone else. He can be prosecuted for attempted murder of the wife and murder of the other person.

Beyond Preparation

As noted earlier, to constitute an attempt there must be a direct act or acts committed leading up to the intended crime. Mere preparation for committing the intended crime is not sufficient to constitute an attempt. A difficult question to answer in many cases is whether or not the act or acts committed goes beyond mere preparation and thus constitute an attempt. The act or acts are sufficient to constitute an attempt if the overt act or acts reach far enough toward the accomplishment of the intended offense to amount to the commencement of its consummation (*People v. Lanzit* 70 CA 498).

The below listed acts were held sufficient to constitute an attempt:

1. Intending to kill his wife, the accused allowed his accomplice to enter the house for the purposes of choking her (*People v. Parrish* 87 CA 2d 853).
2. The defendant planning to commit a burglary was found outside of a bedroom with hands upraised to a bedroom window (*People v. Gibson* 94 CA 2d 468).
3. Defendant intending to bomb a railroad track, noticed officers observing him while he was a block away from the track, and fled (*People v. Davis* 24 CA 2d 408).
4. Defendant was found crouched outside a public telephone booth with lock picks and his car equipped with coin box burglary tools (*People v. Charles* 218 CA 2d 812).

The fact of purchasing a gun is only preparation and not a direct act toward robbery, i.e. no attempt. A similar holding resulted in a case where the defendant, several days before the planned robbery drove by the bank in question to look it over.

Once a direct act leading toward the commission of the intended offense is completed, the crime of attempt is completed, and a later abandonment of the plan to commit the intended offense is not a defense for the attempt.

There can be no attempt if it is legally impossible to commit the intended offense. For example, the accused tries to kill a person who is already dead. No attempt; it is legally impossible to kill a dead person. The fact that other conditions make the crime impossible to complete is not normally a defense. For example, the accused, intending to steal money from a person, reaches into the victim's pocket and finds it empty. The accused may be convicted of an attempt to steal.

The test regarding the possibility of completion of the intended crime is:

"If there is an apparent ability to commit the crime in the way attempted, the attempt is indictable, although, unknown to the person making the attempt, the crime cannot be committed, because the means employed are unsuitable or because of extrinsic facts, such as the nonexistence of some essential object, or an obstruction by the intended victim, of by a third person." (*People v. Siu* 126 CA 2d 41)

4.16 Conspiracy

Penal Code 182 **Conspiracy Defined**

If two or more persons conspire:

1. To commit any crime.
2. Falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime.
3. Falsely to move or maintain any suit, action or proceeding.
4. To cheat and defraud any person of any property, by any means which are in themselves criminal, or to obtain money or property by false pretenses or by false promises with fraudulent intent not to perform such promises.
5. To commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws.
6. To commit any crime against the person of the President or Vice President of the United States, the governor of any state or territory, any United States justice or judge, or the secretary of any of the executive departments of the United States.

[The last portion of this section on punishment is omitted.]

Definition

Conspiracy is an agreement by two or more persons to commit any crime, and one of them does an overt act in furtherance of the conspiracy.

Elements of Conspiracy

The basic elements of the crime of conspiracy are:

1. Two or more persons
2. Agreement to commit a crime
3. An overt act in furtherance of the agreement.

Discussion

For conspiracy to be a crime, it is not necessary that the conspired crime be completed or even attempted. The overt act required must go beyond the agreement or planning stage. The act

must be more than planning, but need not amount to an attempt. The act, however, must be in furtherance of the conspiracy and must take place within California. The overt act may be a lawful act as long as it is in furtherance of the conspiracy (*People v. Jones* 228 CA 2d 74 and *People v. Smith* 63 C 2d 779).

Conspiracy is a specific intent crime, since it must be established that the accused entered into the agreement with the intent to do an unlawful act or do a lawful act by unlawful means (*People v. Jones* 228 CA 2d 74). All persons involved in the conspiracy are equally responsible for the actions of all other parties taken in furtherance of the conspiracy. It includes crimes committed in preparation for, during, commission of, and during escape and arrest. This liability does not, however, include independent and unrelated crimes. Crimes committed prior to entry by the accused into the conspiracy, also, are not charged against him or her.

Conspiracy requires the agreement of two or more persons. At least two of the persons must be legally capable of committing a crime. Accordingly, if only two people are involved and one is an idiot, then no conspiracy. The two required persons may be husband and wife. If one of the two is an undercover police officer who enters into the agreement as part of his or her official duties, there is no conspiracy. This is based on the concept that the undercover police officer did not in fact agree to commit a crime, therefore no agreement. Note: if there are two otherwise qualified persons who agree to commit a crime in addition to the undercover police officer, then a conspiracy may exists.

It is not necessary that all members agree with all other members of the conspiracy, only that each must know of the agreement and must make an agreement with at least one other member of the conspiracy.

Prior to the commission of the conspired offense, one may withdraw, and the withdrawal will avoid criminal liability if the below requirements are present:

1. A complete withdrawal from all aspects of the conspiracy.
2. Must remain away from the scene of the crime at time of crime.
3. Must communicate abandonment to all known confederates prior to the commission of intended offense.

As a practical matter to prove an abandonment, the accused should have communicated to authorities information regarding the conspiracy. (While communication to proper authorities is not required, it is almost impossible to prove abandonment without the communication.)

4.17 Solicitation

In California under Section 653f of the Penal Code; it is a crime to solicit another person to commit bribery, murder, robbery, burglary, felony theft, arson, receiving stolen property, forcible rape, extortion, perjury, forgery, kidnapping, felony assault, sodomy by force and oral copulation by force. Other sections of the code prohibit the solicitation for prostitution, lewd acts, etc. (P C 647(a), (b), and (d).

The elements of the crime of solicitation are:

1. act of solicitation
2. with the specific intent to induce the commission of the offense.

No overt act or agreement by the person solicitated is required. The crime is completed with the solicitation. In most cases, conviction requires testimony of two witnesses or one witness and other corroborating evidence.

Solicitation is a lessor and included offense of conspiracy. To constitute the crime of conspiracy there must be an agreement and an act committed in furtherance of agreement; however, to constitute solicitation, all that is required is the solicitation to commit the offense (*People v. Bottger* 142 CA 3d 974).

4.18 Persons Liable to Punishment

Penal Code 27 **Persons Liable to Punishment**

(a) The following persons are liable to punishment under the laws of this state:

1. All persons who commit, in whole or in part, any crime within this state;

2. All who commit any offense without this state which, if committed within this state, would be larceny, robbery, or embezzlement under the laws of this state, and bring the property stolen or embezzled, or any part of it, or are found with it, or any part of it, within this state;
3. All who, being without this state, cause or aid, advise or encourage, another person to commit a crime within this state, and are afterwards found therein.

(b) Perjury, in violation of Section 118, is punishable also when committed outside of California to the extent provided in Section 118.

CLASSROOM DISCUSSION QUESTIONS

1. Discuss the role of proximate cause in criminal cases.
2. Explain the differences between general and specific intent crimes.
3. Explain the doctrine of transferred intent.
4. What is the rationale for punishing "strict liability" crimes?
5. Why is a "mistake of law" not a defense to most criminal conduct?
6. Explain the present test for insanity in California.
7. What is the "corpus delicti" of a crime?
8. Explain the requirement for a unity of the act and intent.
9. Under what circumstances will a person be guilty of a crime as a passive participatant?
10. What is the purpose of the "transferred intent" doctrine?

SELF STUDY QUIZ

True/False

1. Corpus delicti refers only to homicide cases.
2. There must be a unity in time between the act and the intent to constitute a crime.
3. Criminal acts must be affirmative and voluntary acts.
4. Negligence can be a substitute for specific intent.
5. Proximate cause is necessary to a successful prosecution of all crimes.
6. Criminal intent may not be manifested by the circumstances surrounding the act.
7. Certain persons are incapable of some crimes because of the lack of requisite mental state.
8. Children under the age of 14 may never be punished for committing a criminal offense.
9. All persons are presumed to have the ability to commit crimes.
10. An idiot is a person who is almost totally without understanding or mentality.
11. A mistake of law is an excuse for criminal conduct.
12. California has abolished the defense of diminished capacity.
13. Consent of the victim is a defense in most criminal cases.
14. Temporary insanity is not a defense to criminal conduct in California.
15. Special circumstances must be alleged and proven before an accused may be sentenced to death.
16. Malice means only an "ill-will."
17. Motive and malice are the same.
18. Voluntary intoxication is a defense to certain crimes in California.
19. In California, all parties to a crime are either principals or accessories.
20. To constitute an attempt, there must be a direct act toward the completion of the attempted offense.

Chapter 5

Theft

The thief is sorry that he is to be hanged, but not that he is a thief.
(Thomas Fuller, 1732)

Theft Related Crimes

1. Theft by Larceny (P C 484)
2. Grand Theft (P C 487)
3. Petty Theft (P C 488)
4. Theft by False Pretense or Fraud (P C 532)
5. Theft by Trick or Device (P C 332, and 484)
6. Theft by Credit Card (P C 484d, e, and f)
7. Defrauding Proprietors of Hotels, Inns, etc. (P C 537)
8. Theft of Utility Services (P C 498a)
9. Theft of Trade Secrets (P C 499c)
10. Theft by Embezzlement (P C 484 and 503)
11. Vehicle Theft (P C 499b and V C 10581)
12. Diversion of Construction Funds (P C 484b)
13. Receiving Stolen Property (P C 496)
14. Receiving Property Stolen in Another State (P C 497)
15. Alteration of Serial Numbers (P.C. 537e)

5.1 Statutory Theft

Penal Code 490a **Larceny, Embezzlement or Stealing Renamed "Theft"**

Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereinafter be read and interpreted as if the word "theft" was substituted therefore.

Penal Code 484 **Acts Constituting Theft**

(a) Every person who shall feloniously steal, take, carry, lead, or drive away with the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real, or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft. In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test, and in determining the value of the services received the contract price shall be the test. If there be no contract price, the reasonable and going wage for the service rendered shall govern. For the purposes of this section, any false or fraudulent representation or pretense made shall be treated as continuing, so as to cover any money, property or service received as a result thereof, and the complaint, information or indictment may charge that the crime was committed on any date during the particular period in question. The hiring of any additional employee or employees without advising them of every labor claim due and unpaid, and every judgment that the employer has been unable to meet shall be prima facie evidence of intent to defraud.

Discussion

The present California theft statutes have merged the common law crimes of larceny, embezzlement and obtaining property by false pretenses into the crime of theft (Witkin, *California Crimes* 341 and *People v. Otterman* 154 CA 2d 193). Larceny consisted of the unlawful taking of property. Embezzlement consisted of the taking of property that had been previously entrusted to the individual taking the property (*People v. Ailanjian* 114 CA 260). Obtaining property by false pretenses consisted of using false pretenses or trick to get possession of the property.

In merging the offenses into the crime of theft, California eliminated the fine distinctions and technical niceties which formerly existed between the common law crimes (Clark and Marshall, Crimes 764 and *People v. Carter* 131 CA 177). The consolidation of the common law offenses in P C 484 did not create new crimes or enlarge the scope of the old crimes (People v. Kassab 219 CA 2d 687).

Common Law Theft Defined

Common law theft consists of the taking and carrying away the property of another person, without the consent of the owner, with the specific intent to permanently deprive the owner of the use and benefit of the property (*People v. Pace* 2 CA 2d 464).

Elements of Theft

The elements of theft are:

1. the taking possession and carrying away of property,
2. property that belongs to another,
3. without the consent of the owner or the person with the right of possession, and
4. with the specific intent to permanently deprive.

Discussion

Distinctions still exist between the various types of theft crimes (See 5 Cal. L. Rev. 73). Except for cases involving theft by false pretense and embezzlement, the property must be personal property. To be considered as personal property, the property must not be real property (land or substances attached to the land) (See: 25 Santa Clara L. Rev. 367). It, also, must have some value and be subject to ownership (*People v. Quiel* 68 CA 2d 674).

Real property was not subject to common law larceny since there could be no taking and carrying away (*People v. Folcey* 78 CA 62). If a substance is severed from real property, it then becomes personal property and is subject to the theft statutes. For example, gravel on the ground is a part of the real estate and is not subject to theft by larceny until it is severed from the ground. If an individual, however, severs the gravel from the ground by loading it into a truck, then the property changes its nature from real to personal property. Accordingly, the individual is subject to the theft statutes when he takes possession of the gravel and transports it. A similar situation would exist had the individual picked fruit from trees belonging to others. Real property can be the subject of theft by false pretenses or embezzlement.

Definition of "personal property" under the theft statutes is very broad. A list of subscribers to a telephone service has been considered by one court as personal property and thus subject to the theft statute. Utility services are considered as personal property and, therefore, subject to the theft statutes. It also includes written instruments such as checks and stocks.

Property that is unlawful to possess may still be the subject of a theft. For example, a thief could be convicted of stealing marijuana from a drug dealer.

Asportation

To complete the crime of theft, the individual must take possession of the property and carry it away (*People v. Meyer* 75 C 383). The term "asportation" is used to describe the act of taking possession and carrying away of property (*People v Edwards* 72 CA 102). A thief who attempts to remove an overcoat from a store dummy was not convicted of theft because the overcoat was chained to the dummy (*People v. Meyer* 75 C 383). The court held that there was no taking possession and carrying away of the property. He was, however, guilty of attempted theft.

A person who takes property and hides it in a box containing other products has sufficiently taken possession and carried away the property even if the property is not removed from the premises.

It is not necessary that the taking be from the immediate physical presence of the owner or possessor. It is assumed that the property is in possession of the person who has a right to possess it. It is grand theft, however, if the property is taken from the physical presence of the person.

Once the individual takes possession, the slightest movement is sufficient to establish the carrying away requirement. A thief takes a purse from an automobile and then immediately drops it beside the car when he sees the owner approaching the car. He can be convicted of theft. The fact that the property was quickly abandoned in an attempt to prevent detection is immaterial.

Once possession and carrying away has occurred, the crime is complete. The fact that the property is returned to its original position before the owner notices that it is missing does not erase the fact that a theft has occurred.

Property that Belongs to Another

A person cannot be convicted of stealing his own property unless someone else has a greater right of possession (*People v. Cleary* 1 CA 50). The victim of the crime need not be the owner, as long as the victim has a right of possession of the property. For most purposes, "ownership" and "right of possession" are treated as the same under this requirement (*People v. Brunwin* 2 CA 2d 287). The actual status of ownership of the property is immaterial to the thief. Theft is actually a crime against possession rather than ownership (*People v. Beach* 62 CA 2d 803).

"Thief One" steals a car and drives it for two weeks. Then, "Thief Two" steals the car from "One". In this case, "Two" can be convicted of stealing from "One" on the theory that the first thief has a greater right of possession. (When two claims to the right of possession are equal, the first in time prevails.) "Two" cannot successfully defend on the theory that "One" does not own the property. The general rule is that the unlawful acts of the victim in obtaining the property cannot be used by the thief to erase the crime.

Without the Consent of the Owner

At common law, to be larceny the property must be taken without the consent of the owner or the person with the right of possession of the property. The taking must have been against the will of the owner or possessor (*People v Re Estrada* 63 C 2d 740). Under the present theft statutes, the taking may be:

a. against the will,
b. by trick or fraud, or
c. by converting property that has been entrusted to a person.

The taking against the will is the common law crime of larceny. The taking by trick or fraud is the common law crime of theft by false pretense. In the common law crime of embezzlement the "taking without the consent of the owner" is the converting of property that has been entrusted to a person. A classic example of embezzlement is where the cashier of a store lawfully takes money from customers, but instead of depositing the money, he wrongly keeps it for his own use.

Except for those cases involving embezzlement, theft by trick or device and theft by false pretense, to constitute theft the taking and carrying away of the property must be without the consent of the owner or possessor. If a person has a suspicion that someone is planning to steal his property, the person is under no duty to take steps to prevent the crime. This non- action is not considered as consent to the taking and carrying away. The setting of a trap and thereby providing an opportunity for a thief to steal property is also not considered as consent.

With the Specific Intent to Permanently Deprive

Except as noted below, theft requires that the taking be with the specific intent to permanently deprive the owner of the property, money, etc. (*People v. Kunkin* 9 C 3d 245).

Specific Intent

Theft is a specific intent crime. The person taking the property must know that his taking of

the property was wrong. Accordingly, if one mistakenly takes the property, he or she has not committed a theft crime.

If a person takes another person's property believing that he or she has a legal right to take the property, he is not guilty of theft. For example, mistakenly taking another person's book does not constitute theft.

Permanently Deprive

The crime of theft requires the specific intent to permanently deprive the owner or possessor of the property. Accordingly, one who takes another's property with the intent to use it only temporarily is not guilty of theft. Unauthorized borrowing may be another crime, but it is not stealing. Embezzlement, thefts by false pretenses, and vehicle thefts are exceptions to the requirement of "the intent to permanently deprive." With embezzlement crimes, thefts by false pretenses, and vehicle thefts; as discussed later, the Legislature has eliminated "the intent to permanently deprive" requirement.

The intent to permanently deprive is normally established by proof of the circumstances that the taker acted with the intention to convert the property to his or her own use. For example, picking up the personal property of another and walking away would create a presumption that the taker of the property intended to steal it.

Joe goes into the local grocery store, picks up a package of gum and puts it in his pocket. He leaves the store without paying for the gum. Joe is arrested for theft. He claims that he forgot to pay for the gum. If he did in fact forget, then he has not committed the crime of theft. To establish his guilt, the prosecution would only be required to prove that Joe put the gum in his pocket and walked out without paying for it. It would be up to Joe to establish that the failure to pay was a mistake.

The intent "to take the property" must exist at the time of the taking. There is no requirement that the taking be for gain. All that is needed is the specific intent to deprive the owner or possessor of his property permanently. Taking of a typewriter without the consent of the owner, but without the intention of depriving him of it permanently is not a violation of the theft statutes. It may be a violation of another code section.

Value

Before an item is subject to the theft statutes, it must have some value. The value may only be slight. Intrinsic value is considered sufficient to support a theft charge (*People v. Franco* 4 CA 3d 535).

Rental or Lease Fraud

P C 484 (b), (c), (d), and (e)

(b) Except as provided in Section 10855 of the Vehicle Code, intent to commit theft by fraud is presumed if one who has leased or rented the personal property of another pursuant to a written contract fails to return the personal property to its owner within 20 days after the owner has made written demand by certified or registered mail following the expiration of the lease or rental agreement for return of the property so leased or rented. [Note: Section 10855 of the Vehicle Code, listed as an exception to this subdivision, provides that failure to return a rented or leased vehicle within five days after the agreement expires raises the presumption that the vehicle was embezzled.]

(c) Notwithstanding the provisions of subdivision (b), if one presents with criminal intent identification which bears a false or fictitious name or address for the purpose of obtaining the lease or rental of the personal property of another, the presumption created herein shall apply upon the failure of the lessee to return the rental agreement and no written demand for the return of the leased or rented property shall be required.

(d) The presumptions created by subdivisions (b) and (c) are presumptions affecting the burden of producing evidence.

(e) Within 30 days after the lease or rental agreement has expired, the owner shall make a written demand for return of the property so leased or rented. Notice addressed and mailed to the lessee or renter at the address given at the time of the making of the lease or rental agreement and to any other known address shall constitute proper demand. Where the owner fails to make such written demand the presumption created by subdivision (b) shall not apply.

Discussion

Rental or lease fraud presumptions set forth in P C 484 (b), (c), (d), and (e) are designed to reduce some of the problems encountered when trying to establish in court fraudulent intent. The subdivisions provide that when a person leases personal property from another by a written contract, the failure to return the property within 20 days after the owner has made a written demand by certified or registered mail following the expiration of the lease or rental agreement gives rise to a presumption that the property was taken with the intent to commit theft by fraud. Note: to take advantage of this presumption, there must be a proper written demand for its return. If the owner fails to make proper demand, the presumption does not apply (P C 484 (e)).

Penal Code 485 **Lost Property**

One who finds lost property under circumstances which gives him knowledge of or means of inquiry as to the true owner, and who appropriates such property to his own use, or to the use of another person not entitled thereto, without first making a reasonable and just effort to find the owner is guilty of theft.

Classification and Punishment

Theft crimes are classified and punished as either petty theft or grand theft. Petty theft is a misdemeanor (PC 488) and grand theft is a felony (PC 487).

5.2 Petty Theft

Penal Code 488 **Petty Theft**

Theft in other cases [not grand theft] is petty theft.

PenalCode 666 **Conviction of Crime After Serving Term for theft....**

Every person who, having been convicted of petit theft, grand theft, auto theft under Section 10851 of the Vehicle Code, burglary, robbery, felony receiving stolen propery, or a felony violation of section 496 and having served a term therefore in a penal institution or having been imprisoned therein..., is subsequently convicted of petit theft, then the person convicted of such subsequent offense is punishable by imprisonment in the county jail not exceeding one year, or in the state prison.

Definition

Petty theft is defined in P C 488 as those thefts which are not classified as grand theft. Except as noted in P C 666, petty theft is punishable by fine or by imprisonment in the county jail.

5.3 Grand Theft

Grand theft is difficult to define because of the many considerations and conditions under which theft is classified as "grand theft." The definition of grand theft is set forth in P C 487. The punishment for grand theft is imprisonment in the county jail or in the state prison (wobbler) and/or a fine. Grand theft is theft committed under any of the following circumstances:

1. If the property taken is of a value exceeding $400.00.
2. If the value of the property taken exceeds $100.00 and the property is domestic fowls, avocados, citrus fruit, deciduous fruit, nuts, articokes, olives, substance severed from real estate, other fruits and other farm crops, aquacultural products, fish, shellfish, kelp, and crustaceans.
3. If the property or money is taken by an employee from an employer and the value equals $400.00 or more in any 12 consecutive months.
4. When the property is taken from the body of a person or in a container being carried by the person.
5. When the property is (are) a horse, mare, gelding, cattle, goats, sheep, mules, lambs, pigs, or hogs.
6. Gold dust, mining claims, quicksilver, etc.
7. Theft of dogs for research, sale or other commercial use.
8. Theft of firearms.
9. Theft of an automobile (Grand Theft Auto).

Value Used

To determine the value of the property for the purposes of establishing grand theft, **the reasonable and fair market value at the time that the item is stolen** is used. It the item is stolen from a retail store, then the retail price is used. If services are stolen, the reasonable and going wage for those services is used. The value used is the general market value of the property, not any special value it may have to the victim (*People v. Lizarraga* 122 CA 2d 436 and *People v. Brown* 138 CA 3d 832).

The defendant stole jewelry from a store. The cost of the jewelry to the store was $54,000 and the retail value was $130,000. The appellate court held that the trial court was correct in valuing the property at its retail value of $130,000 for the purposes of sentence enhancement. (*People v. Swanson* 142 C.A. 3d 104).

In the case of *People v. Ross* (25 C.A.3d 190) the accused, an automobile dealer, was charged with theft for selling automobiles on which mileage shown by the odometers had been reduced. The court held that the value for the purposes of punishment and classification of the crime was the amount of money received for the cars by the accused, not the damages suffered by the victims.

In another case, the accused received from the victims $550 to buy a horse that was represented as a full-blooded Arabian mare. The horse was only half-Arabian. The defendant contended that for purposes of sentence enhancement that only the difference in value between a full-blooded Arabian and the one received should be considered. The court held that the total amount of money received by the accused ($550) should be the amount used in determining the type of theft involved (*People v. Hess* 10 C.A. 3d 1071).

5.4 Theft of Public Funds and Embezzlement

Penal Code 514

Every person guilty of embezzlement is punishable in the manner prescribed for theft of property of the value or kind embezzlement; and where the property embezzled is an evidence of debt or right of action, the sum due upon it or secured to be paid by it must be taken as its value; if the embezzlement or defalcation is of the public funds of the United States, or of this state, or of any county or municipality within this state, the offense is a felony, and is punishable by imprisonment in the state prison; and the person so convicted is ineligible thereafter to any office of honor, trust, or profit in this state.

5.5 Theft by Larceny

Larceny is the wrongful taking and carrying away of personal property belonging to another with the intent to permanently deprive the owner of it. In larceny type thefts, the taking is unlawful. In cases involving a wrongful taking, the intent to permanently deprive the owner of the property may be at the time of the taking of the property or at any time while the property is in the possession of the thief. Theft by larceny is contained in Penal Code 484 (a), set forth earlier in this chapter.

Elements

The elements of theft by larceny are:

1. an unlawful taking
2. of personal property belonging to another
3. with the intent to permanently deprive the owner of the use or enjoyment of the property.

5.6 Theft by False Pretense

Penal Code 532 **False Pretense — Obtaining Property, Labor or Services**

Every person who knowingly and designedly, by any false or fraudulent representation or pretense, defrauds any other person of money, labor or property, whether real or personal, or who causes or procures others to report falsely of his wealth or mercantile character, and by thus imposing upon any person obtains credit, and thereby fraudulently gets possession of money or property, or obtains the labor or service of another, is punishable in the same manner and to the same extent as for larceny of the money or property so obtained.

Elements

The elements of the offense of theft by false pretenses are:

1. the defendant made false pretense or representation
2. the pretense or representation was made with the intent to defraud owner of property
3. the owner was in fact defrauded in that he or she parted with the property in reliance on the pretense or representation.

Discussion

Theft by false pretense occurs when the victim is induced to part with the property by false pretenses of the thief. The victim relying on false representations parts with the title to the property. The accused must know that the representations are false at the time they are made. The majority of the time this crime occurs during the transfer or exchange of property. For example, the selling of an automobile with the mileage on the odometer "rolled back" is theft by false pretense, in that the seller is selling an automobile that is represented to have lower mileage and thus a higher value.

The false representations must be representations of fact not opinion. The statements in selling a car, that this is a "good buy" or "this is the best buy in town" are statements of opinion not fact. The statement that this car has "never been in a wreck," however, is a false statement.

While a false promise may be the basis for theft by false pretense, the prosecution must establish that the failure to keep the promise was not "merely a commercial default" (*People v. Kiperman* 64 CA 3d Supp. 25).

The false statement must be of a past, not future event. To be theft by false pretenses, the victim must rely on the false representation. It is not necessary, however, that the false representation be the sole inducement, but it must be a substantial part of the inducement. Note: the suspect may be convicted of an attempted theft without establishing that the victim relied on the false representation. Theft by false pretense applies to both real and personal property.

To be theft by false pretense, the false pretense or representation must have materially influenced the owner to part with the property. It, however, need not be the sole inducing cause (*People v. Taylor* 30 CA 3d 117). The accused to obtain property from its owner, made a false statement regarding his financial character. The owner of the property who wanted to get rid of the property knew that the statement was false, but still turned the property over to the accused. This is not theft by false pretense, since the owner of the property was not materially influenced by the false statement in parting with the property.

The defendant switched price tags on merchandise so as to buy the goods for less than the correct price. The store owner was aware that the tags had been switched, but allowed the defendant to complete the purchase at the incorrect price in order to arrest the accused for theft by false pretense. When the accused left the store, he was arrested in the parking lot. The court held that the defendant could not be convicted of theft by false pretense since the owner of the merchandise was not mislead by the defendant's conduct (*People v. Lorenzo* 64 CA 3d Supp. 25).

The accused was convicted of theft by false pretense when he took money from a farmer by a false promise that the money would be used to bribe a county supervisor in order to obtain favorable consideration of a lease of county owned property (*People v. Fujita* 43 CA 3d 454).

5.7 Theft by Trick or Device

Penal Code 332(a) **Card-Monte, Trick and Sure-thing Games**

Every person who by the game of "three-card monte", so- called, or any other game, device, slight-of-hand, pretensions to fortune-telling, trick, or other means whatever, by use of cards or other implements or instruments, or while betting on sides or hands of any such play or game, fraudulently obtains from another person money or property of any description, shall be punished as in case of larceny of property of like value.

Defined

This crime is committed when the possession of personal property is obtained by fraud. The owner intends to depart with the possession of the property but not the title to it. The intent to steal must exist at the time that the property is taken (*People v. Maggart* 194 CA 2d 84).

Discussion

This crime is different from theft by false pretenses in that in the case of theft by false pretenses, the owner intends to part with title to the property. In theft by trick or device, the owner may intend to temporarily part with custody, but does not intend to part with the title to the property. Larceny by trick or device requires that the intent to steal be present at the time of the taking of the property (*People v. Mason* 86 CA 2d 445).

A thief intending to steal a typewriter, obtains custody of it from the victim after convincing the victim that he only wants to borrow it. If the thief did not intend to return the typewriter at the time of the taking, he has committed the crime of theft by trick or device.

Obtaining a loan of money based on a false statement that the money will be used for a special purpose and with the intent to deprive the owner of it is also theft by trick or device. Pigeon drops and switches are thefts by trick and device. Note: in cases involving theft by trick or device, unlike larceny, the intent to permanently deprive must exist at the time of the taking or the transfer of possession.

The crime is completed when the thief has obtained possession of the property. Theft by trick or device is contained in Penal Code 484 (set forth above) and Penal Code 332.

5.8 Theft by Access (Credit) Card

There are five different types of theft by access card crimes set forth in the Penal Code. They are:

1. Acquiring access cards without the cardholder's or issuer's consent (P C 484e)
2. Forgery of access card (P C 484f)
3. Use of forged access card or the misrepresentation as to the identify of the card holder (P C 484g)
4. Fraud by a merchant in accepting forged access cards; knowingly honoring illegally obtained access card; or receiving payment for access card vouchers for items not furnished (PC 484g)
5. Counterfeiting or illegally completing incomplete access cards (P C 484i)

An accused who uses another person's credit and signing the other person's name to the access card may be guilty of both theft and forgery (People v. Cobb 15 CA 3d 1).

5.9 Defrauding Proprietors of Hotels, Inns, etc.

Any person who obtains any food, fuel, services, lodging, or accommodations at a hotel, inn, restaurant, boardinghouse, apartment house, motel, etc. without paying for it and with the intent to defraud is guilty of this crime (P C 547). In addition, leaving any of the above places after obtaining credit without the intent to pay for services, etc. provided is a crime under this statute. The use of false pretenses to obtain services, etc. is also a crime under this provision.

Leaving a restaurant without paying for the meals or filling up the car with gas and driving off without paying creates a presumptive violation of this statute.

5.10 Theft of Utility Services

Any person who obtains utility services with the intent to avoid payment for the services is guilty of the theft of utility services. Utility services are defined as any electrical, gas or water or any other service provided by a public utility for compensation. This crime includes the act of reconnecting utility service that has been lawfully disconnected by the utility and the use of devices to prevent the meter from accurately measuring the services provided (P C 498).

5.11 Theft by Embezzlement

Penal Code 503 **Embezzlement Defined**

Embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted.

Elements of Embezzlement

The elements of embezzlement are:

1. the property embezzled belonged to another;
2. the property was legally entrusted to the accused as agent, employee, bailee, trustee, or servant (a fiduciary relationship exists);

3. the necessary taking and carrying away occurred; and
4. at the time of the taking and carrying away, the accused had the intent to permanently or temporarily deprive the owner of the property.

Discussion

Theft by embezzlement is theft of property that has been entrusted to the taker. In embezzlement cases, the thief steals property that has legally been entrusted to him or her. It is a violation of the relationship of trust and confidence (fiduciary relationship) (*People v. Fox* 43 CA 399 and *People v. Whitney* 121 CA 2d 515).

A bank teller receives money from a bank's customers for deposit. If the bank teller steals the money rather than depositing it, the teller has committed the crime of theft by embezzlement. An attorney receives money on behalf of his client. Rather than forwarding the money to the client, the attorney deposits it to his own account and fails to tell his client of the payment. The attorney has committed the crime of embezzlement.

The two key distinctions between embezzlement and theft by larceny are:

1. in embezzlement, the original taking of the property is legal (People v. Burchers 199 C 52); and
2. in embezzlement, the intent may be to only temporarily deprive the owner of the property (*People v. Braiker* 61 CA 2d 406).

There is no requirement that the property belong wholly to another. A partner may be convicted of embezzling property belonging to a partnership. It is necessary that at the time of the embezzlement that the accused have actual control of the property (entrusted to the accused). If the property has not been "entrusted" to the accused, he or she is not guilty of embezzlement but may be guilty of another type of theft.

Property subject to embezzlement may be money, goods, chattels, things in evidence of debt, right of action and real property. If the amount taken by a servant, agent or employee from his or her employer or principal totals $400.00 or more in any 12 month period, the crime is a grand theft.

This crime is a modern day statutory crime. At common law, there was no crime of theft by embezzlement.

There is a special embezzlement statute pertaining to public employees. Penal Code 504 is set forth above. This statute applies to any state, county or city employee who fraudulently appropriates for his own use or for any purpose not authorized any public property in his possession or under his control.

5.12 Theft of Lost or Mislaid Property

Civil Code, Section 2080 provides that any person who finds lost property is not bound to take charge of it, but if he or she does, he or she has the obligation to take care of the property and inform the owner, if known, within a reasonable time of the location of the property. The finder may legally charge the owner only a reasonable charge for saving and taking care of the property.

A person who steals lost or mislaid property is guilty of theft under the following conditions:

1. the property is lost or mislaid under circumstance that by inquiry the true owner can be identified and located,
2. no reasonable inquiry is made to find the owner and restore the property to him, and
3. the finder appropriates the property for his own use or the use of another (P C 485).

The above conditions only apply to property that has been lost or mislaid. It does not apply to property that has been abandoned. The crime is completed when having possession of the property, the finder forms the intent to appropriate the property for his own use (*In re Greg F.* 159 CA 3d 466).

5.13 Vehicle Theft (P C 499b and V C 10851)

There are two vehicle theft statutes in California. In both statutes, only temporarily taking is required to constitute the theft. The two crimes are:

Under Penal Code 499b—Vehicle theft is the wrongful taking of any automobile, motorcycle,

motorboat, vessel or vehicle for the purposes of temporarily using or operating. This offense is also known as the "joy-ride" crime. It is designed to prevent the unauthorized "joy-riding" in other people's autos. This crime is a misdemeanor.

Under Vehicle Code 10851- Any person who drives or takes a vehicle not his own, without the consent of the owner and with the intent to either permanently or temporarily deprive the owner of his or her title or possession of the vehicle is guilty of vehicle theft. Auto theft under the provisions of the Vehicle Code 10851 is a felony (Grand Theft Auto). Note: this crime, unlike the other offense, requires the intent to either permanently or temporarily deprive the owner of title or possession of the vehicle.

5.14 Diversion of Construction Funds

Penal Code 484b provides that any person who receives money for construction purposes and willfully fails to apply the funds for the intended purposes is guilty of a felony if the amount misapplied is in excess of $1,000. If the amount misapplied is $1,000 or less, the crime is a misdemeanor.

Penal Code 484c provides that any person who submits a false voucher to obtain construction funds and does not use the funds for the intended purposes is guilty of embezzlement.

5.15 Trade Secrets

Penal Code 499c (b)

Every person is guilty of theft who, with intent to deprive or withhold from the owner thereof control of a trade secret, or with an intent to appropriate a trade secret to his or her own use or to the use of another, does any of the following:

1. steals, takes, carries away, or uses without authorization a trade secret;
2. fraudulently appropriates any article representing a trade secret entrusted to him;
3. having unlawfully obtained access to the article, without authority makes or causes to be made a copy of any article representing a trade secret; or
4. having obtained access to the article through a relationship of trust and confidence, without authority and in breach of the obligations created by such relationship makes or causes to be made, directly from and in the presence of the article, a copy of any article representing a trade secret.

5.16 Receiving Stolen Property (P C 496)

Elements of Receiving Stolen Property

The required elements of receiving stolen property are:

1. a person who **knowingly**
2. buys, receives, conceals or withholds
3. property that has been obtained by theft or extortion.

Discussion

P C 496 provides that any person who knowingly buys or receives any property which has been stolen is guilty of this crime. If a person buys or receives stolen property under such circumstances that he should suspect that the property is stolen, there is an inference that he was aware that it was stolen.

To be convicted of this offense, the property must be stolen property. If the police use its own property or property borrowed from someone as a setup, the accused may be guilty of only an attempt to receive stolen property. This is based on the concept that the property that the accused is receiving is not in fact stolen property.

Receiving stolen property is distinct from the crime of stealing the property. A person cannot be convicted of both stealing and of receiving the same stolen property. In *People v. Stewart* 185 CA 3d 197, the defendant's conviction of receiving stolen property was overturned. The defendant had been convicted of both burglary and receiving stolen property. The court held that a person could not be convicted of both stealing the property and receiving stolen property where the evidence shows that the property received was the same as the property taken in the theft and that a burglar could not be convicted of receiving stolen property from himself. Note: if the burglar or thief disposes of the property and then receives it back,

he/she may be guilty of both theft or burglary and receiving stolen property.

Mere possession of stolen property alone is insufficient to establish the offense of receiving stolen property. A person in the business of buying, dealing with or collecting used property, however, has a duty to conduct an inquiry into the legal right of a seller to sell or deliver the property being offered. Failure to do so under such circumstances that would indicate that the property may be stolen, creates an inference that the person receiving the property knew that it was stolen property.

Possession accompanied by suspicious circumstances may be sufficient to establish the inference that the property was received with knowledge that it was stolen. Factors used to indicate knowledge that the property was stolen include:

1. false statements regarding how the property came into the accused's possession,
2. hiding the property,
3. failure to identify the person from whom the accused received the property,
4. flight from location of the property when the police arrived,
5. attempting to destroy the property,
6. possession of the property with identifying marks removed, and
7. extremely low price on high value items.

In one case, the court held that while the unexplained possession of stolen property, standing alone, is not sufficient to support a conviction for receiving stolen property, it is the circumstances which could lead reasonable persons to believe that the possessor either stole it or received it with the knowledge that it was stolen (*People v. Edwards* 14 CA 3d 57). Possession of recently stolen property raises such a strong inference that only slight additional evidence is needed to support a conviction (*People v. Britz* 17 CA 3d 743).

Possession under this statute is defined as the exercise of dominion and control over the property. It is not necessary that the property be under the immediate control of the accused, as long as he has control of it and knows of its location. The property can be in the possession of more than one person.

A person who receives stolen property is not guilty of being an accomplice to the crime of theft, unless the person makes an arrangement with the thief before the theft is committed. If an arrangement is made between the thief and the receiver prior to the theft, then the thief is an accomplice of the receiving of stolen property and also the receiver is an accomplice to the theft.

5.17 Goods Stolen in Another State

Penal Code 497

Every person who, in another state or country steals or embezzles the property of another, or receives such property knowing it to have been stolen or embezzled, and brings the same into this state, may be convicted and punished in the same manner as if such larceny, or embezzlement, or receiving, had been committed in this state.

5.18 Single or Multiple Thefts

It is sometimes necessary to determine if there is one single theft or separate smaller thefts. The general rule is if there is one general intent to steal and one general plan, it is all one theft (*People v Fleming* 220 C 601). In this case, the values may be added for the purposes of determining if a grand theft has occurred. If the takings do not meet those requirements then each one is considered as a separate crime and may be punished separately.

The taking of several articles at one time normally is considered as one crime. The defendant stole several items of property belonging to different owners. In determining if the accused committed grand theft or several petty thefts, the court instructed the jury that the value of the articles should be aggregated if the defendant had one general overall plan and should be considered separate offenses if the accused had no overall plan to steal them (*People v. Sullivan* 80 CA 3d 16). A series of thefts from one person as a part of one general plan is also considered as one crime.

A mother who obtained monthly welfare checks for a period of six months based on one false representation was guilty of only one theft. An angry employee who sold his employer's goods

during a two-week period and kept the proceeds, was considered as guilty of only one crime since he had only one general intent and general plan.

5.19 Alteration of Serial Numbers (P. C. 537e)

Penal Code 537e Possession of Articles From Which Name Plates Removed-Misdemeanor

(a) Any person who knowingly buys, sells, receives, disposes of, conceals, or has in his possession a radio, piano, phonograph, sewing machine, washing machine, typewriter, adding machine, comptometer, bicycle, a safe or vacuum cleaner, dictaphone, watch, watch movement, watch case, or any mechanical or electrical device, appliance, ... from which the manufacturer's nameplate, serial number or any other distinguishing number or identification mark has been removed, defaced, covered, altered or destroyed, is guilty of a misdemeanor. If the value of any integrated chip from which the nameplate, serial number, or other distinguishing mark is removed, defaced, covered, altered, or destroyed exceeds four hundred ($400), the offense is a felony punishable by imprisonment in the county jail not to exceed one year or in the state prison.

CLASSROOM DISCUSSION QUESTIONS

1. On a rainy day, Jerry goes to the local restaurant for lunch. As he was leaving the restaurant, he picks up what he thinks is his umbrella. The umbrella does not belong to him. What crime, if any, has he committed? Explain your answer.
2. Same as the above facts, however, Jerry knows that the umbrella does not belong to him. What crime, if any, has he committed?
3. Same as number 1, except, Jerry takes the umbrella which he thinks does not belong to him. He, however, actually picked up one that belonged to him that he had left there last week and forgot about it. What crime, if any, has he committed?
4. Judy buys a new car on credit. The seller retains title to the car until the payments are completed. After she had made three payments, she sold the car to Ralph. Can she be convicted of stealing the car?
5. Kathy was a checker at a K-Mart Store in Los Angeles. The defendant, her brother, was observed with a shopping cart containing several items approaching and stopping at her register. Kathy took the items out of the cart and put them on the counter. Next, she placed the items in a shopping bag and handed the bag to her brother. He walked out of the store with the items without paying for them. What crime, if any, has he committed? What crime, if any, has she committed?
6. The victim received a watch as a gift in 1949 from her father shortly before his disappearance. The victim, having no need for the watch, stored it in a chest. The defendant stole the watch from the chest. The watch originally cost $295.00. A similar watch would cost about $500.00 on today's market. Should the defendant be charged with petty theft or grand theft?
7. Explain the differences between theft by trick or device and theft by false pretenses.
8. How does common law theft compare with statutory larceny?
9. Why was real property not subject to common law theft?
10. What are the key distinctions between embezzlement and theft by larceny?

SELF-STUDY QUIZ

True/ False

1. Theft by larceny requires the intent to permanently deprive the owner of the property.
2. Both petty and grand thefts may be felonies.
3. Embezzlement requires that the accused use false pretenses to obtain possession of the property.
4. Real property may be subject to theft by false pretense.
5. California has eliminated most of the fine distinctions and technical niceties that formerly existed between the common law theft crimes.
6. If fruit is picked from a tree, it is then subject to the theft by larceny statutes.
7. For the crime to be theft, it is necessary that the taking be from the immediate physical presence of the owner of the property.

8. The value of the property is determined by the original cost of it.
9. Theft by trick or device is committed when the possession of the property is obtained by fraud.
10. In order to be guilty of theft, a person must steal property that has some value.
11. A pawn shop owner cannot be convicted of receiving stolen property unless he or she knew for certain that the property was stolen.
12. Jerry devises a plan to steal $5.00 per day from his employer. He stole a total of $550 in this manner. He has committed the crime of petty theft only.
13. Caren picks up a package of gum and hides it in her purse. She is stopped prior to leaving the store. She cannot be convicted of theft, since she is still in the store.
14. Stealing from the physical presence of a person is a petty theft.
15. Grand theft may be punished by jail, a fine or by prison term.

Chapter 6

Burglary

We inflict atrocious injuries on the burglars we catch in order to make the rest take effectual precautions against detection. (George Bernard Shaw)

Burglary Related Crimes

1. Burglary (P C 459)
2. Unauthorized Entry (P C 602.5)
3. Burglary By Use of Acetylene Torch or Explosive (P C 464)
4. Possession of Burglary Tools (P C 466)
5. Sale of Burglary Tools (P C 466.1)
6. Forced Entry (P C 603)
7. Vending Machine Theft (P C 466.3)

6.1 Burglary

Penal Code 459 **Acts Constituting Burglary; "Inhabited Defined."**

Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, as defined in Section 21 of the Harbors and Navigation Code, railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, as defined in Section 635 of the Vehicle Code, any house car, as defined in Section 362 of the Vehicle Code, inhabited camper, as defined by Section 243 of the Vehicle Code, vehicle as defined by Vehicle Code when the doors are locked, aircraft as defined by Section 21012 of the Public Utilities Code, mine or any underground portion thereof, with the intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes whether occupied or not. A house, trailer, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises.

Burglary Defined

The entering of a building or place listed in P. C. 459,with the intent to commit grand or petit larceny (theft) or any felony constitutes burglary.

The essence of the crime of burglary is the unlawful entry and the dangers associated with such an entry (*People v. Lamica* 249 CA 2d 640). The crime is completed with the entry (*People v. Clifton* 148 CA 2d 276). Burglary statutes are based on the premise that the intruder may harm the occupants in process of attempting to commit the crime (People v. Lewis 274 CA 2d 912).

An additional purpose of the burglary statutes is the protection of buildings and property, especially residences. At common law, burglary required the breaking and entering of a dwelling house during the time of darkness. California burglary statutes have eliminated the requirements of "breaking" and "entry during the hours of darkness" (*People v. Scofield* 149 CA 3d 536). The statutes have also included structures other than dwellings and vehicles to the places subject to burglary.

To constitute burglary, the entering of the building or vehicle must be with the intent to commit grand or petty theft or any felony (*People v Lamica* 274 CA 2d 640). Burglary is a specific intent crime (*People v. Green* 228 CA 2d 437). The intended offense is separate from the burglary crime (*People v. Garnett* 29 C 622). Accordingly, one entering a building for the purpose of committing a theft therein is guilty of both the crime of burglary and, at least, an attempted theft. In many cases, the crime of burglary is a more serious offense than the crime contemplated after entry. For example, petty theft is a misdemeanor, but entering an inhabited dwelling with the intent to commit a petty theft is first degree burglary (*People v. Wolfe* 257 CA 2d 420).

Elements of Burglary

The elements of statutory burglary in California are:

1. An entry
2. Into a building, structure or vehicle
3. With the intent to commit grand or petty larceny (theft) or a felony

Discussion

The Entry Requirement

There is no requirement that the entry be a forcible entry (*People v. Talbot* 64 C2d 691). The entry may either be "actual" or "constructive." A constructive entry occurs when an agent, confederate, accessory, or aider and abettor enters the structure, instead of the defendant (*People v. Bonilla* 124 CA 212). For example, in one case, the accused was convicted of burglary based on the entry into a railroad car by his confederate. In this case, the confederate passed the stolen hams outside the railroad car to the defendant (*People v. Failla* 64 C 2d 560).

If more than one entry is made in the building, the crime is completed when the first entry is made (*People v. Jones* 225 CA 2d 434). There is also no requirement that the entry be illegal (*People v. Edwards* 22 CA 3d 598 and *People v. Barry* 94 C 481).

A person may be convicted of burglary even though he or she had permission to enter the building from the owner. For example, the entering of a store that is open for business is a sufficient entry provided that at the time of the entry the accused had the intent to commit a crime (*People v. Brittian* 142 C 8). This is based on the concept that any permission to enter is canceled by the criminal intent of the accused.

The accused was invited into a house by the resident and asked to wait for a few moments. The accused instead stole some jewelry and left. The court instructed the jury that the accused could be convicted of burglary if the jury determined that he had the intent to steal at the time he entered the house (*People v. Lowen* 42 P 32).

While an entry, either actual or constructive, is an essential element of the crime, an accused may not be convicted of burglary if the accused has an absolute right to enter the building. Thus, if the accused who leases a building for a legal purpose and later during the period of the lease enters it for the purposes of stealing the fixtures therein, there has been no entry for purposes of the burglary statutes. This is based on the theory that the accused had an unconditional right to enter the building and therefore did not violate any possessory right (*People v. Gauze* 15 C 3d 709).

Entering the building is an essential requirement. The body of the accused, however, does not have to physically enter the structure (*People v. Allison* 200 C 407). Constructive entering is sufficient. For example, using a drill bit to bore a hole into the building has been held to be "an entry" where a portion of the bit entered into the building. In another case, entry was considered complete when the accused used a crowbar to open a window and then reached into the building with a hook and removed an item of personal property (*People v. Pettinger* 94 CA 297). Sending a trained animal into the building to fetch an item of property would, also, be an entry. Reaching an arm through a broken window into a building in order to steal a ham hanging in the building constitutes a sufficient entry. The entry of an agent, accessory, etc. is imputed to the accused (*People v. Walters* 249 CA 2d 547) .

The required entry may be to an interior room of a building. An accused, for example, enters a

building without the necessary intent. After entering the building and finding it empty, he forms the intent to steal and enters another room for purposes of finding something to steal. The entering of the interior room with the intent to steal is sufficient to constitute the crime of burglary. The accused entered one building to facilitate the commission of theft in an adjoining area, the entry was sufficient to constitute burglary (*People v. Garcia* 214 CA 2d 681 Note: reversed on other grounds).

In one recent case, the accused stole an automatic teller machine (ATM) card and attempted to use it to withdraw money from an ATM built into the wall of a bank. He was convicted of burglary. The question on appeal was whether or not the act of inserting a bank card into the ATM was sufficient entry of the building to constitute the crime of burglary. The California Court of Appeals, Second Circuit, in affirming the conviction, held that where the ATMs are firmly affixed to and attached to the inside of a bank building and covered by the bank roofs, they are buildings within the meaning of the burglary statutes. The act of inserting a card into them with the intent to commit a felony is sufficient entry of the building to constitute burglary (*People v. Ravenscroft* 198 CA 3rd 639).

In *People v. Nible* (L.A. Daily Journal, Daily Appellate Reports, April 26, 1988, p. 5135), the accused on appeal contented that he was not guilty of burglary where the evidence established that he had penetrated the window screen but not the window. The court held that the penetration of the screen was a sufficient "entry" to uphold a burglary conviction. The California Court of Appeals, Third Appellate District, stated that:

> Burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation . . . . The laws are designed not to deter trespass . . . so much as to forestall the germination of a situation dangerous to personal safety.

As noted earlier, at common law, the entry was required to be during the hours of darkness. Since a 1982 amendment to the Penal Code, time of entry is immaterial.

The Building

A building, structure or vehicle includes:

a. structure with enclosed walls and a roof,
b. an open pit mine,
c. enclosed telephone booth,
d. railroad cars,
e. aircraft,
f. cargo container of at least 1,000 cubic feet, permanent character, strong enough for repeated use, designed to facilitate the carriage of goods and designed to be easy to fill and empty (P.C. 458),
g. locked vehicle,
h. locked trunk of a locked or unlocked vehicle, and
i. locked or unlocked inhabited camper.

Note: to be a building, the structure must have four walls and a roof. A bin with a roof and three walls was not a building for purposes of this crime (*People v. Gibbons* 206 C 112). A telephone booth with three walls, roof and a folding door on the fourth side is a building for purposes of this statute (*People v. Miller* 95 CA 2d 631).

Required Intent

The intent to commit grand theft, petty theft, or any felony must be a specific intent (*People v. Falla* 64 C 2d 560 and *People v. Earl* 29 CA 3d 894). The accused must have the specific intent at the time of the entry. It does not need be a completed intention. The fact that the intention is frustrated by outside factors or that there is a voluntary cessation of effort after entry does not eliminate an otherwise sufficient intent (*People v. Markus* 82 CA 3d 477).

It is not necessary that the accused intended to commit the crime in the building (*People v. Wright* 206 CA 2d 184). It is sufficient that the intended entry was to facilitate the commission of the crime. For example, the accused has committed the crime of burglary when he enters the house to hide while waiting for an opportunity to steal from people passing by.

If the entry is made without the specific intent, the crime of burglary has not been committed (*People v. Collins* 53 C 185). An accused

who was too intoxicated to form an intent to steal or to commit a felony does not commit the crime of burglary when he enters the building (*People v. Yoder* 100 CA 3d 333).

If the accused makes only one entry into a building with the intent to commit two or more felonies, he or she is guilty of only one burglary since the entry is the primary focus of the offense (*People v. Failla* 64 C 2d 560). Accordingly, an accused may be convicted of only one burglary when he enters the home with the intent to both assault and rob the woman resident (*People v. Clifton* 148 CA 2d 276).

The required intent may be established in court by circumstantial evidence and by reasonable inferences (*People v. Martin* 275 CA 2d 769). For example, if it is proven that an accused entered a home and attempted to rape a woman therein, the court or jury may reasonably infer that the accused intended to commit rape at the time he entered.

Completed Crime

The crime of burglary is completed when the accused enters the building. It does not matter that the accused was unable to complete the offense intended when he entered the building. For example, an accused intending to steal a briefcase breaks open the door of a locked vehicle. If he is stopped after opening the door, but before stealing the briefcase, he has committed the crimes of burglary and attempted theft. In one case, the court held that the crime of burglary was completed when the defendant entered his ex-wife's apartment with the intent to commit an assault and a theft therein. It was immaterial that he did not assault the ex-wife or commit theft after the entry (*People v. Clifton* 148 CA 2d 276).

Locked Vehicle

As noted earlier, automobiles are subject to burglary if they are locked. A trailer was considered as a locked vehicle where the doors were sealed by a locked metal clip (*People v. Massie* 241 CA 2d 812).

In *People v. Woods* (112 CA 3d 226), the court held that a vehicle was not a "locked" vehicle where the doors were locked, but one window was deliberately rolled down approximately five inches. In *People v. Malcolm* (47 CA 3d 217), however, the court held that a vehicle was "locked" where all the doors were locked and the windows rolled up. The wing lock on the left front window, however, was broken. The broken wing lock enabled the accused to push open the wing, and thus open the door. In *People v. Burns* (114 CA 2d 566), a burglary conviction was reversed where no proof was entered that the motor vehicle was locked at the time of the entry.

6.2 Degrees of Burglary

Burglary is classified as either first or second degree (P.C. 460). First degree burglary is every burglary of an inhabited dwelling house or trailer coach as defined by the Vehicle Code, or the inhabited portion of any other building. All other kinds of burglary are of the second degree. An important exception to the classification of burglary is burglary by use of acetylene torch or explosive (P.C. 464). This latter crime has its own punishment schedule.

Note: "inhabited camper," "railroad car," and "vehicle when its doors are locked" are omitted from the list of places subject to first degree burglary. One appellate court held that such an omission raised an inference that the legislature did not intend to include such places in the classification of first degree burglary even if they were inhabited. (*People v. Moreland* 146 Cal. Rptr 118)

Inhabited

For the purposes of the burglary statutes, "inhabited" means that the structure is currently being used for dwelling purposes. Dwelling purposes refers to a place where a person with possessory rights uses the place as sleeping quarters and intends to do so in the future. There can be more than one dwelling under a common roof as in an apartment house or hotel. A furniture store where a night watchman regularly slept was an inhabited dwelling (*People v. Marquez* 143 CA 3d 797).

There is no requirement that the structure be occupied at the time of the entry or attempted entry. A residence is an inhabited dwelling, even if

the residents are away on a vacation. A house that is vacant because the residents have moved is not inhabited (*People v. Stewart* 113 CA 2d 687).

In those cases where the residents are absent, the house is considered as inhabited as long as the residents intend to return. For example, a house was considered as "inhabited" where the sole resident was confined to a hospital for an indefinite time. In this case, the resident still intended to return to the house and presently considered it her home (*People v. Marquez* 143 CA 3d 797).

The entry into an attached garage of an inhabited house was considered in one case as burglary of an inhabited dwelling. The court stated that where the garage is an integral part of the structure, it is simply one room of several. Burglary of a storeroom connected to the home by a breezeway was also considered as burglary of an inhabited dwelling (*People v. Cook* 135 Ca 3d 785).

There is no requirement for the accused to know that the building was "inhabited". In one case, the accused entered a building to steal items therein. He was under the impression that the house was no longer occupied as a residence. He was convicted of first degree burglary. The appellate court stated that the knowledge of the accused as to whether or not the house was inhabited is not an element of first degree burglary (*People v. Guthrie* 144 CA 3d 832).

In a similar case, the defendant broke into the first floor of a three-story warehouse. The accused was unaware that the third floor was being used as a residence by a couple who worked in the building. He appealed his conviction of first degree burglary on the basis that his mistake as to the nature of the building (as an inhabited building) was reasonable. The court upheld the conviction and stated that the belief of the accused as to whether or not the building was inhabited had no bearing on the case (*People v. Parker* 175 CA 3d 818).

A 1987 change to Penal Code 459 provides that a house, trailer, or portion of the building that is currently being used for dwelling purposes is still inhabited if the occupants are not occupying it solely because of a natural or other disaster which caused the occupants to leave the premises.

6.3 Punishment

1. First degree burglary is punished by imprisonment in the state prison.
2. Second degree burglary is punished by imprisonment in the county jail not exceeding one year or in the state prison.
3. Burglary by use of acetylene torch or explosive is punished by imprisonment in the state prison.

Penal Code 1170.95 provides that the total of the terms for consecutive residential burglaries that are not "violent felonies" shall not exceed ten years. Residential burglary is defined as burglary of an inhabited house, trailer coach or the inhabited portion of any other building.

Probation Limitations

P.C. 462 provides that, except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any person convicted of a burglary of an inhabited dwelling house or trailer or the inhabited portion of any other building.

If the court grants probation as an unusual case, the court must specify the reason or reasons for granting probation.

6.4 Burglary By Use of Acetylene Torch or Explosive

Penal Code 464

Any person who, with intent to commit crime, enters either by day or night, any building, whether inhabited or not, and opens or attempts to open any vault, safe, or other secure place by use of acetylene torch or electric arc, burning bar, thermal lance, oxygen lance, or any other similar device capable of burning through steel, concrete, or any other solid substance, or by use of nitroglycerine, dynamite, gunpowder, or any other explosive, is guilty of a felony and, upon conviction, shall be punished by imprisonment in the state prison . . . .

Elements of Burglary

The elements of Burglary by Use of Torch or Explosives:

1. entry to any building,

2. with the specific intent to commit a crime,
3. by use of torch, explosive, etc., and
4. opening or an attempt to open a safe, vault or other secure place.

Discussion

Burglary by use of a torch or by explosives is an aggravated form of burglary, since the using of a torch or explosives increases the danger that someone will be injured or killed. An additional purpose of the increased penalty is to discourage an accused from using a torch or explosives when confronted with a secure depository (*People v. Chastain* 262 CA 2d 433).

A "secure place" is a storage place that has most of the attributes of a safe or vault and is designed for the purposes of keeping valuables. "Safe" and "vault" are used in their ordinary and popular meaning (*People v. Cook* 135 CA 3d 785).

6.5 Unlawful Entry

Penal Code 602.5 **Unauthorized Entry of Dwelling**

Every person other than a public officer or employee acting within the course and scope of his employment in performance of a duty imposed by law, who enters or remains in any noncommercial dwelling house, apartment, or other such place without the consent of the owner, his agent, or the person in lawful possession thereof, is guilty of a misdemeanor.

Discussion

The unauthorized entering or remaining in a noncommercial dwelling is not a necessarily included lessor offense of the crime of burglary. An accused was convicted of unlawful entry under P.C. 602.5 when evidence established that the accused had entered a dwelling to steal, but was too drunk to form the specific intent necessary for a burglary conviction (*People v. Muis* 163 Cal Rptr 791). Unlawful entry under this statute does not apply to nonresidential structures (*In Re D.C.L.* 147 Cal Rptr 54).

6.6 Possession of Burglary Tools

Penal Code 466 **Burglar Tools**

Every person having upon him or her or in his or her possession a picklock, crow, keybit, crowbar, screwdriver, vice grip pliers, water-pump pliers, slidehammer, slim jim, tension bar, lock pick, floor-safe gun, tubular lock pick, floor-safe door puller, master key or other instrument or tool with the intent feloniously to break or enter into any building, railroad car, aircraft, or vessel, trailer coach, or vehicle defined in the Vehicle Code, without being requested to do by some person having the right to open the same, or who, shall make, alter, or repair any instrument or thing, knowing or having reason to believe that it is intended to be used in committing a misdemeanor or felony, is guilty of a misdemeanor. Any of the structures mentioned in Section 459 shall be deemed to be a building within the meaning of this section.

Elements

The elements of Possession of Burglary Tools:

1. The possession of certain tools
2. Required intent:
   a. with the intent to break or enter any building or structure mentioned in P.C. 459 (Burglary);
   b. knowingly make or attempt to make a key or other instrument to fit another building without legal request;
   c. the failure by a maker to ascertain the right to open or make or alter, or repair any instrument or thing; or
   d. knowing or having reason to believe that the tool(s) is (are) intended to be used in committing a misdemeanor or felony.

Discussion

Possession of burglary tools is a criminal offense if one of the four types of intent listed above is present. Subparagraphs a and b require a specific intent, whereas c and d require only a general intent.

6.7 Sale of Burglar Tools

Penal Code 466.1 **Sale of Burglar Tools—Information to Be Retained**

Any person who knowingly and willfully sells or provides a lock pick, a tension bar, a lock pick gun, a tubular lock, or a floor-safe door puller, to another, whether or not for compensation, shall obtain the name, address, telephone number, if

any, date of birth and driver's license number or identification number, if any, of the person to whom the device is sold or provided and the signature of the person to whom the device was sold or provided, shall be set forth on a bill of sale or receipt. A copy of each bill of sale or receipt shall be retained for one year and shall be open for inspection by any peace officer during business hours.

Any person who violates any provision of this section is guilty of a misdemeanor.

6.8 Vending Machine Theft

Penal Code 466.3 **Vending Machine Theft**

(a) Whoever possesses a key, tool, instrument, explosive, or device, or a drawing, print, or mold of a key, tool, instrument, explosive, or device, designed to open, break into, tamper with, or damage a coin-operated machine as defined in subdivision (b), with the intent to commit a theft from such machine, is punishable by imprisonment in the county jail . . . .

(b) As used in this section, the term "coin-operated machine" shall include any automatic vending machine or any part thereof, parking meter, coin telephone, coin laundry machine, coin dry cleaning machine, amusement machine, music machine, vending machine dispensing goods or services, or moneychanger.

6.9 Other Related Crimes

Listed below are related crimes involving the possession, use of, or making of duplicate keys. The below discussed crimes are misdemeanors.

Penal Code 466.6—requires that anyone who makes a motor vehicle key made other than by duplication of an existing key must keep certain records regarding the person who requested the making of the key.

Penal Code 466.7 makes it unlawful to possess a key made other than by duplication with the intent to use it in the commission of an unlawful act.

Penal Code 466.8 requires that anyone who makes a key capable of opening a building by any method involving an onsite inspection of the building must keep certain records regarding the person who requested the making of the key.

Penal Code 469 makes it a crime to duplicate any key to a building or other area owned, operated or controlled by the State of California without proper authorization.

CLASSROOM DISCUSSION QUESTIONS

1. Chandler entered a hotel in the city of Los Angeles for the purposes of obtaining a room for the evening. No one was present at the reception desk. He noticed a valuable watch on the counter. Unobserved, he picked up the watch and walked out of the hotel. Chandler is charged with the crime of burglary. Is he guilty? Explain your answer.
2. The Bradley family moved from their home on the first of the month leaving most of their furniture. The next day, the house was burglarized. The crime was discovered when the family returned to remove their belongings. Was this first or second degree burglary. Explain your answer. (*People v. Cardona* 142 CA 3d 481, 191 Cal Rptr 109).
3. What purposes are served by requiring a vehicle to be "locked" before it is protected by P C 459?
4. When is a building considered "inhabited" under P C 460?
5. At what point is the crime of burglary completed?
6. Which burglaries are classified as first degree ones?
7. If the accused does not know that the house is inhabited, can he still be convicted of first degree burglary? Explain.
8. What are the restrictions on granting of probation for a defendant convicted of burglary?
9. What importance does the fact that the burglary was committed during "day" or "night" time have in burglary statutes?
10. What information is required to be kept by a person who sells a lock pick gun?

SELF STUDY QUIZ

True/False

1. John enters a dwelling with the intent to steal

valuables therein. After entry, he could not find any valuables to steal. He cannot be convicted of burglary under these circumstances.

2. Joe entered a residence to commit the crimes of rape and theft therein. He may be convicted of two burglaries since he entered with the intent to commit two separate crimes in the building.
3. It is not burglary unless the breaking occurred during the hours of darkness.
4. The accused must physically enter the building in order to commit the crime of burglary.
5. The entry of the building under the burglary statute requires a breaking.
6. An automobile is not covered by the statutory burglary laws.
7. The entry into the building must be with the intent to commit a crime, but there is no requirement that the crime be committed in the building.
8. It is not a crime to possess burglary tools unless one plans to use them.
9. Sending a dog into a house to fetch property therein may in some cases be burglary.
10. Burglary of an inhabited dwelling is only a misdemeanor.

Chapter 7

Arson, Vandalism and Disorderly Conduct

Arson, after all, is an artificial crime. Some crimes are crimes in themselves, would be crimes without any law . . . but the burning of things is in itself neither good nor bad. A large number of houses deserve to be burnt. (H.G. Wells, History of Mr. Polly.)

Arson Related Crimes

1. Arson (P C 451)
2. Unlawfully Causing a Fire (P C 452)
3. Possession of Flammable Explosive or Combustible Material or Substance or Device With Intent to Set Fire to or Burn (P C 453)
4. Attempt to Set Fire to, Burn, and, Counsel or Procure the Burning of Structure, Forest Land, or Property (P C 455)

Vandalism and Disorderly Conduct Related Crimes

1. Vandalism (P C 594)
2. Disorderly Conduct (P C 647)
3. Trespassing (P C 602)
4. Unlawful Assembly (P C 407)
5. Public Nuisances (P C 370)
6. Distrubing the Peace (P C 415)

7.1 Arson

Penal Code 450 **Definition of Terms**

In this chapter, the following terms have the following meanings:

(a) "Structure" means any building, or commercial or public tent, bridge, tunnel, or powerplant.

(b) "Forest land" means any brush covered land, cut-over land, forest, grasslands, or woods.

(c) "Property" means real property or personal property, other than a structure or forest land.

(d) "Inhabited" means currently being used for dwelling purposes whether occupied or not. "Inhabited structure" and "inhabited property" do not include the real property on which an inhabited structure or an inhabited property is located.

(e) "Maliciously" imports a wish to vex, defraud, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law.

(f) "Recklessly" means a person is aware of and consciously disregards a substantial and unjustifiable risk that his or her act will set fire to, burn, or cause to burn a structure, forest land, or property. The risk shall be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof by reason of voluntary intoxication also acts recklessly with respect thereto.

Arson Defined

Under early common law, arson was a crime against the home. It consisted of the willful and malicious burning of another person's dwelling and/or surrounding buildings. The burning could

be either day or night, but a burning at night was the more serious crime. Arson was considered as a crime against the security of the home. Arson was a common law felony. Similar to present day arson, the word "malicious" did not require ill will or hate. California, like most other states, has expanded the definition of arson to include the burning of other structures, forest land and other types of property.

Elements of Arson

The elements of arson are:

1. Setting fire to or burns or causes to be burned or who aids, counsels or procures the burning of
2. any structure, forest land or property
3. by the intentional act of the accused

Discussion

For the purposes of arson related crimes, willful means an intentional act. Maliciousness means only that the setting of the fire was intentional and deliberate. A fire is started willful and maliciously when the accused intentionally and deliberately sets fire to the building (*People v. Green* 146 CA 3d 369).

A fire that is started accidentally or unintentionally is not considered as the result of willful and maliciousness conduct. Arson is not established unless it is shown that the fire was of incendiary rather than accidental origin.

The malicious intent of the defendant must be malicious only in the sense that his is a mind set on doing an intentional wrong. In the Green case (cited above), the defendant set fire to his wife's apartment, and the fire spread to the carport and destroyed a car parked in the carport. The defendant contended that he should not be convicted of arson of the car, since he did not intend to burn it. The court held that the fire was set willfully and maliciously, and the fact that some of the results of the fire were unintentional was irrelevant.

In the majority of cases, the willful and malicious intent is established by circumstantial evidence. For example, in a case where the firemen found the windows closed, shades drawn, doors locked, a smell of kerosene, and fire starting in three different rooms, the jury's finding that the fire was intentionally set was upheld on appeal (*People v. Patello* 13 P 2d 1068).

In another case, the court considered the fact that the accused had financial problems, most of his personal effects had been removed from the house shortly before the fire, and the house was over-insured as evidence that the owner of the house had wilfully set fire to the house (*People v. Freeman* 135 CA 2d 11).

In *People v. Nance*, 25 CA 3d 925, the court held that the defense of diminished capacity was not a defense to the charge of arson. In this decision, the court stated that arson does not require a specific mental state as long as the burning involved is intentional. In another case, the police were notified of the accused's plan to burn a building. The police hid nearby until the accused started the fire and then arrested him for arson. The court stated that the actions of the police did not excuse the accused nor did the facts negate the accused's malicious intent (*People v. Greening* 102 C 384).

An accused was found guilty of willfully and maliciously causing a dwelling to burn where he intentionally set fire to a nearby building which spread to the dwelling. His conviction was upheld even though there was evidence that the burning of the dwelling was not intended (*People v. Hiltel* 131 C 577).

Motive

Motive is not an essential element of the offense of arson. The presence of motive may, however, be important in proving the presence of a wrongful intent. Lack of motive may be used by the defendant to dispute the presence of the required intent.

Burning

To constitute a burning, no outbreak of flame is necessary, but some part of the building, etc. must be at least charred. A burning, however slight, is sufficient to meet this requirement. For example, the floor of a building that is charred in a single place is considered as a "burning" (*People v. Haggerty* 46 C 354). Some fibers, however, must be destroyed to constitute a burning. Mere

blacking of the wood was held to be insufficient to establish a burning (*People v. Simpson* 50 C 304).

The accused was convicted of arson of a building made of marble, plaster and concrete. He had contended that this building, a mausoleum, was incapable of burning. The court held that since part of the marble floor was destroyed by "spawling," a conviction of arson was proper. Note: "spawling" is the disintegration of marble by heat. (*People v. Mentzer* 163 CA 3d 482.)

Burning Own Property

A person who burns his/her own property may be convicted of arson under P C 451, if the burning was with the intent to defraud or when it results in injury to property of others. The intent to defraud situation often involves the burning of insured property with the intent to collect an insurance recovery. In cases involving protected forest lands, an individual may, also, be guilty of arson when he or she deliberately burns their own protective forest land.

The restrictions and limitations placed on an owner's right to dispose of his or her own property is a valid exercise of a state's "police power" (*People v. George* 42 CA 2d 568).

Structures, Forest Land and Property

The arson statute covers structures of any type, forest land and any other type of property. The term "property" includes both real and personal property. Apparently, "personal property" does not include intangible personal property. "Intangible personal property" are items like stocks, bonds, deeds, etc.

Inhabited

As discussed later, burning of an inhabited structure is considered as a more serious offense and greater maximum punishment than the burning of an uninhabited one. The increased punishment schedule is based on the theory that there is a greater danger of injury or death when an inhabited structure is burned.

The defendant was convicted of arson of an inhabited structure based on the fact that the apartment that he set fire to had been vacated several days earlier. The court stated that for the purposes of arson, P C 450 defines "inhabited" as "currently being used for dwelling purposes whether occupied or not." Therefore, the legislative intent was to cover structures likely to be inhabited because of the danger to human life. (*People v. Green* 146 C 3d 369). (Note: the term "inhabited" has a slightly different meaning for arson than for burglary.)

7.2 Unlawfully Causing a Fire

Penal Code 452

A person is guilty of unlawfully causing a fire when he recklessly sets fire to or burns or causes to be burned, any structure, forest land or property. [Subparagraphs (a) to (e) of statute omitted]

Discussion

The only difference between P C 451 and 452 is that under P C 451, the fire is the result of a "willful and malicious" act whereas under P C 452, the fire is the result of "recklessness". To be guilty of this offense, the accused must "recklessly" set fire to or burn or cause to be burned any structure, etc. An accused's conduct was not considered as "reckless" when he negligently built a small campfire which was the source of a large fire after an unprecedented wind force developed. To be guilty of this offense, the court ruled that the accused must consciously disregard the risk involved so as to characterize his conduct as reckless (*People v. Budish* 131 CA 3d 1043).

Since this crime is considered as an "unintentional" crime, a person may not be convicted of an attempt to commit this offense (*In re Kent W.* 181 CA 3d 721). The court, in *In re Kent W*, held that since an attempt requires the specific intent to commit the target offense, that it was logically impossible to specifically intend an unintentional result. Accordingly, there could be no such crime as attempting to recklessly start an unlawful fire.

7.3 Possession of Flammable, Explosive or Combustible Material

Penal Code 453

(a) Every person who possesses any flammable, explosive or combustible material or substance, or any device in an arrangement or

preparation, with intent to willfully and maliciously use such material, substance, forest land or property, is punishable by imprisonment in the state prison or in the county jail, not exceeding one year.

(b) Every person who possesses, manufactures or disposes of a firebomb is guilty of a felony.

For purposes of this subdivision, "disposes of" means to give, give away, loan, offer, offer for sale, sell or transfer.

For purposes of this subdivision, a "firebomb" is a breakable container containing a flammable liquid with a flashpoint of 150 degrees Fahrenheit or less, having a wick or similar device capable of being ignited, but no device commercially manufactured primarily for the purpose of illumination shall be a firebomb for the purpose of this subdivision. [Subparagraph (c) which exempts fire departments, military persons and police possessing the above material in the course of their duties is omitted.]

Discussion

In *People v. Diamond* (2 CA 3d 860), the defendant was convicted of the possession of a combustible substance when three firebombs were found in his automobile near a downtown mall during a period of racial unrest.

7.4 Attempted Arson

Penal Code 453

(a) Any person who willfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the burning of any structure, forest land, or who commits any act preliminary thereto, or in furtherance thereof, is punishable by imprisonment in the state prison . . . .

Discussion

The placing or distribution of any flammable, explosive or combustible material or substance, or any device in or about any structure, forest land or property in an arrangement or preparation with intent to eventually willfully and maliciously set fire to or burn same or to procure the setting fire to or burning of the same shall, for the purposes of this act constitute an attempt to burn such structure, forest land or property.

7.5 Psychiatric Examination

Frequently, arson related offenses are committed by persons with emotional disorders. Accordingly, Penal Code 457 permits the court to order a psychiatric examination of anyone convicted of an arson related offense. In addition, Penal Code 457.1 requires that persons convicted of arson or attempted arson may be required by the court to register with the chief of police or sheriff.

7.6 Notice of Release of Arsonist

P C 11150 Requires that prior to the release of a person convicted of arson, the Director of Corrections shall notify in writing the State Fire Marshall and all police departments and the sheriff in the county in which the person was convicted and, if known, the county in which he or she is released to. P C 11151 requires similar notification by the Director of Mental Hygiene within five days of the release from a state mental institution or hospital of a person convicted of arson.

7.7 Vandalism

Penal Code 594 provides that any person is guilty of vandalism who:

1. defaces with paint or any other liquid,
2. damages, or
3. destroys any real or personal property not his own.

The amount of defacement, damage or destruction determines whether or not the crime is a felony or misdemeanor. If the amount of damage is less than $5,000, the offense is a misdemeanor. If the amount is $5,000 or more the offense is a "wobbler."

Penal Code 594.3 provides that any person who knowingly commits any act of vandalism to a church, synagogue, building owned and occupied by a religious education institution, or other place primarily used as a place of worship where religious services are regularly conducted is guilty of vandalism of a church and is punishable by confinement in the county jail or state prison (a wobbler).

Note: Education Code, Section 48905 deals with vandalism of school property. Its provisions are similar to those noted above. In addition,

Education Code, Section 48904 and Civil Code Section 1714.1 impose civil liability on parents or guardians for the vandalism of the child.

7.8 Disorderly Conduct

Penal Code 647 provides, in part, that a person is guilty of a misdemeanor who does one of the below listed acts:

Lewd or Dissolute Conduct — Solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view.

Prostitution — Solicits or who agrees to engage in or who engages in any act of prostitution. For purposes of Penal Code 647, prostitution includes any lewd act between persons for money or other consideration.

Begging — Accosts other persons in any public place or in any place open to the public for the purposes of begging or soliciting alms.

Loitering — Who loiters, prowls or wanders upon the private property of another, at any time, without visible or lawful business with the owner or occupant thereof.

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

Who lodges in any building, structure, vehicle or place, whether public or private, without the permission of the owner or person entitled to the possession or control thereof. (Note: "public place" includes any park, street, or building open to the public, or any public offices.)

"Solicit" means to strongly urge, to entice or lure, especially into evil, attempt to seduce, or to accost for an immoral purpose (P C 648).

7.9 Trespassing

Penal Code 602 provides that a person is guilty of trespassing (misdemeanor) who enters and occupies real property or structures without consent from the owner or person in lawful possession. Transient noncontinuous possession is not considered as occupying (*People v. Catalano* 29 C 3d 1). While mere presence on private property may not be a trespass, the refusing to leave private property not open to the public after being asked to leave by the owner or by a peace officer at the owner's request is a trespass (*People v. Medrano* 78 CA 3d 198).

There is no trespass if the private property is open to the general public, unless the property is being used in a manner not related to the purpose for which it is open to the public (*People v. Lundgren* 189 CA 3d 381).

7.10 Unlawful Assembly

Penal Code 407 provides, in part, that whenever two or more persons assemble together to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly. This is a specific intent crime, since those assembled must intend to commit an unlawful act, or a lawful act in a violent, boisterous or tumultuous manner. Violation of the penal section is a misdemeanor.

7.11 Rout/Riot

Penal Code 404 and 406 deal with riots. Section 406 provides that whenever two or more persons, assembled and acting together, make an attempt to advance toward the commission of an act which would be a riot, if actually committed, that the assembly is a **rout**.

Section 404 provides that any use of force or violence, disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot. The group must be acting together with a common intent. There must be at least threats to use force or violence which is apparently available. In addition, the threats or use of force must actually disturb the peace. Public peace is considered "disturbed" when the actions of the group excite terror, alarm, and consternation in the neighborhood. Note: P C 404.6 prohibits

urging others to riot or to burn or otherwise to destroy property.

7.12 Public Nuisance

P C 370 defines a public nuisance as anything which:

1. is injurious to health,
2. or is indecent,
3. or offensive to the senses,
4. or an obstruction to the free use of property,
   (a) so as to interfere with the comfortable enjoyment of life or property
   (b) by an entire community or neighborhood,
   (c) or by any considerable number of persons,
5. or unlawfully obstructs, the free passage or use, in the customary manner,
   (a) of any navigable lake,
   (b) or river, bay, stream, canal, or basin,
   (c) or any public park, square, street,
   (d) or highway is a public nuisance.

P C 372 states (in part) that every person who maintains or commits any public nuisance or who willfully omits to perform any legal duty relating to the removal of a public nuisance, is guilty of a misdemeanor. A "nuisance" can be an act, condition, thing or person causing trouble, annoyance, or inconvenience. Before prosecution may be had under P C 372, the accused must be given notice to abate the public nuisance and an opportunity to do so.

7.13 Disturbing the Peace

P C 415 defines three types of disturbing the peace crimes. The three are as follows:

1. Unlawfully fighting or challenging another person to fight in a public place.
2. Maliciously and willfully disturbing another person by loud and unreasonable noise.
3. Using offensive words in a public place which are likely to produce an immediate violent reaction.

P C 415.5 is similar to P C 415, except that it applies only to buildings and grounds of any public school, elementary school, community college, state college, etc. Note: P C 415.5 does not apply to any person who is registered as a student of the school where the disturbance took place. The crime of disturbing the peace is a misdemeanor.

CLASSROOM DISCUSSION QUESTIONS

1. Paul starts a fire in his garage in order to destroy his automobile. The fire spreads to his neighbor's house. What crimes can Paul be convicted of?
2. Karl attempts to burn his home in order to collect insurance on it. He is unaware at the time that he started the fire, his insurance policy had expired and the house was uninsured. After he starts the fire, he changes his mind and puts it out. The house suffered only minor damage from the fire. What crimes has Karl committed?
3. What are some of the problems involved in prosecuting public nuisance crimes?
4. What is the difference between a "rout" and a "riot?"
5. Explain the differences between P C 451 and 452.
6. What part does "motive" play in the crime of arson?
7. Why does the court have the authority to order a psychiatric examination of a person convicted of arson?
8. Define "recklessness" for the purposes of P C 452.
9. What constitutes the offense of "trespassing" under P C 602?
10. When is "vandalism" a "wobbler?"

SELF-STUDY QUIZ

True/false

1. The crime of arson is a misdemeanor.
2. Motive is an essential element of arson.
3. To be convicted of arson, the burning must be during the hours of darkness.
4. "Forest land" for the purposes of the arson statutes does not include grasslands.
5. A person may be convicted of an attempt to "unlawfully set a fire" under Penal Code 452.

6. A judge may order the defendant to undergo psychiatric examination if the defendant is convicted of arson.
7. Arson requires that the burning be accomplished with a "malicious and willful" intent.
8. To constitute the crime of arson, there must be some burning or charring of the structure, forest land or property.
9. A person may be convicted of arson if the individual recklessly starts a fire.
10. In order to establish the crime of arson, it must be shown that the fire was of incendiary rather than accidental origin.
11. Unlawfully obstructing a river is not a public nuisance.
12. A rout is an attempted riot.
13. Unlawful assembly is a specific intent crime.
14. To be guilty of trespass, a person must enter and occupy real property or structures.
15. For purposes of disorderly conduct crimes, "solicit" means to strongly urge, to entice or lure, especially into evil, attempt to seduce, or to accost for an immoral purpose.

Chapter 8

Assault/Battery and Deadly Weapons Law

A code of laws is like a vast forest: the more it is divided, the better it is known. (Jeremy Bentham, A General View On a Complete Code of Laws)

Assault/Battery and Deadly Weapons Related Crimes

1. Assault (P C 240)
2. Battery (P C 242)
3. Assault Against a Peace Officer (P C 241)
4. Sexual Battery (P C 243.4)
5. Assault With Deadly Weapon (P C 245)
6. Assault With Intent to Commit Mayhem, Rape, Sodomy, Oral Copulation (P C 220)
7. Motor Vehcile Assaults (P C 417.3)
8. Throwing Acid With Intent to Disfigure (P C 244)
9. Mayhem (P C 203)
10. Aggravated Mayhem (P C 205)
11. Spousal or Cohabitant Battery (P C 273.5)
12. Child Abuse and Neglect (P C 270 & 273a)
13. Dangerous Weapons' Control Law (P C 12000)
14. Discharge of Firearms at Inhabited Dwelling or Vehicle (P C 246)
15. Drawing, Exhibition or Using A Firearm Or Deadly Weapon (P C 417 (a)(1))
16. Exhibiting Firearm in Presence of Peace Officer (P C 417b)
17. Shooting at Aircraft (P C 247)
18. Carrying Switchblade Knife (P C 653k)
19. Unlawful Possession of Concealed Weapon (P C 12001)
20. Possession of Sawed-off Shotgun (P C 12020)

8.1 Definition of Assault and Battery

An assault is an attempt to inflict violent injury upon another person by some form of contact. If the violent injury is actually inflicted or contact is made upon the person of another, then the crime is a battery. An assault is an attempt to commit a battery. Accordingly, one may be convicted of an assault even if the evidence establishes that a battery was committed (*People v. Whalen* 124 CA 2d 713).

8.2 Assault

Penal Code 240 **Assault-Defined**

An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.

Elements

The elements of the crime of assault are:

1. an unlawful attempt
2. with the (apparent) present ability
3. to commit an injury to the person of another.

8.3 Battery

Penal Code 242 **Battery-Defined**

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

Elements

The Elements of the crime of battery are:

1. The willful and unlawful
2. use of force or violence
3. against the person of another.

8.4 Discussion of Assault and Battery Crimes

To constitute an assault, the attempt to commit a violent injury must be unlawful. For example, an attempt to commit a violent injury in a prize fight or in self-defense is not normally unlawful and thus, not an assault. It is also not an assault if the act is made with the consent of the victim (*People v. Gordon* 70 C 467).

Required Intent

To constitute the offense of an assault under California statutes, there must be an intent to inflict violent injury against another, and a direct act toward carrying out that intent. Accordingly, an individual cannot "accidentally" commit an assault. Reckless conduct, but without the intent to commit violent injury, on the part of an accused is not an assault (*People v. Barnes* 101 CA 3d 341). In that case, the court held that the intent necessary to commit an assault is the intent to commit a battery. The intent to commit a battery, however, may be implied from the act. The general rule is that it is enough that the act be intentional and unlawful. There is no requirement to prove an intent to injure.

Present Ability

The direct act is, also, dependent on the present ability of the offender to carry out the intended injury. If the individual does not have the present ability to commit a violent injury, then there is no assault. The belief of the victim as to the ability of the defendant to commit the assault is immaterial (*People v. Mosqueda* 5 CA 3d 540).

Pointing an unloaded gun at a person in a threatening manner is not an assault under California law since there is no present ability to commit a battery. (Note: this may be a violation of P C 417, threatening with a weapon.)

In *People v. Ranson* (40 CA 3d 317), the accused pointed a loaded weapon at the victim. The top cartridge was improperly loaded causing the weapon to jam. The court held that the defendant had "present ability" to commit a violent injury since he could have quickly cleared the jam and fired the weapon. In a similar case, the present ability was present where an automatic weapon without a round in the firing chamber, but with a loaded magazine, was pointed at the victim.

Violent Injury

The phrase "violent injury" is misleading. For purposes of the assault and battery crimes, "violent injury" has a special meaning. It is not the same as "bodily harm." Actual bodily harm is not required. The term "violent injury" includes any wrongful act committed by means of physical force against the person of another. An offensive touching is sufficient. The "violent injury" referred to may be only to the dignity of the person. The kind of physical force used is immaterial. The act of spitting at another or attempting to touch someone in an offensive manner is considered sufficient.

In one case, a conviction of battery was upheld on evidence that the accused pushed on the door of an office to prevent the victim from closing the door. The court stated that the closing of the door while it was touching the "victim" could be deemed an offensive touching (*People v. Puckett* 44 CA 3d 607).

It is not important that the victim "fear" the violent injury. If for example, you were to take a swing at close range with your fist at a heavy weight boxing champion, that conduct would constitute an assault. It does not matter that the boxer did not fear your assault.

Battery on Peace Officers

It is a felony (wobbler) to commit a battery:

1. on the person of:
   a. a peace officer,
   b. firefighter,
   c. an emergency medical person,
   d. a custodial officer,

e. a process server, and
f. operator or passenger of transportation for hire vehicle. (PC 243.3)

2. when the victim is engaged in the performance of his/her official duties; and
3. the offender knows or should reasonably know that the victim is one of the above persons.

8.5 Attempted Assault

As noted earlier, an assault is an attempted battery. An attempted assault, however, is not a crime (*In re James* 9 CA 3d 517). For example, threats of injury without the present ability to commit a battery is not an assault — nor is the leering at a woman.

8.6 Simple and Felonious Assaults

Simple Assault

Simple assault is the popular term used to denote a misdemeanor assault (*People v. Egan* 91 CA 44). To constitute a simple assault, there must be an ability and an attempt to commit the offense. Basically, it is an assault without any aggravating factors such as a completed battery or assault with a dangerous weapon. It is also a lessor included offense to other types of assault. For example, if the accused is tried for assault with the intent to commit rape and the State proves an assault but cannot establish the intent to commit the rape, the accused may be convicted of at least simple assault.

Felonious Assault

Felonious assault describes those assaults that are committed with the intent to commit a felony. For example, some of the more common felonious assaults are:

1. assault with a deadly weapon;
2. battery with serious bodily injury;
3. sexual battery;
4. assault with intent to commit mayhem, rape, sodomy or oral copulation; and
5. assault on a peace officer in the performance of duty;

8.7 Motor Vehicle Assaults

Penal Code 417.3 **Drawing or Exhibiting Firearm to Person in Motor Vehicle**

Every person who, except in self-defense, in the presence of any other person who is an occupant of a motor vehicle proceeding on a public street or highway, draws or exhibits any firearm, whether loaded or unloaded, in a threatening manner against another person in such a way as to cause a reasonable person apprehension or fear bodily harm is guilty of a felony.

Nothing in this statute shall preclude or prohibit prosecution under any other statute.

Discussion

P C 417.3 was enacted by the Legislature in 1987 as a direct result of the "freeway" shootings in Southern California, which later spread to other parts of the State. It is assumed that the phrase "proceeding on a public street or highway" includes those situations where the motor vehicles are stopped in traffic because of traffic lights or traffic problems. Note: the offense may be committed with either a "loaded" or "unloaded" weapon.

P C 12034 makes it a misdemeanor to discharge a firearm from a motor vehicle. If the weapon is discharged at another person, the crime is a felony. Note: P C 246.1, also, provides that any person who maliciously and willfully discharges a firearm at an inhabited dwelling, house, occupied motor vehicle or inhabited housecar is guilty of a felony (wobbler).

8.8 Assau[illegible] h Deadly Weapon

Penal Code 24.

(1) Every p[illegible]son who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any force likely to produce great bodily injury is punishable by imprisonment in the state prison ... or in a county jail not exceeding one year, or by fine ... or by both such fine and imprisonment.

(2) Every person who commits an assault upon the person of another with a firearm is punishable by imprisonment in the state prison ... or in a county jail ... or by both a fine and ... imprisonment.

Elements

The elements of an assault with a deadly weapon are:

1. An unlawful attempt to commit a violent injury
2. Upon the person of another
3. With the present ability
4. Using a deadly weapon or a force likely to produce great bodily injury.

Discussion

There are two different crimes. The first involves the use of a deadly weapon and the second is the use of force (with or without a weapon) in a means likely to produce great bodily injury.

A deadly weapon can be any object capable of causing death or great bodily injury from the manner in which it is used. For example, hitting the person over the head with an unloaded pistol could cause great bodily injury, and therefore, is a deadly weapon, whereas the pointing of an unloaded rifle at a person would not. To be guilty of this offense, it is not necessary for an actual injury to result from the assault.

To determine if the weapon used is a deadly weapon, the nature of the weapon, the manner of its use, the location of the person at which the weapon was directed and the injury, if any, inflicted will be considered.

Any physical force that is capable of producing great bodily injury is sufficient for purposes of the deadly force requirement. If the victim is injured and no weapon is found, the nature of the victim's injury may justify an inference that a dangerous weapon was used.

This offense is not a special intent crime. For example, one accused was convicted of an assault with a deadly weapon for pointing a loaded pistol at the victim. There is no requirement to establish that the accused intended to use the weapon. Also,the firing of a pistol in the direction of the victim without an intent to hit the victim, but to only "scare him" is an assault with a deadly weapon (*People v. McCoy* 25 CA 2d 518).

8.9 Assault With the Intent to Commit Mayhem, Rape, Sodomy, or Oral Copulation

Penal Code 220

Every person who assaults another with intent to commit mayhem, rape, sodomy, oral copulation, or any violation of Section 264.1, 288 or 289 is punishable by imprisonment in the state prison. [Note: sections 264.1, 288 and 289 pertain to rape and other sexual offenses.]

Elements

The elements of the crime of felonious assault are:

1. An unlawful attempt to commit a violent injury upon the person of another
2. with the present ability
3. with the specific intent to commit mayhem, rape, sodomy, oral copulation or any of the sexual offenses listed in Sections 264.1, 288 or 289 of the Penal Code.

8.10 Mayhem

Penal Code 203 **Mayhem Defined**

Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem.

Penal Code 205 **Aggravated Mayhem**

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

Elements

The elements of mayhem are:

1. An unlawful battery,
2. maliciously inflicting or attempting to inflict violent injury, and
3. one or more described injuries as a result of above action.

Discussion

Mayhem is a form of aggravated battery (*People v. DeFoor* 100 C 150). Unlike assault with the

intent to commit mayhem, there is no requirement of a specific intent to inflict the resulting injury. For example, one defendant was convicted of mayhem when he hit the victim in the head, breaking his glasses and destroying the sight in one eye. No evidence, however, was presented regarding an intent to destroy the eyesight (*People v. Wright* 93 C 564 and *People v. Vigil* 242 CA 2d 862).

The nature of the injuries involved in mayhem convictions include:

1. biting off the nose, or portion thereof,
2. cutting off a piece of an ear or a portion of a lip,
3. rendering an eye useless for practical purposes,
4. disabling the tongue by biting it, and
5. biting through the lip ("slit").

Aggravated mayhem was created by the legislature in 1987 for punishing those who permanently disable or disfigure victims. Offenders convicted of this offense may be sentenced to life imprisonment.

8.11 Spousal or Cohabitant Battery

Penal Code 273.5 **Felony to Inflict Corporal Injury on Spouse or Cohabitant**

(a) Any person who willfully inflicts upon his or her spouse, or any person who willfully inflicts upon any person of the opposite sex with whom he or she is cohabiting, or any person who willfully inflicts upon any person who is the mother or father or his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony....

(b) Holding oneself out to be the husband or wife of the person with whom one is cohabiting is not necessary to constitute cohabitation as the term is used in this section.

(c) As used in this section, "traumatic condition" means a condition of the body, such as a wound or external or internal injury, whether of a minor or serious nature, caused by a physical force.

[Penal Code 12028.5 permits law enforcement personnel to take possession of any firearms at the scene of a domestic violence incident.]

[The Domestic Violence Prevention Act (Code of Civil Procedure, Sections 540-533) allows any family member who can show that he or she has been abused in the past by a spouse or other member of the household to obtain a temporary restraining order (TRO) to prevent further violence. Violation of a TRO is a misdemeanor under P C 273.6.]

8.12 Child, Spouse, or Parent Abuse or Neglect

Child Abuse

Penal Code 273a(1) makes it a felony (wobbler) to willfully abuse a child under circumstances likely to produce great bodily harm or death. The types of abuse covered by this section include:

1. Willfully causing or permitting the child to suffer unjustifiable physical pain or mental suffering.
2. Having custody of the child, willfully permitting the child to be placed in a situation that endangers the person or health of the child.
3. Having custody of the child, willfully causes or permits the child to be injured.

P C 273a(2) makes it a misdemeanor in the above cases, if the circumstances or conditions are other than those likely to produce great bodily harm or death.

Child Abuse Reporting

Penal Code 11166 provides that:

1. any child care custodial,
2. medical practitioner,
3. non-medical practitioner, or
4. employee of one of the above who has knowledge or reasonably suspects that a child is a victim of child abuse shall:

a. immediately report, by telephone, the abuse to a child protection agency, and

b. follow-up with a written report within 36 hours.

Note: the above reporting requirement does not include child abuse by other than physical means. For example it does not include mental abuse or endangerment of emotional well being.

Child Neglect

Penal Code 270 provides for punishment of parents and guardians of any child who fail without a lawful excuse to furnish the necessary food, clothing and shelter for his or her child. That section, also, provides punishment for the abandonment or desertion of a child by a parent or a guardian. Note: that criminal conduct is present only when there is "no lawful excuse" for the failure to provide the necessary care. The inability to provide the necessary care is, in most cases, a defense to child abuse.

Other penal statutes involving neglect or abandonment of child are:

1. P C 270f provides for the reporting and investigation of failure to support a minor child.
2. P C 270.5 makes it a misdemeanor to refuse to accept your child in your home without just cause.
3. P C 272 makes it a crime to contribute to the delinquency of a minor.
4. P C 273 makes it a misdemeanor to pay money or give any thing of value to a parent for the adoption of a child. (Note: medical, hospital or birth related expenses may be paid by the adopting parent.)

Neglect of Spouse

P C 270a makes it a misdemeanor for an individual who has sufficient ability to provide for his or her spouse's support to fail to provide the necessary support. An exception to the obligation to support exists in those cases where the conduct of the other spouse is such that the individual was justified in abandoning such spouse.

Neglect of Parent

Civil Code 206 establishes a reciprocal duty of support for parent and child. Accordingly, the parent or child has a duty to support the other if the other is unable to maintain himself or herself. P C 207c provides that the failure of an adult child to support an indigent parent is a misdemeanor.

8.13 Dangerous Weapons' Control Law

Penal Code 12001 **Firearms Defined**

(a) As used in this chapter, the terms "pistol," "revolver," and "firearms capable of being concealed upon the person" shall apply to and include any device, designed to be used as a weapon, from which is expelled a projectile by force of any explosion, or other form of combustion, and which has a barrel less than 16 inches in length. These terms also include any device which has a barrel 16 inches or more in length which is designed to be interchanged with a barrel less than 16 inches in length.

(b) ... the terms "pistol," "revolver," and "firearm capable of being concealed upon the person" include the frame or receiver of any such weapon. [Subsection (c) omitted.]

Penal Code 12001.5 **Sawed-Off Shotguns Not Authorized**

... nothing shall be construed as authorizing the manufacture, importation into the state, keeping for sale, or giving, lending, or possession of any sawed-off shotgun, as defined in Section 12020.

Penal Code 12020 **Manufacture, Importation, Sale, Possession or Carrying Concealed Weapons**

[This section makes it a felony (wobbler) to manufacture, import, sale, possess or carry a concealed or disguised firearm or other deadly weapon. A 1987 modification to the section included "camouflaging firearm containers" within the prohibition. Concealed weapons include "cane guns," "wallet guns," "sawed-off shotgun," "flechette darts," and "ballistic knives."]

Penal Code 417 **Threatening With Weapon**

(a)(1) Every person who, except in self-defense, in the presence of any other person, draws or exhibits any deadly weapon whatsoever, other than a firearm, in a rude, angry or threatening manner, or who in any manner, unlawfully uses the same in any fight or quarrel is guilty of a misdemeanor.

(a)(2) Every person who, except in self-defense, in the presence of any other person, draws or exhibits any firearm, whether loaded or

unloaded, in a rude, angry, or who in any manner, unlawfully uses the same in any fight or quarrel is guilty of a misdemeanor ...

[Subparagraph (b) makes it a felony or misdemeanor to draw, exhibit, or use a firearm in the immediate presence of a peace officer.]

Penal Code 417.1 **Threatening Reserve Peace Officer With Weapon**

[This section makes it a felony or misdemeanor to draw, etc., against any person designated as a reserve or auxiliary sheriff or city police officer.]

[Note Penal Code 417.3 regarding threatening and assaulting motorists with a firearm is discussed earlier in this chapter.]

Penal Code 417.8 **Exhibiting Weapon at Peace Officer**

Every person who draws or exhibits any firearm, whether loaded or unloaded, or other deadly weapon, with the intent to resist or prevent the arrest or detention of himself or another by a peace officer shall be imprisoned in the state prison ... [felony].

Penal Code 246 **Firearms, Discharge of, at Inhabited Dwelling or Vehicle**

[This section makes it a felony or misdemeanor to maliciously and willfully discharge a firearm at an inhabited dwelling, occupied building, occupied motor vehicle, occupied aircraft, inhabited housecar or inhabited camper.]

Penal Code 653K **Switchblade Knives**

[This section makes it a misdemeanor to have a switchblade knife in the passenger compartment of a vehicle, including the glove compartment. "Switchblade" is defined as a knife having the appearance of a pocket knife, and shall include a springblade knife, snapblade knife, gravity knife, or any other similar type knife, the blade or blades are two or more inches long and which can be released by a flick of a button, pressure on the handle, flip of the wrist or other mechanical device.]

Penal Code 12002 **Law Enforcement Equipment Exempt**

[This section permits peace officers to carry wooden clubs, baton or other authorized equipment. Certified uniformed security guards engaged in any lawful business, also, may carry wooden clubs or baton for purposes of protecting and preserving property or life within the scope of his or her employment.]

Penal Code 12020 **Manufacture, Sale, Possession, Etc., of Certain Weapons**

[This section makes the manufacture, sale, possession, etc. of the below weapons a felony or misdemeanor:

1. cane or wallet gun;
2. any firearm which is not immediately recognizable as a firearm;
3. any ammunition which contains or consists of any flechette dart;
4. any bullet containing or carrying an explosive agent;
5. any ballistic knife;
6. any instrument or weapon of the kind commonly known as a blackjack, slungshot, billy, nunchaku, sandclub, sandbag, sawed-off shotgun;
7. metal knuckles;
8. who carries concealed on his person any explosive substance, any dirk, or dagger.]

Penal Code 12020.5 **Advertising Sale of Weapons**

[This section makes it unlawful for any person to advertise the sale of any prohibited weapon.]

Penal Code 12021 **Convicts, Persons Convicted of Offenses Involving Violent Use of Firearms, and Addicts Prohibited From Possessing Firearms**

[This section makes it unlawful for any person who has previously been convicted of a felony under the laws of any state or the federal government to possess any firearm. Note: prohibition under this section, does not apply to those convicted of a felony under federal law unless the offense is similar to a felony in the State of California or the accused served at least 30 days in a federal correctional facility or received a fine of more than $1,000.00.]

Penal Code 12021.1 **Persons Previously Convicted of Violent Offense Prohibited From Possessing Firearms**

[This section makes it a felony or misdemeanor for persons previously convicted of a violent offense (26 violent offenses listed in the section) to possess any firearm.]

Penal Code 148 **Resisting or Obstructing Public Officer... Removal of Officer's Firearm**

[This section makes it a felony for any person to remove or take a firearm from the person of, or immediate presence, of a public officer, during the commission of any offense. Any attempt to remove or take a firearm from a public officer is a misdemeanor. Taking of a weapon other than a firearm from a public officer is also a misdemeanor.]

Penal Code 12025 **Unlawful to Carry Concealed Firearms Without License**

[This section makes it a misdemeanor (or felony with a prior conviction of carrying a concealed weapon) to carry a concealed weapon without a license.]

Penal Code 12026 **Possession at Residence or Place of Business**

[This section permits an adult to purchase and to possess at his or her residence or place of business a firearm without permit or license.]

Penal Code 12026.1 **Transportation in Trunk or Locked Container**

[This section makes it legal for an adult to carry a concealed handgun within the locked trunk or a motor vehicle, or in a locked container other than the glove compartment. The handgun may be carried to and from the vehicle while concealed within the locked container.]

Penal Code 12031 **Loaded Firearms—Carrying in Public Place or in Vehicle**

[The section prohibits the carrying of a loaded firearm in public places or in a vehicle.]

12022.5 **Additional Punishment for Use of Firearm**

[This section provides for an additional term of imprisonment for using a firearm in the commission of a felony. Note: this is a sentence enhancement, and therefore must be alleged in the complaint, indictment or information and proved if not admitted by the accused.]

Penal Code 12035 **Criminal Storage of a Firearm**

Any person who keeps any loaded firearm within any premises which is under his or her custody of control where a child under the age of 14 years may gain access to the weapon is guilty of PC 12035.

CLASSROOM DISCUSSION QUESTIONS

1. Explain the differences between an assault and a battery.
2. What is meant by the term "apparent present ability?"
3. What constitutes a "violent injury" for purposes of the assault and battery crimes?
4. Define "offensive touching."
5. What is the gist of the crime of mayhem?
6. Define a "dangerous weapon."
7. Under what circumstances is "consent" a defense to battery?
8. Distinguish between the types of intent required to establish "simple assault" and assault with an intent to commit mayhem.
9. Why do the statutes allow an adult to possess a firearm without permit in his or her residence?

SELF STUDY QUESTIONS

True/False

1. An assault is an attempt to inflict violent injury upon another person by some form of contact.
2. An assault is an attempt to commit a battery.
3. To be an assault, the attempt to commit a violent injury must be unlawful.
4. Consent is a defense to battery.
5. Pointing an unloaded weapon at a person is not an assault.
6. Violent injury has a special meaning in assault and battery cases.
7. Simple assault is normally used to denote a felony assault.
8. A deadly weapon can be any object capable of causing death or great bodily injury from the manner in which it is used.
9. Assault with a deadly weapon is a specific intent crime.
10. Battery is a general intent crime.
11. Mayhem is a form of aggravated battery.

12. To be mayhem, the injury must disfigure the victim.
13. The Dangerous Weapons Control Law applies only to persons using illegal weapons.
14. Threatening a person with an unloaded weapon is not a crime in California.
15. It is a misdemeanor to willfully discharge a firearm at an inhabited dwelling.

Chapter 9

Homicide

Truth will come to light; murder cannot be hid long. (Shakespeare, Merchant of Venice)

Homicide Related Crimes

1. Murder in the first degree
2. Murder in the second degree
3. Voluntary Manslaughter
4. Involuntary Manslaughter
5. Aiding Another to Commit Suicide

9.1 Homicide Defined

Homicide is the killing of a human being by another human. Not all homicides are crimes. For example, excusable homicides and justifiable homicides are not crimes. These will be discussed later in this chapter. Criminal homicides are those homicides that are crimes, mainly murder and manslaughter.

9.2 Criminal Homicides

Criminal homicides are classified as:

1. Murder
   a. First degree murder
   b. Second degree murder
2. Manslaughter
   a. Voluntary
   b. Involuntary
   c. Vehicular

The circumstances surrounding the killing and the mental state of the actor determines in most cases the type of criminal homicide involved (*People v. Mar Gin Suie* 11 CA 42). All criminal homicides are considered "mala in se" (evil in itself) crimes (*People v. Herbert* 6 C 2d 541).

Corpus Delicti

The literal meaning of the term "corpus delicti" is "body of the crime." In criminal homicide, the corpus delicti is the death of a human being under criminal circumstances. "Corpus delicti" is basically the required elements of a particular crime.

The elements of criminal homicide are:

1. A criminal activity (either act or omission)
2. Resulting in the killing of another human being.

The Killing of A Live Person

The above elements include the requirement that the human being was "alive" at the time of the act (*People v. Smith* 215 C 749). A person, however, who has suffered a mortal wound and will die shortly, may still be the victim of a criminal homicide by the infliction of a new injury that hastens his death. For example,if the deceased attempts to kill himself and inflicts grave injuries on himself, the act of another in putting the deceased out of his misery is considered a criminal homicide. (*People v. Lewis* 124 C 551).

Whether the killing of a fetus in a woman's body is a homicide depends on the viability of the fetus. A fetus is "viable" if it is capable of surviving the trauma of birth and living outside of the womb. It does not matter if the birth is assisted by artificial medical treatment or that the fetus must

be sustained on machines; as long as it is capable of existing independently of the mother (*People v. Apodaca* 76 CA 3d 479). The killing of viable fetus is not criminal homicide if an abortion is conducted under the Therapeutic Abortion Act or is required for the mother's safety. In most cases, the fetus is considered viable during the third trisemester (final three months) of the pregnancy. Note: there is no statutory crime of manslaughter of a fetus in California (*People v. Apodaca,* 76 CA3d 479).

Time Requirement

At common law, the death must occur within one year and a day after the cause of the death. This has been modified by P C 194 which requires that the death occur within three years and one day after the cause. In those cases where there is a delay between the act or omission causing the death and the death, the date of the act, not the date of death, is used for legal purposes. For example, in the case of *People v. Gill* (6 C 63), the death occurred after the enactment of a new statute on criminal homicide, but the act causing the death was prior to the new law. The court held that since it was the date of the act, not date of death that controlled, the new law did not apply.

Brain Death

Inflicting an injury that would otherwise be a fatal injury is not a criminal homicide if the victim is already "brain dead" (*People v. Lewis* 124 C 551). In California, the brain death concept is used as the definition of death. Health and Safety Code, Section 7180, describes death as the "the total and irreversible cessation of brain functions." Accordingly, once the determination of brain death has been made, the person is no longer alive, even if the body is still breathing.

Proximate Cause

Criminal homicide must be the result of an affirmative act, an omission to act, or criminal negligence. The act causing the death, however, need not be the only cause of death (*People v. Fowler* 178 C 657 and *People v. Lewis* 124 C 551).

The death must be the proximate result of a human act. It need not, however, be the direct result. Proximate cause means that the death was a natural and probable consequence of the act. The test is "if the original act had not occurred, would the victim have died?" For example, if the victim is shot by the accused resulting in a non-fatal wound, but the victim dies on the operating table as the result of shock, the shooting is the "proximate cause" of the death (*People v. Freudenberg* 121 CA 2d 564). In another case, *People v. Moan* (65 C 532), the victim being quite ill suffered an injury which accelerated his death. The injury was considered as the "proximate cause" of his death.

9.3 Murder

Penal Code 187

(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

Penal Code 188 **Express and Implied Malice — No Other Mental State Needed to Establish Malice Aforethought**

Such malice may be "expressed" or "implied." It is expressed when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an "abandoned and malignant heart."

When it is shown that the killing resulted from the intentional doing of an act with expressed or implied malice as defined above, no other mental state need be shown to establish malice aforethought.... [See: People v. Semone 140 CA 318].

Penal Code 189 **Murder of First or Second Degree**

All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree. [Section 288 concerns lewd acts on a child under the age of 14.]

As used in this section, "destructive device" shall mean any destructive device as defined in Section 12301, and "explosive" shall mean any explosive as defined in Section 12000 of the Health and Safety Code. To prove the killing was "deliberate and premeditated," it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.

Malice Aforethought

Malice aforethought is an essential element of the crime of murder (*People v. Holt* 25 C 2d 59). The difference between murder and manslaughter is the presence or absence of "malice aforethought." The malice may be either expressed or implied. Except for those cases involving implied malice, there must either be an intent to kill or an intent to commit acts likely to kill with a conscious disregard for human life (*People v. Washington* 62 C 2d 777).

For express malice, all that is required is the intent to kill. It does not require any ill will or hatred toward the victim (*People v. Bender* 27 C 2d 164). The intent to kill may be formed at anytime prior to or at the time of the act. Accordingly, the intent to kill may be formed at the time that the death-causing act is administered (*People v. Jamarillo* 57 C 111).

Transferred Intent

Under the "transferred intent" doctrine, if the accused intends to kill one person, but in attempting to do so kills another, the intent to kill is transferred to the actual victim. Accordingly, the accused may be convicted of murder of the other person (*People v. Henderson* 34 C 2d 340). In one case, the accused shot at his wife, missed her and killed a bystander. He was guilty of assault with the intent to murder (on the wife) and murder of the other person (*People v. Brannon* 70 C 225).

Implied malice occurs when:

1. no considerable provocation is present,
2. when the circumstances indicate an abandoned and malignant heart, or
3. the killing resulted from the intentional doing of an act likely to cause death or serious bodily injury.

Malice aforethought actually refers to the state of mind of the accused. It manifests itself in one of the following situations:

1. The result of an act done with the specific intent to kill (expressed malice).
2. The result of an act done with the intent to produce serious bodily harm (expressed malice).
3. The result of an act done during the perpetration of or the attempt to commit one of the felonies listed in P C 188 (implied malice). (See discussion of felony-murder rule later in this chapter.)
4. The result of an act done in conscious disregard of the consequences, where death or serious injury is likely to occur, and which indicates an "abandoned and malignant heart" such as the tossing of a fire bomb into a crowd (implied malice).
5. The result of an act of resisting a lawful arrest and done in a manner that demonstrates a conscious disregard for human life (implied malice).

9.4 Felony-Murder Rule

At common law, under the felony-murder rule, a murder committed during the perpetration of or an attempt to commit a serious felony was considered as premeditated murder. In California, the rule is incorporated into P C 189. Accordingly, murders committed during the perpetration of or an attempt to commit one of the listed felonies is first degree murder. Note: for the felony-murder rule to apply, there must be a murder, not merely a homicide (*People v. Coefield* 37 C2 865).

The effect of the felony-murder rule is that it is a substitute for "malice aforethought" in homicides when there is a direct causal connection between the commission or attempted commission of a listed felony and the death (*People v. Ireland* 70 C 2d 522).

Specific intent required for murder in the first degree is still required, but under the felony-murder rule it is a transferred intent. Accordingly, the accused had a specific intent to commit a felony and that intent is transferred to the killing. (*People v. Dillon* 34 C 3d 441).

A criminal is accountable for all killings committed by him/her and his/her associates in the course of the felonious conduct. This liability is not limited to foreseeable deaths. It also includes accidental deaths. For example, in one case the accused, intending to commit arson, sets fire to a building which he thought was unoccupied. During the fire, a person sleeping in the building was killed. The accused was convicted of first degree murder under the felony-murder rule (*People v. Milton* 145 C 169).

The felony-murder rule contained in the penal code requires that the "killing" occur in the perpetration of one of the listed felonies. A coincidental death is not a "killing" within the meaning of the statute (*People v. Gunnerson* 74 CA 3d 370). The death, however, need not be a direct cause of the felony. A concurrent cause is sufficient. A killing to escape the scene of a felony or to prevent discovery or apprehension is a killing within the meaning of the felony-murder rule (*People v. Rye* C 2d 688).

The felony-murder rule does not apply to crimes not listed. There is also a corresponding misdemeanor-manslaughter rule. Murder committed during the perpetration of or an attempt to commit a felony not listed, or a misdemeanor may be second degree murder or manslaughter.

If two or more persons conspire to commit one of the felonies listed in P C 189, and during the commission of the felony a murder is committed, then each may be tried for the murder as if each had conspired to commit the murder.

In one case, the defendants had conspired to take money from a victim. One of the defendants struck the victim in the head causing his death. The other defendants stated that they had conspired to roll a drunk, and that striking the victim was not part of the plan. The court instructed the jury that the degree of murder depended on whether the defendants conspired to rob the victim (murder in the first degree) or merely "drunk rolling" (murder in the second degree) (*People v. Bauman* 39 CA 2d 587).

9.5 Multiplicity

The general rule is that each victim is considered a separate crime. Accordingly, if an individual causes the death of five people by a single criminal act, the individual may be tried for five murders. In one case, the accused killed two people with a single criminal act. The court held that the acquittal of the accused in one case did not bar prosecution for the other death (*People v. Carson* 37 CA 3d 349).

9.6 Punishment for Murder

The punishment for murder is set forth in P C 190. The punishment schedule is:

1. Murder in the first degree — death, life imprisonment or term of 25 years to life.
2. Murder in the second degree—term of 15 years to life.

The penalty for murder with special circumstances is death or confinement for life without possibility of parole. Special circumstances are set forth in P C 190.2. Some of them are listed below:

1. Intentional murder for financial gain.
2. Murder committed by means of a destructive device, bomb or explosive planted, hidden or concealed in any place, area, dwelling, etc., and the defendant knew or reasonably should have known that his act or acts would create a great risk of death to a human being or human beings.
3. Murder was committed for the purpose of avoiding or preventing a lawful arrest or to perfect or attempt to perfect an escape from lawful custody.
4. The victim was a peace officer in the performance of his/her duties and the defendant knew or should have known of the victim's status as a peace officer.
5. The victim was a witness to a crime who was killed to prevent his/her testimony.
6. The defendant was lying in wait.
7. The victim was killed because of his/her race, color, religion, nationality or country of origin.

9.7 Voluntary Manslaughter

Voluntary manslaughter is the unlawful killing of a human being without malice upon a sudden quarrel or in the heat of passion.

Heat of Passion

To reduce the unlawful killing of a human being from murder to manslaughter, the killing must be done without malice and as the result of a sudden quarrel or done in the heat of passion. Sudden quarrel refers to unplanned mutual combat such as a fist fight in a bar caused by a quarrel. To constitute adequate "heat of passion," the accused must be in a state of blinding rage which is sufficient to cloud the judgment and common sense of a reasonable person and prompts the person to act rashly and without deliberation.

The heat of passion must exist at the time of the killing. If the provocation is adequate, but there is a cooling off period between the provocation and the killing, the crime is murder not manslaughter. Note: The amount of provocation may affect the length of the "cooling off" period.

9.8 Involuntary Manslaughter

Involuntary manslaughter is the unlawful and unintentional killing of a human being without malice during the commission of an unlawful non-felony act or the commission of a lawful act which might produce death, in an unlawful manner and without due caution. [Note: P C 192 (b) regarding involuntary manslaughter does not apply to deaths involving driving a vehicle.]

There are two basic types of involuntary manslaughter in California. The first involves the unintentional killing of another during the commission of an unlawful act that does not amount to a felony. For example, the accused hits the victim in the head with his fist without just cause. The victim falls and strikes his head on a boulder causing his death. The accused has committed involuntary manslaughter. Note: if the assault was with a dangerous weapon rather than with fists, the crime is murder. This is based on the fact that assault with a dangerous weapon is a felony whereas simple battery is only a misdemeanor.

The second type of involuntary manslaughter involves those situations where the accidental killing results from the commission of a lawful act but in a criminally negligent manner. For example, taking target practice in a rural area without checking out the impact area and thus causing the death of a person camping in the vicinity.

9.9 Vehicular Manslaughter

Vehicular manslaughter is the unlawful killing of a human being, without malice and unintentional, while driving a vehicle.

The types of vehicular manslaughter are:

1. Death caused by the gross negligence of the driver (felony).
2. Death caused by the negligence, but not gross negligence, of the driver (misdemeanor).
3. Death caused by a negligent and unlawful act of the driver (felony).
4. Death caused by the gross negligence of the driver while under the influence of drugs or alcohol (felony).

Note: a homicide involving the driving of a vehicle is not manslaughter if the death is not the proximate result (cause) of the unlawful act or negligence.

9.10 Gross Negligence

Gross negligence is defined as:

1. Such a degree of negligence or carelessness that either shows a willful and wanton disregard for the life and safety of others,
2. Amounts to the want of even slight diligence, or
3. A failure to exercise care of so slight a degree as to justify the belief that there is an indifference to the safety of others and a conscious indifference to the consequences.

9.11 Punishment for Manslaughter

The punishment for manslaughter is set forth in Penal Code 193. The punishment schedule is:

1. For voluntary manslaughter — imprisonment in the state prison.
2. For involuntary manslaughter — imprisonment in the state prison.

3. For vehicular manslaughter—
   a. Involving the commission of an unlawful act not amounting to a felony and with gross negligence or driving a vehicle in the commission of a lawful act which might produce death, in an unlawful manner and with gross negligence—imprisonment in the county jail or in state prison.
   b. Same as above except without gross negligence—imprisonment in the county jail for not more than one year.
   c. Driving under the influence of drugs or alcohol, but without gross negligence—imprisonment in the county jail or state prison.
   d. Vehicular manslaughter involving gross negligence while intoxicated—imprisonment in the state prison.

9.12 Suicide

Suicide is not considered a criminal homicide in California. Attempted suicide is, also, not a crime in the state. Encouraging another to commit suicide is, however, a felony under P C 401. In a suicide pact where one party survives, the surviving party normally may be tried for encouraging a suicide. Note: this is not the case in murder/suicide situations where the dead party did not intend to commit suicide. In this latter situation, it is probably murder. Also, if the survivor actually commits the death causing act on the other person, then it is murder even if the act was done at the request of the victim.

9.13 Non-Criminal Homicides

As stated earlier, not all homicides are criminal. The non-criminal homicides are classified as:

1. Excusable
2. Justifiable
   a. by a police officer
   b. others

Penal Code 195 **Accidental and Excusable Homicide**

Homicide is excusable in the following cases:

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

Excusable Homicide

Excusable homicide is a homicide caused by an accident or other misfortune while doing a lawful act by lawful means and using usual and ordinary caution. There must be no unlawful intent involved with the act causing the death. For example, an automobile accident not involving an unlawful act or negligence which causes the death of a person, would be excusable homicide (P C 195).

9.14 Justifiable Homicide

Penal Code 199 **Acquittal of Person Guilty of Justifiable Homicide**

The homicide appearing to be justifiable or excusable, the person indicted must, upon his trial, be fully acquitted and discharged.

Justifiable Homicide

A justifiable homicide is one that was committed for the protection of society or a part of society. A homicide is considered justifiable when committed by a public officer as set forth in P C 196 (above) or in any of the following circumstances:

1. When resisting any attempt by the deceased to murder any person, or to commit a felony, or to do some great bodily injury upon any person.
2. When committed in defense of home, person or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony.
3. When committed against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the home of another for the purpose of offering violence to any person therein.
4. When reasonably committed in the lawful defense of one's self or others.

5. When necessarily committed in attempting by lawful ways and means to apprehend any person for a felony committed or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.

In the above listed situations, a "bare fear" of the commission of a felony is not sufficient to justify the homicide. The circumstances must be sufficient to excite the fears of a reasonable person, and the party doing the killing must have acted under the influence of such fears alone (P C 198).

Penal Code 196 **Killing in Performance of Official Duty Justifiable**

Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either—

1. In obedience to any judgment of a competent court; or,
2. When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or,
3. When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing justice or resisting arrest.

Use of Deadly Force By a Police Officer

In 1985, the U.S. Supreme Court held in *Tennessee v. Garner*, 471 U S 1, that a statute which permitted the police to use deadly force to prevent the escape of an unarmed and non-dangerous felon was unconstitutional. This case limited the use of deadly force to only those situations where the use is necessary to prevent serious bodily harm or death to the police officer or others. The Garner case modifies the provisions of P C 196 (in civil liability cases) which indicates that homicide is justifiable in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty.

9.15 Home Protection

Penal Code 198.5 **Home Protection Bill of Rights**

Any person using force intended or likely to cause death or great bodily injury within his or her residence shall be presumed to have held a reasonable fear of imminent peril of death or great bodily injury to self, family, or a member of the household when that force is used against another person, not a member of the family or household, who unlawfully and forcibly enters or has unlawfully and forcibly entered the residence and the person using the force knew or had reason to believe that an unlawful and forcible entry occurred.

As used in this section, great bodily injury means a significant or substantial physical injury.

9.16 Self-Defense

The right of self-defense involves the right of an individual to repel force with similar force to protect his or her life, members of the family, the home and other property. Deadly force may be used only to prevent great bodily harm, prevent the perpetration of a felony by surprise or violence against one's person or home.

Deadly force is not normally justified for the protection of property. A person may,however, use deadly force to prevent anyone from entering his or her home to commit a felony or to inflict serious bodily harm on people living in the home. In determining whether or not excessive force has been used, the courts look to what action appeared to be reasonable under the circumstances as they appeared to the defender at the time of the attack.

Instigator

In most cases, the individual who starts a fight cannot rely on self defense to justify the killing. An exception to this general rule is where the original instigator gives up the fight and attempts to retreat. Under these circumstances, the original instigator may regain the right to self defense (*People v. Hoover* 107 CA 635). Note: a police officer making an arrest is not an instigator (P C 835a).

Duty to Retreat

In some states, a person has a duty to retreat

before using deadly force when the individual can safely retreat. In California, an individual who is attacked may stand his or her ground and defend himself or herself (*People v. Zuckerman*, 56 CA 2d 366).

DISCUSSION QUESTIONS

1. What are the essential differences between murder and manslaughter?
2. What is meant by "heat of passion?"
3. When is a homicide not a criminal one?
4. What are the elements of murder in the first degree?
5. When is the killing of a fetus a criminal homicide?
6. What are the types of criminal homicide in California?
7. What are the two types of non-criminal homicides in California?
8. Define "death" as used in murder cases?
9. What is the difference between "expressed" and "implied" malice?
10. Define "malice aforethought."

SELF-STUDY QUIZ

True/False)

1. All homicides are criminal.
2. To be a criminal homicide, the death must occur within one year and a day after the act causing the death.
3. The corpus delicti of a criminal homicide does not contain the elements of the crime.
4. California uses "brain death" as the definition of death.
5. Malice aforethought requires a feeling of ill will toward the victim.
6. Malice may be either expressed or implied.
7. A killing to make an escape from a robbery scene is within the felony-murder rule.
8. The felony-murder rule does not apply to those felonies not listed by the statute.
9. The accused killed two people with one rifle shot. He has committed only one murder.
10. The "heat of passion" may reduce an unlawful killing from murder to manslaughter.

Chapter 10

Rape and Other Sexual Crimes

Unnatural deeds do breed unnatural problems (Shakespeare, Macbeth)

Rape and Other Sexual Crimes

1. Rape (P C 261)
2. Rape of Spouse (P C 292 (b))
3. Penetration of Genitals or Anus with Foreign Object (P C 289)
4. Sexual Battery (P C 243.4)
5. Indecent Exposure (P C 314)
6. Oral Copulation (P C 288a)
7. Sodomy (P C 286)
8. Sexually Assaulting Animal (P C 286.5)
9. Unlawful Sexual Intercourse (P C 261.5)
10. Incest (P C 285)
11. Pimping (P C 266h) [Discussed in Chapter 13.]
12. Selling Person for Illicit Use (P C 266f) [Discussed in Chapter 13.]
13. Pandering (P C 266i) [Discussed in Chapter 13.]
14. Prostitution (P C 647(b)) [Discussed in Chapter 13.]

10.1 Rape

Penal Code 261 **Rape- Acts Constituting**

Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following conditions:

(1) Where a person is incapable, because of mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act. . . . the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent.

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

(3) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, administered by or with the privity of the accused.

(4) Where a person is at the time unconscious of the nature of the act, and this is known to the accused.

(5) Where a person submits under the belief that the person committing the act is the victim's spouse, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce the belief.

(6) Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the

threat. As used in this paragraph "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.

(7) Where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official. As used in this paragraph, "public official" means a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official.

Penal Code 261.6 **"Consent" Defined**

In prosecutions under Section 261, 286, 288a, or 289, in which consent is at issue, "consent" shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.

Penal Code 263 **Essential Elements- Penetration**

The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however, slight, is sufficient to complete the crime.

Elements of Rape

The elements of rape are:

1. sexual intercourse with a person not the spouse of the perpetrator, and
2. without the lawful consent of the victim.

Discussion

As noted above, to be convicted of rape under Section 261, the victim must not be the spouse of the perpetrator. (Spousal rape is discussed later in this chapter.) In addition, the courts have determined that to be raped, the victim must be alive at the moment of penetration (*People v. Stanworth* 11 C 3d 588). A single act of intercourse is only one offense of rape, even though it is accomplished under more than one of the circumstances listed in P C 261 (*People v. Craig* 17 C 2d 453).

Inability by reason of intoxication to form a specific intent to rape is not a defense to the crime (*People v. Potter* 77 CA 3d 45). Sterility is, also, not a defense (*People v. Langdon* 192 CA 3d 1419). In California, a conviction of rape may be had solely on the testimony of the victim. There is no requirement for corroboration of the victim's testimony (*People v. Frye* 117 CA 3d 101). Note: since the elements of rape involve sexual intercourse with a "person," a woman may be convicted of raping a male in California.

10.2 Sexual Penetration

Penetration is an essential element of the crime of rape (*People v. Ray* 187 CA 2d 182). Sexual intercourse for the purposes of Section 261 is completed with a sexual penetration, however slight (*People v. Karsai* 131 CA 3d 224).

10.3 Consent

Valid consent to the sexual intercourse is a defense to the crime of rape (*People v. Alfrand* 61 CA 3d 414). A good faith belief by the accused that the woman had consented to the sexual intercourse is a defense to the crime of rape by force or fear (*People v. Anderson* 144 CA 3d 55).

If a woman initially gives consent, but later withdraws her consent, any sexual penetration after she withdraws her consent is rape. If consent is, however, withdrawn after penetration has occurred, that act of intercourse is not rape (*People v. Vela* 172 CA 3d 237).

10.4 Rape by Force or Fear

The crime of forcible rape is committed if at any time during the struggle, the accused intends to use force or threatens to use force to gratify his lustful concupiscence against the victim's will (*People v. Royal* 53 C 62). Actual use of physical force is not necessary. Threats of great and immediate bodily harm is sufficient to constitute force. The threats, however, must be sufficient to put the victim in actual fear of bodily injury (*People v. Benavidez* 255 CA 2d 563).

The amount of force or threats of force required for conviction of forcible rape is that

amount of physical force required under the circumstances to overcome the victim's resistance (*People v. Wheeler* 71 CA 3d 902). To convict an accused of forcible rape, actual physical resistance on the part of the victim is not required (*People v. Barnes* 42 C 3d 284). The necessary threats need not be verbally expressed. Acts, conduct or the exhibition of a weapon may imply the necessary threats (*People v. Benadivez* 255 CA 2d 563).

An assault with intent to commit rape and simple assault are lessor and included offenses of rape (*People v. Chavez* 103 C 407).

10.5 Gang Rape

Penal Code 264.1 prohibits conduct when the defendant, voluntarily acting in concert with another person, by force or violence and against the will of the victim, commits rape or anal or genital penetration by a foreign object. These acts are more commonly known as "gang rape" and is a separate crime from the crime of rape. To be guilty of this offense, the accused need only aid or abet in some manner. He/she does not need to personally participate in the act. (*People v. Best* 143 CA 3d 232).

10.6 Unconscious Victim

To constitute rape under subsection (4) (unconscious victim), it is not necessary that the victim be totally and physically unconscious. A victim is considered as unconscious when the victim is unaware of the nature of the act being committed on her, and the accused is aware of her state (*People v. Ogunmola* 193 CA 3d 274). In one case, a conviction was upheld under P C 261 (4), where the victim went to the defendant's office for an abortion. During one of the followup visits, the defendant had intercourse with her after giving her an injection that made her light-headed and carefree (*People v. Ing* 65 C 2d 603).

In another case prosecuted under subsection (4), the conviction was reversed where the accused identified himself as a doctor and induced the victim to engage in sexual intercourse based on his false statement to her that she was suffering from a dangerous, highly infectious and fatal disease and would die unless she had sexual intercourse with an anonymous donor who had been injected with a serum which would cure the disease. The court held that based on the above facts, there was no rape of a victim who was unconscious as to the nature of the act, that the woman understood the nature of the act, and there was no evidence indicating that she lacked the capacity to appreciate the nature of the sex act (*Boro v. Superior Court* 163 CA 3d 1224).

10.7 Consent Obtained by Fraud

Fraudulent statements or misrepresentations which induce sexual intercourse is material only for rape under Subsection (5) of P C 261 (regarding misrepresentation of status as a spouse). Lack of the consent of the victim is an essential element of rape under Subsections (2) and (3). "Consent" even though induced by fraud is still a defense to Subsections (2) and (3) (*People v. Harris* 93 CA 3d 103). Note: P C 266c (enacted in 1986) makes it a crime (unlawful intercourse) to induce sexual intercourse by the use of false representation made with the intent to create fear.

A conviction was upheld under Subsection (5) where the female, in good faith, entered into a "mock marriage" that was arranged by the accused. She then engaged in sexual intercourse with him on the mistaken belief that she is married to him (*People v. McCoy* 58 CA 534).

10.8 Statutory Rape

Penal Code 261.5 **Definition of Unlawful Sexual Intercourse**

Unlawful sexual intercourse is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years.

Discussion

Unlawful intercourse is more popularly known as "statutory rape". Consent is not an issue in this crime, since sexual intercourse with a female under the age of 18 years is prohibited (*Michael M. v. Superior Court* 25 C 3d 608). It is not an unconstitutional discrimination to prohibit sexual intercourse with a female under 18 years of age, but not prohibit similar conduct with a male under 18 years of age (*People v. Mackey* 46 CA 3d

755). The defendant's reasonable belief (referred to in some cases as a "good faith and reasonable" belief) that the victim was over the age of 18 years is a defense to "statutory rape." The burden, however, to establish this defense is on the defense (*People v. Zeihm* 40 CA 3d 1085 and *People v. Hernandez* 61 C 2d 519). Note: the belief as to the age of the victim must be not only in good faith, but must also be reasonable.

10.9 Spousal Rape

Penal Code 262 **Rape of Person Who is Spouse of Perpetrator**

(a) Rape of a person who is the spouse of a perpetrator is an act of unlawful sexual intercourse by means of force or fear of immediate and unlawful bodily injury on the spouse or another, or where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this subdivision "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.

(b) The provisions of Section 800 shall apply to this section; however, there shall be no arrest or prosecution under this section unless the violation of this section is reported to a peace officer having the power to arrest for a violation of this section or to the district attorney of the county in which the violation occurred, within 90 days after the day of the violation. [Note: Section 800 refers to the six year statute of limitations.]

10.10 Incest

Penal Code 285

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

Evidence Code 621 (a)

Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be the child of the marriage. [Subdivision (b) refers to those cases where a blood test establishes that the husband cannot be the father of the child.]

Elements of Incest

The elements of the crime of incest are:

1. the marriage or sexual intercourse between
2. parties who are related by blood to each other by certain degrees of relationship.

Discussion

Only marriage and sexual intercourse between persons closely related by blood are prohibited under the above penal code. It does not prohibit oral copulation. Lack of knowledge of the relationship is a defense to incest (*People v. Koller* 142 C 621). To be incestuous, there must be a blood relationship. Accordingly, where a father has sexual intercourse with his adopted daughter, while he is guilty of other crimes, he is not guilty of incest (*People v. Russell* 22 CA 3d 330).

If both parties are over the age of 14, and both consent to the sexual acts, then both are guilty of incest (*People v. Pettis* 95 CA 2d 790).

Consanguineous

Civil Code 4400 lists the following relationships as consanguineous (such close blood relatives as to make marriage and/or intercourse illegal):

1. natural parents, or any degree of grandparents and their children, grandchildren, etc.;
2. uncles or aunts and their nieces and nephews; and
3. brothers and sisters and other siblings, whether whole- blood or half-blood.

10.11 Penetration by Foreign Object

Penal Code 289 [Partial]

(a) Every person who causes the penetration, however slight, of the genital or anal opening of another person for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person or where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat, shall be punished by imprisonment in the state prison ...

[Subsections (b) and (c) prohibits such conduct on a person incapable of giving consent.]

[Subsection (d) prohibits similar conduct on an unconscious person.]

[Subsection (e) prohibits such conduct on an intoxicated person.]

[Subsection (f) prohibits such conduct where the person submits under the belief that the person committing the act is the spouse of the victim.]

[Subsection (g) prohibits such conduct where consent is obtained by threat to use the authority of a public official.]

[Subsection (h) prohibits such conduct on a person under the age of 18.]

[Subsection (i) prohibits such conduct by a person over the age of 21 years against a person under the age of 16. Note: this offense has a greater maximum punishment than the offense under Subsection (h) above.]

[Subsection (j) prohibits such conduct by a person under the age of 14 where the offender is more than ten years older than the victim. Note: this offense has a greater maximum punishment than the offenses under Sections (h) and (i).]

(k) As used in this section, "foreign object, substance, instrument, or device" shall include any part of the body, except a sexual organ.

(l) As used in subsection (a) "threatening to retaliate" means a threat to kidnap or falsely imprison, or inflict extreme pain, serious bodily injury or death.

Elements of Anal or Genital Penetration

The elements of the crime of anal or genital penetration are:

1. the intentional anal or genital penetration of another
2. with any object except a "sexual organ,"
3. without the lawful consent of the other person.

Discussion

In cases where the victim is a child, lack of consent is automatically assumed. There is no requirement that the accused make the penetration for sexually motivated reasons as long as the acts are intentionally committed (*People v. White* 179 CA 3d 193).

10.12 Sex Acts-Induced by False Representations Penal Code 266c Inducing Commission of Sexual Act Through False Representations Creating Fear

Every person who induces any other person, except the spouse of the perpetrator, to engage in sexual intercourse, penetration of the genital or anal openings by a foreign object, substance, instrument, or device, oral copulation, or sodomy when his or her consent is procured by false or fraudulent representation or pretense that is made with the intent to create fear, and which does induce fear, and that would cause a reasonable person in like circumstances to act contrary to the person's free will, and does cause the victim to so act, is punishable by imprisonment in either the county jail ... or in the state prison .... As used in this section, "fear" means the fear of unlawful physical injury or death to the person or to any relative of the person or member of the person's family.

Element of the crime

The elements of the crime of inducing the commission of sexual act through false representation creating fear are:

1. inducing a person, not the spouse of the perpetrator
2. to engage in sexual intercourse or
3. penetration of the genital or anal openings by a foreign object or
4. oral copulation, or
5. sodomy
6. by consent procured by
7. false or fraudulent representation, or
8. pretense made with the intent to and actually creating reasonable fear in the victim
9. by such conduct that would deprive a reasonable person of their free will.

10.13 Lewd or Dissolute Conduct

Penal Code 647 [Subsection (a) only.]

Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

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

Penal Code 288 **Lewd Act on Child Under 14** [Subsection (a) only.]

(a) Any person who shall willfully and lewdly commit any lewd or lascivious act including any of the acts constituting other crimes provided for in Part 1 of this code upon, or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony . . . .

Elements of Lewd or Dissolute Conduct (P C 647 (a))

The elements of lewd or dissolute conduct under Section 647 (a) are:

1. Soliciting, or engaging
2. in lewd or dissolute conduct
3. in any public place, or
4. in any place open to the public, or
5. exposed to public view.

Elements of Lewd Act on Child

The elements of lewd act on child under 14 are:

1. a lewd or lascivious act upon any part of the body of
2. a child under the age of 14,
3. with the specific intent to arouse, appeal or to gratify the lust or passions or sexual desires of either party.

Definitions

Lewd conduct refers to conduct that disregards socially accepted constraints. Lascivious refers to wanton, lustful conduct. Dissolute refers to conduct that is unashamed, lawless, loose in morals and conduct. For example, dancing in the nude at a party open to the public was considered as "dissolute" conduct (*People v. Scott* 113 CA 778)

Lewd and lascivious act under Section 288 (a) has been defined as an act which has a tendency to excite lust, committed with a disregard for sexual constraints. It is not necessary that the act be sexual in nature (*People v. Dontanville* 172 CA 3d 783).

Discussion

Nude sunbathing on Black's Beach in San Diego (a beach where nude sunbathing is popular), while located in an area open to the public was not considered as lewd conduct under Section 647 (a) (*In re Smith* 7 C 3d 362). The court in this case, stated that nudity of this type is not of itself lewd conduct.

Under Section 288 (a), if the victim is under 14 years of age, consent is not an element of the offense (*People v. Dontanville* 172 CA 3d 783). The offense may be committed by a mere touching of the body or clothing of the other person, if done with the specific intent to arouse (*People v. Roberts* 26 CA 3d 585). It is also not necessary that the naked body be touched (*People v. Austin* 111 CA 3d 110).

10.14 Indecent Exposure

Penal Code 314 **Indecent Exposure**

Every person who willfully and lewdly, either:

1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other per-

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

[Last two paragraphs of section dealing with punishment are omitted.]

Elements of the Crime of Indecent Exposure

The elements of indecent exposure are:
1. willful exposure of person or private parts
2. at a place where other persons are present who may be annoyed, or
3. public view
4. who exposes, procures, counsels, or assists in the exposure,
5. and the act is offensive to decency or designed to incite vicious or lewd thoughts or acts.

Discussion

The above elements require willful and lewd conduct on the part of the participant. There is, however, no requirement for any movement or manipulation of the body or parts thereof. A person convicted under this section is required to register as a sex offender under P C 290.

10.15 Oral Copulation

Penal Code 288a **Oral Copulation**

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

[Subsection (b)(1) prohibits oral copulation with another person who is under the age of 18.]

[Subsection (b)(2) prohibits oral copulation by a person over the age of 21 with another person under the age of 16. This offense has a greater maximum punishment than the offense under Subsection (b)(1).]

[Subsection (c) prohibits oral copulation with a person under the age of 14 by a person who is ten years older. This offense has a greater maximum punishment than the offenses under Subsections (b)(1) and (b)(2).]

[Subsection (d) prohibits oral copulation by force or fear.]

[Subsection (e) prohibits oral copulation by any person confined in a state or local confinement facility.]

[Subsection (f) prohibits oral copulation where the other party is unconscious of the nature of the act.]

[Subsections (g) and (h) prohibits oral copulation with a person who is incapable of giving lawful consent.]

[Subsection (i) prohibits oral copulation with an intoxicated person.]

[Subsection (j) prohibits oral copulation where consent is obtained under the false belief that the person committing the act is the spouse of the other person.]

[Subsection (k) prohibits oral copulation where consent is obtained under the threat to use the authority of a public official.]

Definition

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

Discussion

No specific intent, purpose or motive is necessary to commit this offense. Oral copulation is not illegal if engaged in private by consenting persons over the age of 18. It is a crime, however, if committed by someone confined in a state or local confinement facility or on a victim who is unconscious, insane or otherwise unable to give consent, and this condition is known or should have been known by the perpetrator.

10.16 Sodomy

Penal Code 286 **Sodomy [Partial]**

(a) Sodomy is sexual contact consisting of contact between the penis of one person and the anus of another person.

[Subsections (b) through (k) are similar to those for oral copulation noted above.]

Elements of Sodomy

The elements of sodomy are:
1. sexual contact by penetration of
2. the penis of one person, and
3. the anus of another person
4. under one of the prohibited situations or circumstances.

Discussion

No specific intent, purpose or motive is required to commit sodomy. Sodomy requires "penetration" not merely "contact" (*People v. Martinez* 188 CA 3d 19 and *People v. McElrath* 220 CA 4).

10.17 Sexual Battery

Penal Code 243.4 **Sexual Battery**

(a) Any person who touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, gratification, or abuse, is guilty of sexual battery . . . .

(b) Any person who touches an intimate part of another person who is institutionalized for medical treatment and who is seriously disabled or medically incapacitated, if the touching is against the will of the person touched, and if the touching is for the purpose of sexual arousal, gratification, or abuse, is guilty of sexual battery . . . .

(c) Any person who, for the purposes of sexual arousal, gratification, or abuse, causes another, against that person's will while that person is either unlawfully restrained by the accused or an accomplice, or is institutionalized for medical treatment and is seriously disabled or medically incapacitated, to masturbate or touch an intimate part of either of those persons or a third person is guilty of sexual battery . . . .

(d) As used in this section, "intimate part" means the sexual organ, anus, groin, or buttocks of any person and the breast of a female . . . . As used in this section, "touches" means physical contact with the skin or another person whether accomplished directly or through the clothing of the person committing the offense . . . .

(e) This section shall not be construed to limit or prevent prosecution under any other law which also proscribes a course of conduct that also is proscribed by this section.

10.18 Sexually Assaulting Animals

Penal Code 286.5

Any person who sexually assaults any animal protected by Section 597f for the purpose of arousing or gratifying the sexual desire of the person is guilty of a misdemeanor.

[Section 597f refers to Animal Neglect and protects pets and other domestic animals.]

Note: any sexual penetration, either penile or oral, completes the offense (*People v. Smith* 117 CA 2d 648).

10.19 Registration as Sex Offender

Penal Code 290 requires persons convicted of sex offenses or sex related crimes to register within 14 days of coming into any county or city in which he or she will reside for any period of time with the chief of police or the sheriff of the county.

CLASSROOM DISCUSSION QUESTIONS

1. What is the nature of the crime of rape?
2. Who is incapable of giving "legal" consent to sexual intercourse?
3. What are the essential differences between the various types of rape?
4. Why is the inability by reason of intoxication to form a specific intent to rape not a defense to the charge of rape?
5. What act completes the crime of rape?
6. Explain the differences between statutory rape and unlawful sexual intercourse.
7. What acts constitute incest?
8. What constitutes lewd conduct?
9. What constitutes indecent exposure?
10. Distinguish between sexual battery and rape.

SELF STUDY QUIZ

True/False

1. Rape is an act of sexual intercourse involving consent of all parties.

2. Some persons are incapable of giving consent to sexual intercourse.
3. To be considered as unconscious for purposes of prosecution under P C 261 (4), the victim must be completely unaware of the nature of the act and in a state of total unconscious.
4. The essential guilt of rape is the outrage to the person and the feelings to the victim.
5. For rape, the penetration is not an essential element.
6. Sexual intercourse under P C 261 is considered complete with any sexual penetration.
7. Consent, even though obtained by fraud, is a defense to rape by force or fear.
8. An assault is a lessor and included offense of rape.
9. Statutory rape is the sexual intercourse with a female under the age of 18 and not the wife of the perpetrator.
10. To be prosecuted for spousal rape, the rape must be reported to the proper authorities within 90 days after the violation.
11. The statute of limitations for spousal rape is six years.
12. Incest can be committed only by marriage or sexual intercourse between two people who are closely related by blood.
13. Lewd conduct refers to conduct that disregards socially accepted constraints.
14. To be lewd, the act must be sexual in nature.
15. Indecent exposure is not a crime in California unless the exposure is committed in a public place.

Chapter 11

Robbery and Extortion

Nobody ever commits a crime without doing something stupid.
(Oscar Wilde, The Picture of Dorian Gray)

Robbery and Extortion Related Crimes

1. Robbery (P C 211)
2. Extortion (P C 518)
3. Kidnapping for Ransom or Robbery (P C 209) [Discussed in Chapter 12.]
4. Simulating Court Process (P C 526)

11.1 Robbery

Penal Code 211 **Defined**

Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

Penal Code 212 **Fear Defined**

The fear mentioned in Section 211 may be either:

1. The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family; or,
2. The fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery.

Penal Code 212.5 **First and Second Degree Robbery**

(a) Every robbery of any person who is performing his or her duties as an operator of any (1) bus, taxicab, cable car, streetcar, (2) trackless trolley, or other vehicle, including a vehicle operated on stationary rails or on a track or rail suspended in the air, and used for the transportation of persons for hire, every robbery of any passenger which is perpetrated on any of these vehicles, and every robbery which is perpetrated in an inhabited dwelling house or trailer coach, as defined in the Vehicle Code, or the inhabited portion of any other building, is robbery of the first degree.

(b) All kinds of robbery other than those listed in subdivision (a), are of the second degree.

[Note: Section 212.5 was passed in 1986 and modified in 1987 by the Legislature to overrule in part the decision in *People v. Beller* 172 CA 3d 904, which held that robbery and residential robbery were separate substantive crimes. The Legislature indicated that there was only one crime of robbery which is set forth in Section 211 and that some forms of robbery are more aggravated and deserving of greater punishment (Stats. 1986 ch. 1428, section 6).]

Definition of Robbery

Robbery at common law was the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by force or fear (Black's *Law Dictionary* 4th ed., page 1492). Under the above definition, robbery is an aggravated form of theft with the additional element of the taking from the immediate presence and will of the victim. In California, robbery is considered

as both a crime against the person and the property (*People v. Jones* 53 C 58). Robbery is a combination of assault and larceny (*People v. Blue* 161 CA 2d 1).

Elements of Robbery

The elements of the crime of robbery are:

1. the wrongful taking of personal property (including asportation)
2. from the possession of another, or
3. from his or her person, or
4. from immediate presence
5. against the will of the person
6. accomplished by means of force or fear.

Discussion

To be robbery, the property taken must have at least some intrinsic (real or true) value which is subject to larceny (*People v. Stevens* 141 C2d 699). One defendant was convicted of robbery based on the severance of a standing crop of marijuana from property where the other required elements were present. The court stated that since the severance and taking of a growing crop is now subject to larceny, the same property is also subject to robbery (*People v. Dillon* 34 C 3d 441).

Neither the value of the property or the amount of money taken is material to the robbery offense as long as the property has some value or some money was taken (*People v. Coleman* 8 CA 3d 722). The fact that the victim from whose possession the money was taken was not the true owner of the money, is not a defense to the crime of robbery. In one case, the victim had earlier stolen the money from someone else. The court held that even a thief could be robbed (*People v. Moore* 4 CA 3d 668).

11.2 Immediate Presence or Possession

The term "immediate presence" is broadly interpreted to include any place within sight or hearing of the person (*People v. Lavender* 137 CA 582). In determining whether or not the property is in the immediate presence of the victim, all sensory perceptions are used. Actual corporeal (physical) presence of the victim is not required (*People v. Hays* 147 CA 3d 534). An attempted robbery was, however, not established where no person was identified as being present and in possession of a safe that the accused was charged with taking (*Laurel v. Superior Court* 255 CA 2d 292).

A robbery was held to have been committed in the immediate presence of a victim (an employee), even though the employee was not in charge or had immediate control of the items stolen (*People v. Arline* 13 CA 3d 200). A security guard or night watchman has constructive possession of the merchandise to the same degree as a salesperson (*People v. Estes* 147 CA 3d 23). In one case, the employee's mother entered the store during the robbery. The accused handed her a bag and ordered her to take the money from the cash register. A conviction of robbery by taking the money from the possession of the mother was upheld on appeal (*People v. Moore* 4 CA 3d 668).

In one case, the court held that where the money was taken from the "immediate possession" of the victim when the defendant removed the victim's pants and allowed her brother to look through the pockets while the defendant had sex with the victim (*People v. Moore* 4 CA 3d 668). In another case (*People v. Davis* 100 CA 179), the defendant pointed a weapon at the cashier in a movie theater. She ran out the back door. He entered the ticket booth and took the money. His conviction for robbery was upheld by the appellate court.

11.3 Force or Fear

The property must be taken by either force or fear. Unless one or the other is used, the crime is not robbery. The particular means, however, by which "force" is used or "fear" imposed is not an element of robbery (*In re Michael* 39 C 3d 81). Something more, however, than the amount of force necessary to lift or seize the property is necessary to change the offense from "theft from a person" to robbery (*People v. Morales* 49 CA 3d 134). The hasty snatching of a purse without resistance may be only larceny if no force was used nor fear imposed (*People v. Church* 116 C. 300).

The force or fear must have been used for the purpose of taking the property, not some other

reason. Thus, an accused who used force to commit rape and after the rape took a cigarette from the victim was not guilty of robbery. This result was based on the lack of evidence establishing that the victim was afraid to resist the taking and that no additional force was used in taking the cigarette (*People v. Welsh* 7 C 2d 209).

In one case, during the robbery, two victims were in joint possession of the property. The court stated that since the central element of robbery is the force or fear applied to the individual victim, two convictions for robbery was appropriate where both victims were in joint possession of the property (*People v. Ramos* 30 C 3d 553).

The degree of fear necessary must be sufficient to cause the victim to comply with the unlawful demand for his or her property. It is not necessary that terror exists (*People v. Borra* 123 CA 482). Fear may be inferred from the circumstances surrounding the demand. In one case, the victim testified that he did not fear the accused even though the accused pointed a weapon at him. The court in upholding the robbery conviction stated that element of fear could be inferred from the fact that a pistol was pointed at the victim (*People v. Renteria* 61 C 2d 497). In another case, the conviction for robbery was upheld despite the testimony of the victim that she was not afraid of the defendant because she did not think he was serious when he pointed a weapon at her (*People v. Harris* 65 CA 3d 978). The general rule is that the degree of fear needed to establish robbery by "fear" is:

> An amount of fear that would cause a reasonable person under the same set of circumstances to be in fear of his or her life, fear or danger of injury or fear that his or her property may be injured or damaged.

11.4 Asportation

The requirement of asportation (movement) is similar to the same element required in the theft crimes. Only slight movement is required. It is not necessary that the property be taken out of the physical presence of the victim. As one court stated, "Whether the appellant conveyed the money one yard or one mile from the presence of the victim is immaterial insofar as the requirement of asportation is concerned." (*People v. Beal* 3 CA 2d 252). In one case, a robbery conviction was upheld where the accused was apprehended by police officers while leaving the store with the money. He never got out of the store (*People v. LeBlanc* 25 CA 3d 576).

It is not necessary that the accused take actual physical possession of the property. The accused pointed a weapon at the victim and ordered the victim to drop his wallet on the ground. The victim did as ordered. When the victim stated that there was no money in the wallet, the accused ordered him to pick it up and allowed the victim to leave. The court held that the acts were sufficient to constitute the crime of robbery since all that was required was the "taking of possession away from the victim and into the control of the taker ... ." (*People v. Quinn* 77 CA 2d 734). The asportation was completed in one case when the bank clerk was forced to give the money to another bank clerk on orders from the defendant (*People v. Powell* 513 CA 3d 101).

11.5 Intent to Steal

Robbery is a specific intent crime since an intent to steal is an essential element of the crime (*People v. Ford* 60 C 2d 772). The intent to steal requirement is the same as that for larceny.

The necessary intent to steal was missing in one case where the money was taken under a good faith claim of right to possession of it (*People v. Sheasbey* 82 CA 459). The "good faith" claim of right to possession need not be "reasonable." The defendant was charged with attempted robbery for taking money from a bar that operated an illegal gambling game. The defendant stated that he was only trying to regain money that he had illegally lost in the game. The court said that if the defendant in "good faith" believed that he had a right to retake his money, that was a defense to the crime of robbery. Note: he was, however, convicted of assault (*People v. Littleton* 25 CA 3d 96).

It is not the original intent, but the intent at the time of taking that determines whether or not the crime is robbery. If in the above gambling case,

the accused while at first intending to retake only his money decides at the time of taking to take more than he lost, the crime is robbery.

In *People v. Alvardo* (133 CA 3d 1003), a robbery conviction was upheld where the evidence established that the defendants robbed the victim, not to recover property that they had given him in exchange for inferior drugs, but to "settle the score." Note: the specific intent to steal can be inferred from the circumstances surrounding the taking of the property.

11.6 Completed Crime of Robbery

Robbery is completed when the robber has taken possession of the property and the element of asportation is fulfilled. The intervention of the police before the property had been taken off the premises is immaterial as long as the essential elements are satisfied (*People v. Johnson* 219 CA 2d 631).

11.7 Extortion

Penal Code 518 **Defined**

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

Penal Code 519 **Fear Induced by Threat**

Fear, such as will constitute extortion, may be induced by a threat, either:

1. To do an unlawful injury to the person or property of the individual threatened or of a third person; or,
2. To accuse the individual threatened, or any relative of his, or member of his family, of any crime; or,
3. To expose, or to impute to him or them any deformity, disgrace or crime; or,
4. To expose any secret affecting him or them.

Penal Code 521 **When Under Color of Office**

Every person who commits any extortion under color of official right, in cases for which a different punishment is not prescribed in this code, is guilty of a misdemeanor.

Penal Code 522 **Extorting Signature to Transfer of Property**

Every person who, by any extortionate means, obtains from another his signature to any paper or instrument, whereby, if such signature were freely given, any property would be transferred, or any debt, demand, charge, or right of action created, is punishable in the same manner as if the actual delivery of such debt, demand, charge, or right of action were obtained.

Penal Code 523 **Written Threat Made to Extort**

Every person who, with intent to extort any money or other property from another, sends or delivers to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to imply, any threat such as is specified in section 519, is punishable in the same manner as if such money or property were actually obtained by means of such threat.

Definition of Extortion

Common law extortion is defined as taking money or other valuable thing either by compulsion, by actual force, or by force or motives applied to the will and often more overpowering and irresistible than physical force (*Commonwealth v. O'Brien* 12 Cush., Mass., 90). Extortion is popularly known as "blackmail." Both extortion and robbery are aggravated forms of theft. Extortion, however, is broader than robbery in the following ways:

1. Extortion does not require a taking of the property from the presence or possession of the victim.
2. Extortion does not require that the threat be of immediate harm as in robbery.
3. The types of harms that constitute extortion are much broader than those covered in the robbery statute.
4. Robbery pertains only to personal property, whereas extortion can involve real property.
5. With extortion, the victim "consents" to the turning over of the property or money.

Elements of Extortion

The elements of the crime of extortion are:

1. The act of obtaining property or money from another,

2. with the consent of the other, or
3. obtaining an official act of a public officer,
4. by inducement through wrongful use of force, or
5. fear, or
6. under color of official right.

Discussion

Extortion may be committed for the purposes of obtaining "property" or "an official act of a public officer." The "property" requirement is broadly interpreted. A threat to expose the victim unless the victim withdrew an appeal in a pending civil law suit was considered "property" in one case (*People v. Cadman* 57 C 562). Extortion is a crime that involves moral turpitude (*In re Coffey* 123 C 522). To be extortion, the threat must imply or express one of the statutory threats listed in Section 519 (*People v. Choynski* 95 C 640).

Threats Inducing Fear

The threats inducing fear may be:

1. threat to injure person or property,
2. to accuse one of a crime,
3. to defame or expose, or
4. to expose a secret.

The "fear" must be the controlling factor in consenting to the turning over of the property or doing an official act. As one court stated "the fear must be so material that the money would not have been paid without it." (*People v. Turner* 22 CA 2d 186). No precise words need be used. "An experienced extortionist does not find it necessary to designate specifically what he intends to do as a means of terrifying his prey" (*People v. Oppenheimer* 209 CA 2d 413). The use of high-pressure on an elder homeowner by a belligerent and aggressive male which forced the homeowner to agree to unwanted work at an exorbitant sum was determined to be extortion by one court (*People v. Massengale* 10 CA 3d 689).

The "threat to accuse one of a crime" is extortion (if other elements are present) even if the person is in fact guilty of the crime. It makes no difference as to the motives of the person making the threat. Accordingly, a "just" motive for making the threat is normally not a defense to extortion. For example, it is extortion for a person from whom property was stolen to threaten the thief with prosecution unless the thief pays for the property (*People v. Beggs* 178 C. 79).

The threat "to defame or expose another" must be of a nature that tends to impute deformity, disgrace or a crime. A threat to make public certain matters contained in court proceedings which would tend to ruin the character and business of the person threatened was an adequate basis for an extortion conviction (*People v. Cadman* 57 C 562).

The threat to expose a secret must be such that it is unfavorable to the reputation of the person exposed or defamed. The secret normally must be unknown to the general public, or some particular part thereof, which others might be interested in obtaining. The damage of the exposure must be such that it would likely induce a person through fear to pay out money or give up property for the purpose of avoiding the exposure (*People v. Lavine* 115 CA 289).

Sending Threatening Letters

The offense of sending threatening letters does not require that the threat be apparent on the face of the writing. The prosecution may produce evidence of the facts surrounding the writings to establish the nature of the threat. It is enough if the writings used language that imply any of the threats specified in Section 519. This offense is completed at the time that the letter is deposited in the mail or the writing is delivered. The offense is punishable in the same manner as if the property was actually obtained (*People v. Choynski* 95 C 640). Extortion is not committed by a creditor sending a letter to a debtor threatening to take legal action if a debt is not paid (*Murray Showcase & Fixture Co. v. Sullivan* 15 CA 475).

Obtaining Signature by Threat

This section provides that any transfers of property or right of action transferred under threat of extortion is void. In addition, the act is punishable as extortion, i.e., as if the actual delivery of the property or right of action was obtained (*People v. Peppercorn* 34 CA 2d 603). This crime is complete when a signature is obtained (*People v. Massengale* 10 CA 3d 689). Note: the obtaining of

a written confession regarding a crime is not a violation of this offense, since a confession is neither property nor an instrument that creates a right of action (*People v. Kohn* 258 CA 2d 368).

11.8 Simulating Court Process

Penal Code 526 **Imitation or Pretended Process —Delivery**

Any person who, with the intent to obtain from another person any money, article or personal property, or other thing of value, (1) delivers or causes to be delivered to (2) the other person any paper, document or written, typed or printed form purporting to be an order or other process of a court, designed or calculated by its writing, typing or printing, or the arrangement thereof, to cause or to lead (3) the other person to believe it to be an order or other process of a court, when in fact such paper, document or writing is not an order or process of a court, is guilty of a misdemeanor, and each separate delivery . . . constitutes a separate offense.

Discussion

It is a crime under this section for a debt collector, creditor or attorney to send a document to a debtor which simulates a legal or judicial process or gives the appearance of authorization by governmental agency for the purposes of collecting a debt.

CLASSROOM DISCUSSION QUESTIONS

1. The owner of a store put a bag of money down beside his car and went back into his store to get the keys to the car. When the owner returned, he encountered the defendant who had the money in one hand and a gun in the other. The defendant ordered the store owner to move away and got into a car and left. Do the above facts support the offense of robbery or only theft? (Note: facts taken from the case of *People v. Perhab* 92 CA 2d 430).
2. The defendants forced a bank manager at gunpoint to take money from the vault. The manager then carried the money to the rear of the bank in order to give it to the defendants. The defendants were apprehended before receiving the money from the manager. Has the crime of robbery been completed? (Note: facts taken from the case of *People v. Price* 25 CA 3d 576).
3. What degree of force is necessary to constitute robbery by force?
4. Define "asportation."
5. Is robbery a specific intent crime?
6. What are the differences between robbery and extortion?
7. Define "immediate presence" for purposes of the robbery statutes.

SELF STUDY QUIZ

True/False

1. Robbery is the felonious taking of real property from the possession of another.
2. Robbery requires that the taking of the property be by means of force or fear.
3. Robbery of a train conductor is first degree robbery.
4. Robbery of an elderly person is first degree robbery.
5. Robbery in California is both a crime against the person and the property.
6. To be robbery, the property taken must be worth at least $50.00.
7. The property must be in the immediate possession of the owner to be subject to the crime of robbery.
8. To be robbery, the force or fear must be used for the purposes of taking the property.
9. The requirement of "asportation" is very similar to the same requirement in theft cases.
10. It is necessary that the accused take actual physical custody of the property before the crime of robbery is completed.
11. Robbery is not a specific intent crime.
12. Extortion is the obtaining of property from another by use of force or fear and without the consent of the possessor of the property.
13. Extortion does not require a taking of property from the immediate presence of the victim.
14. Robbery pertains only to personal property, whereas, extortion may also pertain to real property.
15. To be extortion, the threat must be of immediate harm to the victim.

Chapter 12

Kidnapping, False Imprisonment and Laws of Arrest

If you can't do time, don't do crime. John Morgan, after being sentenced to seven years imprisonment, May 18, 1985.

Kidnapping and False Imprisonment Related Crimes

1. Kidnapping (P C 207)
2. False Imprisonment (P C 236)
3. Posing as a Kidnapper (P C 210)
4. Kidnapping Child Under 14 (P C 667.85)
5. Kidnapping for Purposes of Sexual Offense (P C 667.8)
6. Kidnapping for Ransom or Reward (P C 209)
7. Taking Hostages (P C 210.5)
8. Malicious Taking of A Child (P C 277)
9. Unlawful Detention (P C 278)
10. Violation of Custody Decree (P C 278.5)

Laws of Arrest

1. Acts Constituting An Arrest (P C 834)
2. Duty to Refrain From Resisting An Arrest (P C 834a)
3. Necessary Restraint (P C 835)
4. Use of Reasonable Force to Arrest (P C 835a)
5. When A Peace Officer May Arrest (P C 836)
6. Arrest by Private Person (P C 837)
7. Summoning Assistance (P C 839)
8. Time of Day Arrest May be Made (P C 840)
9. Notice of Authority to Arrest (P C 841)

12.1 Kidnapping

Penal Code 207 **Definition of Kidnapping**

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

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

(c) Every person who forcibly takes or arrests any person, with a design to take the person out of this state, without having established a claim, according to the laws of the United States, or of this state, or to be taken or removed therefrom, for the purpose and with the intent to sell such person into slavery or involuntary servitude, or otherwise to employ such person for his or her own use, or to the use of another, without the free will and consent of such persuaded person, is guilty of kidnapping.

(d) Every person, who being out of the state, abducts or takes by force or fraud any person contrary to the laws of the place where such act is committed, and brings, sends, or conveys such person within the limits of this state, and is afterwards found within the limits thereof, is guilty of kidnapping.

Kidnapping Defined

At common law, kidnapping involved the

forcible asportation (carrying away) of a person from their own county to another (Dix and Sharlot, *Basic Criminal Law*). In California, the statutory crime of kidnapping requires only the movement of a person from one part of county to another part. Accordingly, kidnapping by force is the unlawful, forcible taking of a person against his or her will from one place to another.

Elements of Kidnapping

Under Penal Code 207 (above), there are four different crimes of kidnapping in California. The elements of each are set forth below:

1. Forcible Kidnapping [P C 207(a)] elements:
   a. the unlawful movement by force
   b. of a person by another
   c. against the person's will
   d. from one place to another
2. Kidnap with Intent to Commit P C 288 felony (crimes against children, lewd and lascivious acts) [P C 207(b)] elements:
   a. hiring, persuading, decoying, enticing, seducing, by false promises, misrepresentations, or the like of
   b. a child under the age of 14 years
   c. to go from one place to another
   d. with the intent to commit a violation of P C 288 [crimes against children, lewd and lascivious acts]
3. Kidnapping with Intent to Take Out of State [P C 207(c)] elements:
   a. a forcible taking or arresting of another
   b. with the specific intent to remove the person from the state
   c. without legal authority
4. Bringing Kidnapped Victim into State [P C 207(d)] elements:
   a. the unlawful abduction or taking of a victim in another state
   b. bringing the victim into this state

Discussion

The movement required to constitute the offense of kidnapping must be unlawful. Movement is not unlawful if accomplished pursuant to a legal arrest or with the valid consent of the victim. The term "unlawful" means only that the victim has not given consent and the movement is not pursuant to a valid legal order or court process.

Force

The force required to constitute the offense is sufficient as long as the victim feels compelled to obey, and reasonably fears some kind of harm will occur if the force is used. Note: no physical force or express threats are needed to effectuate the movement (*People v. Caudillo* 21 C 3rd 562). If the kidnapping starts in a vehicle, the fact that the initial consent to enter the vehicle was given by the victim is immaterial as long as the victim is subsequently restrained during movement of the automobile (*People v. Galvin* 187 CA 3d 1205).

If the victim consents to the movement, even if the consent was obtained by fraud, the crime is not kidnapping under P C 207 (a), (c) and (d). Only movements accomplished by force are material to the offense of forcible kidnapping under P C 207. (*People v. Stephenson* 10 C 3rd 652).

Movement

The statute does not define the distance required to constitute the offense of kidnapping. The courts have had difficulty with this element. This difficulty is caused by the common law requirement that the victim be taken to another county. P C 207 requires only that the movement be to "another part of the county." Based on this phrase, the courts have required that the "movement" necessary to complete the offense of kidnapping must be substantial as opposed to slight or trivial.

Substantial movement was defined by one court as the movement that subjects the victim to a substantial increase in the risk of harm. A movement of one city block was considered sufficient, whereas the movement of the victim across a room or from a vehicle to a storefront was not (*People v. Maxwell* 94 CA 3d 562). Forcing a victim at gunpoint to walk one-quarter mile was considered as substantial movement (*People v. Stanworth* 11 C 3rd 601). Dragging a victim from the front of a laundromat to the rear to sexually assault her was insufficient movement to constitute kidnapping (*People v. Thornton* 11 C 3rd 738). Note: if all the

elements are present except substantial movement, then the offense may be an "attempted kidnapping."

A two-prong test is used to establish forcible kidnapping (*People v. Caudillo* 21 C 3d 562):

1. Was the movement by compulsion?
2. Was the movement substantial?

Intent to Take Victim Out of State

The offense of kidnapping with the intent to take the victim out of the state (P C 207(c)) is designed, in part, to prevent law enforcement officers from unlawfully taking suspects out of the state to avoid extradition laws. For example, if the police from another state locate a person wanted in that state living in California, they cannot cross state lines and take the person by force out of California without going through the required legal process.

12.2 False Imprisonment

Penal Code 236 **False Imprisonment Defined**

False imprisonment is the unlawful violation of the personal liberty of another.

Elements of False Imprisonment

The elements of false imprisonment are:

1. the unlawful violation
2. of the personal liberty of another

Discussion

False imprisonment is always a lessor and included offense of the offense of kidnapping (*People v. Maxwell* 94 CA 3d 562). False imprisonment is a misdemeanor unless it is committed by; violence, menace, fraud or deceit. If so committed, it is a felony (P C 237).

False imprisonment, unlike forcible kidnapping, is not considered an "inherently dangerous felony" by the courts. Accordingly, the felony-murder rule does not apply (*People v. Henderson* 19 C 3d 86).

12.3 Posing as Kidnapper

Penal Code 210 **Posing as Kidnapper**

Every person who for the purposes of obtaining any ransom or reward, or to extort or exact from any person, any money or thing of value, poses as, or in any manner represents himself to be a person who has seized, confined, kidnapped or carried away any person, or who poses as, or in any manner represents himself to be a person who holds or detains such person, or who poses as, or in any manner represents himself to be the person who has aided or abetted any such act, or who poses as or in any manner represents himself to be the person who has the influence, power, or ability, to obtain the release of such person so seized or concealed, kidnapped or carried away, is guilty of a felony . . . .

Nothing in this section prohibits any person who in good faith believes that he can rescue any person who has been seized, confined, inveigled, enticed, decoyed, abducted, concealed, kidnapped or carried away, and who has had no part in, or connection with, such confinement, inveigling, decoying, false abducting, concealing, kidnapping, or carrying away, from offering to rescue or obtain the release of such person monetary consideration or other thing of value.

12.4 Kidnapping for Purposes of Committing Sexual Offense

Penal Code 667.8 provides for a sentence enhancement if convicted of kidnapping for the purposes of committing sexual offense.

12.5 Kidnapping Child Under 14

Penal Code 667.85 **Prison Term for Kidnapping Child Under 14 Years**

Any person convicted of a violation of Section 207, who kidnapped or carried away any child under the age of 14 years with the intent to permanently deprive the parent or legal guardian custody of that child, shall be punished by an additional term of five years.

12.6 Kidnapping for Ransom, Extortion or Robbery

Penal Code 209 **Kidnapping for Ransom or Extortion**

(a) Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom,

reward or to commit extortion or to exact from another person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall be punished . . . .

(b) Any person who kidnaps or carries away any individual to commit robbery shall be punished by imprisonment in the state prison for life with the possibility of parole.

Discussion

Unlike forcible kidnapping (which is a general intent crime), kidnapping for ransom, reward, or extortion is a specific intent crime. To be an offense under this section, at the time of the kidnapping, the offender must commit the offense with the specific intent to either rob, extort or obtain a ransom or reward.

To be guilty of kidnapping for the purposes of robbery, there must be substantial movement similar to that required for forcible kidnapping under P C 207. The movement need not, however, be related to the same victim as the robbery is as long as the kidnapping was accomplished for the purposes of robbery. For example, if the accused robs a storeowner, then kidnaps a customer in order to assist in his escape; he is guilty of kidnapping for the purposes of committing robbery.

The offense of kidnapping for the purposes of ransom or extortion, unlike forcible robbery, does not require any movement. Mere holding the person with the specific intent to obtain payment of a ransom or reward or to commit extortion is sufficient to constitute the offense.

Bodily Harm

Under P C 209, the offender is subject to greater punishment if the victim suffers "bodily harm." "Bodily harm" for the purposes of this punishment enhancement exists whenever the victim suffers some degree of bodily trauma. It does not need to be serious injury. A cut requiring stitches or a rape is sufficient to constitute "bodily harm." A mere nose bleed is not (*People v. Schoenfield* 111 CA 3d 671). The harm required to constitute "bodily harm" is less than "great bodily harm" required in other penal code provisions (*People v. Caudillo* 21 C 3d 562).

12.7 Child Abduction

Penal Code 277 **Punishment for Taking Minor From Person or Public Agency**

In the absence of a court order determining rights of custody or visitation to a minor child, every person having a right of custody of the child who maliciously takes, detains, conceals, or entices away that child within or without the state, without good cause, and with the intent to deprive the custody right of another person or a public agency also having a custody right to that child shall be punished by imprisonment in the county jail . . . or by imprisonment in state prison . . . .

A subsequently obtained court order for custody or visitation shall not affect the application of this section.

For purposes of this section, "a person having a right of custody" means the legal guardian of the child or a person who has a parent and child relationship with the child pursuant to Section 197 of the Civil Code.

Penal Code 278 **Taking Minor From Parent or Guardian**

Every person, not having a right of custody, who maliciously takes, detains, conceals, or entices away, any minor child with intent to detain or conceal that child from a person, guardian, or public agency having the lawful charge of the child shall be punished by imprisonment in the state prison . . . or . . . in a county jail.

Penal Code 278.5 **Concealment, Detention, Taking or Retaining of Child in Violation of Custody Order**

(a) Every person, who in violation of the physical custody or visitation provisions of a custody order, judgment, or decree, takes, detains, conceals, or retains the child with the intent to deprive another person of his or her rights to physical custody or visitation shall be punished by imprisonment in the state prison . . . or . . . in county jail . . . .

(b) Every person who has a right to physical custody of or visitation with a child pursuant to an order, judgment, or decree of any court which grants another person, guardian, or public agency right to physical custody of or visitation with that child, and who within or without the state detains,

conceals, takes, or entices away that child with the intent to deprive the other person of that right to custody or visitation shall be punished by imprisonment in the state prison. . . .or. . . .in the county jail. . . .

Penal Code 279 **Concealment or Detention of Child in Violation of Custody Order. . . .**

(a) A peace officer investigating a report of a violation of Section 277, 278, or 278.5 may take a minor child into protective custody if it reasonably appears to the officer that any person unlawfully will flee the jurisdictional territory with the minor child.

(b) A child who has been detained or concealed shall be returned to the person, guardian, or public agency having lawful charge of the child, or to the court in which a custody proceeding is pending, or to the probation department of the juvenile court in the county in which the victim resides.

(c) The offenses enumerated in Sections 277, 278, and 278.5 are continuous in nature, and continue for so long as the minor child is concealed or detained.

(d) Any expenses incurred in returning the child shall be reimbursed as provided in Section 4605 of the Civil Code. Those expenses, and costs reasonably incurred by the victim, shall be assessed against any defendant convicted of a violation of Section 277, 278 or 278.5.

(e) Pursuant to Sections 27 and 778, violation of Section 277, 278 or 278.5 is punishable in California, whether the intent to commit the offense is formed within or without the state, if the child was a resident of California or present in California at the time of the taking, or if the child thereafter is found in California.

Discussion

In kidnapping, the victim is forced to go with the offender. Child stealing, however, is a crime against the person with the right to custody, and therefore, the consent of the child is irrelevant.

Sections 277, 278 and 278.5 makes it a crime to maliciously take, detain, conceal or entice a child away from the person or agency who has the legal right to custody. The right to lawful custody in the other person or agency may exist as the result of a court order or the "natural" right of a parent. It is also a crime under the above sections if the person taking the child has some right to custody, but violates the visitation periods or rights (terms) of the custody order, judgment or decree. For example, in one case the father was convicted of a violation of Section 278.5 (felony) even though he had custody 50 percent of the time. In this case, the father took the child and moved to another state where he concealed the location of the child from the child's mother (*People v. Lortz* 137 CA 3d 363).

If the taking is for "good cause," there is no violation of the above sections. "Good cause" for the purposes of these sections is defined as a "good faith belief" that the taking, detaining, concealing, or enticing away of the child is necessary to protect the child from ***immediate bodily injury or emotional harm.*** In some situations, a person may be convicted under Section 277 as a substitute for attempted child molestation charges. For example, if the offender entices the child to another location for the purposes of sexual molesting, but does not complete the offense of child molesting, the movement of the child by the enticement of the offender may constitute a violation of Section 277.

12.8 Laws of Arrest

Penal Code 834 **Who May Make and Acts Constituting**

An arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace-officer or by a private person.

Penal Code 834a **Duty to Refrain From Resisting Arrest**

If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest.

Penal Code 835 **Restraint limited to Necessity**

An arrest is made by an actual restraint of the person, or by submission to the custody of an officer. The person arrested may be subjected to

such restraint as is reasonable for his arrest and detention.

Penal Code 835a **Use of Reasonable Force to Effect Arrest**

Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent the escape or to overcome resistance.

A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance.

Penal Code 836 **Arrest Under Warrant-Peace Officer**

A peace officer may make an arrest in obedience to a warrant, or may, pursuant to the authority granted to him by the Provisions of Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, without a warrant, arrest a person:

1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence.
2. When a person arrested has committed a felony, although not in his presence.
3. Whenever he has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed.

Penal Code 837 **Arrest by Private Person**

A private person may arrest another:

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

Penal Code 838 **Arrest for Acts in Presence of Magistrate**

A magistrate may orally order a peace-officer or private person to arrest any one committing or attempting to commit a public offense in the presence of such magistrate.

Penal Code 839 **Summoning Assistance**

Any person making an arrest may orally summon as many persons as he deems necessary to aid him therein.

Penal Code 840 **Time of Day Arrest May be Made**

An arrest for the commission of a felony may be made on any day and at any time of the day or night. An arrest for the commission of a misdemeanor or an infraction cannot be made between the hours of 10 o'clock p.m. of any day and 6 o'clock a.m. of the succeeding day, unless:

(1) The arrest is made without a warrant pursuant to Section 836 or 837.

(2) The arrest is made in a public place.

(3) The arrest is made when the person is in custody pursuant to another lawful arrest.

(4) The arrest is made pursuant to a warrant which, for good cause shown, directs that it may be served at any time of the day or night.

Penal Code 841 **Notice of Authority and Intent to Arrest**

The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person making the arrest has reasonable cause to believe that the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or the person to be arrested is pursued immediately after its commission, or after an escape.

The person making the arrest must, on request of the person he is arresting, inform the latter of the offense for which he is being arrested.

Penal Code 842 **Showing Warrant on Demand**

An arrest by a peace officer acting under a warrant is lawful even though the officer does not have the warrant in his possession at the time of the arrest, but if the person arrested so requests it, the warrant shall be shown to him as soon as practicable.

Penal Code 843 **Overcoming Resistance of Preventing Escape**

When the arrest is being made by an officer under the authority of a warrant, after information of the intention to make the arrest, if the person to be arrested either fleas or forcibly resists, the officer may use all necessary means to effect the arrest.

Discussion

The above Penal Code provisions regarding the "laws of arrest" are generally self-explanatory. Some of the key concepts, however, are restated below:

1. Normally, a peace officer may arrest without a warrant for misdemeanor only when he or she has probable cause to believe that the suspect committed the crime in the presence of the peace officer.
2. A private person may arrest only when a crime has been committed or attempted. A peace officer may arrest when he or she has probable cause to believe that an offense has been committed.
3. A person has a duty to refrain from resisting an arrest by a peace officer. It is not a defense that the peace officer had no authority to arrest (P C 834a).

Additional Arrest Provisions

Listed below are some additional arrest provisions that pertain to the "laws of arrest:"

1. A juvenile may be arrested without a warrant for a misdemeanor even if it was not committed in the peace officer's presence (Welfare and Institutions Code, Section 625).
2. A peace officer may arrest without a warrant a person who has committed an assault or battery on school property during school hours (even though it was not committed in the presence of the peace officer) (P C 243.5).
3. As a general rule, a person may not be arrested inside a dwelling unless there is an arrest warrant, consent to enter the dwelling is given, or emergency circumstances (exigent circumstances) exist (*Payton v. U.S.* 445 U.S. 573). An example of exigent circumstances is an arrest made in a dwelling without a warrant if there is probable cause to believe that the suspect inside is armed and is likely to use the weapon (*James v. Superior Court* 87 CA 3d 985).
4. Refusing to aid and assist a uniformed peace officer in making an arrest is a misdemeanor (P C 150).
5. Forcible freeing of a prisoner from the lawful custody of the arresting party is a felony (P C 4550).
6. While a peace officer may use a reasonable amount of force to make an arrest, deadly force may only be used in the protection of life (Peterson v. City of Long Beach 24 C 3d 238).

CLASSROOM DISCUSSION QUESTIONS

1. Explain the differences between false imprisonment and kidnapping for purposes of ransom.
2. In which kidnapping offenses is movement required?
3. What is meant by the terms "consent" and "without free will?"
4. When may a peace officer arrest without a warrant?
5. When may a private person arrest without a warrant?
6. When may a police officer use deadly force to arrest a suspect?
7. What acts constitute an arrest?
8. What constitutes sufficient movement for kidnapping crimes?

SELF STUDY QUIZ

True/False

1. Forcible kidnapping in California requires that the victim be moved to at least another county.
2. To be kidnapping in California, the victim must be taken in California.
3. Consent is a valid defense to forcible kidnapping.
4. The movement necessary to constitute forcible kidnapping must be unlawful.

5. If consent is obtained by fraud, the offense may be forcible kidnapping.
6. A two-prong test is often used to determine if forcible kidnapping has been committed.
7. False imprisonment is always a felony in California.
8. False imprisonment involves the unlawful violation of the personal liberty of another.
9. False imprisonment is a lessor and included offense of forcible kidnapping.
10. Posing as a kidnapper is a crime in California.
11. Kidnapping for a ransom, like forcible kidnapping, requires movement to establish the offense.
12. Kidnapping for purposes of robbery is a specific intent crime.
13. A person may conceal a child from the person with legal rights to custody without committing a crime if there is "good cause" for the concealment.
14. A private person has no right or authority to arrest another in California.
15. A peace officer may use deadly force to effect an arrest.
16. A peace officer may never effect a warrantless arrest at night for a misdemeanor.
17. A citizen may legally resist an arrest by a peace officer if the arrest is not legal.
18. A private person may not assist a peace officer in making an arrest.
19. A person being arrested has a right to know why he or she is being arrested.
20. A person may be arrested in a private dwelling for a felony without a warrant.

Chapter 13

Crimes Against Public Decency, Morality and Public Peace

I only wish that we could have a code of practice for the criminals.
(Baroness Phillips House of Lords, July, 1984)

Related Crimes

1. Sale or Distribution of Obscene Matter (P C 311.2)
2. Making, Developing, Exchanging Sex Films of a Child (P C 311.3)
3. Employment of Minors For Sale or Distribution of Obscene Matter (P C 311.4)
4. Advertisements, Promotion, etc., of Obscene Matter (P C 311.5)
5. Participating in Obscene Live Conduct (P C 311.6)
6. Purchaser Required to Receive Obscene Matter as A Condition of Sale (P C 311.7)
7. Distribution of Harmful Matter to Minor (P C 313.1)
8. Residing in House of Ill-Fame (P C 315)
9. Keeping Disorderly Houses (P C 316)
10. Pimping (P C 266h)
11. Pandering (P C 266i)
12. Abduction for Purposes of Prostitution (P C 267)
13. Bigamy (P C 281)
14. Abortion (P C 274)
15. Incest (P C 285) [Discussed in Chapter 10.]
16. Sodomy (P C 286) [Discussed in Chapter 10.]
17. Indecent Exposure (P C 314) [Discussed in Chapter 10.]
18. Lotteries (P C 321)
19. Bingo Games (P C 326.5)
20. Slot Machines (P C 330.1)
21. Chain Letters (P C 327)
22. Organized Crime Bill (P C 186.2)

13.1 Historical and Constitutional Developments

U.S. Constitution, Amendment I (adopted 1791)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . .

Discussion

Historically, obscenity and similar laws involving public decency and morality have had problems with three constitutional principles:

1. the freedom of speech under the First Amendment,
2. the void for vagueness doctrine (*Winters v. New York* 333 U.S. 507), and
3. the constitutional right of privacy (*Stanley v. Georgia* 394 U.S. 557).

Free Speech

Often the defense of "free speech" is raised when dealing with obscene matters. In *Roth v. United States* (354 U.S. 476) decided by the U.S. Supreme Court in 1957, the Court held that obscenity was not protected by the First Amendment. The present standard for determining what constitutes obscenity is based on the 1973 U.S. Supreme Court case of *Miller v. California* (413 U.S. 15). Those standards are reflected in the obscenity statutes listed later in this chapter.

Vagueness

As Justice Reed stated in *Winters v. New York* (333 U.S. 507): "It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishments of incidents fairly within the protection of the guarantee of free speech is void on its face." Mr. Justice Reed, also, noted the difficulty of defining crimes by words well understood through long use in the criminal law (i.e. obscene, lewd, lascivious, filthy, indecent or disgusting) leaves a person uncertain as to the kind of prohibited conduct covered by the statute.

To overcome the above objections, the statutes involving obscenity and similar conduct are required to be as precise as practical. For this reason, these statutes are very lengthy and may appear to be unnecessarily repetitious.

Privacy

The Supreme Court in *Stanley v. Georgia* (394 U.S. 557) stated: "Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the first amendment means anything, it means a State has no business telling a man, sitting alone in his own home, what books he may read or what films he may watch." This right of privacy, however, does not protect the public exhibition of obscene matter nor the involvement of minors (*Paris Adult Theatre v. Slaton* 413 U.S. 49).

13.2 Community Standards

The test of obscenity is its violation of "contemporary standards." The prosecution has the burden of proving what the standards are and that the matter violates those standards. Since there are different standards in different parts of the country, this creates a problem in determining which standards apply. The obscenity standards for Fresno, California are quite different from the obscenity standards for New York City. Two approaches that have historically been used are the "local community standards" and the "national standards." California, however, as the result of a 1988 amendment to the Penal Code, now uses the "local community standards" approach in this area.

13.3 District Attorney's Charging Considerations

Traditionally, district attorneys have had major practical problems in determining whether or not to charge and prosecute obscenity and similar types of crimes. Those problems include:

1. Obscenity and decency cases are difficult and expensive to prosecute. Each case will take a considerable portion of a DA's limited resources.
2. Prosecution has, in the past, had minimal effect in reducing the availability of obscene matter or little effect on stopping prostitution in the community.
3. Public feeling regarding obscenity and similar cases are normally very strong toward prosecution.

As indicated by the above problems, the district attorney normally has a difficult and unpopular choice involved in making the decision to prosecute or not to prosecute.

13.4 Obscenity

Penal Code 311 **Definitions**

(a) "Obscene matter" means matter taken as a whole, the predominant appeal of which to the average person, applying contemporary community standards, is to prurient interest, meaning a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole lacks significant literacy, artistic, political, educational, or scientific value.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, that evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter lacks significant literary, artistic, political, educational, or scientific value.

(3) In determining whether the matter taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters, the fact that the defendant knew that the matter depicts as persons under the age of 16 years engaged in sexual conduct, as defined in (c) of Section 311.4, is a factor which can be considered in making that determination.

(b) "Matter" means any book, magazine, newspaper or other printed or written material or any picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter or live conduct.

(f) "Exhibit" means to show.

(g) "Obscene live conduct" means any physical human body activity, whether performed or engaged in alone or with other persons including but not limited to singing, speaking, dancing, acting, simulating, or pantomiming, where, taken as a whole, the predominant appeal of such conduct to the average person, applying contemporary statewide standards is to prurient interest, meaning a shameful or morbid interest in nudity, sex, or excretion; and is conduct which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is conduct which taken as a whole lacks significant literary, artistic, political, educational, or scientific value.

(1) The predominant appeal to prurient interest of the conduct is judged with reference to average adults unless it appears from the nature of the conduct or the circumstances of its production, presentation or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the conduct shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances or production, presentation advertising, or exhibition indicate that live conduct is being commercially exploited by the defendant for the sake of its prurient appeal, that evidence is probative with respect to the nature of the conduct and can justify the conclusion that the conduct lacks significant literary, artistic, political, educational, or scientific value.

(3) In determining whether the live conduct taken as a whole goes substantially beyond customary limits of candor in description or representation of such matter, the fact that the defendant knew that the live conduct depicts a person under the age of 16 years engaged in sexual conduct, as defined in subsection (c) of Section 311.4, is a factor which can be considered in making that determination.

13.5 Sale of Obscene Matter

Penal Code 311.2 **Sale or Distribution of Obscene Matter**

(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is for a first offense guilty of a misdemeanor . . .

(b) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares publishes, develops, duplicates, or prints, with intent to distribute or to exhibit to, or exchanges with, others for commercial consideration, any obscene matter, knowing that the matter depicts a person under the age of 18 years personally engaging in or personally simulating sexual conduct, as defined in Section 311.4 is guilty of a felony . . . .

(c) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, develops, duplicates, or prints, with intent to distribute or to exhibit to, or exchanges with, a person 18 years of age or older any matter, knowing that the matter depicts a person under the age of 17 years personally engaging in or personally simulating sexual conduct, as defined in Section 311.4 is guilty of a misdemeanor . . . . It is not necessary to prove commercial consideration or that the matter is obscene in order to establish a violation of this subdivision. If a person has been previously convicted of a violation of this subdivision, he or she is guilty of a felony.

(d) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, develops, duplicates, or prints, with intent to distribute or to exhibit to or to exchange with, a person under 18 years of age any matter, knowing that the matter depicts a person under the age of 17 years personally engaging in or personally simulating sexual conduct, as defined in Section 311.4, is guilty of a felony . . . .

(e) Subdivisions (a) and (d), inclusive, shall not apply to the activities of law enforcement and prosecuting agencies in the investigation and prosecution of criminal offenses or to legitimate medical, scientific, or educational activities, or to lawful conduct between spouses.

(f) This section shall not apply to matter which depicts a child under the age of 18, which child is legally emancipated, including lawful conduct between spouses when one or both are under the age of 18.

Discussion

The offenses involving the sale or distribution of obscene matter requires that the offender "knowingly" distribute or sale obscene matter. The knowledge required is that of "being aware of the character of the matter" (36 So. Cal. L. Rev. 537). As long as the offender is aware of the character of the matter, there is no requirement that he or she recognize it as obscene.

13.6 Child Sex Films

Penal Code 311.3 **Sex Films, etc. of Child**

(a) A person is guilty of sexual exploitation of a child when he or she knowingly develops, duplicates, prints, or exchanges any film, photograph, video tape, negative, or slide in which a person under the age of 14 years is engaged in an act of sexual conduct.

(b) As used in this section "sexual conduct" means any of the following:

(1) Sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between humans and animals.

(2) Penetration of the vagina or rectum by any object.

(3) Masturbation, for the purposes of sexual stimulation of the viewer.

(4) Sadomasochistic abuse for the purpose of sexual stimulation of the viewer.

(5) Exhibition of the genitals, pubic or rectal areas of any person for the purpose of sexual stimulation of the viewer.

(6) Defalcation or urination for the purpose of sexual stimulation of the viewer.

(c) Subdivision (a) shall not apply to the activities of law enforcement and prosecution agencies in the investigation and prosecution of criminal offenses or to legitimate medical, scientific, or educational activities, or to lawful conduct between spouses.

(d) Every person who violates subdivision (a) is punishable by a fine . . . or by imprisonment in county jail . . . or by both a fine and imprisonment. If such person has been previously convicted of a violation of subdivision (a) or any section of this chapter, he or she is punishable by imprisonment in the state prison.

(e) The provisions of this section shall not apply to an employee of a commercial film developer who is acting within the scope of his employment and in accordance with the instructions of his employer, provided that the employee has no financial interest in the commercial developer by which he is employed.

13.7 Employment of a Minor for Sale or Distribution of Obscene Matter

Penal Code 311.4 **Employment of Minor for Sale or Distribution of Obscene Matter**

(a) Every person who, with knowledge that a person is a minor, or who, while in possession of any facts on the basis of which he or she should reasonably know that the person is a minor, hires, employs, or uses the minor to do or assist in doing any of the acts described in Section 311.2 is for a first offense, guilty of a misdemeanor . . . .

(b) Every person who, with knowledge that a person is a minor under the age of 17 years, or who, while in possession of any facts on the basis of which he or she should reasonably know that the person is a minor under the age of 17 years, knowingly promotes, employs, uses, persuades, induces, or coerces a minor under the age of 17 years, or any parent or guardian of a minor under the age of 17 years under his or her control who knowingly permits the minor, to engage in or assist others to engage in either posing or modeling alone or with others for purposes of preparing a film, photograph, negative, slide, or live performance involving sexual conduct by a minor under the age of 17 years alone or with other persons or animals, for commercial purposes, is guilty of a felony . . . .

(c) [This subdivision is similar to subdivision (b) above except it is not necessary to prove a commercial purpose. The offense is still a felony, but the range of punishment is less.]

(d) As used in subdivisions (b) and (c), "sexual conduct" means any of the following, whether actual or simulated: sexual intercourse, oral copulation, anal intercourse, anal-oral copulation, masturbation, bestiality, sexual sadism, sexual masochism, penetration of the vagina or rectum by any object in a lewd or lascivious manner, exhibition of the genitals, pubic, or rectal area for the purposes of sexual stimulation of the viewer, any lewd or lascivious sexual act as defined in Section 288, or excretory functions performed in a lewd or lascivious manner, whether or not any of the above conduct is performed alone or between members of the same or opposite sex or between humans and animals. An act is simulated when it gives the appearance of being sexual conduct.

(e) This section does not apply where the minor is legally emancipated, including lawful conduct between spouses when one or both are under the age of 17.

(f) In every prosecution under this section involving a minor under the age of 14 years at the time of the offense, the age of the victim shall be pled and proven for the purpose of the enhanced penalty provided in Section 647a. Failure to plead and prove that the victim was under the age of 14 years at the time of the offense shall not bar prosecution under this section if it is proven that the victim was under the age of 18 years at the time of the offense.

13.8 Advertising of Obscene Matter

Penal Code 311.5 **Advertisement, Promotion, etc. of Obscene Matter**

Every person who writes, creates, or solicits the publication or distribution of advertising or other promotional material, or who in any manner promotes the sale, distribution, or exhibition of matter represented or held out by him to be obscene is guilty of a misdemeanor.

13.9 Participating in Obscene Live Conduct

Penal Code 311.6 makes it a misdemeanor for any person who knowingly engages or participates in, manages, produces, sponsors, presents or exhibits obscene live conduct to or before an assembly or audience consisting of at least one person or spectator in any public place or in any place exposed to the public view. It does not matter whether or not an admission fee is charged.

13.10 Requiring Purchaser to Receive Obscene Matter

Penal Code 311.7 makes it a misdemeanor to require as a condition of the sale, allocation, consignment, or delivery for resale of any books, papers, magazine, etc, that the purchaser also accept or receive any obscene matter. It is also a misdemeanor under this section to deny or threaten to deny or to revoke or threaten to revoke a franchise by reason of the failure of any person to accept obscene matter.

13.11 Defenses to Obscenity Charges

Penal Code 311.8 **Defenses**

(a) It shall be a defense in any prosecution for a violation of this chapter that the act charged was committed in aid of legitimate scientific or educational purposes.

(b) It shall be a defense in any prosecution for a violation of this chapter by a person who knowingly distributed any obscene matter by the use of telephone facilities to any person under the age of 18 years that the defendant has taken either of the following measures to restrict access to the obscene matter by persons under 18 years of age:

(1) Required the person receiving the obscene matter to use an authorized access or identification code, as provided by the information provider, before transmission of the obscene matter begins, where the defendant has previously issued the code by mailing it to the applicant, therefore after taking reasonable measures to ascertain that the applicant was 18 years of age or older and has established a procedure to immediately cancel the code of any person after receiving notice, in writing or by telephone, that the code has been lost, stolen or used by persons under the age of 18 years or that the code is no longer desired.

(2) Required payment by credit card before transmission of the matter.

(c) Any list of applicants or recipients compiled or maintained by an information-access service provider for the purposes of compliance with subdivision (b) is confidential and shall not be sold or otherwise disseminated except upon the order of the court.

13.12 Distribution of Harmful Matter to Minor

Penal Code 313.1

(a) Every person who, with knowledge that a person is a minor, or who fails to exercise reasonable care in ascertaining the true age of a minor, knowingly distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit any harmful matter to the minor is guilty of a misdemeanor.

(b) Every person who misrepresents himself to be the parent or guardian of a minor and thereby causes the minor to be admitted to an exhibition of any harmful matter is guilty of a misdemeanor.

(c) Any person who, within 500 meters of any elementary school, junior high school, high school, or public playground, or any part thereof, knowingly sells or offers to sell, in any coin or slug operated vending machine or mechanically or electronically controlled vending machine which is located on a public sidewalk any harmful matter displaying in public view photographs or pictorial representations of the commission of the following acts, is guilty of a misdemeanor: sodomy, oral copulation, sexual intercourse, masturbation, bestiality, or a photograph or an exposed penis in an erect and turgid state.

Penal Code 313(a) **Definitions**

(a) "Harmful matter" means matter taken as a whole, the predominant appeal of which to the average person, applying contemporary statewide standards, is to prurient interest, meaning a shameful or morbid interest in nudity, sex, or excretion, and is patently offensive to the prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and lacks significant literary, artistic, political, educational, or scientific value for minors . . . .

13.13 Pimping and Pandering

Penal Code 266h **Pimping**

Any person who, knowing another person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of the person's prostitution, or from money loaned or advanced to or charged against that person by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or who solicits or receives compensation for soliciting for the person is guilty of pimping, a felony . . . .

Penal Code 266i **Pandering**

Any person who: (a) procures another person for the purpose of prostitution; or (b) by promises, threats, violence, or by device or scheme, causes, induces, persuades or encourages another person to become a prostitute; or (c) procures for another

person a place as an inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state; or (d) by promises, threats, violence or by any device or scheme, causes, induces, persuades or encourages an inmate of a house of prostitution, or any place in which prostitution is encouraged or allowed within this state, or (e) to come into this state or leave this state for the purposes of prostitution; or (f) receives or gives, or agrees to receive or give, an money or thing of value for procuring or attempting to procure, another person for the purpose of prostitution, is guilty of pandering, a felony . . . .

13.14 Abduction for Prostitution

Penal Code 267 **Abduction for Prostitution**

Every person who takes away any person under the age of 18 years from the father, mother, guardian, or other person having the legal charge of the other person, without their consent, for the purpose of prostitution, is punishable by imprisonment in the state prison . . . .

13.15 Keeping or Residing in House of Ill-Fame

Penal Code 315 Residing in House of Ill-Fame

Every person who keeps a house of ill-fame in this state, resorted to for the purposes of prostitution or lewdness, or who willfully resides in such house, is guilty of a misdemeanor . . . .

Penal Code 316 **Keeping Disorderly House**

Every person who keeps any disorderly house, or any house for the purpose of assignation or prostitution, or any house of public resort, by which the peace, comfort, or decency of the immediate neighborhood is habitually disturbed, or who keeps any inn in a disorderly manner; and every person who lets any apartment or tenement, knowing that it is to be used for the purpose of assignation or prostitution, is guilty of a misdemeanor.

13.16 Local Ordinances

P C 318.5 provides that cities and counties can pass ordinances which prohibits waiters or entertainers from exposing their breasts, buttocks or genitals, in establishments which serve food and beverages including alcoholic beverages.

13.17 Bigamy

Penal Code 281 **Bigamy**

Every person having a husband or wife living, who marries any other person, except in the cases specified in Section 282 is guilty of bigamy.

Penal Code 282 **Effect of Five Year Absence or Dissolution of Marriage**

Section 281 does not extend to any of the following:

(a) To any person by reason of any former marriage whose husband or wife by such marriage has been absent for five successive years without being known to such person within that time to be living.

(b) To any person by reason of any former marriage, which has been pronounced void, annulled, or dissolved by the judgment of a competent court.

Penal Code 284 **Marrying Spouse of Another**

Every person who knowingly and willfully marries the husband or wife of another, in any case in which the husband or wife would be punishable under the provisions of this chapter, is punishable by fine . . . or by imprisonment in the state prison.

13.18 Abortion

Penal Code 274 **Definition and Punishment — Exception**

Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, except as provided in the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code, is punishable by imprisonment in the state prison.

Penal Code 275 [This section makes it a felony to solicit any person to perform or to submit to an illegal abortion.]

Discussion

The U.S. Supreme Court in *Roe v. Wade,* 410 U.S. 113, held that a woman's right to privacy under the federal constitution includes "a woman's decision whether or not to terminate her pregnancy". Under this case, a woman has a right to obtain an abortion during the first trimester of the pregnancy. During the second trimester, the state may place restrictions for the medical protection of the woman. During the third trimester, the state has the right to consider the protection of the unborn child.

13.19 Gambling

In California, not all gambling is illegal. The most common illegal forms of gambling are Listed below:

1. Lottery (except the official state lottery). Lottery is defined as any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to give any valuable consideration for the chance of obtaining such property or a portion of it, or any interest in such property (P C 326.5). Note: a "football pool" is a lottery, and therefore is illegal. The key phrase is "by chance." If the winning depends on skill, not chance, it may not be gambling.
2. Chain letters. chain letters and pyramid schemes are a violation of P C 327.
3. Bookmaking. Bookmaking is a violation of P C 337a
4. Operating an unlicensed gaming house is a violation of P C 330.
5. Slot machines P C 330.1.

13.20 Organized Crime

The Organized Crime Bill (P C 186) provides that when selected other penal statutes are violated for financial gain, two or more times by organized crime or any person who is engaged in a "pattern of criminal profiteering," the offender(s) are guilty of criminal profiteering in addition to the other crimes involved.

CLASSROOM DISCUSSION QUESTIONS

1. How does one establish the statewide community standards for obscenity cases?
2. What is the extent of the "right of privacy?"
3. Why is it difficult to prosecute cases involving obscenity?
4. Define "obscenity?"
5. How does the obscenity laws and the right of privacy conflict?
6. What is the difference between "pimping" and "pandering?"
7. Under what circumstances is an individual guilty of "bigamy?"
8. What standard does California use for "obscenity?"

SELF STUDY QUIZ

1. The first amendment to the federal constitution protects the right to publish obscene matter.
2. California uses the "statewide community standards" in obscenity cases.
3. Obscenity cases are relatively easy to prosecute.
4. The phrase "obscene matter" does not include films or recordings under the statutes.
5. The predominant appeal to prurient interest of the conduct is always judged with reference to average adults.
6. "Knowingly" under the statutes means that the individual must recognize that the matter is obscene before he or she can be prosecuted.
7. The employment of a minor for the sale of obscene matter is always a felony offense.
8. A person has the right to read obscene books in his or her own home.
9. The right of privacy for a woman includes the right to have an abortion at any time during the pregnancy if her doctor consents.
10. It is illegal to place a slug operated vending machine within 1,000 yards of a high school.

Chapter 14

Forgery, Counterfeiting and Check Offenses

The Pen is mighter than the sword. (Old English Proverb)

Forgery, Counterfeiting and Check Related Crimes

1. Forgery — Acts Constituting (P C 470)
2. Forging Driver's License — Identification Card (P C 470a)
3. Possessing Forged Driver's License — Identification Card (P C 470b)
4. Altering Entries in Books and Records (P C 471)
5. Possessing, Receiving or Uttering Forged Paper (P C 475)
6. Forging or Counterfeiting State, Corporate and Official Seals (P C 472)
7. Sending False Message by Phone or Telegraph (P C 474)
8. Uttering or Passing Check, Money Order, or Warrant to Defraud (P C 475a)
9. Making, Drawing or Possessing Fictitious Bill, Note or Check (P C 476)
10. Making, Drawing or Passing Worthless Check, Draft or Order (P C 476a)
11. Counterfeiting (P C 477)
12. Having or Uttering Counterfeit (P C 479)
13. Making or Having Counterfeit Die or Apparatus (P C 480)
14. Ticket Scalping (P C 483)
15. Offering False or Forged Instrument to be Filed of Record (P C 115)
16. Altering Certified Copies of Official Records (P C 115.3)
17. Filing False or Forged Documents or Instruments (P C 115.5)
18. Forgery of Initiative Signatures (Elections Code 29733)
19. Forgery of Trademark (B & P C 14322)

14.1 Forgery

Penal Code 470 **Forgery — Acts Constituting**

Every person who, with intent to defraud, signs the name of another person, or a fictitious person, knowing that he or she has no authority to do so or falsely makes, alters, forges, or counterfeits, any charter, letters patent, deed, lease, indenture, writing obligatory, will, testament, codicil, bond, covenant, bank bill or note, post note, check, draft, bill of exchange, contract, promissory note, due bill for the payment of money or property, receipt for money or property, passage ticket, lottery ticket or share purporting to be issued under the California State Lottery Act of 1984, trading stamp, power of attorney, or any certificate of any share, right, or interest in the stock of any corporation or association, or any controller's warrant for the payment of money at the treasury, county order or warrant, or request for the payment of money, or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing, or acquittance, release, or receipt for money or goods, or any acquittance, release, or discharge of any debt, account, suit, action, demand, or other thing, real or personal, or any transfer or assurance of money, certificate of shares of stock, goods, chattels, or other property whatever, or any letter of attorney, or other power to receive money, or to receive or transfer certificates of shares of stock or annuities, or to let, lease, dispose of, alien, or convey any goods,

chattels, lands, or tenements, or other estate, real or personal, or any acceptance or endorsement of any bill of exchange, promissory note, draft, order, or any assignment of any bond, writing obligatory, promissory note, or other contract for money or other property; or counterfeits or forges the seal or handwriting of another; or utters, publishes, passes, or attempts to pass, as true and genuine, any of the above-named false, altered, forged, or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged, or counterfeited, with intent to prejudice, damage, or defraud any person; or who, with intent to defraud, alters, corrupts, or falsifies any record of any will, codicil, conveyance, or other instrument, the record of which is by law evidence, or any record of any judgment of a court or the return of any officer to any process of any court, is guilty of forgery.

Penal Code 470a **Forging Driver's License — Identification Card**

Every person who alters, falsifies, forges, duplicates or in any manner reproduces or counterfeits any driver's license or identification card issued by a governmental agency with the intent that such driver's license or identification card be used to facilitate the commission of any forgery, is punishable by imprisonment in the state prison, or by imprisonment in the county jail . . . .

Penal Code 470b **Possessing Forged Driver's License — Identification Card**

Every person who displays or causes or permits to be displayed or in his possession any driver's license or identification card of the type enumerated in Section 470a with the intent that such driver's license or identification card be used to facilitate the commission of any forgery, is punishable by imprisonment in the state prison, or by imprisonment in the county jail . . . .

Forgery Defined

At both common law and by statute, forgery is the making of a false instrument or the material alteration of an existing genuine instrument. The common law crime of uttering a forged document is also included in the statutory crime of forgery under P C 470. Uttering is the offering, passing or attempted passing of a false instrument with knowledge thereof and with the intent to defraud. Forgery is complete when one either makes or passes a false instrument with the intent to defraud (*People v. Ross* 198 CA 2d 723). The gist of forgery offenses is the "intent to defraud." Actual defrauding is not required (*People v. Garin* 174 CA 2d 654).

Elements of Forgery

The elements of the crime of forgery (making a false document or alteration of a genuine instrument) are:

1. a false signature or material alteration
2. signed or altered without authority
3. a writing or other instrument that if genuine, would have legal significance
4. an intent to defraud

The elements of the crime of forgery (uttering, passing, publishing, or attempting to pass) are:

1. a forged document that if genuine, would have legal significance
2. uttering, passing, publishing, or attempting to pass the forged document with the intent to defraud.

Discussion

Forgery is a specific intent crime, in that a specific intent to defraud is a necessary element of the offense. The term "writing" includes printed or typewritten material. In one case, the accused was convicted of forgery where he signed his own name to a check. In this case, the defendant wrongly received a check that was made payable to another person with the same name as the defendant. The defendant knew that the check was not his and thus by signing his name with the intention of having it accepted as the other person's signature was forgery (Clark and Marshall, p. 848).

Fraud in the Inception

Forgery may be committed by obtaining a genuine signature to an instrument by fraudulent representations regarding the nature of the document. For example, a check signed in blank by a victim who was promised that it was to be used only as an example; it was later filled in without authority. The court held that this was a forgery (*People v. Bartges* 126 CA 2d 763). In another

case, the defendant obtained the signature of a victim on a deed of trust by stating that the document was a contract. The court held that the crime of forgery was committed (*People v. Parker* 11 CA 3d 500).

Authority to Sign

The prosecution must establish that there was a lack of authority to sign the other person's name. Accordingly, the implied authority to sign the other person's name is a defense.

Instruments Subject to Forgery

To be subject to forgery the instrument, if genuine, must create some legal right or obligation (have apparent legal significance). If the instrument has no legal significance on its face, then it is not subject to forgery. If it has no legal significance, but this is not apparent on its face, then the instrument is subject to forgery statutes. For example, the conviction for the forgery of a will was upheld on review even though the deceased had no estate (property) to pass under the will (*People v. Bibby* 91 C 470).

Instruments which the courts have found to have apparent legal significance include:

1. transcript of college record or college diploma (*People v. Russel* 214 CA 2d 445)
2. letter of credit (*People v. Kagan* 264 CA 2d 656)
3. insurance form of proof of loss (*People v. Di Ryana* 8 CA 333)
4. divorce decree (*Ex parte Finley* 66 C 262)
5. signing false name to a charge slip while using a stolen credit card (*People v. Searcy* 199 CA 2d 740)

Alteration

The alteration of a document is expressly included in P C 470. The general theory is that when a genuine document is altered, it becomes a false document. To be forgery, however, alteration must be of a material part. For example, changing the date on a check from April 4 to April 14 will not be a forgery unless the change in date has some legal significance. The alteration must result in some material change in the rights and obligations of the parties involved. For example, the material alteration of a check already made, with the intent to defraud another is forgery (*People v. Brotherton* 47 C 388).

Intent

An intent to defraud is a necessary element. The intent, however, may be inferred from circumstances (*People v. Cullen* 99 CA 2d 468). A general intent to defraud members of the public is sufficient. There is no requirement to establish that the defendant intended to defraud any particular person, as long as a general intent to defraud another is established (*People v. Brown* 113 CA 492).

Uttering

The crime of "uttering a forgery" is the offense of trying to pass a forged document as genuine. To be guilty of this offense, the accused need not complete the passing or uttering of it. Attempting to pass is sufficient to constitute the offense (*People v. Clark* 233 CA 2d 725). A conviction of uttering a forgery was upheld where one defendant was caught attempting to cash a forged payroll check by representing to a cashier that he was the individual whose name was on the check (*People v. Ford* 233 CA 2d 725). Possession of a forged instrument with the intent to pass it is not forgery under P. C. 470. There must be at least an attempt to pass the false document. (Note: possession of a forged document may be a violation of the "possession" statutes.)

14.2 Making False Entries in Records or Returns

Penal Code 471 **Making False Entries in Records or Returns**

Every person who, with intent to defraud another, makes, forges, or alters any entry in any book of records, any instrument purporting to be any record or return specified in the preceding section, is guilty of forgery.

Penal Code 471.5 **Falsifying Medical Records**

Any person who alters or modifies the medical record of any person, with fraudulent intent, or who, with fraudulent intent, creates any false medical records, is guilty of a misdemeanor.

14.3 Forgery of Corporate and Public Seals

Penal Code 472 **Forgery of Corporate and Public Seals**

Any person who, with intent to defraud another, forges, or counterfeits the seal of this state, the seal of any public officer authorized by law, the seal of any court of record, or the seal of any corporation, or any other public seal authorized or recognized by the laws of this state, or of any other state, government, or country, or who falsely makes, forges, or counterfeits any impression purporting to be an impression of any such seal, or who has in his possession any such counterfeited seal or impression thereof, knowing it to be counterfeited, and willfully conceals the same, is guilty of forgery.

14.4 Sending False Messages

Penal Code 474 **False Messages**

Every person who knowingly and willfully sends by telegraph or telephone to any person a false or forged message, purporting to be from a telegraph or telephone office, or from any other person, or who willfully delivers or causes to be delivered to any other person any such message falsely purporting to have been received by telegraph or telephone, or who furnished to any agent, operator, or employee, to be sent by telegraph or telephone, or to be delivered, any such message, knowing the same to be false or forged, with the intent to deceive, injure, or defraud another, is punishable by imprisonment in the state prison . . . or in the county jail . . . .

Discussion

The defendant was convicted of this offense for sending a telegraph message to her former husband stating that their 14 year old son had been killed and his remains cremated. Apparently, she was trying to defraud her ex-husband of his visitation rights awarded by the court (People v. Tolstoy 250 CA 2d 22).

14.5 False Signature on Letter to Newspaper

P C 538a makes it a misdemeanor to sign another person's name to a letter, and send it to a newspaper with the intent to cause the newspaper to believe that the letter was written by the person whose name is signed to the letter.

14.6 Filing Forged Instruments

Penal Code 115 **Offering False or Forged Instruments to be Filed.**

(a) Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, registered, or recorded under any law of this state or of the United States, is guilty of a felony.

(b) Each instrument which is procured or offered to be filed, registered, or recorded in violation of subdivision (a) shall constitute a separate violation of this section.

[Subsections (c) and (d) referring to punishments are omitted.]

Penal Code 115.5 **Filing False or Forged Documents or Instruments**

(a) Every person who files any false or forged document or instrument with the county recorder which affects title to, places an encumbrance on, or places an interest secured by a mortgage or deed or trust on, real property consisting of a single-family residence containing not more than four dwelling units, with knowledge that the document is false or forged is punishable . . . .

(b) Every person who makes a false sworn statement to a notary public, with knowledge that the statement is false, to induce the notary public to perform an improper notarial act on an instrument or document affecting title to, or placing an encumbrance on, real property containing not more than four dwelling units is guilty of a felony.

Discussion

The above offenses required that the filing or offering for filing or the making of a false sworn statement to a notary public be "with the knowledge" that the documents or statements are forged or false. There is no requirement, however, to establish an "intent to defraud."

14.7 Altering Certified Copies of Official Records

Penal Code 115.3 **Altering Certified Copies of Official Records**

Any person who alters a certified copy of an official record, or knowingly furnishes an altered certified copy of an official record, of this state,

including the executive, legislative, and judicial branches thereof, or of any city, county, city and county, district, or political subdivision thereof, is guilty of a misdemeanor.

Discussion

The above offense of altering certified copies of official records does not require an "intent to defraud." The mere altering of certified copies is sufficient to constitute the offense.

14.8 Possession of Forged Bills

Penal Code 475 **Forged or Unfinished Bills or Notes, Possession**

Every person who has in his possession, or receives from another person, any forged promissory note or bank bill, or bills, or any counterfeited trading stamp, or stamps, or lottery ticket or share purporting to be issued under the California State Lottery Act of 1984, or tickets or shares, for the payment of money or property, with the intention to pass the same, or to permit, cause, or procure the person, knowing the same to be forged or counterfeited, or has or keeps in his or her possession any blank or unfinished note or bank bill made in the form or similitude of any promissory note or bill for payment of money or property, made to be issued by any incorporated bank or banking company, or any blank or unfinished check, money order, or traveler's check, whether the parties thereto are real or fictitious, with intention to fill up and complete the blank and unfinished note or bill, check, money order, or traveler's check, or to permit, or cause, or procure the same, or to permit, or cause, or procure the same to be uttered or passed, to defraud any person, is punishable by imprisonment in the state prison, or by imprisonment in the county jail . . . .

Penal Code 475a **Fraudulent Possession of Money Order, Warrant or Completed Check**

Every person who has in his possession a completed check, money order, traveler's check, controller's warrant for the payment of money at the treasury, or county order or warrant, whether the parties thereto are real or fictitious, with intention to utter or pass the same, or to permit, cause, or procure the same to be uttered or passed, to defraud any person, is punishable by imprisonment in the state prison, or by imprisonment in the county jail . . . .

Penal Code 476 **Possessing Fictitious Bill, Note or Check**

Every person who makes, passes, utters, or publishes, with intention to defraud any other person, or who, with the like intention, attempts to pass, utter, or publish, or who has in his possession, with like intent to utter, pass, or publish, any fictitious bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for the payment of money or property of some bank, corporation, copartnership, or individual, when, in fact, there is no such bank, corporation, copartnership, or individual in existence knowing the bill, note, check, or instrument in writing to be fictitious, is punishable by imprisonment in the county jail . . . or . . . in the state prison.

Discussion

For the "possession" to be crime, the possession must be with the knowledge that the instrument was false or was not genuine. Each instrument possessed constitutes a separate crime.

14.9 Check Offenses

Penal Code 476a **Delivering or Making Check With Insufficient Funds**

(a) Any person, who for himself or as the agent or representative of another or as an officer of a corporation, willfully, with intent to defraud, makes or draws or utters or delivers any check, draft or order upon any bank or depository, of person, or firm, or corporation, for the payment of money, knowing at the time of such making, drawing, uttering or delivering that the maker or drawer or the corporation has not sufficient funds in, or credit with said bank or depository, or person, or firm, or corporation, for the payment of such check, draft, or order and all other checks, drafts, or orders upon such funds then outstanding, in full upon its presentation, although no express representation is made with reference thereto, is punishable by imprisonment in the county jail . . . .

(b) However, if the total amount of all such checks, drafts, or orders that the defendant is

charged with and convicted of making, drawing, or uttering does not exceed two hundred dollars ($200), the offense is punishable only by imprisonment in the county jail for not more than one year, except that this subdivision shall not be applicable if the defendant ... [has a previous conviction of this Section or Sections 470, 475, or 476.]

(c) Where such check, draft, or order is protested, on the ground of insufficiency of funds or credit, the notice of protest thereof shall be admissable as proof of presentation, nonpayment and protest and shall be presumptive evidence or knowledge of insufficiency of funds or credit with such bank or depositary, or person, or firm, or corporation.

(d) In any prosecution under this section involving two or more checks, drafts, or orders, it shall constitute prima facie evidence of the identity of the drawer of a check, draft, or order if:

(1) At the time of the acceptance of such check, draft or order from the drawer by the payee there is obtained from the drawer the following information: name and residence of the drawer, business or mailing address, either a valid driver's license number or Department of Motor Vehicles identification card number, and the drawer's home or work phone number or place of employment. Such information may be recorded on the check, draft, or order itself or may be retained on file by the payee and referred to on the check, draft, or order by identifying number or other similar means; and

(2) The person receiving the check, draft, or order witnesses the drawer's signature or endorsement, and, as evidence of that, initials the check, draft, or order at the time of the receipt.

(e) The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depository or person or firm or corporation for the payment of such check, draft or order.

(f) [Omitted.]

Elements

The elements of the offense of delivering or making a check with insufficient funds are:

1. the making of, uttering or the delivery of
2. a check, draft or order,
3. with the intent to defraud,
4. for the payment of money or property,
5. with knowledge that at the time of the making, delivering or uttering, there were insufficient funds or credit to cover the check, draft or order.

Discussion

In most cases, the conduct required to establish a violation of this offense, also, is sufficient to constitute theft. A critical problem with the prosection of most theft by check offenses is in establishing the identify of the maker or presenter of the check. This problem is made easier by the presumptions contained in (d) (1) above. The evidentiary presumptions, therefore, make it easier in most cases to establish a violation of this statute rather than the theft statute.

While this section requires an intent to defraud, it is not necessary to establish that any person was actually defrauded. It does require proof that at the time of the making, uttering, or delivery that the defendant knew that he or she had neither sufficient funds or credit with the bank, etc. to cover the check, draft or order.

14.10 Counterfeiting

Penal Code 477 **Counterfeiting Coin, Bullion, etc.**

Every person who counterfeits any of the species of gold or silver coin current in this state, or any kind of species of gold-dust, gold or silver bullion, or bars, lumps, pieces, or nuggets, or who sell, passes, or gives in payment such counterfeit coin, dust, bullion, bars, lumps, pieces, or nuggets, or permits, with intention to defraud any person, knowing the same to be counterfeited, is guilty of counterfeiting.

Penal Code 479 **Counterfeit Gold or Silver Coins, etc.**

Every person who has in his possession, or receives for any other person, any counterfeit gold or silver coin of the species current in this state, or any counterfeit gold dust, gold or silver bullion or bars, lumps, pieces or nuggets, with the intention to sell, utter, put off or pass the same, or permits, causes or procures the same to be sold, uttered or passed, with intention to defraud any person,

knowing the same to be counterfeit, is punishable by imprisonment in the state prison . . . .

Penal Code 480 **Possessing or Making Counterfeit Dies or Plates**

Every person who makes, or knowingly has in his possession any die, plate, or any apparatus, paper, metal, machine, or other thing whatever, made use of in counterfeiting coin current in this state, or in counterfeiting gold dust, gold or silver bars, bullion, lumps, pieces, or nuggets, or in counterfeiting bank notes or bills, is punishable by imprisonment in the state prison . . . and all such dies, plates, apparatus, paper, metal, or machine, intended for the purpose aforesaid, must be destroyed.

Discussion

Counterfeiting of U.S. currency is a federal crime and is subject to prosecution in U.S. District Courts. It is also a state crime and the states have concurrent power to punish (*In re Dixon* 41 C 2d 756). By statute, counterfeiting includes more than the making of phony currency. For example, a conviction for the counterfeiting of parimutuel tickets was upheld in one case. Note: the intent to defraud is similar to that required for forgery (*People v. Bratis* 73 CA 3d 751).

14.11 Ticket Scalping

Penal Code 483 **Ticket Scalping**

Except as otherwise provided . . . any person . . . that shall sell to another any ticket, pass, scrip, mileage or commutation book, coupon, or other instrument for passage on a common carrier, for the use of any person not entitled to use the same according to the terms of the book or portion thereof from which it was detached, shall be guilty of a misdemeanor.

Discussion

Unlike forgery or counterfeiting, ticket scalping is a general intent crime. This crime also differs in that there is no requirement to establish an intent to defraud as a necessary element. For example, most sports tickets have restrictions printed on them limiting their transfer or resale. Accordingly, reselling the tickets in violation of the ticket restrictions is an offense under this section.

CLASSROOM DISCUSSION QUESTIONS

1. Explain the difference between the crimes of possession of forged instruments and uttering a forged document.
2. Bob writes a check to pay his rent. At the time of writing his check, he thinks that he has sufficient credit with the bank to cover the check. Two days prior, however, he had received a letter from his bank indicating that his line of credit was cancelled. Bob had misread the letter and thought that it had increased his line of credit. Has he committed a check offense under P C 476a?
3. Joe finds four tickets to the UCLA/USC football game. He needs money to pay his tuition to UC. He attempts to sell the tickets. What crime(s), if any, has he committed?
4. Jim White has the same name as a famous football player. He writes a letter to the newspaper regarding football. The newspaper thinking the letter is from the famous Jim White publishes it. What crime(s), if any, has Jim committed?
5. Mike asks Jerry to cash his check for him (Mike) at the local bank. Mike forgets to endorse the check. Jerry realizing this signs Mike's name to the check, cashes it and gives the money to Mike. Is Jerry guilty of forgery?
6. Susan finds a check with the name of the payee blank. She fills in her name and cashes the check. What crimes has she committed?

SELF STUDY QUIZ

True/false

1. Forgery requires an intent to defraud.
2. Implied authority is a defense to forgery.
3. Making a false lottery ticket is not forgery.
4. Altering a lottery ticket to make it a winning ticket is not forgery.
5. Trading stamps are not subject to be forged.
6. The crime of uttering a forged document requires that the transfer of the document be completed.
7. A material alteration of a bank check is a forgery.
8. Forgery may be committed by obtaining a genuine signature by fraud.

9. The offense of sending false messages under P C 474 requires an intent to injure, deceive or defraud.
10. A person may be convicted of possession of a forged check without establishing that the person was aware of its falsity.
11. Counterfeiting is a federal crime and thus cannot be prosecuted in state criminal courts.
12. Ticket scalping is a specific intent crime.
13. To be guilty of the crime of altering certified copies of official records, it must be proven that the individual did the altering with an intent to defraud.
14. Passing a forged driver's license is always a felony.
15. Uttering a forged document is the offense of offering, passing or attempting to pass a forged document with the knowledge of its falsity and with the intent to defraud.

Chapter 15

Controlled Substances and Alcohol Related Crimes

There are two ways of being addicted to heroin. One way is to mainline it. The other way is to traffic in it. (Richard Berdin, Code Name Richard)

Drug and Alcohol Related Crimes

1. Uniform Controlled Substances Act (H & S 11000-11853)
2. Driving Under the Influence of Alcohol or Drugs (V C 23152)
3. Felony Driving Under the Influence (V C 23153)
4. Driving Under the Influence — Juveniles (V C 23140)

15.1 Uniform Controlled Substances Act

The most drug offenses in California are contained in the Uniform Controlled Substances Act (referred to as the Act) which is set forth in the Health and Safety Code (H&S), Sections 11000-11853.

The below listed definitions are set forth in the Act:

Controlled Substances

A drug, substance, or immediate precursor which is listed in any section of the Act (H&S 11007).

Drug

(a) A substance recognized as drugs in the official United States Pharmacopoeia of the United States or official National Formulary, or any supplement to any of them;

(b) substances intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or animals;

(c) substances (other than food) intended to affect the structure or any function of the body of man or animals; and

(d) substances intended for use as a component of any article specified in subdivisions (a), (b) and (c).

Drugs do not include devices or their components, parts, or accessories (H&S 11014).

Marijuana

Marijuana means all parts of the plant Cannabis Sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of the plant which is incapable of germination (H&S 11018).

Narcotic Drug

Narcotic drug means any of the following whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(a) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

(b) Any salt, compound, isomer, or derivative, whether natural or synthetic, or the substances referred to in subdivision (a), but not including the isoquinoline alkaloids of opium.

(c) Opium poppy and poppy straw.

(d) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, but not including decocainized coca leaves or extraction of coca leaves which do not contain cocaine or ecgonine.

(e) Cocaine, whether natural or synthetic, or any salt, isomer, derivative, or preparation thereof.

(f) Ecgonime, whether natural or synthetic, or any salt, isomer, derivative, or preparation thereof.

(g) Acetyfentanyl, the thiophene analog thereof, derivatives of either, and any salt, compound, isomer, or preparation of acetylfentanyl or the thiophene analog thereof. (H&S 11019)

Opiate

Opiate means any substance having addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. (H&S 11020)

Opium Poppy

Opium poppy means the plant of the species Papaver somniferum L., except its seeds. (H&S 11021)

15.2 Schedules

The Act divides the controlled substances into five different schedules.

Schedule I

Those drugs classified as Schedule I controlled substances are listed in H & S 11054. Substances classified under Schedule I include:

1. opiates unless specifically listed in another schedule
2. heroin
3. LSD (lysergic acid diethylamide)
4. mescaline
5. marijuana
6. hallucinogenic substances unless specifically listed in another section
7. morphine methylbromide
8. peyote
9. cocaine base
10. methaqualone

Note: this is not a complete list of all Schedule I substances.

Schedule II

H & S 11055 contains a list of those substances classified as Schedule II. The list includes:

1. opium
2. codeine
3. cocaine except that classified as Schedule I
4. pentobarbital
5. morphine
6. methadone
7. amphetamines
8. methylphenidate

Note: this is not a complete list of substances under Schedule II.

Schedule III

Schedule III controlled substances are listed in H & S 11056. The list of Schedule III substances include:

1. phencyclidine (PCP)
2. methaqualone
3. barbiturates
4. stimulants unless specifically listed under another schedule
5. depressants unless specifically listed under another schedule
6. secobarbital
7. lysergic acid
8. chorhexadol

Note: not a complete list.

Schedule IV

Schedule IV substances are listed in H & S Section 11057 and include the below listed substances:

1. veronal
2. luminal

3. chloral hydrate
4. valmid
5. placidyl
6. barbital
7. chloral betaine
8. pipradrol

Note: not a complete list.

Schedule V

The Schedule V controlled substances listed in H & S 11058 include:

1. not more than 200 milligrams of codeine per 100 milliliters or per 100 grams
2. not more than 100 milligrams of opium per 100 milliliters or per 100 grams
3. not more than 100 milligrams of dihydrocodeine per 100 milliters or per 100 grams

15.3 Reporting Requirements

The Act requires certain reports be submitted regarding the manufacture, sale or delivery of controlled substances. Reports required include:

1. (H & S 11100) Any manufacturer, wholesaler, retailer, or other person who sells, transfers, or otherwise furnishes certain controlled substances shall submit a monthly report to the State Department of Justice of all of those transactions. Those substances include:
   a. Phenyl-2-propanone
   b. Methylamine
   c. Ethylamine
   d. D-lysergic acid
   e. Ergotamine tartrate
   f. Diethyl malonate
   g. Malonic acid
   h. Ethyl malonate
   i. Barbituric acid
   j. Piperidine
   k. N-acetylanthranilic acid
   l. Pyrrolinine
   m. Penylacetic acid
   n. Anthranilic acid
   o. Morpholine
   p. Ephedrine
   q. Pseudoephedrine
2. (H & S 111000.1) Any manufacturer, etc., who receives the controlled substances listed above from outside the state shall make a report of the transaction to the State Department of Justice.
3. (H & S 11103) Reports are required to be made on the thefts or loss of any of the controlled substances listed under Section 11100.

Forms for Reports

H & S 11101 requires that the monthly reports contain at least the following information on those substances covered by section 11100:

1. name of substance,
2. quantity of the substance involved,
3. date of the transaction,
4. name and address of the receiver of the substance, and
5. name and address of the person providing the substance.

15.4 Felony Offense for Certain Sales

Health & Safety Code 11104

Any manufacturer, wholesaler, retailer, or other person who sells, transfer, or otherwise furnishes any of the substances listed in subdivision (a) of Section 11100 with knowledge or the intent that the recipient will use the substance to unlawfully manufacture a controlled substance is guilty of a felony.

15.5 Permits for Sale, Transfer, etc.

H & S 11106 requires that any manufacturer, wholesaler, etc., who sells, transfers, etc. any of the controlled substances listed in section 11100 must obtain a permit prior to the transfer from the State Department of Justice. Permits may be granted for a maximum period of one year.

15.6 Prescriptions

Only physicians, dentists, podiatrists or veterinarians or pharmacists acting within the provisions of Article 18 of the Health and Safety Code and registered nurses under certain circumstances may write prescriptions. Some of the general rules on writing and filling prescriptions include:

1. No person shall write, issue, fill, compound or dispense a prescription except as authorized by the Act.
2. Prescriptions for a controlled substance shall only be issued for a legitimate medical purpose.
3. Both the prescribing practitioner and the pharmacist filling the prescription have the responsibility to ensure that only legal prescriptions are filled.
4. It is unlawful to solicit, directly or indirectly, any person to prescribe, fill, etc. an illegal prescription.
5. No person shall issue a prescription that is false or fictitious in any respect.
6. No person shall issue, prescribe, administer, etc., a controlled substance to an addict except as permitted under the Act.
7. With minor exceptions, controlled substances classified under Schedules II, III, IV and V may not be dispensed without a prescription.
8. In most cases, a maximum of 72-hour supply of a Schedule II substance may be dispensed pursuant to a valid prescription.
9. Prescription blanks are issued by the State Department of Justice in serially numbered groups of not more than 100 forms each in triplicate.
10. Possession of unauthorized prescription blanks or counterfeit blanks is a criminal offense under the Act.
11. The giving of a false name or address in connection with prescribing, dispensing, etc. of a controlled substance is unlawful.
12. Records of all prescriptions prescribed, dispensed, etc. shall be maintained for a period of at least three years.
13. Records shall contain, at least, the following information:
    a. name and address of the patient,
    b. date,
    c. character and quantity of controlled substances involved, and
    d. pathology and purpose for which the prescription was issued (or in the case of the pharmacist, the name and address of the prescriber of the controlled substance).

15.7 Unlawful Possession

It is unlawful to possess any controlled substance except as permitted by law. In most cases, the unlawful possession is a felony (H & S 11350-11356). The possession of substances under Schedules III, IV or V may in most cases be treated by the court as a misdemeanor (wobbler). Possession for purposes of sale or distribution is an aggravated form of possession. There are two types of possession; actual and constructive. Actual possession is where the individual has the substance in his or her possession. Constructive possession is where the substance is possessed by someone else, but the defendant has control of it.

The elements of unlawful possession are:

1. the person had possession or the right to exercise control of a controlled substance,
2. the possession is unlawful,
3. the person had knowledge of the nature of the substance, and
4. the amount of substance possessed was a usable quantity. Note: While a usable amount must be possessed, there is no requirement that the amount be sufficient to produce a narcotic effect (*People v. Piper* 19 CA 3d 248).

15.8 Unlawful Manufacture, Import, Sale, etc. of Controlled Substance

H & S 11379 makes it a felony to illegally transport, import, manufacture, sale, etc. of a controlled substance listed under Schedules III, IV and V.

15.9 Marijuana

Possession

The possession of less than 28.5 grams of marijuana (any concentrated cannabis) is normally a misdemeanor (H & S 11357).

Cultivation

Every person who plants, cultivates, harvests, dries, or processes any marijuana or any part thereof, except as otherwise provided by law, shall be punished by imprisonment in the state prison (felony) (H & S 11358).

Possession for Sale

Every person who possesses for sale any marijuana, except as otherwise provided by law, shall be punished by imprisonment in the state prison (felony) (H & S 11359).

Transportation, Distribution, or Importation

Except as provided for by law, every person who transports, imports into the state, sells, furnishes, etc. marijuana is guilty of a felony (H & S 11360). If the amount is less than 28.5 grams of marijuana other than concentrated cannabis, the offense is a misdemeanor.

Minors

The employment or using of minors in the unlawful selling, distributing, etc. of marijuana is a felony. It is also a felony for an adult to distribute, give, sell, etc. marijuana to a minor (H & S 11361).

15.10 Peyote

Health and Safety Code 11363

Every person who plants, cultivates, harvests, dries, or processes any plant of the genus Lophophora, also known as peyote, or any part thereof shall be punished by imprisonment in the county jail . . . . [A misdemeanor offense.]

15.11 Possession of Paraphernalia for Unlawful Use

Section 11364 makes it unlawful to possess an opium pipe or any device, etc. used for unlawfully injecting or smoking a controlled substance.

15.12 Presence During Unlawful Use

It is unlawful to visit or to be in any room or place where any controlled substances are being unlawfully used, smoked, etc. (H & S 11365)

15.13 Driving Under the Influence Vehicle Code 23152 Driving While Under Influence of Alcohol or Drugs

(a) It is unlawful for any person who is under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcoholic beverage and any drug, to drive a vehicle.

(b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his/her blood to drive a vehicle.

For purposes of this subdivision, percent, by weight, of alcohol shall be based upon grams of alcohol per 100 milliliters of blood.

In any prosecution under this subdivision, it is a rebuttable presumption that the person has 0.08 percent or more, by weight, of alcohol in his/her blood at the time of driving the vehicle if the person had 0.10 percent or more, by weight, of alcohol in his/her blood at the time of the performance of a chemical test within three hours after the driving.

(c) It is unlawful for any person who is addicted to the use of any drug to drive a vehicle. This subdivision shall not apply to a person who is participating in a methadone maintenance treatment program . . . .

Discussion

There are three offenses under Vehicle Code 23152:

1. driving under the influence,
2. driving with a blood alcohol content of 0.08 or higher, and
3. driving by a person who is addicted to the use of any drug, unless the person is on an approved methadone maintenance treatment program.

Prior to 1982, the above offenses were only committed by driving on a public highway. In 1982, the section was changed to remove the public highway requirement. The section now applies to highways and elsewhere within the state. Note: as discussed under the laws of arrest, normally a misdemeanor must be committed in the presence of the officer before an officer has the authority to make a misdemeanor arrest without a warrant. DWI/DUI offenses, however, are exceptions to this rule (P C 836).

Under the Influence

"Under the influence" means that alcohol or drugs or a combination thereof have so affected the nervous system, the brain, or muscles as to impair to an appreciable degree the ability of the person to operate a motor vehicle in an ordinary and cautious manner (*People v. Byrd* 125 CA 3d

1054). "Under the influence" does not require that the driver be "drunk" (*People v. Haeussler* 41 C 2d 252).

The drug involved may be a prescribed drug and need not be illegal. For example, where the accused is stopped for driving under the influence, it is not a defense that the drugs were duly prescribed and were taken according to the doctor's directions (*People v. Keith* 184 CA 2d Supp. 884).

For the offense of driving while a drug addict, it is not necessary to establish that the driver was under the influence of drugs at the time he or she was driving. All that is necessary is that the defendant is a drug addict and operated a vehicle during the time he or she was addicted (*People v. Diaz* 234 CA 2d 818 and *People v. O'Neil* 62 CA 2d 748).

Driver Defined

The driver is the person who drives or is in actual physical control of the vehicle (Vehicle Code, Section 305). The person steering the vehicle is considered the driver, even if the vehicle is being towed or pushed by another vehicle. The identity of the driver may be proven by circumstantial evidence (*People v. Moreno* 188 CA3d 1179).

Driving

To constitute "driving" for purposes of DWI/DUI statutes, some movement of the vehicle is necessary. It need only be a slight movement. The movement may be coasting downhill or pedaling a mo-ped, as long as the vehicle is capable of moving under its own power. A movement of a few feet is sufficient (*People v. Padilla* 184 CA 3d 1022).

Vehicle

A vehicle is defined as any device which permits persons or property to be propelled, drawn, or moved upon a public highway, except a device moved exclusively by human power (Vehicle Code, Section 670). The definition includes animal-drawn vehicles, go-carts, forklifts, snowmobiles, bulldozers, mopeds and mobile cranes (*People v. Jordan* 75 CA 3d Supp. 1). Note: there are separate code sections applying to operating a bicycle under the influence (Vehicle Code, Sections 21200 and 21200.5).

15.14 Felony Drunk Driving

Vehicle Code 23153 **Driving While Under the Influence of Alcohol or Drugs — Causing Injury**

(a) It is unlawful for any person, while under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcoholic beverage and any drug, to drive a vehicle and, when so driving, do any act forbidden by law or neglect any duty imposed by law in the driving of the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.

(b) It is unlawful for any person while having 0.08 percent or more, by weight, of alcohol in his/her blood to drive a vehicle and, when so driving, do any act forbidden by law or neglect any duty imposed by law in the driving of the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver....

(c) In proving the person neglected any duty imposed by law in the driving of the vehicle, it is not necessary to prove that any specific section of this code was violated.

Discussion

The above offenses are similar to those set forth under Vehicle Code Section 23152 (a) and (b) with the below two additional requirements:

1. bodily injury to any person other than the defendant, and
2. the injury was caused by an act or failure to act which constitutes a violation of the code or of a duty imposed by the code.

15.15 Operating an Aircraft or Boat While under the Influence

There are various code provisions which make it unlawful to operate an aircraft or boat while under the influence of alcohol or drugs. The restrictions are similar to those for driving a vehicle, except that it is illegal to operate an aircraft (on the ground or in the air) with a blood alcohol level of .04 or more.

15.16 Juveniles

Vehicle Code 23140 **Driving While Under the Influence of Alcohol — Under Age 18**

(a) It is unlawful for a person under the age of 18 years who has 0.05 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

(b) A person may be found to be in violation of subdivision (a) if the person was, at the time of driving, under the age of 18 years and under the influence of, or affected by an alcoholic beverage regardless of whether a chemical test was made to determine that person's blood-alcohol concentration and if the trier of fact finds that the person had consumed an alcoholic beverage and was driving a vehicle while having a concentration of 0.05 percent or more, by weight, of alcohol in his or her blood.

Discussion

Vehicle Code 23140 makes it unlawful for a juvenile whose blood alcohol level is .05 or more to drive a vehicle. A violation under this section may be established even if no chemical test was taken. Note: this section applies only to driving under the influence of alcohol and does not apply to driving under the influence of drugs. If this section does not apply, the juvenile may still be prosecuted under regular DWI/DUI offenses.

15.17 Chemical Test Advisement

Under the provisions of Vehicle Code, Section 23157, prior to asking a driver to submit to a chemical test, the driver must be advised of the following items:

1. Refusal to submit to, or failure to complete, a chemical test will result in suspension or revocation of his or her driving license and mandatory imprisonment upon conviction.
2. He or she has a choice of either blood, breath or urine test. Note: if taken to a medical facility for treatment, the driver must take what evertests are available.
3. A refusal to take or a failure to complete a test may be used in court against the driver as evidence that the driver was driving in violation of Vehicle Code Sections 23152, or 23153.
4. The driver has no right to consult with counsel prior to taking the test or making a choice of which test to take.
5. If he or she is unable to complete one test, he or she must submit to another one.

Note: Miranda warnings are not required during field investigations prior to an arrest.

CLASSROOM DISCUSSION QUESTIONS

1. Explain the general rules regarding the transfer of controlled substances.
2. Define the term "drug."
3. What is a "narcotic?"
4. Explain the differences between Vehicle Code, Sections 23152 and 23153.
5. What are the essential differences between the various schedules under the Uniform Controlled Substances Act?
6. Who may prescribe a controlled substance under the provisions of the Uniform Controlled Substances Act?
7. What records are required to be kept by a person who prescribes controlled substances?
8. What are the elements of unlawful possession of a controlled substance?

SELF STUDY QUIZ

True/False

1. The term "marijuana" as used in the Act, includes the seeds of the plant.
2. A controlled substance is a substance or drug listed in the Act.
3. Opium is a narcotic drug.
4. Opiates are habit forming.
5. There are six schedules under the Act.
6. Opium and morphine are Schedule II substances.
7. Lysergic acid is a Schedule III substance.
8. Permits are required prior to the manufacture of D-lysergic acid.
9. Possession of minor amounts of marijuana is normally a misdemeanor.
10. Growing marijuana is a misdemeanor.
11. Providing marijuana to a minor may be a felony.
12. It is not unlawful for an addict to drive a vehicle unless he or she is under the influence of a drug or alcohol.

13. The person steering the vehicle is considered as the driver.

14. It is not unlawful to drive while under the influence of a duly prescribed drug.

Chapter 16

Modification of the Law

He who does not prevent a crime when he can, encourages it.
(William Seneca)

16.1 Appellate Court Decisions

When the U. S. Constitution was written, it was expected that the judicial branch would not be involved in the modification of laws. Under the separation of powers doctrine, this duty was delegated to the legislative branch. Appellate courts do, however, make law and modify existing laws through court decisions interpreting the constitution and statutes. The judicial legislation is indirect and a "spinoff" of the judicial duties of the appellate courts. If the actions of the legislature are within its scope of power and do not violate any constitutional protections, the courts do not pass on the reasonableness, wisdom, and propriety of the law (*People v. Ferguson* 129 CA 300).

16.2 United States Supreme Court Decisions

The U. S. Supreme Court has been a leader in modifying criminal law and procedure. As the results of the "criminal justice revolution" started by the Warren Court (the Court during Chief Justice Earl Warren's tenure: 1953-69), every major stage of the criminal justice process has been substantially modified since 1962 (Israel and LaFave, *Criminal Procedure: Constitutional Limitations*). Every Supreme Court term since 1962, has resulted in judicial decisions by the court which have changed the criminal justice system. Changes in the court membership in the past eight years has, however, created a new court. The directions that the new court will take will probably continue to modify or finetune the criminal justice system. For the U. S. Supreme Court to modify California criminal law, however, the decisions must be based on the U. S. Constitution or federal law.

Clear examples of the U. S. Supreme Court modifying the law are the *Miranda* and the *Mapp v. Ohio* cases. In both of these cases, the court modified the existing law. Note: the modifications were accomplished even though the court has only the power to approve or reverse a lower court conviction.

16.3 California Supreme Court Decisions

The California Supreme Court makes the final decision on those issues involving the Penal Code which do not involve federal constitutional rights or federal law. The court's authority like that of the U. S. Supreme Court is limited only to approvals or disapprovals of lower court decisions. With the 1986 changes in personnel on the court, this court is also a new court.

16.4 Development of California Statutory Law

Article IV, Section 1, of the California Constitution

The legislative power of this state is vested in the California Legislature which consists of Senate and Assembly, but the people reserve to themselves the powers of ***initiative*** and ***referendum.***

Discussion

In California, as in other states and the federal government, all statutory laws must be initiated by the state legislature or by referendum or initiative. The modification of laws or the creation of new laws by referendum or initiative is discussed in Chapter 1.

The California legislature is made up of two houses, the Senate and the Assembly. Each house can initiate a new statute or modification to an existing one. The new law or modification, however, must be approved by both houses before it is sent to the Governor for final action. If the governor signs the bill, it becomes the law. If the governor vetoes the bill, it goes back to the legislature. If both houses of the legislature override the governor's veto by a two-thirds vote in each house, the bill becomes law. Unless the enactment is an emergency measure, there will be a "cooling off" period before it is effective. The effects of repeal and amendment of statutes are discussed in Chapter 1.

When a new law or modification is introduced by a house member, it is called a "bill." If and when the bill becomes law, it is then considered as a "statute." If it is a general statute, it will be integrated into one of the state's twenty-seven codes.

The twenty-seven different codes in California are:

1. Business and Professions Code (B & P)
2. Civil Code (C C)
3. Code of Civil Procedure (C C P)
4. Commercial Code (Com. C)
5. Corporations Code (Corp. C)
6. Education Code (Educ. C)
7. Elections Code (Elec. C)
8. Evidence Code (Evid. C)
9. Financial Code (Fin. C)
10. Fish and Game Code (Fish & Game C)
11. Food and Agricultural Code (F & Arig. C)
12. Government Code (Govt. C)
13. Harbors & Navigation Code (Harb. & Nav. C)
14. Health and Safety Code (H & S C)
15. Insurance Code (Ins. C)
16. Labor Code (Lab. C)
17. Military & Veterans Code (Mil. & Vet. C)
18. Penal Code (P C)
19. Probate Code (Prob. C)
20. Public Resources Code (Pub. Res. C)
21. Public Utilities Code (Pub. Ut. C)
22. Revenue and Taxation Code (Rev. C)
23. Streets and Highways Code (Sts. & H C)
24. Unemployment Insurance Code (Unemp. Ins. C)
25. Vehicle Code (V C)
26. Water Code (Water C)
27. Welfare & Institutions Code (Welf. C)

16.5 City and County Ordinances

City and county ordinances are enacted to fit the special needs of local cities or counties. Since cities and counties derive their power from state charters, they have only the power to enact ordinances as granted by the state. Local ordinances are normally modified by action of local boards of supervisors and city and town councils.

16.6 United States Code

The basic statutory law of the United States (federal law) is contained in the United States Code (U.S.C.). The code is divided into 50 general subject areas, called "titles". The titles are numbered from 1 to 50. Title 18 is the federal criminal code. In citing the U. S. Code, the title number is cited first, then U.S.C. then section number. For example 18 U.S.C. 302 defines the federal crime of arson. Changes to the U. S. Code are made by statutes which originate in one of the houses of Congress. Note: appropriations bills may originate only in the House of Representatives.

Note: often the cite is to the "annotated" code. In the above example, the cite for arson under the federal code would be 18 U.S.C.A. 302. "Annotated codes" contain, in addition to the official text of the code, historical information on the text, cross-references to legal sources and notes on court decisions regarding the text.

16.7 Victims Bill of Rights

California Constitution, Article I, Section 28 (Proposition 8)

(a) The People of the State of California find and declare that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights, is a matter of grave statewide concern. The rights of victims pervade the criminal justice system, encompassing not only the right to restitution from the wrongdoers for financial losses suffered as a result of criminal acts, but also the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance. Such public safety extends to public primary, elementary, junior high, and senior high school campuses, where students and staff have the right to be safe and secure in their persons.

To accomplish these goals, broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons are necessary and proper as deterrents to criminal behavior and to serious disruption of people's lives.

(b) Restitution. It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer.

Restitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary. The Legislature shall adopt provisions to implement this section during the calendar year following adoption of this section.

(c) Right to Safe Schools. All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful.

(d) Right to Truth-in-Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782, or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

(e) Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In setting bail, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety shall be the primary consideration.

A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail. However, no person charged with the commission of any serious felony shall be released on his or her own recognizance.

Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney shall be given notice and reasonable opportunity to be heard on the matter. When a judge or magistrate grants or denies bail or release on a person's own recognizance, the reasons for that decision shall be stated in the record and included in the court's minutes.

(f) Use of Prior Convictions. Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding. When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court.

(g) As used in this article, the term "serious felony" is any crime defined in Penal Code, Section 1192.7(c).

Discussion

Proposition 8, better known as "Victim's Bill of Rights," was passed by the California voters on June 9, 1982. The proposition changed the law regarding diminished capacity, right to bail, standing, restitution, plea bargaining, the use of prior felony convictions for impeachment and the use of the exclusionary rule for violations of the state constitution. Proposition 8 is applicable only to prosecutions for crimes committed on or after its effective date of June 9, 1982 (*People v. Smith* 34 C 3d 251).

Truth in Evidence

The primary purpose of "Truth in Evidence" portion of Proposition 8 was to eliminate the "independent state grounds" as a basis for the "exclusionary rule." The cases of *In re Lance W.*, (37 C 3d 873) and *People v. May* (44 C 3d 309) indicate that Proposition 8 has achieved this purpose.

In the case of *In re Lance W.* (37 C 3d 873), the State Supreme Court ruled that Proposition 8 changed the remedy for a violation of the substantial rights of citizens under the state constitution. That "independent state grounds" is no longer a basis for excluding evidence from a trial. *Lance W* addressed unreasonable searches and seizures (Fourth Amendment problems). *People v. May* (44 C 3d 309) held that Proposition 8 had the same effect with regard to the Fifth and Sixth Amendments, i.e., confessions, *Miranda* problems, and right to counsel. [Note: now only a violation of a "federal constitutional" right will be the basis for excluding evidence under the exclusionary rule.]

Bail Provisions

Proposition 8 provided that a judge or magistrate may consider in setting, reducing or denying bail the "protection of the public." The P C 1275 now provides that public safety is the primary consideration is setting bail.

In upholding the constitutionality of this section, a California Court of Appeals held in the case of *In re Nordin* (143 CA 3d 538), that since pretrial detention is a regulatory matter not penal, the denial of bail does not deprive the defendant of his constitutional right to trial by jury. The Eighth Amendment's prohibition against excessive bail is a limitation on the amount of bail that a judge may impose, but is not a limitation of a state's right to regulate eligibility for bail.

Restitution

Proposition 8 provided that restitution shall be ordered from a convicted person to the victim unless the court finds compelling and extraordinary reasons for not ordering restitution. The requirement is now contained in P C 1202.4.

Prior Convictions

The proposition provides that any prior felony conviction or any person in any criminal proceeding may be used without limitation for purposes of impeachment or enhancement in any criminal proceedings.

The Evidence Code, Section 788 provides that the judge in a criminal trial has discretion to exclude impeachment evidence of prior felony convictions of the accused, if the judge determined that the probative value and credibility of the prior convictions are outweighed by the risk of undue prejudice. In *People v. Olmedo* (167 CA 3d 1085), a California Court of Appeals held that Proposition 8 did not change that section in that the judge still had the discretion to exclude the prior conviction, if the risk of undue prejudice outweighed the probative value of evidence.

The California Supreme Court, in *People v. Castro* (38 C 3d 301), held that the drafters of the initiative did not intend to abolish a trial court's power to exclude certain evidence, but intended merely to revert to the rule that, subject to the trial court's discretion, priors are admissable to impeach.

Diminished Capacity

The proposition abolished the defense of diminished capacity in all criminal proceedings. Accordingly, evidence of an accused's intoxication, trauma, mental illness, disease or defect is not admissable to negate the capacity to form a particular intent or motive (P C 25(a)). Note:

evidence of diminished capacity may be considered by the court at the time of sentencing or other disposition.

Insanity

Proposition 8 restored the *M'Naghten* Rule as the test for legal insanity. This test is discussed in Chapter 4.

Prior Conviction When an Element of the Offense

The proposition provides that when a prior conviction is an element of the offense, it shall be proven to the jury (or judge in a court trial) in open court. This section was enacted to stop the practice of the defense in stipulating as to the prior conviction and thereby keeping from the jury the facts of the prior conviction. In *People v. Callegri* (154 CA 3d 856), a California Court of Appeals held that the trial court did not err in refusing to allow the defendant to stipulate to his prior conviction where the prior conviction was element of the offense with which defendant was charged.

Victim's Rights

The right of the victim or the next of kin of the victim, if the victim is dead has a right to attend all sentencing proceedings and shall be given adequate notice by the probation officer of all the proceedings. The victim or next of kin has the right to make a statement at the sentencing proceedings regarding the crime, the person responsible, and the need for restitution. The trial court shall consider the statements of the victims or next of kin prior to imposing any sentence and shall make a statement on the record the court's conclusion as to whether or not the defendant would pose a threat to public safety (P C 1191.1). The failure of the probation officer to comply with the notification requirements set forth in Proposition 8, however, does not deprive a Superior Court of its jurisdiction to proceed (*People v. Superior Court (Thompson)* 154 CA 3d 319).

Sentence Enhancement

The proposition modified P C 667(a) to provide that any person convicted of a "serious felony" who has previously been convicted of a serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five year enhancement for each such prior conviction. The terms for the present offense and each enhancement shall run consecutively. In People v. Fritz (40 C 3d 227), the California Supreme Court held that a judge had discretionary power to strike a prior felony conviction and thereby forgo the additional five-year serious felony enhancement.

Serious felonies for the purposes of this enhancement are those felonies listed in P C 1192.7. Serious felonies include:

1. murder or voluntary manslaughter
2. rape
3. mayhem
4. sodomy by force, violence, duress, or fear of immediate and unlawful bodily injury on the victim, or another
5. lewd or lascivious acts on a child under the age of 14 years
6. any felony punishable by death or imprisonment for life
7. oral copulation by force, threat, duress, etc.
8. robbery
9. kidnapping
10. burglary of a residence
11. selling, furnishing, etc. of heroin, cocaine, or PCP
12. any felony where great bodily injury is inflicted on any person
13. any felony in which the defendant uses a firearm
14. arson
15. assault by a life prisoner or with intent to commit rape or robbery
16. assault with a deadly weapon or instrument on a peace officer
17. assault with a deadly weapon by an inmate

Plea Bargaining

Plea bargaining is prohibited in cases involving any "serious felony" and DUI/DWI offenses by Proposition 8 except in the below circumstances:

1. there is insufficient evidence to prove the people's case,
2. the testimony of a material witness cannot be obtained, or

3. the reduction or dismissal would not result in a substantial change in sentence (P C 1192.7).

CLASSROOM DISCUSSION QUESTIONS

1. How does an appellate court modify existing law?
2. Who makes the final decision on state criminal law issues that don't involve federal issues?
3. What are the restrictions on plea bargaining in cases involving "serious felonies?"
4. Why would the defense be willing to stipulate as to the fact of a prior conviction?
5. What is the present legal insanity test in California?
6. Under what circumstances can evidence of diminished capacity be introduced into evidence in a criminal case?
7. To which branch of the state government is the legislative function delegated?
8. What rights does a victim have at a sentencing proceeding?
9. What is the primary concern of the judge in setting bail in a case involving a serious felony?
10. When does a "bill" become a "statute?"

SELF STUDY QUIZ

True/False

1. Proposition 8 eliminated plea bargaining in California.
2. The primary concern of the judge in all bail decisions is public safety.
3. Proposition 8 eliminated the insanity defense.
4. The U. S. Supreme Court is not involved in reviewing state criminal convictions.
5. Proposition 8 eliminated the discretion of trial judges regarding the admissability of prior convictions.
6. Judicial legislation is direct and a "spinoff" of the legislative power.
7. The California Supreme Court makes the final decision on state issues.
8. In the State of California, only the Assembly can initiate a new criminal statute.
9. If one of the two houses of the legislature and the governor agreed, a bill becomes a law.
10. Local ordinances are normally modified by legislative action of the state legislature.

SUBJECT INDEX

TABLE OF CASES