CHAPTER

2
Fundamentals of Criminal Law

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2.0 INTRODUCTION
As is true in any endeavor, it is necessary to learn some basics of a field of study before progressing to more complex concepts and applications. The student should be able to distinguish between moral issues and legal issues. Understanding the differences and the underlying reasons gets the reader/student out of a social mind-set and into a legal frame of reference necessary to appreciate the more complex legal issues presented in this and later chapters.

2.1 MORALITY AND THE LAW
The student of criminal law must be able to approach the subject with an open mind and as objectively as possible. There is often a difference between what is morally wrong (morality) and what is legally prohibited. Legal problems should not be settled by resorting to emotion, because people who fall prey to emotion discover many wrong answers. This is not to say that there is necessarily a right or wrong answer to a legal question. If this were true, our system would not require the services of attorneys and judges; the facts of a particular case could be fed into a computer and the “right answer” retrieved mechanically.
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An act may be committed that is obviously morally wrong in the eyes of most people but for which there is no legal penalty. Suppose that a young girl swam too far from shore and is struggling to keep from drowning. A man on the beach observes this activity but takes no action to save the girl, even though a rescue attempt would involve no danger to his own safety. Instead, he remains on shore and takes photographs of the drowning girl with the thought of having them published in a national magazine. The girl drowns. Most people would agree that this man’s conduct was morally wrong and that there probably is some clear-cut crime here with which he should be charged. Although morally this conduct cannot be tolerated, legally no offense has occurred.

Of course, criminal law, like other areas of law, is not completely devoid of moral considerations. The next section of this chapter is concerned with the classification of crimes. Historically, offenses have been classified according to their severity and the threat they pose to the public welfare. It must be recognized that this categorization was based on the precepts of society at the time of classification. The seriousness of the offenses is really a moral consideration.

2.2 CLASSIFICATION OF CRIMES

Crimes are classified in many ways. Among them is the distinction made between offenses mala in se and mala prohibita. Crimes mala in se are defined as those bad in themselves, morally as well as legally wrong. Murder and rape would be among the crimes classified this way. Historically, all common law crimes were mala in se. Statutory crimes were not classified this way by legal philosophers even at common law. Mala prohibita crimes are those that are wrong simply because they are prohibited though they involve no moral turpitude. Other significant differences between offenses mala in se and mala prohibita are presented in Chapter 5.

Basically, moral turpitude is depravity or baseness of conduct. Most authorities, including the courts, agree with this. However, whether a particular prohibited act constitutes depravity or baseness depends on the attitude of the people and is usually determined by the courts, based on the facts and circumstances on a case-by-case basis. A criminal act that may be mala in se (involving moral turpitude) in one jurisdiction may not be in another.

The most popular common law classification of crimes—into the three categories of treason, felonies, and misdemeanors—is perhaps the most workable. This basic classification system with its distinctions between types of crimes remains the preferred system in most jurisdictions. In fact, most recent legislative modifications in this area involve distinguishing various degrees of misdemeanors and felonies, as described later. Although treason is considered the most serious of all crimes because it threatens the very existence of the nation, its rarity of occurrence precludes further treatment in this book.

At common law, a felony was defined as any crime for which the perpetrator could be compelled to forfeit his property—both real and personal—in addition to being subject to punishment through the procedures of death, imprisonment, or
The common law felonies were murder, manslaughter, rape, sodomy, larceny, robbery, arson, and burglary. Statutes today make other crimes felonies, but these were the only felonies of common law. The key to distinguishing felonies from misdemeanors was not the punishment that could be imposed, but whether forfeiture was required.

The word felony, like misdemeanor, is just a label used to define a class of offenses, and these labels do not apply uniformly throughout all jurisdictions. Each jurisdiction is free to call a criminal violation by any name it chooses and to impose such punishment for violations as it desires, providing it does not violate the Eighth Amendment of the U.S. Constitution protecting individuals from cruel and unusual punishments. As a result, there are some differences. For example, in Maryland it is a misdemeanor to use a machine gun for an aggressive purpose, but it is a felony to use a machine gun to commit specified crimes of violence, carrying a sentence of up to 20 years. Injuring a racehorse is a felony with a maximum penalty of 3-years’ imprisonment. Kidnapping a person of any age is a felony carrying a 30-year maximum sentence, abducting a child under 16 years of age for prostitution is a misdemeanor carrying a maximum penalty of 10 years, and kidnapping a child under 12 years of age from his or her home is a felony carrying a 20-year maximum sentence. Maliciously damaging a gas company’s equipment is a misdemeanor carrying up to 6 months in jail and a $250 fine. Marrying while lawfully married to another person, commonly referred to as bigamy, is a felony with a maximum sentence of nine years in prison.

Today the law does not require forfeiture of property for committing a felony; therefore, the common law rule is no longer applicable. However, most jurisdictions still maintain the distinction between felonies and misdemeanors. Some jurisdictions distinguish them on the basis of where the imprisonment is to take place. Most states distinguish felonies from misdemeanors based on the place of imprisonment or the length of confinement. The remaining jurisdictions seem to use character of the offense or place of imprisonment, or both, to make this distinction. In many of those jurisdictions, the criteria are difficult to comprehend. In some states, the length of imprisonment is the deciding factor, whereas in others it is difficult to determine what criteria are used to differentiate between felonies and misdemeanors. For example, in Louisiana, a felony is defined as an offense punishable by death or imprisonment at hard labor. All other offenses, including municipal ordinance violations providing penal sanctions, are considered misdemeanors. In Wisconsin, if an offense is categorized as a misdemeanor specifying a 1-year sentence, the sentencing court has discretion to order the defendant to serve the sentence in either the county jail or in prison. In Oklahoma, if a statute prescribes a punishment of imprisonment but is silent as to the place of imprisonment, the length of incarceration governs the classification of the crime. Thus, any punishment of more than 1 year is considered a felony, and the sentence is served in prison.

On the federal level, persons convicted of crimes for which imprisonment is imposed are all sentenced to federal prisons. Thus, the distinction between felonies and misdemeanors on the federal level cannot be based on the place of imprisonment, but rather on the length of imprisonment. A felony under federal law is any crime for which the penalty is death or imprisonment for a term exceeding 1 year.
It is important to know the distinction between a felony and a misdemeanor because much of the treatment of the accused hinges on this distinction. The procedural steps that may be taken by law enforcement officers in the performance of their duties depend on whether they are dealing with a felony or a misdemeanor. As is illustrated in detail in Chapter 6, the amount of force an officer may use to apprehend a person for commission of a crime is based on the type of crime for which the individual is being arrested. In addition, a person convicted of a felony loses his or her civil rights, whereas a convicted misdemeanant does not. Even more important, the arrest powers that an officer or private citizen has are governed by the classification of the crime for which the arrest is being made.

Whether a crime is a felony or a misdemeanor is governed by the maximum punishment that can be imposed by the courts for a conviction of the offense and not by the punishment that is actually imposed. For example, if Andy commits grand larceny in a state where a felony is defined as any crime punishable by imprisonment in the state prison, assuming grand larceny carries a maximum penalty of five years in the state prison in that state, Andy is guilty of a felony regardless of the fact that the court may sentence him to spend only six months in the county jail.

All crimes carrying penalties less than those imposed for the commission of felonies are misdemeanors. Thus, by the process of elimination, it may be determined which crimes are misdemeanors in any particular jurisdiction.

2.3 ENACTMENT AND INTERPRETATION OF STATUTES
Most people automatically think of recent U.S. Supreme Court decisions the instant the word constitutionality is mentioned. Constitutional law is a broad subject in its procedural applications and is beyond the scope of this book. The following is a highly simplified explanation of who enacts laws and on what authority laws are enacted, in addition to a short summary of a few basic rules observed when a statute is interpreted.

Two phrases, grant of power and limitation on power, are essential to understanding this subject. The federal government exists because the people of the various states, in whom rests total sovereignty, created it. It has only the authority specifically given it by the people of the states. The instrument by which the people granted this authority is the U.S. Constitution. In essence, the people stripped their state governments of certain powers, such as governing commerce, coining money, and conducting wars.

For this reason, we call the U.S. Constitution a grant of power. The federal government exercises this authority through acts passed by Congress. To determine the constitutionality of these acts, the courts look to the Constitution to see if the people gave the federal government the power to pass laws on the particular subject with which a congressional act deals. If the power and authority can be found in the Constitution and if Congress acted within the limits set by the people in dealing with the particular subject of the act, it is constitutional. If Congress was without the authority or acted outside the scope of that authority, the act is unconstitutional.
Turning to the state constitutions, called limitations on power, it can be seen that any powers not specifically granted to the federal government through the U.S. Constitution are reserved to the states or their people. Thus, the states are free to exercise any legislative power not given to the federal government unless there are certain rights that the people of the states wish to reserve to themselves, not allowing even their own state legislatures to have a say in this regard. Therefore the people, through their respective state constitutions, limit the powers of state legislatures. They may prohibit their state from having an income tax, or prohibit gambling that would otherwise be permissible. It is for this reason that state constitutions are referred to as limitations on power. State constitutions are therefore usually negative in their application, if not in their language. A state legislature may enact laws on any subject for which authority has neither been granted to the federal government nor prohibited to them by the people of that state. Of course, the law is not a static concept, and it continues to evolve as the state’s citizenry and its elected officials refine their thinking and approach to morals, public safety, and the general welfare of the citizens of the state. New laws are frequently passed by state legislative bodies in response to these concerns.

To test the constitutionality of a state statute, the state courts first determine if the authority to legislate in the particular area has been granted exclusively to the federal government. For example, if a state enacted a criminal statute prohibiting counterfeiting of money, the court would find that this power has been granted to the federal government exclusively. In this case, the state would not have the authority to pass such a law, and the statute would be unconstitutional.

If this authority has not been granted to the federal government through the U.S. Constitution, the court must then look to the state constitution to determine if the people forbade the legislature from enacting such a law. Finding no such prohibition, the court can declare the statute constitutional. It is a principle of law that courts make every effort to hold statutes constitutional. Only when there is no way of so holding do they declare them to be unconstitutional.

In this section, we implied that the authority to enact laws on any particular subject rests with either the federal government or the state legislatures. However, there are times when the two levels of government have concurrent jurisdiction. Bank robbery, for example, is a federal offense if the bank is insured by the Federal Deposit Insurance Corporation. The act constitutes robbery under state criminal laws. As a result, there are differences among the states on the same subject matter. Federal legislation must apply uniformly to all states on any subject, whereas each state legislature can enact laws on the same subject pertaining only to its geographic boundaries.

One further principle governs the determination of the constitutionality of statutes: Because people are entitled to know what conduct is prohibited by law, statutes cannot be written in such broad terms as to make unclear the type of conduct prohibited. Such statutes are held unconstitutional for vagueness.

An illustration of what constitutes a vague and ambiguous statute is reported in a 2000 federal case. An Arizona statute criminalized any medical “experimentation” or “investigation” involving fetal tissue from induced abortions unless necessary to perform...
a "routine pathological examination" or to diagnose a maternal or fetal condition that prompted abortion. The plaintiffs in a suit challenging the constitutionality of the statute included individuals suffering from Parkinson's disease who, because of the statute, were unable to receive transplants of fetal brain tissue, which many medical experts believe holds out promise for treatment and eventual amelioration of the disease. Doctors also challenged the statute, fearing possible criminal prosecutions if they provided these potentially beneficial services to their patients. The federal trial court and the Circuit Court of Appeals both found the statute to be unconstitutionally vague.17

Criminal laws must be written with sufficient definitions so that ordinary people can understand what conduct is prohibited, and they must be written so as not to encourage arbitrary and discriminating enforcement.18 In this instance, the Court decided that because there was no standard to be followed, there was too much opportunity for moment-to-moment and officer-by-officer judgments. The Court ended by saying that although the Constitution does not require “impossible standards of clarity,” it does require some clarity so that personal biases and prejudices do not become the standard.

There are some instances, however, in which a statute can be very clear and specific and yet be written so broadly as to make otherwise innocent conduct a violation.19 When that happens, courts will probably find the law invalid. For example, the Utah Supreme Court ruled on a city ordinance that made it illegal “in public or in a public place to solicit another to engage in sex.” The ordinance did not mention anything about money or other consideration of value as part of the solicitation. The court said that the ordinance would also prohibit husbands and wives from suggesting sexual intercourse “as they strolled through the park.”20 In Houston, an ordinance made it a crime to “assault, strike, or in any manner oppose, molest, abuse, or interrupt any policeman in the execution of his duty.” The defendant was convicted under the ordinance for yelling to the police, “Why don’t you pick on someone your own size?” The U.S. Supreme Court found the ordinance to be substantially too broad, because the law granted unfettered discretion to police to arrest individuals for words or conduct that annoyed or offended them.21

To avoid confusion, a distinction must be made between the principle discussed in Chapter 1 (statutes are broadly and flexibly written to be capable of interpretation) and the constitutional issue of vagueness presented here. Under the broad yet flexible philosophy, the standards of conduct are clearly defined, although situations may differ. When a statute is found to be too vague, the standards of conduct are either unclear or absent.

Our legal system is based on the theory that every benefit of the doubt will be accorded to the defendant in criminal cases. This is like the rule in baseball games that a tie goes to the runner. Based on this principle, we take the view that criminal statutes are to be strictly construed when they work against the accused in a criminal case and liberally construed when they benefit the accused. This means that if the statute works against the defendant, it is interpreted in its narrowest sense so that only the specified conduct is included. If, however, the statute works for the benefit of the defendant, it is broadly construed so that his or her conduct is interpreted in the most favorable way.
The American Law Institute has proposed the Model Penal Code (MPC). Several states have adopted this code, with some qualifications and changes. The MPC creates different classes of crimes.

Under the MPC, a crime is a felony if it is so designated, no matter what the penalty. Any crime that creates a punishment exceeding one year is also a felony under the MPC. Furthermore, the MPC creates degrees of felonies. First- and second-degree felonies are those so labeled in the MPC. A crime that is a felony but for which there is no designated degree is a third-degree felony. This creation of degrees is for the purpose of sentencing. Certain fines attach to the various degrees of felonies as a result. A first- or second-degree felony carries a $10,000 fine, a third-degree felony a $5,000 fine, unless higher (or lower) amounts are specifically attached to a specific offense. Punishments for the different degrees of felonies have a fixed maximum and minimum length of imprisonment, ranging from one year to life, to one to five years.

A misdemeanor is one designated as such by the MPC no matter what the penalty is. The MPC also adds a new term, petty misdemeanor, and says that a petty misdemeanor is a crime so designated or one for which the penalty is less than one year. A misdemeanor carries a $1,000 fine, and a petty misdemeanor a $500 fine, unless higher (or lower) amounts are attached to a specific offense. As under previous law, an undesignated offense providing a sentence is a misdemeanor under the MPC.

The MPC also creates a new class of offense called violations. A violation usually is named as such and, most important, provides no jail sentence. It involves only a fine or forfeiture of bond. Because a violation is not a crime, there is to be no disability or legal disadvantage for someone convicted of a violation. Many of the mala prohibita offenses are violations under the MPC. A number of states, even though they have not adopted the MPC in total, have adopted its method of classifying offenses. Only New Jersey and Pennsylvania have adopted major portions of the Code without changes; 33 other states have adopted portions of the MPC.

2.4 EX POST FACTO LAWS

The U.S. Constitution, in Article I, Sections 9 and 10, prohibits the passage of ex post facto laws by either federal or state government. In brief, an ex post facto law is one that alters the laws regarding a particular act in such a way as to be detrimental to the substantial rights of an accused person. This can occur in any of three ways. First, if at the time a person commits an act, that act is not criminal but is subsequently made a crime by legislative action, the person cannot then be prosecuted for its violation. Any attempt to prosecute in such a case constitutes an ex post facto application of the law. A person is entitled to know what, if any, violation occurs at the time when he or she commits an act. Thus if the act is not criminal at the time it was committed, no punishment can be imposed.
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The second situation to which the rule applies involves increasing the punishment for a specific crime after it has occurred. Suppose, for example, that Fred commits grand larceny, for which the maximum penalty is five years’ imprisonment. Before his trial, the legislature increases the maximum penalty to ten years’ imprisonment. Any application of the more severe penalty to Fred would be ex post facto because it affects his substantial rights. He can be punished only to the extent provided at the time he committed the criminal act. The U.S. Supreme Court reinforced this position in a case in which a defendant was given a harsher sentence under Florida’s sentencing guidelines than he would have received prior to the guidelines. The Court said that since the act was committed before the sentencing provisions, the imposition of a harsher punishment raised an ex post facto defense.

Third, the ex post facto rule applies to decreasing the state’s burden of proof. It is ex post facto if the legislature decreases the amount of proof the state is required to produce to convict for a crime, because it is detrimental to the rights of the accused if the state could convict the accused more easily than it could have at the time the act was committed.

However, other changes in the rules of evidence, those that do not materially affect the defendant’s rights, can be made. In a 2000 case, the U.S. Supreme Court found that a Texas law violated the constitutional prohibition against ex post facto. The Court ruled that the defendant was wrongfully convicted of 15 counts of committing sexual offenses against his stepdaughter. The alleged conduct had taken place between 1991 and 1995, when the girl was 12 to 16 years of age. In 1993, Texas amended a statute authorizing conviction of certain sexual offenses based on the victim’s testimony alone; the previous statute required the victim’s testimony along with other corroborating evidence to convict. The defendant was convicted based on the victim’s testimony alone for all the offenses back to 1991. The Court held that for the alleged conduct occurring before the effective date of the law change in 1993, there had to be corroborating evidence to support the victim’s testimony. The conviction of those offenses before that date on the lower burden of proof violated the ex post facto prohibition.

If the reverse of any of these situations exists (for instance, when the punishment is decreased or the burden of proof on the state is increased between the time of the commission of the crime and the trial), these changes benefit the defendant and are not considered ex post facto.

In an 1866 case, the U.S. Supreme Court held that post–Civil War Missouri laws banning former Confederates from the ministry and requiring lawyers to swear that they had not supported the Confederacy as a condition of practicing law in federal courts violated the ex post facto clause of the Constitution.

If the reverse of any of these situations exists (for instance, when the punishment is decreased or the burden of proof on the state is increased between the time of the commission of the crime and the trial), these changes benefit the defendant and are not considered ex post facto.
Similarly, if the statute making a certain act criminal was repealed after the accused committed the act, proceedings against the person must be dropped. The conduct must be criminal both at the time of the act and during the course of proceedings to punish the accused. This is true even if the crime is repealed any time before final appeals have been exhausted. Generally, changes in the law that relate to procedure and jurisdiction and that are to be applied retroactively do not come within the prohibition of ex post facto laws.

2.5 STATUS OF MUNICIPAL ORDINANCES

Municipal police officers enforce the laws of the state, county, and municipality. When enforcing municipal ordinances, this is often not criminal law enforcement because violations of ordinances are not always considered crimes. The distinction between crimes and non-criminal violations of ordinances lies in the definition of crime and in the nature of municipal corporations.

A crime is defined as a public wrong created by the state and prosecuted by the state in its name. Public wrong is interpreted as a wrong affecting the people of the entire state, not just of a particular portion of the state. Municipal ordinances are not enacted by the state legislature, nor are they punished by that lawmaking body. Ordinances are enacted by city councils or commissions, affecting only the municipality, and are punished by the city in its name when they are violated.

A municipality is a corporation like any other corporation, except that it is a public corporation. Municipalities are created by the state legislature and exist at the whim of that body. Municipalities can be dissolved when and if the legislature so chooses, unless they have been established under constitutional home rule.

As with other corporations, municipal corporations are required to have a charter granted by the state. Private corporations have rules for governing internal operations, called bylaws; municipal ordinances are the bylaws of municipal corporations. Violations of some ordinances do not carry penalties and therefore are of little concern to municipal police officers; violations of other ordinances do carry penalties and subject the violators to arrest and trial, but these are not crimes. They are more closely associated with civil wrongs. For this reason, violations of ordinances are often called quasi-criminal in nature. It is difficult to define this term, except to say that it lies somewhere between a criminal wrong and a civil wrong. Because the state delineates criminal offenses and because such offenses must be applicable throughout the state on a uniform basis, the state legislature cannot delegate this power.

It would appear that individuals may be fined or imprisoned for violation of a municipal ordinance in the same manner as they might for the commission of a crime. In theory, a fine is treated as civil damages for wronging the municipality. Failure to pay a fine subjects the violator to imprisonment. This is not imprisonment for nonpayment of a debt, but imprisonment for failure to obey a lawful court order. A municipal court is empowered to assess a fine. If the fine is not paid, only then can the defendant be imprisoned under the theory that he or she has failed to comply with an order of the court. This theory is followed in the states of Georgia, Louisiana, Minnesota, Missouri, Montana, New York, and Wisconsin.
The real problems thus presented are procedural. For example, is the violator of an ordinance entitled to a trial by jury, or a summary (bench) trial (by a judge)? In some states, neither felonies nor high misdemeanors may be the subject of municipal ordinances. Other states allow municipalities to track or adopt verbatim a state law without any variation. If a city may and does adopt a state statute as an ordinance and the offense is of a grave character, the right to a jury trial attaches. If the city prosecute the case in the name of the state, all constitutional rights must be afforded. The higher the misdemeanor at common law, the more substantial is the guarantee of a jury trial. This principle is still true under modern law. The U.S. Supreme Court held that although many factors must be considered, a sentence exceeding six months is sufficiently severe by itself to require a jury trial. However, just because an offense carries a maximum penalty of six months or less does not automatically mean that no jury trial may be warranted.

Another constitutional issue—the right to counsel—is also affected by the status of municipal ordinances. The case of *Gideon v. Wainwright* decided by the U.S. Supreme Court in 1963 made the right to counsel obligatory on the states. Until 1972, the ruling in *Gideon* requiring the state to provide counsel to indigent defendants was not applied to minor misdemeanors and ordinance violations, but in 1972, the Supreme Court held that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as a petty misdemeanor or felony, where there is a substantial chance of incarceration, unless that person was represented by counsel at the trial. The Court said these so-called trivial matters can result in serious repercussions affecting the career or reputation of the defendant. The net effect is that unless a city wants to pay for attorneys in all cases involving indigent defendants, it should impose only fines on ordinance violators, because no jail time can be imposed without the defendant having the opportunity to have an attorney. In fact, a judge has the discretion to decide, often at the behest of the state, before trial that no jail time will be given, and thus avoid the need to appoint a lawyer. The *Florida rule* is that an indigent accused charged with an offense that carries imprisonment as a possible punishment must be appointed counsel unless the judge timely issues a written order guaranteeing that the accused will never be incarcerated as a result of a conviction. Once this happens, of course, the judge cannot change the decision.

### 2.6 Corpus Delicti

To fully understand what is necessary to prove a case in court, a law enforcement officer must be aware of the factors that constitute a particular crime. This involves the concept of *corpus delicti*.

Contrary to popular belief and most comic-strip detectives, the *corpus delicti* is not the body of a victim of a homicide, but rather the body of the crime. Every offense consists of distinctive elements, all of which must exist for a particular crime to be proved. If one or more of these elements are missing, the crime thought to have occurred, in fact, could not have been committed; what might have been committed was another crime requiring proof of those elements that do exist. The combination of these elements in a particular offense is called the *corpus delicti*. 
As an example, at common law, the corpus delicti of burglary consists of the following elements: breaking in and entering the dwelling house of another, in the nighttime, with intent to commit a felony therein. All these elements must exist before the crime of burglary can be charged properly at common law. If, instead of a dwelling house, a store is broken into, burglary has not been committed, because one element of the corpus delicti is not present; instead, another crime has been committed. If the defendant is charged with burglary, the state would be unable to prove that burglary was committed, and the case would be thrown out of court.

As noted, the corpus delicti issue has gained its primary renown in homicide cases. To prove a felonious homicide (i.e., murder), one must prove that a person existed and that this person is now dead at the hands of a human agency. There is no lack of cases in which innovative defendants have done ghoulish deeds to get rid of the body, believing that these acts disposed of the corpus delicti. However, proof of the corpus delicti can be direct or circumstantial. Even when there has been a proper confession, our judicial system is reluctant to convict anyone of homicide without verifying the felonious nature of the death. In one case, the body of a dead infant was found in a creek. The State was able to prove that the defendant was the last person to be seen with the infant alive, that the dead body was found, and the death was caused by drowning. The Court held this to be adequate proof of corpus delicti, particularly when the defendant purportedly took the infant from its mother in order to “give it away” to people in another town.

A totally missing body can be most dramatic. In a Kansas case, the defendant was accused of killing his grandmother. He was tried and convicted. In summation, the court said that the facts established at the trial were sufficient to establish corpus delicti, even though the grandmother’s body was never found. The facts revealed that (1) after April 5, the grandmother had not been heard from by her friends and customary associates; (2) there existed a strained relationship between the grandson and grandmother; (3) the carefully constructed alibi consisted of the grandson’s fabricated drunkenness and an all-night trip to Colorado; (4) there was a false-alarm fire two days before; (5) the grandson avowed to get the ranch “one way or another”; and (6) the grandson had premature knowledge of the real fire and his grandmother’s death.

In summary, the state must establish that (1) a criminal law was violated, (2) the violation was not the result of an accident or misfortune and was not self-inflicted, (3) a human agency caused the violation, and (4) the defendant was the human cause of the violation.

### 2.7 LESSER AND GREATER INCLUDED OFFENSES

In substantive as well as procedural criminal law, the doctrine of lesser and greater included offenses plays an important role. The doctrine affects decisions as to what crimes are to be charged, what plea negotiations take place, what instructions are given to a jury, what impact decisions have on double jeopardy law, and what verdicts might be rendered by juries.
To understand the doctrine as it originated at common law, one must think of crimes as a series of chains. The concept becomes clearer as the reader progresses through this book, but let us use murder as an example. Murder is the most serious offense that can be committed against the body of a human being. (This is verified in Chapter 8.) There are, however, other, less severe offenses against the body. These include simple assault (the threat to do bodily harm; Chapter 7), battery (a completed assault; Chapter 7), and manslaughter (a heat-of-passion killing; Chapter 8). Thus, offenses that are against the body or that involve bodily harm are in a chain from the most severe or greater included (e.g., murder, which is the greatest offense) to the least severe or lesser included (e.g., simple assault). Murder, then, has a number of lesser included (less severe) crimes, such as manslaughter, battery, and simple assault (in descending order of bodily harm). However, simple assault has a number of greater included (more severe) crimes, which, in ascending order of bodily harm, include battery, manslaughter, and murder.

There are separate chains for other types of crimes. For example, as the reader progresses through this book, it can be seen that battery is the base crime in the chain leading up to rape and sexual battery, and that a petit theft is the root of the robbery chain. For each of the major felonies recognized at common law, a misdemeanor was at the base of the chain.

The doctrine tends to become confusing in modern times, when so many additional offenses have been created by legislative acts. Thus, there are now additional forms of aggravated assault, such as assault with a deadly weapon and assault with intent to commit murder. Other forms of killing not known at common law have led to the enactment of criminal offenses; vehicular homicide is an example. To determine whether these statutorily created offenses are in a specific chain of lesser and greater included offenses, it is necessary to determine whether they are in the same general sections of the statutes (codes) of the other offenses in that chain. For example, if vehicular homicide is grouped with other homicides in the statutes, it is included in the assault and murder chain. If, however, vehicular homicide is grouped with other motor vehicle–related offenses, it is included in a different chain.

The significance of these distinctions by chain affects the prosecutor’s decision as to what charge or charges can be brought. Depending on the provable facts, a defendant can possibly be charged with multiple offenses if they are in separate chains and either be convicted of multiple offenses or at least provide the jury with more options for conviction. Conversely, a defendant cannot be charged with multiple offenses within the same chain, although if the prosecutor charges the greatest included offense that he or she thinks can be proved, the jury is then permitted to find guilt of any lesser included offense committed if the prosecutor fails to prove the crime charged.

The U.S. Supreme Court has held that the conviction of a lesser included offense is an implied acquittal of the greater offense. Thus, if a person is tried for murder but is convicted of only assault as a lesser included offense, appeals the conviction, and wins a new trial, the state cannot recharge the murder or any other offense in the chain greater than assault. To allow any other decision would place the defendant in double jeopardy.
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**DISCUSSION QUESTIONS**

1. Why is it important for an officer to know and understand the difference between a felony and a misdemeanor?

2. Distinguish between the violation of a state criminal statute and the violation of a municipal ordinance.

3. By what process is a state statute declared constitutional or unconstitutional?

4. Define and describe *ex post facto* laws.

5. What are the four components for establishing *corpus delicti*?

6. Is auto theft a lesser included offense of carjacking? Why or why not?

**GLOSSARY**

*concurrent jurisdiction* Crime over which both state and federal courts have jurisdiction.  
*constitutionality* Test of whether a statute satisfies the requirements to be valid under constitutional principles.  
*corpus delicti* Body of the crime, composed of the elements that make up the act.  
*ex post facto* Law that alters conduct, penalty, or burden of proof in a manner detrimental to the substantial rights of an accused.  
*felony* At common law, a crime for which one would forfeit all property in addition to punishment; today, generally a crime for which the punishment is jail for more than one year or incarceration in state prison.  
*grant of power* Power given by the people to the federal government through the U.S. Constitution.  
*lesser and greater included offenses* Series of offenses, built on a core of elements, which are greater or lesser, depending on the addition or subtraction of one element from another offense nearest in the chain.  
*limitation on power* Power reserved to the people by restricting the authority of government in a state constitution.  
*mala in se* Bad in itself.  
*mala prohibita* Bad only because it is prohibited.  
*misde-meanor* Crime of a minor nature, the penalty for which is less than that for commission of a felony.

*Model Penal Code (MPC)* Model of substantive criminal laws developed by the American Law Institute and that is adopted in whole or in part by a majority of states.  
*morality* Basic philosophy of right and wrong that governs one’s thoughts and behaviors.  
*moral turpitude* Conduct that is base or depraved and that calls into question the morals and ethics of the actor.  
*municipal ordinance* Rule or bylaw by which a public municipality operates.  
*public wrong* Wrong affecting the people of the entire state, not just a particular portion of the state.  
*vague and ambiguous statute* Grounds on which statute can be held unconstitutional because people cannot understand how to act to be in compliance with the law.

**ENDNOTES**

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