Chapter 9: Criminal Homicide



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[W]hether it is made for the purpose of destroying animal life, or whether it was not made by man at all, or whether it was made by him for some other purpose, if it is a weapon, or if it is a thing with which death can be easily and readily produced, the law recognizes it as a deadly weapon…

—*Acers v. U.S.*, cited in Section 9 "Inference of Intent"

9.1 Homicide

Learning Objectives

1. Define homicide.
2. Recognize that all homicides are not criminal.
3. Identify the corpus delicti components in a criminal homicide.
4. Compare the definition of fetus in criminal homicide and feticide statutes.
5. Compare common-law feticide and suicide with modern views.
6. Ascertain whether it is constitutional to criminalize assisted suicide.

In this section, you learn the definition of **homicide** and the meaning of *human being*, which vary from state to state. You also learn that suicide is not criminal, but *assisted suicide* might be, depending on the jurisdiction.

Synopsis of the History of Homicide

Homicide is the killing of one human being by another. Homicide is not always criminal. For example, a lawful execution pursuant to the death penalty is *homicide*, but it is not *criminal* homicide.

Homicide law in the United States has its origins in the English common law. Oxford professor Sir William Blackstone defined homicide as justifiable, excusable, or felonious. Justifiable homicides were not criminal because they did not include the concept of guilt. Excusable homicides were not criminal because they included minimal guilt. Felonious homicides were criminal and were considered the most heinous offenses known to man.

Initially at common law, every felonious or criminal homicide was punished by death. Gradually, as the law evolved, unlawful killings were divided into murder and manslaughter based on the defendant's criminal *intent*. Murder had the criminal intent element of malice aforethought and remained a capital offense. Manslaughter was an unlawful killing without malice and was punished by incarceration.

In modern times, most states define criminal homicide and its elements in *statutes*, which often are interpreted by case law. Many jurisdictions continue to follow Blackstone's philosophy and the common-law division between murder and manslaughter, as is discussed in this chapter.

Corpus Delicti in Criminal Homicide

An essential component of *every* criminal case, including criminal homicide, is **corpus delicti**. Corpus delicti is the substance of the crime at issue. The prosecution must prove corpus delicti beyond a reasonable doubt, with evidence *other than a defendant's confession* (People v. Ochoa, 2011). Although a detailed discussion of corpus

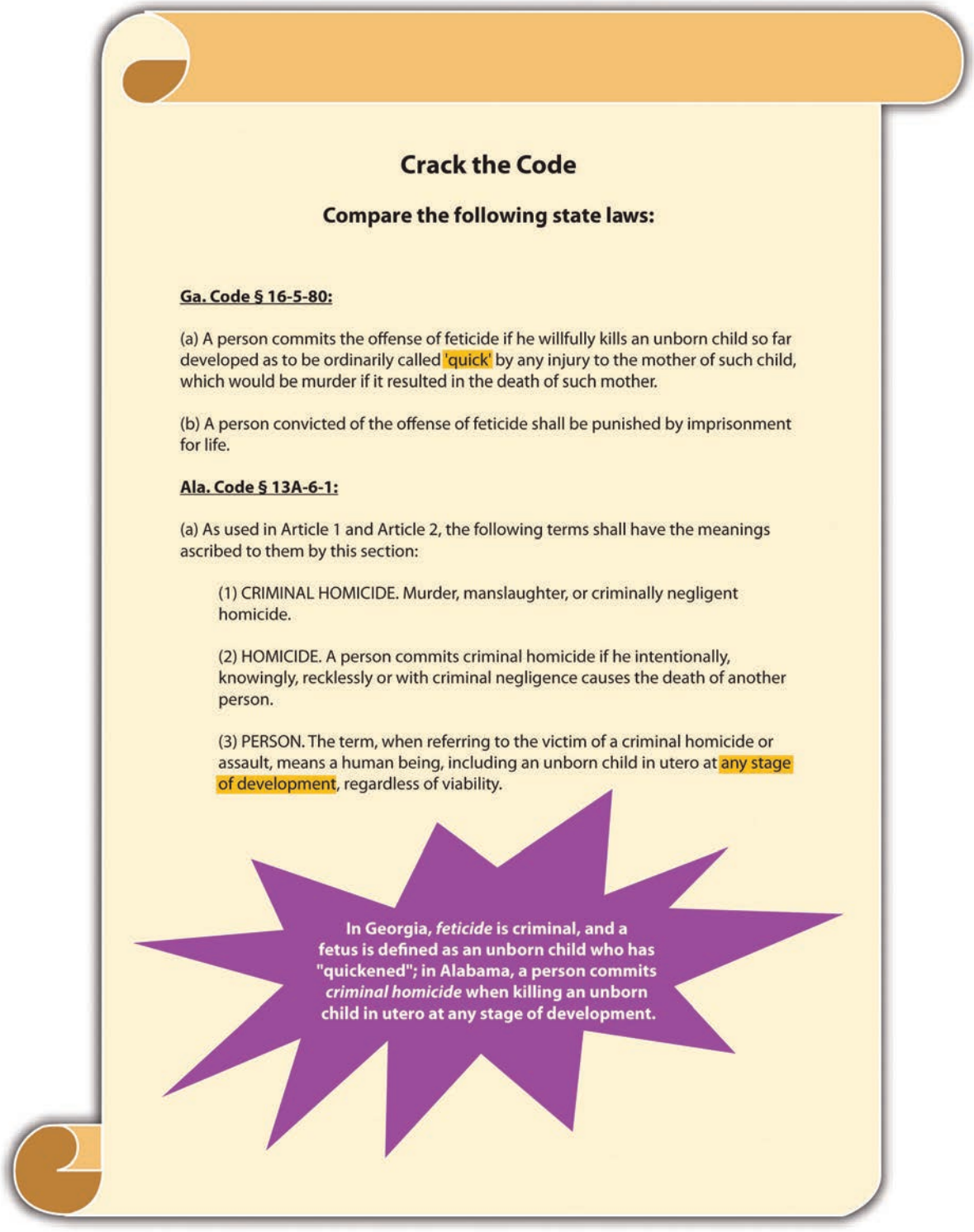
delicti is beyond the scope of this text, corpus delicti in a criminal homicide case consists of the death of a victim, caused by the defendant, in an unlawful manner.

Often the victim's body is never discovered, which could make it more difficult for the prosecution to prove corpus delicti but not impossible. If there is sufficient circumstantial or direct evidence, such as bloodstains, surveillance footage, or witness testimony, the prosecution can prove corpus delicti without the victim's body and can convict the defendant of criminal homicide.

Feticide

Feticide is the intentional destruction of a fetus. At common law, a *human being* could not be the victim of criminal homicide unless it was born alive (Keeler v. Superior Court, 2010). The Model Penal Code takes this approach and defines human being as "a person who has been born and is alive" (Model Penal Code § 210.0 (1)). The modern trend in many jurisdictions is to include the fetus as a victim in a criminal homicide or feticide statute, excepting *abortion*. The definition of fetus is either set forth in the criminal homicide or feticide statute or created by case law. Many states and the federal government consider an embryo a fetus from the time of conception (Ala. Code, 2010). Other states determine that a fetus is formed when the child has "quickened," or is able to move within the womb—about four to five months after conception (Fla. Stat., 2010). A few states do not consider the fetus a victim of criminal homicide or feticide until it is viable and can survive outside the womb (Ind. Code, 2010).

Figure 9.1 Crack the Code



Suicide

At common law, suicide was a crime. The punishment was forfeiture of the lands owned by the deceased. In modern times, most states do not criminalize suicide. However, almost all jurisdictions make it a crime to *assist*

a suicide, and the US Supreme Court has held these statutes constitutional (Washington v. Glucksberg, 2010). Several states have special statutes that specifically punish assisted suicide less severely than their first- or second-degree murder statutes (Tex. Penal Code, 2010). A minority of states allow terminally ill patients to end their lives with the assistance of a physician (Or. Rev. Stat., 2010). The Model Penal Code provides that "[a] person who purposely aids or solicits another to commit suicide is guilty of a felony of the second degree if his conduct causes such suicide or an attempted suicide" (Model Penal Code § 210.5(2)).

Key Takeaways

- Homicide is the killing of one human being by another.
- Homicide is not always criminal. For example, a lawful execution pursuant to the death penalty is homicide, but it is not criminal homicide.
- The corpus delicti components in a criminal homicide are the death of the victim, caused by the defendant, in an unlawful manner.
- States that criminalize feticide consider an embryo a fetus at the moment of conception, when it quickens in the womb, or when it is viable and can survive outside the womb.
- In modern times, in many jurisdictions feticide is a crime (excepting abortion), and suicide is not. At common law, the following applied:
    - Feticide was not a crime; only a person "born alive" could be the victim of criminal homicide.
    - Suicide was a crime; the punishment was forfeiture of the deceased's lands.
- The US Supreme Court has held that it is constitutional to criminalize assisted suicide, and most states do. A minority of states allow a physician to legally end the life of a terminally ill patient.

Exercises

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. What is the fundamental difference between homicide and suicide?
2. Read *Washington v. Glucksberg*, 521 U.S. 702 (1997). Which part of the Constitution did the US Supreme Court analyze when it held that it is constitutional to criminalize assisted suicide? The case is available at this link: http://scholar.google.com/scholar_case?case=17920279791882194984&q=Washington+v.+Glucksberg&hl=en&as_sdt=2,5.

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9.2 Murder

Learning Objectives

1. Define the criminal act element required for murder.
2. Explain why criminal intent is an important element of murder.
3. Identify, describe, and compare the three types of malice aforethought and the three Model Penal Code murder mental states.
4. Explain the deadly weapon doctrine.
5. Define death.
6. Give examples of justifiable and excusable homicides.
7. Ascertain which type of criminal homicide the defendant commits when deliberately and inadvertently transmitting AIDS.

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

Murder Act

Most jurisdictions define the **criminal act** element of murder as conduct that causes the victim's death (N.Y. Penal Law, 2011). The criminal act could be carried out with a weapon, a vehicle, poison, or the defendant's bare hands. Like all criminal acts, the conduct must be undertaken *voluntarily* and cannot be the result of a *failure to act* unless a duty to act is created by common law or statute.

Murder Intent

It is the criminal intent element that basically separates murder from manslaughter. At common law, the criminal intent element of murder was **malice aforethought**. In modern times, many states and the federal government retain the malice aforethought criminal intent (Cal. Penal Code, 2011). The Model Penal Code defines murder intent as **purposely**, **knowingly**, or **recklessly** under circumstances manifesting extreme indifference to the value of human life (Model Penal Code § 210.2).

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

The Meaning of Malice

Malice, as used in the term malice aforethought, is not the intent to vex or annoy. Nor is it hatred of the victim. Malice exists when the defendant desires the victim's death or is indifferent to whether the victim lives or dies. Malice is apparent in three criminal homicide situations: the defendant intends to kill the victim, the defendant intends to cause serious bodily injury to the victim, or the defendant has a **depraved heart** and does not care if the victim lives or dies.

The specific intent to kill the victim corresponds with the Model Penal Code's **purposely** murder mental state and is often referred to as **express malice** (N.R.S., 2011). The intent to cause serious bodily injury corresponds with the Model Penal Code's **knowingly** or **recklessly** murder mental states and is often referred to as **implied malice**. *Serious bodily injury* is a technical term and is generally defined in a state statute or by case law. The Model Penal Code defines serious bodily injury as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ" (Model Penal Code § 210.0(3)). The depraved heart intent is also **implied malice** (N.R.S., 2011) and corresponds with the Model Penal Code's **knowingly** or **recklessly** murder mental states, depending on the attendant circumstances.

Example of Intent to Kill

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

Example of Intent to Cause Serious Bodily Injury

Jay wants to injure Robbie, a track teammate, so that he will be the best runner in the high school track meet. Jay waits for Robbie outside the locker room and when Robbie exits, Jay attacks him and stabs him several times in the knee. Unfortunately, one of Jay's stabbing wounds is in the carotid artery, and Robbie bleeds to death. Jay is acting with the *intent to cause serious bodily injury*, which would be implied malice, or knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.

Example of Depraved Heart Intent

Jay is angry at Brittany for turning him down when he asks her to the senior prom. Jay decides to teach Brittany a lesson. He knocks her unconscious as she walks home from school and then drives her out to a deserted field and dumps her on the ground. He thereafter leaves, feeling vindicated at the thought of her walking over ten miles to the nearest telephone. Brittany does not regain consciousness and spends the entire night in the field, where temperatures drop to 5°F. Brittany dies of exposure and acute hypothermia. Jay acts with the intent of depraved

heart, also called *abandoned and malignant heart*. This criminal intent is another form of implied malice, or knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.

The Meaning of Aforethought

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

Inference of Intent

The **deadly weapon** doctrine creates an inference of murder intent when the defendant uses a deadly weapon (People v. Carines, 2011). A judge may instruct the jury that they can infer the defendant intended the natural and probable consequences of the criminal act, which are *death* when a deadly weapon is utilized. This basically alleviates the burden of having to prove criminal intent for murder.

A deadly weapon is any instrumentality that can kill when used in a manner calculated to cause death or serious bodily injury (Acers v. United States, 2010). The Model Penal Code defines deadly weapon as "any firearm, or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury" (Model Penal Code § 210.0 (4)). Some examples of deadly weapons are knives, guns, broken bottles, or even bare hands if there is a discrepancy in the size of the attacker and the victim. Aside from creating an inference of intent for murder, use of a deadly weapon may also *enhance a sentence* for certain crimes.

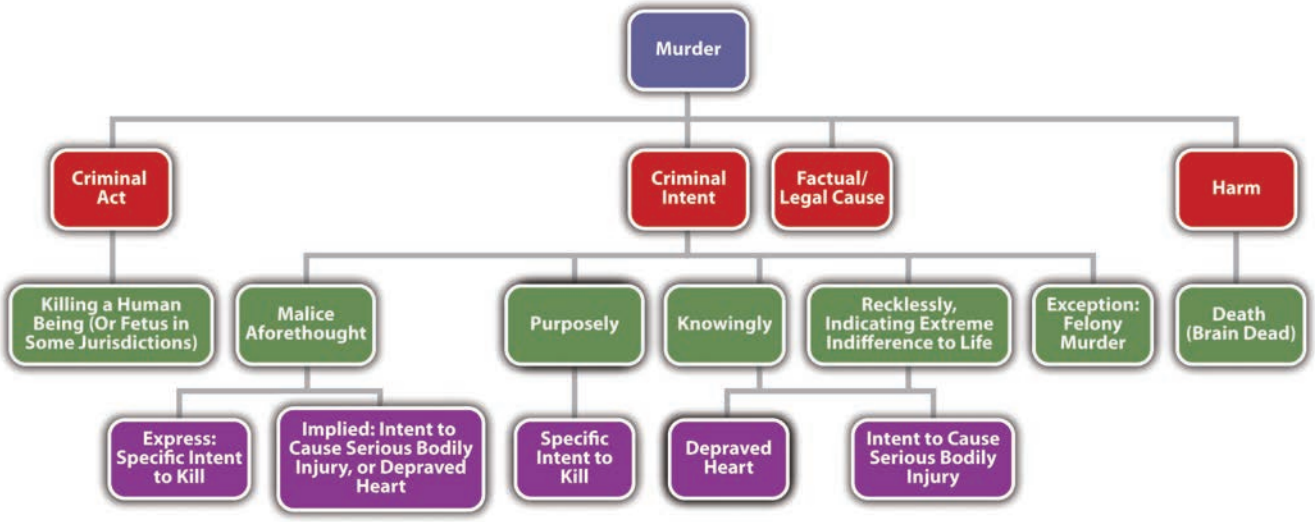
Causation Issues in Murder

There is always a causation analysis for murder. The defendant must be the **factual** and **legal cause** of a very specific harm—the victim's death. Causation issues in murder are numerous. If a state has a one or three years and a day rule, this could complicate the causation scenario when a victim's life is artificially extended. One and three years and a day rules are discussed in detail in Chapter 4 "The Elements of a Crime". In addition, *co-felon liability* could extend criminal responsibility to defendants that did not actually kill the victim, as is discussed shortly.

Harm Element of Murder

As stated previously, the **harm** element of murder is a victim's death. With the advent of life-sustaining machines, jurisdictions have had to develop a definition for the term *dead*. A victim is **legally dead** when there is irreversible cessation of the entire brain, including the brain stem (Uniform Determination of Death Act, 2010).

Figure 9.2 Diagram of Murder



Justification and Excuse

As Blackstone stated, murder cannot be *justified* or *excused*. Justifiable and excusable homicides are *noncriminal*, and thus justification or excuse can operate as an **affirmative defense** in many jurisdictions. A thorough discussion of defenses based on justification and excuse is in Chapter 5 "Criminal Defenses, Part 1" and Chapter 6 "Criminal Defenses, Part 2".

A *justifiable homicide* is a homicide that is warranted under the circumstances. One example of a justifiable homicide is when a law enforcement officer shoots and kills a fleeing felon to prevent imminent great bodily injury or death. This killing is intentional and **purposeful** with **malice aforethought**, but it is noncriminal. The justification negates the criminality and the law enforcement officer will not be convicted of murder. A complete discussion of use of deadly force by law enforcement to arrest or apprehend a criminal defendant is in Chapter 5 "Criminal Defenses, Part 1". Other murder defenses based on justification are self-defense, defense of others, and defense of habitation.

An *excusable homicide* is a homicide that society forgives or pardons. One example of an excusable homicide is a homicide committed by a defendant who is found legally insane. This killing could also be intentional and **purposeful** with **malice aforethought**, but it is noncriminal. The excuse negates the criminality and the defendant will not be convicted of murder. A complete discussion of the insanity defense is in Chapter 6 "Criminal Defenses, Part 2".

AIDS and Homicide

The criminal transmission of AIDS is a new and evolving topic with state and federal courts and criminal codes. Many jurisdictions have statutes specifying that death by the *deliberate* transmission of AIDS is **murder** because murder intent is present (Minn. Stat. Ann., 2010). Death by the *inadvertent* transmission of AIDS is more likely **manslaughter**, although modern courts could begin to imply malice or murder intent in this situation. For states

that follow the one or three years and a day rule, the time limit could affect any murder or manslaughter charge because medical breakthroughs have extended the life span of AIDS victims significantly.

Good News: The US Murder Rate Is Declining

Table 9.1 Murder Rate in the United States: Percent Change January–December

Years	Percent Change/Murder Rate
2006/2005	+1.8
2007/2006	−0.6
2008/2007	−3.9
2009/2008	−7.2

Source: Department of Justice, “Crime in the United States; Preliminary Annual Uniform Crime Report,” accessed July 28, 2010, http://www.fbi.gov/ucr/prelimsem2009/table_3.html.

Key Takeaways

- The criminal act element required for murder is conduct that causes the victim’s death.
- The criminal intent element of murder is important because it distinguishes murder from manslaughter.
- The three types of malice aforethought are intent to kill, intent to cause serious bodily injury, and depraved heart. The three Model Penal Code murder mental states are purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life.
- Express malice is the intent to kill the victim, or purposely, under the Model Penal Code. Implied malice is indifference to whether the victim lives or dies, or knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life under the Model Penal Code. Implied malice, knowingly, and recklessly includes the intent to commit serious bodily injury and depraved heart intent.
- The deadly weapon doctrine creates an inference of murder intent when the defendant uses a deadly weapon. If the trier of fact accepts the inference, the prosecution does not have the burden of proving criminal intent.
- A human being is dead when there is irreversible cessation of the entire brain, including the brain stem.
- An example of a justifiable homicide is a killing by law enforcement to prevent great bodily injury or death. An example of an excusable homicide is a killing perpetrated by a legally insane defendant.
- When a victim dies because of the deliberate transmission of AIDS, the crime is most likely murder because murder intent is present. When a victim dies because of the inadvertent transmission of AIDS, the crime is most likely manslaughter, although modern courts could begin to imply malice or murder intent in this situation.

Exercises

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Jay is angry about the grade he received on his criminal law midterm. Jay pulls a loaded revolver out of his backpack, aims at a tree and fires in an attempt to release his frustrations. Unfortunately, Jay is an inexperienced marksman and the bullet strikes an innocent bystander in the forehead, killing him. What was Jay's criminal intent when shooting the revolver?
2. A prosecutor reviews the file for Jay's criminal case. After reading the facts, he chuckles and tells his paralegal, "It won't be hard to prove criminal intent in this case." Is this true? Why or why not?
3. Read *U.S. v. Moore*, 846 F.2d 1163 (1988). Did the US Court of Appeals for the Eighth Circuit hold that teeth are a deadly weapon when the defendant is infected with the HIV virus? The case is available at this link: http://openjurist.org/846/f2d/1163.

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9.3 First-Degree Murder

Learning Objectives

1. Ascertain the three types of murder that are typically first degree.
2. Define premeditated murder.
3. Explain the significance of the criminal act element of murder in premeditated murder.
4. Define murder by a specified means.
5. Give examples of specified means for first-degree murder.
6. Analyze first-degree murder grading.
7. Ascertain the circumstances that merit capital punishment.

In this section, you analyze the *factors* that classify a murder as **first-degree murder**. Keep in mind that the criminal act, criminal intent, causation, and harm elements of murder have already been discussed.

Factors Classifying Murder as First Degree

States and the federal government usually include **premeditated murder**, **murder by a specified means**, and very serious **felony murders** in their first-degree murder statutes. Felony murder is discussed shortly.

Premeditated Murder

Premeditated murder was originally and historically the predominant form of murder in any first-degree murder statute. A common statutory definition of first-degree premeditated murder is a willful, deliberate, premeditated killing (Mich. Comp. Laws, 2010).

Definition of Willful, Deliberate, and Premeditated

Most jurisdictions define **willful** as a **specific intent to kill**, **purposely**, or *express malice*. Jurisdictions differ when interpreting **deliberate** and **premeditated**. A minority of jurisdictions equate express malice or purposely with deliberation and premeditation, which means that the prosecution need only prove specific intent to kill for a first-degree premeditated murder conviction (Hawthorne v. State, 2010). However, this interpretation could blur the distinction between first and second-degree murder. The majority of jurisdictions have defined *deliberate* as

calm and methodical, without passion or anger (People v. Anderson, 2011). *Premeditated* generally means the defendant reflected on the act or planned ahead (People v. Cole, 2011). In other words, if the defendant specifically intends to kill the victim and rationally, purposefully, takes steps that culminate in the victim's death, the defendant has committed first-degree premeditated murder in many jurisdictions.

Often it is the act itself that proves the killing was willful, deliberate, and premeditated. If the killing is carried out in a manner that indicates a strong and calculated desire to bring about the victim's death, the trier of fact can and often does conclude that the murder was premeditated (State v. Snowden, 2010).

Most jurisdictions agree that an *extended period of time* is not a requirement of premeditation (Commonwealth v. Carroll, 2010). Thus a murder can be premeditated and first degree even if it is conceived only moments before the actual killing (State v. Schrader, 2010). Some jurisdictions do not require *any* appreciable time lapse between the formation of intent and the criminal act (State v. Snowden, 2010).

Example of a Willful, Deliberate, Premeditated Murder

Imagine that Joannie and her husband Tim are in a terrible fight in the kitchen. Tim tells Joannie that he is going to get a divorce and will thereafter seek full custody of their two young children. Joannie states, "Wait here. I need to go to the bathroom. I will be right back." She walks down the hall, but goes into the *bedroom*, rather than the bathroom, and removes a handgun from the nightstand drawer. She then walks to the bathroom and flushes the toilet. Hiding the handgun in the pocket of her bathrobe, she walks back into the kitchen, removes it, and shoots Tim four times in the abdomen, killing him.

In this scenario, Joannie probably could be convicted of premeditated murder in most jurisdictions. Joannie shoots and kills Tim in a calm, methodical manner, evidencing **deliberation**. Her manufactured excuse and flushing of the toilet indicate **planning**. The act of shooting Tim four times shows that Joannie has a **specific intent to kill** and a strong and calculated desire to bring about Tim's death. Note that *timing* is not an issue here. Even a few minutes are enough to carry out a premeditated murder if the proper facts are present.

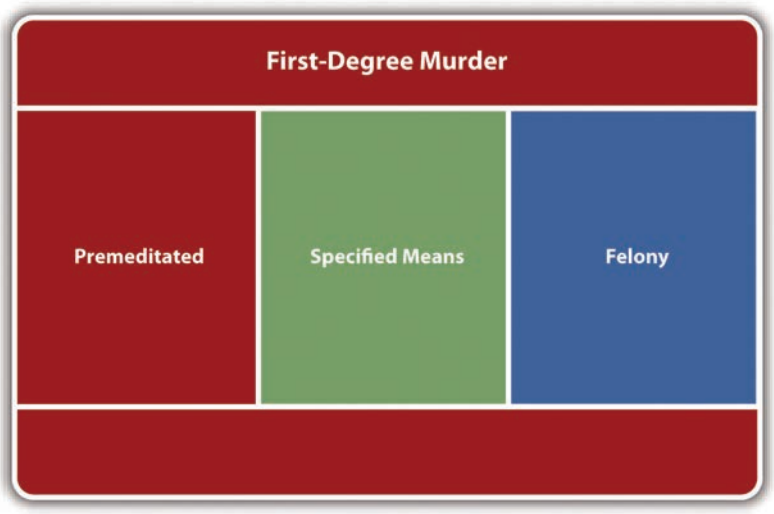
Example of a Spontaneous Killing

Compare the previous example with this scenario. Frank, Dillon's supervisor, calls Dillon into his office and fires him. Enraged, Dillon grabs a heavy brass paperweight from the top of Frank's desk and strikes him in the forehead, killing him instantly. In this example, Dillon acts in *anger*, not calm, cool, reflection. The act of grabbing a heavy brass paperweight appears *impulsive*, not planned. There is no evidence to indicate that Dillon knew he would be fired or knew that there was a brass paperweight on Frank's desk. In addition, the single blow to the head does not necessarily indicate that Dillon had a strong and calculated desire to *kill* Frank. Dillon's conduct may be supported by **murder intent** (most likely implied malice, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life), but there is no evidence of specific intent to kill, deliberation, or premeditation. Thus Frank's killing would probably not be first-degree premeditated murder in most jurisdictions.

Murder by a Specified Means

Murder by a **specified means** is a specific *method* of killing that is extremely heinous. Most states list the specified means in their first-degree murder statutes. Some examples of commonly included specified means are murder by drive-by shooting, destructive device like a bomb, weapon of mass destruction, ammunition designed to puncture a bulletproof vest, poison, torture, or **lying in wait**, which is an ambush-style killing (Cal. Penal Code, 2010). Note that all the aforementioned *methods* of killing involve premeditation to a certain extent and could also probably qualify as first-degree premeditated murder.

Figure 9.3 Diagram of First-Degree Murder



First-Degree Murder Grading

Most states divide murder into **first** and **second degree** (N.R.S., 2011). Some states add a **third degree** of murder that generally includes less serious sentencing options (Pa. Cons. Stat. Ann., 2010). The Model Penal Code classifies *all* murders as felonies of the first degree (Model Penal Code § 210.2(2)).

First-degree murder is the highest classification of murder and results in the most extreme punishment available in a jurisdiction's punishment scheme. If the jurisdiction allows for the death penalty, first-degree murder typically is the only crime against an individual that qualifies the defendant for execution (N.R.S., 2011). If the jurisdiction does not allow for the death penalty, first-degree murder often qualifies the defendant for *life in prison* (Mich. Comp. Laws, 2011).

Capital Punishment

The US Supreme Court has held that criminal homicide is the *only* crime against an individual that can merit the death penalty (Kennedy v. Louisiana, 2010). A discussion of crimes against the government (such as treason) that merit the death penalty is in Chapter 13 "Crimes against the Government".

In states that allow capital punishment, first-degree murder with one or more **aggravating factor**(s) is generally a capital offense. Examples of aggravating factors are killing more than one person, killing for financial gain, killing with a particularly heinous method, or killing a peace officer (Death Penalty Information Center 1, 2010). In general, the trier of fact must ensure that the aggravating factor(s) are not outweighed by **mitigating factor**(s). Examples of mitigating factors are the youth of the defendant, the defendant's lack of a criminal history, and the fact that the defendant was acting under extreme emotional or mental disturbance (Death Penalty Information Center 2, 2010).

Figure 9.4 Diagram of Capital Punishment



The Peterson Case

A jury convicted Scott Peterson of first-degree premeditated murder for the killing of his pregnant wife Laci Peterson. They also convicted him of second-degree murder for the killing of his unborn son Conner (Montaldo, C. 1, 2010). The governing statute was California Penal Code § 189 (Cal. Penal Code, 2010). After issuing the verdict, the jury sentenced Peterson to death based on the special circumstance of killing more than one person (Montaldo, C. 2, 2010).

The prosecution was successful without *direct evidence* or proof of the *cause of death* (Montaldo, C. 1, 2010).

Congress was inspired by the Peterson case to pass the **Unborn Victims of Violence Act**, 18 U.S.C. § 1841 (18 U.S.C., 2010), creating the new federal crime of killing an unborn child.

Key Takeaways

- Most states and the federal government include premeditated murder, murder by a specified means, and felony murder in their first-degree murder statutes.
- Premeditated murder is typically a purposeful killing committed after calm planning and reflection. An extensive length of time between the formation of criminal intent and the criminal act is not generally a requirement of premeditated murder.
- The criminal act can help prove that a murder was premeditated. If the killing is carried out in a manner that indicates a strong and calculated desire to bring about the victim's death, the trier of fact can conclude that the murder was premeditated.
- When the defendant commits murder with a particularly heinous method, the killing is murder by a specified means.
- First-degree murder statutes often include the following specified means: murder by drive-by shooting,

destructive device like a bomb, weapon of mass destruction, ammunition designed to puncture a bulletproof vest, poison, torture, or lying in wait.

- First-degree murder is the highest classification of murder with the most severe sentencing options. If the jurisdiction allows for capital punishment, first-degree murder typically is the only crime against an individual that merits the death penalty. If the jurisdiction does not allow for capital punishment, first-degree murder often qualifies the defendant for life in prison.
- The only crime against an individual that can merit capital punishment is criminal homicide. In most jurisdictions, the defendant must commit first-degree murder combined with one or more aggravating factors that are not outweighed by mitigating factors to receive the death penalty.

Exercises

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Johnnie decides he wants to kill Marcus, the leader of a rival gang. Johnnie knows that Marcus always hangs out in front of the gas station on Friday nights. Johnnie puts his gun in the glove compartment of his car and drives to the gas station on a Friday night. He sees Marcus standing out front. He slowly drives by, takes aim, and shoots Marcus from the car, killing him. Could this be first-degree murder? Explain your answer.
2. Read *State v. West*, 844 S.W.2d 144 (1992). Did the Supreme Court of Tennessee hold that a defendant's failure to report a shooting to the police for over an hour and concealment of the murder weapon constitutes sufficient evidence to prove premeditated murder? The case is available at this link: http://scholar.google.com/scholar_case?case=3481778471457660977&hl=en&as_sdt=2002&as_vis=1.
3. Read *U.S. v. Downs*, 56 F.3d 973 (1995). Identify motive, planning, and preconceived design in this case. The case is available at this link: https://casetext.com/case/us-v-downs-2.

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9.4 Felony Murder

Learning Objectives

1. Define the criminal intent element required for felony murder.
2. Compare the criminal intent element of felony murder to implied malice, knowingly, or recklessly under circumstances manifesting extreme indifference to human life.
3. Explain the rule of co-felon liability for felony murder.
4. Explain an exception to the rule of co-felon liability for felony murder.
5. Analyze criminal responsibility for felony murder when someone other than a co-felon kills the victim.
6. Analyze criminal responsibility for felony murder when someone other than a co-felon kills a co-felon.
7. Describe concurrence of the felony and the homicide for felony murder.
8. Analyze felony murder grading and ascertain the felonies that typically classify felony murder as first degree.

Felony murder is a criminal homicide that occurs during the commission or attempted commission of a felony. Most states and the federal government include felony murder in their penal codes (18 U.S.C., 2011). However, it has not been universally adopted. The Model Penal Code does not include felony murder per se. It does suggest a rebuttable presumption that killings that occur during the commission of specified dangerous felonies exhibit recklessness under circumstances manifesting extreme indifference to the value of human life (Model Penal Code § 210.2(1)(b)).

Felony Murder Intent

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

Explanation of Felony Murder Intent

When the defendant commits a felony that is inherently dangerous to life, he or she does so knowing that some innocent victim may die. In essence, this awareness is similar to implied malice, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life. What is difficult to justify is a conviction for felony murder when the felony is *not* inherently dangerous to life. Thus most jurisdictions limit the felony murder doctrine to felonies that create a foreseeable risk of violence or death. States that include nonviolent

felonies in their felony murder statutes generally grade them as **second-** or **third-degree** felony murder (Fla. Stat. Ann., 2010).

Example of Felony Murder Intent

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

In this example, Joaquin did not *intend to kill* the tenants. However, he did most likely have the criminal intent necessary for **arson**. Therefore, felony murder convictions are appropriate. Note that Joaquin exhibited extreme indifference to whether the tenants in the building lived or died, which could also constitute the criminal intent of **implied malice** or **depraved heart**.

Liability of Co-Felons for Felony Murder

It is common for more than one defendant to cooperate in the commission of a felony. Group participation in criminal conduct could constitute more than one crime—for example, conspiracy—and could also place criminal responsibility squarely on a defendant who did not *commit* the criminal act. The general rule for felony murder in many jurisdictions is that if *one* defendant kills a victim during the commission or attempted commission of a specified felony, *all defendants* involved in the felony are guilty of felony murder (State v. Hoang, 2011).

Example of Co-Felon Liability for Felony Murder

Joe and Jane dream up a plan to rob a local bank. Joe is designated as the primary robber and is supposed to enter the bank and hand a note to the teller demanding all the money in her station. Jane's role in the felony is to drive the getaway vehicle to the bank, wait outside the front door with the motor running, and transport Joe and the money back to their apartment after the bank transaction is completed. Joe takes a handgun hidden beneath his jacket into the bank. He passes the note to the teller, and she frantically summons a security guard. As the security guard starts to approach, Joe pulls out the gun. An elderly lady standing to the left of Joe suffers a heart attack and dies at the sight of the gun. In this case, Joe *and Jane* can probably be convicted of felony murder. Note that Jane did nothing to directly cause the victim's death from a heart attack. However, Jane *did* drive the getaway vehicle with the criminal intent to commit robbery, so Jane is criminally responsible for the consequences in many jurisdictions.

Exception to Co-Felon Liability for Felony Murder

Some jurisdictions provide an **exception to co-felon liability** for felony murder if the defendant did not actually commit the act that killed the victim and had neither knowledge nor awareness that a death might occur (N.Y. Penal Law, 2010).

Example of the Exception to Co-Felon Liability for Felony Murder

Review the example with Joe and Jane in Section 9 "Example of Co-Felon Liability for Felony Murder". Change this example so that Jane is a teller at the local bank. Joe and Jane plan the "robbery" so that Jane is to pretend Joe is a customer, and hand Joe all the money in her station after he enters the bank *unarmed* and passes her a phony check made out to "cash." Without informing Jane, Joe brings a gun into the bank, "just in case." The security guard observes Jane handing Joe large amounts of cash. Suspicious, he begins to approach the station. Joe notices and frantically pulls out the gun and points it at the security guard. The elderly lady standing to the left of Joe suffers a heart attack and dies at the sight of the gun. In this example, Jane may have a valid defense to co-felon liability for the elderly lady's death in some jurisdictions. Although Jane had the intent to commit theft, a trier of fact could determine that Jane had neither the *knowledge* nor *awareness* that a death might occur because she believed she was cooperating in a nonviolent offense. Thus it is possible that in certain jurisdictions only Joe is subject to a conviction of felony murder in this case.

Liability When Someone Other than the Defendant Kills the Victim

Generally, if the felony is inherently dangerous to life, and the defendant or defendants intentionally create a situation that is likely to result in death, if death does result, each and every defendant is guilty of felony murder. In some jurisdictions, this criminal liability exists even *when someone other than a co-felon* kills the victim (People v. Hernandez, 2010). Review the bank robbery committed by Joe and Jane, as discussed in Section 9 "Example of Co-Felon Liability for Felony Murder". If the security guard takes a shot at Joe but misses and kills the bank teller instead, both Joe and Jane are guilty of the bank teller's death pursuant to this interpretation of the felony-murder doctrine.

Some jurisdictions relieve a defendant from criminal liability for felony murder if the death is the *death of a co-felon*, rather than a completely innocent victim (State v. Canola, 2010). In the case of Joe and Jane discussed in Section 9 "Example of Co-Felon Liability for Felony Murder", if the security guard shoots and kills *Joe* in a jurisdiction that recognizes this exception, Jane is not guilty of felony murder.

Concurrence of the Felony and the Death of the Victim

Another important aspect that must be analyzed in any felony murder case is the **concurrence** of the felony and the death of the victim. The felony and the death must be part and parcel of the same continuous transaction.

Therefore, there must be a determination of (1) when the felony begins and (2) when the felony ends. If the death occurs *before* or *after* the commission or attempted commission of the felony, the defendant might not be guilty of felony murder.

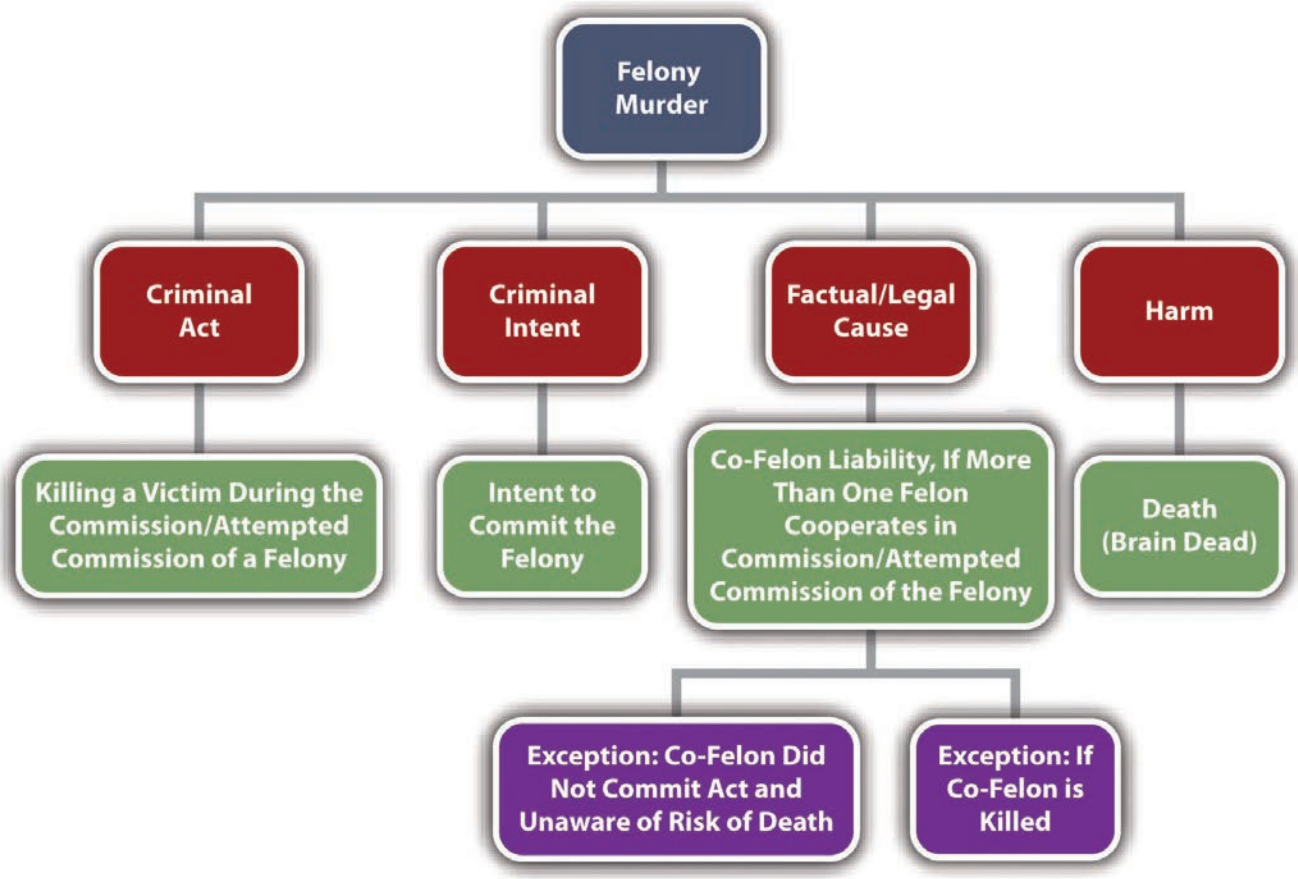
Example of a Death That Occurs before the Felony Begins

Carlos shoots and kills his drug dealer in a fit of temper because the drugs he bought are placebo. After the killing, it occurs to Carlos that the drug dealer might be carrying significant amounts of cash. Carlos thereafter steals some cash from the drug dealer's pockets and runs off. Although this killing is probably murder, it is *not* **felony murder**. Carlos stole money from his drug dealer, but the theft occurred *after the murder*. Thus the killing did not happen *during* a robbery. If premeditation is proven, this could still be first-degree murder, but it is not first-degree felony murder.

Death That Occurs after the Felony Ends

More commonly, the issue is whether the killing occurs after the felony ends. The general rule is that the felony ends when the defendant has reached *a place of temporary safety* (People v. Young, 2010). This place does *not* have to be the defendant's residence; it could simply be a hiding place. Pursuant to this rule, a death that occurs during a car chase as the defendants flee the scene of the crime is considered felony murder (Del. Code Ann. Tit. 11, 2011).

Figure 9.5 Diagram of Felony Murder



Felony Murder Grading

Felony murder can be **first**, **second**, or **third degree** (Fla. Stat. Ann., 2010). Some common examples of felonies listed in first-degree murder statutes are arson, rape, carjacking, robbery, burglary, kidnapping, and certain forcible sexual felonies (Cal. Penal Code, 2010).

Key Takeaways

- The criminal intent element required for felony murder is the intent required for the underlying felony, not murder intent.
- If a felony is inherently dangerous to life, the defendant may act with implied malice, knowingly, or recklessly manifesting extreme indifference to human life when committing or attempting to commit the felony.
- If more than one defendant commits or attempts to commit a felony, all defendants are guilty of felony murder if a victim is killed during the commission or attempted commission of the felony.
- Some jurisdictions will not find a co-felon criminally responsible for felony murder if the co-felon did not commit the act of killing and was unaware that there was a risk of death.
- In some jurisdictions, all co-felons are criminally responsible for felony murder when someone other than a

co-felon kills a victim during the commission or attempted commission of a felony that is inherently dangerous to life.

- In some jurisdictions, all co-felons are not criminally responsible for felony murder when someone other than a co-felon kills a co-felon during the commission or attempted commission of a felony.
- The killing must take place during the commission or attempted commission of a felony for the felony murder rule to apply.
- Felony murder can be first, second, or third degree. Typical felonies that classify felony murder as first degree are arson, rape, carjacking, robbery, burglary, kidnapping, and certain forcible sexual felonies.

Exercises

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Read *People v. Anderson*, 666 N.W.2d 696 (2003). Did the Minnesota Supreme Court uphold a charge of second-degree felony murder when the underlying felonies were possession of a firearm by a convicted felon and possession of a stolen firearm? The case is available at this link: http://law.justia.com/cases/california/supreme-court/3d/6/628.html.
2. Kurt robs a convenience store at gunpoint. As the cashier hands him money out of the cash register, Kurt hears a siren and runs outside, stuffing the money in his pockets. He sees a dark alley and dashes into it. While he crouches there waiting for the police to leave, a homeless person living in the alley taps him on the shoulder. Startled, Kurt spins around and shoots and kills the homeless person. Is this felony murder? Explain your answer.
3. Read *Enmund v. Florida*, 458 U.S. 782 (1982). In *Enmund*, the US Supreme Court held that the death penalty is unconstitutional in a felony murder case for one who neither took life, attempted to take life, nor intended to take life. On which part of the Constitution did the Court rely in reaching this holding? The case is available at this link: http://www.law.cornell.edu/supct/html/historics/USSC_CR_0458_0782_ZO.html.

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9.5 Second-Degree Murder

Learning Objectives

1. Compare statutory definitions of second-degree murder.
2. Ascertain two types of murder that are typically second degree.
3. Analyze second-degree murder grading.

States that classify murder as either first or second degree often define **second-degree murder** as any murder that is not first-degree murder (Mich. Comp. Laws, 2010). This definition excludes murders that are premeditated or committed with a specified means. It includes *implied malice* murder, such as murder committed with the intent to inflict serious bodily injury and depraved heart murder.

Depraved Heart Murder

Some statutes use the Model Penal Code's language and define second-degree murder as a killing executed recklessly, under circumstances manifesting extreme indifference to the value of human life (K.S.A., 2010). This definition embodies the concept, discussed previously, of murders committed with a depraved or abandoned and malignant heart. The facts that give rise to this type of second-degree murder often indicate the mens rea of *recklessness*, rather than purposeful or knowing intent or express malice. Whether the killing is a second-degree murder or manslaughter is left to the trier of fact and often rests on the **degree** of recklessness exhibited. If the defendant's conduct indicates *extreme* indifference to life, the killing is a depraved heart murder. If the defendant's conduct is simply reckless, the killing is manslaughter. As the Model Penal Code states in its comments, "[w]hether recklessness is so extreme that it demonstrates similar indifference is not a question, it is submitted, that can be further clarified. It must be left directly to the trier of fact under instructions which make it clear that recklessness that can fairly be assimilated to purpose or knowledge should be treated as murder and that less extreme recklessness should be punished as manslaughter" (A.L.I., Model Penal Code & Commentaries Part II § 210.2, Comment. 4, pp. 21–22 (1980)).

Example of a Depraved Heart Murder

After watching his fifth-grade daughter play softball, Doug attends a party with her team and other parents at the local pizza parlor. Doug's daughter leaves the party with her mother, Doug's ex-wife. Doug consumes ten beers and then leaves the party and smokes some crack cocaine in his vehicle. He thereafter begins driving home. As he is driving in a busy section of town, he hears his phone beep, indicating the receipt of a text message. He grabs

his phone and starts reading the text. This lapse of attention causes him to run a red light and broadside a vehicle turning left in front of him, killing a child sitting in the passenger seat. Doug puts his vehicle in reverse, drives around the car he hit, and leaves the scene of the accident. These facts could give rise to a conviction for depraved heart second-degree murder. Although Doug did not act with specific intent to kill, his conduct in driving while under the influence of alcohol and crack cocaine, reading a text message while driving impaired in a busy part of town, and leaving the scene of an accident most likely elevate Doug's intent from ordinary recklessness to recklessness indicating extreme indifference to the value of human life. Thus the trier of fact could find Doug guilty of murder rather than manslaughter in this case.

Figure 9.6 Diagram of Second-Degree Murder

Second-Degree Murder	
Second-Degree Murder	

Second-Degree Murder Grading

Most jurisdictions **grade** second-degree murder *lower* than first-degree murder and include less serious sentencing options (N.R.S. § 200.030, 2011). Most jurisdictions grade second-degree murder *higher* than manslaughter because it has a more heinous criminal intent (N.R.S. § 200.080, 2011). Manslaughter is discussed shortly.

Key Takeaways

- Second-degree murder is often defined as any murder that is not first-degree murder. Second-degree murder can also be defined as murder committed recklessly, under circumstances evidencing extreme indifference to life.
- Second-degree murder includes implied malice murder, such as murder with the intent to cause serious bodily injury, and depraved heart murders.
- Second-degree murder is graded lower than first-degree murder but higher than manslaughter.

Exercises

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Reread the second question of the exercises in Section 9.4 "Felony Murder". When Kurt shoots the homeless person in the alley, is this killing first or second-degree murder? Explain your answer.
2. Read *Berry v. Superior Court*, 208 Cal. App. 3d 783 (1989). In *Berry*, the defendant was charged with second-degree murder when his pit bull attacked and killed a young child. The pit bull had never bitten anyone before this incident. Did the California Court of Appeal uphold the defendant's murder charge on a theory of implied malice? The case is available at this link: http://lawschool.courtroomview.com/acf_cases/9986-berry-v-superior-court.

3. Read *Dowda v. State*, 776 So.2d 714 (2000). Why did the Mississippi Court of Appeals hold that this killing was a depraved heart murder? The case is available at this link: http://www.mssc.state.ms.us/images/Opinions/Conv9328.pdf.

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9.6 Manslaughter

Learning Objectives

1. Compare murder and manslaughter.
2. Define voluntary manslaughter.
3. Ascertain the basis of an adequate provocation.
4. Explain the concurrence of a voluntary manslaughter killing and the heat of passion.
5. Compare voluntary and involuntary manslaughter.
6. Describe the three types of involuntary manslaughter.
7. Analyze manslaughter grading.

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

Voluntary Manslaughter

Manslaughter has two basic classifications: **voluntary** and **involuntary**. **Voluntary manslaughter** has the same criminal intent element as murder. In fact, a voluntary manslaughter killing is typically supported by express malice, specific intent to kill, or purposely. However, in a voluntary manslaughter, an emotional state called a **heat of passion** negates the murder intent. An **adequate provocation** from the *victim* inspires the heat of passion (Tenn. Code Ann., 2010). The Model Penal Code does not require adequate provocation from the victim per se, but it does have a similar provision that reduces murder to manslaughter when there is a reasonable explanation or excuse (Model Penal Code § 210.3(1)(b)).

The **adequacy** requirement is essential to any voluntary manslaughter analysis. Many defendants are provoked and thereafter kill with murder intent. Nonetheless, most provocations are not **adequate** to drop the crime from murder to manslaughter. The victim's provocation must be serious enough to goad a *reasonable person* into killing (People v. Steele, 2011). A reasonable person is a fictional and objective standard created by the trier of fact. Of course, *the defendant* must *actually* be provoked, which is a subjective standard (People v. Steele, 2011).

Example of Inadequate Provocation

Revisit the situation discussed in Section 9 "Example of a Spontaneous Killing", in which Dillon kills his

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

Example of Adequate Provocation

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

Other Examples of Adequate Provocation

Other examples of adequate provocation are when the homicide victim batters the defendant and a killing that occurs during a mutual combat (Ohio v. Shane, 2011). Cases have generally held that *words alone* are *not* enough to constitute adequate provocation (Girouard v. State, 2011). Thus in the adequate provocation example in Section 9 "Example of Adequate Provocation", if a friend told José that his wife was committing adultery, and José responded by shooting and killing his wife, this would probably be murder, not voluntary manslaughter.

Concurrence of the Killing and the Heat of Passion

The second requirement of voluntary manslaughter is that the killing occur *during* a heat of passion. Defendants generally exhibit rage, shock, or fright when experiencing a heat of passion. This emotional state negates the calm, deliberate, intent to kill that supports a charge of murder. However, heat of passion mental states are typically brief in duration. Thus there cannot be a *significant time lapse* between the victim's provocation and the killing (State v. Cole, 2010). Analyze the adequate provocation example discussed in Section 9 "Example of Adequate Provocation". If José waits until the next day to shoot and kill his wife, the crime is most likely premeditated first-degree murder, *not* voluntary manslaughter.

Figure 9.7 Diagram of Voluntary Manslaughter

Voluntary Manslaughter		
Adequate *provocation* from the victim		Killing occurs *during* a heat of passion
Enough to cause a reasonable person to kill	The defendant must actually be provoked into killing in a heat of passion	No significant time lapse between heat of passion and the killing

Involuntary Manslaughter

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

Misdemeanor Manslaughter

Misdemeanor manslaughter, also called **unlawful act manslaughter**, is a criminal homicide that occurs during the commission or attempted commission of a *misdemeanor*. The Model Penal Code completely rejects misdemeanor manslaughter. There is a trend to follow the Model Penal Code's example and abolish misdemeanor manslaughter. Most states that prohibit misdemeanor manslaughter only include misdemeanors that are inherently dangerous to life in the criminal statute, excluding strict liability misdemeanors or malum prohibitum crimes (K.S.A., 2010). A minority of states and the federal government include strict liability or malum prohibitum crimes in their misdemeanor manslaughter statutes (21 O.S., 2010). In either jurisdiction, the defendant need only possess the criminal intent *for the misdemeanor* to be guilty of the killing.

Example of Misdemeanor Manslaughter

Roberta points an unloaded gun at Jennifer to scare her into breaking up with Roberta's ex-boyfriend. This crime is called brandishing a weapon and is often classified as a misdemeanor. At the sight of the gun, Jennifer suffers a heart attack and dies. Roberta has most likely committed misdemeanor manslaughter in this case. Brandishing a weapon is not always inherently dangerous to life. However, if Jennifer has a heart attack and dies because of Roberta's commission of this misdemeanor offense, Roberta still could be criminally responsible for misdemeanor manslaughter in many jurisdictions.

Reckless or Negligent Involuntary Manslaughter

States and the federal government also criminalize **reckless** or **negligent** involuntary manslaughter (Ala. Code, 2011). Reckless or negligent involuntary manslaughter is a more common form of manslaughter than misdemeanor manslaughter. The Model Penal Code defines reckless homicide as *manslaughter* and a felony of the second degree (Model Penal Code § 210.3). The Model Penal Code defines negligent homicide as a felony of the third degree (Model Penal Code § 210.4).

Reckless involuntary manslaughter is a killing supported by the criminal intent element of **recklessness**. Recklessness means that the defendant *is aware* of a risk of death but acts anyway. Negligent involuntary manslaughter is a killing supported by the criminal intent element of **negligence**. Negligence means that the defendant *should be aware* of a risk of death, but is not. This category includes many careless or accidental deaths,

such as death caused by firearms or explosives, and a parent's failure to provide medical treatment or necessities for his or her child. Reckless and negligent criminal intent is discussed in detail in Chapter 4 "The Elements of a Crime".

As stated in Section 9.5.1 "Depraved Heart Murder", reckless or negligent involuntary manslaughter is often similar to second-degree depraved heart murder. If the prosecution charges the defendant with both crimes, the trier of fact determines which crime is appropriate based on the attendant circumstances.

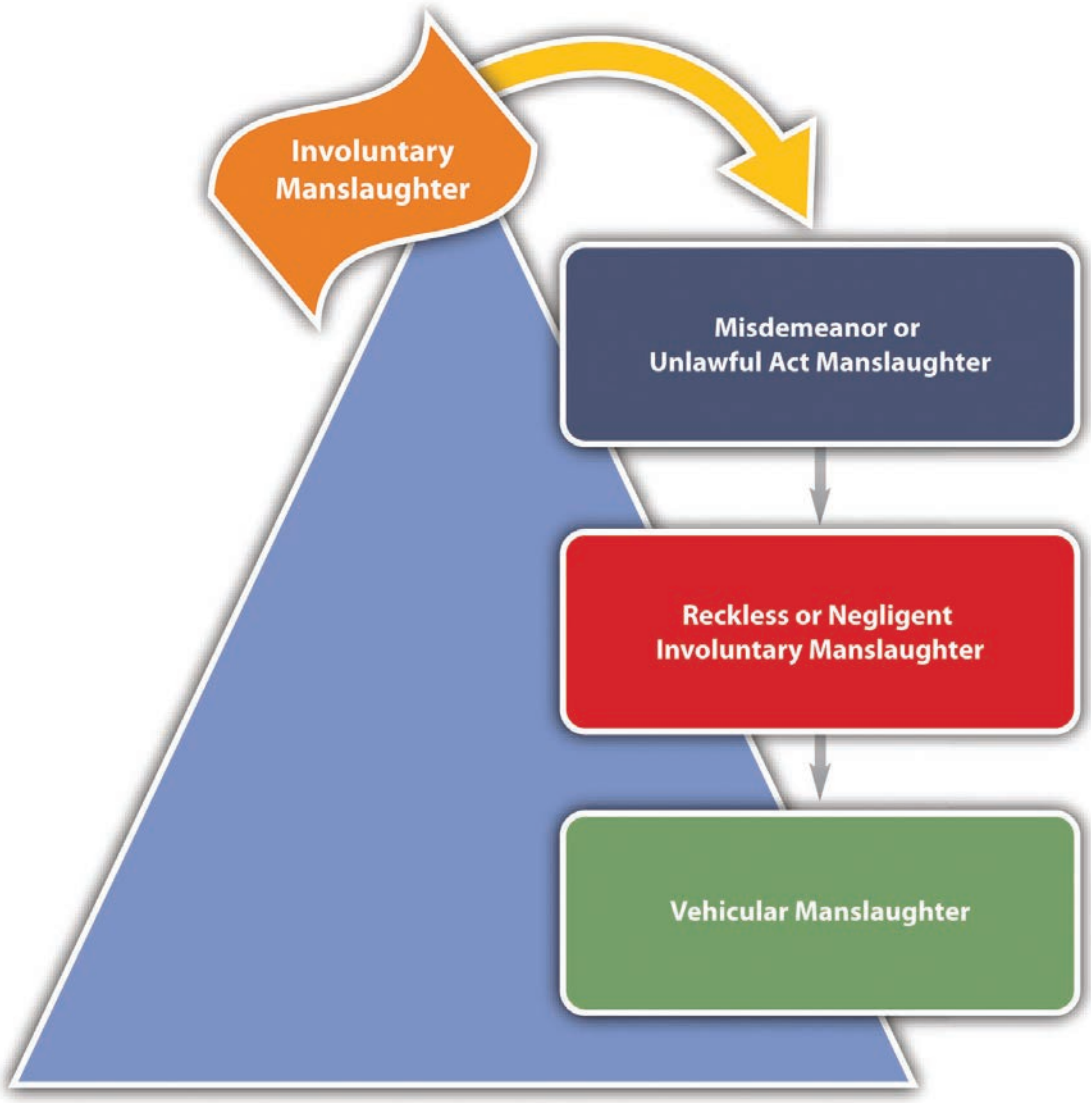
Example of Reckless or Negligent Involuntary Manslaughter

Steven, an off-duty sheriff's deputy, brings his shotgun into the local rifle shop to be repaired. Steven thinks that the shotgun is unloaded and hands it to the employee with the *safety off*. Unfortunately, the gun is loaded and discharges, shooting and killing the employee. In this case, Steven *should know* that at certain times the safety on his shotgun must always be on because he is a registered gun owner and a sheriff's deputy who has been trained to handle guns. However, Steven is unaware of the risk and believes that the gun is unloaded. If the employee dies, Steven could be convicted of negligent involuntary manslaughter in jurisdictions that recognize this crime. If Steven is in a jurisdiction that only recognizes **reckless** involuntary manslaughter, the prosecution may have to prove a higher degree of awareness, such as Steven's knowledge that the shotgun was *loaded*.

Vehicular Manslaughter

Vehicular manslaughter is typically either the operation of a motor vehicle with **recklessness** or **negligence** resulting in death or the operation of a motor vehicle *under the influence* of alcohol or drugs resulting in death (N.Y. Penal Law §125.12, 2010). Some states have specific vehicular manslaughter statutes (Cal. Penal Code, 2011). In states that do not, the defendant could be prosecuted under a jurisdiction's misdemeanor or unlawful act manslaughter statute if the defendant violates a vehicle code section. Vehicular manslaughter can also be prosecuted under a jurisdiction's reckless or negligent involuntary manslaughter statute, depending on the circumstances. If the defendant uses a motor vehicle as a weapon to kill the victim, the intent to kill is present and the appropriate crime would be **murder**.

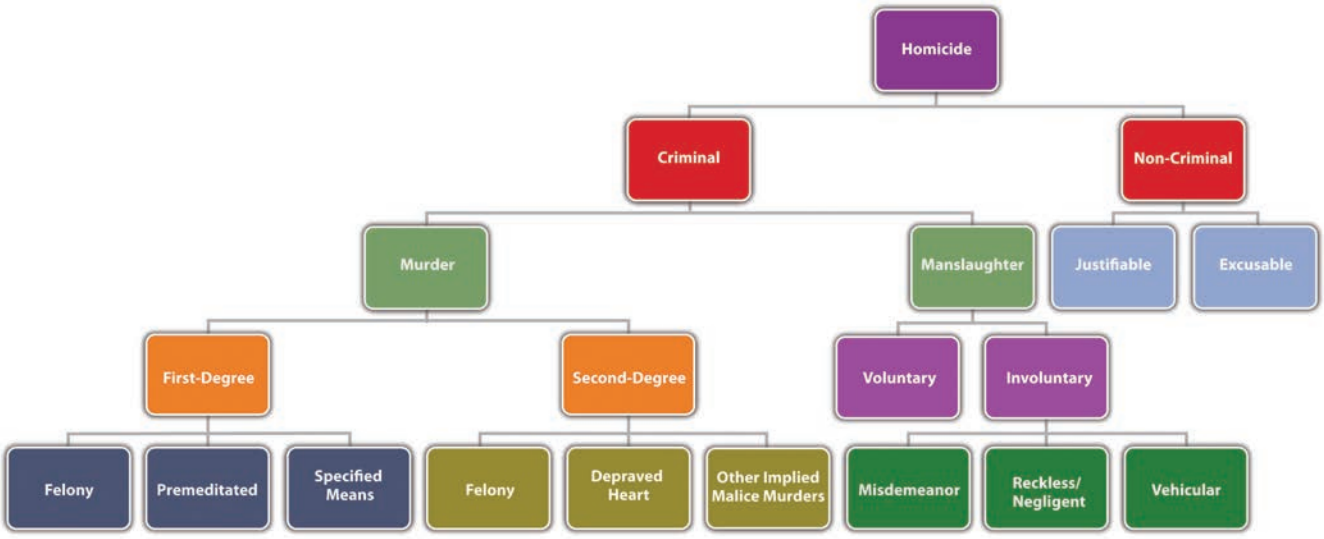
Figure 9.8 Diagram of Involuntary Manslaughter



Manslaughter Grading

Voluntary and involuntary manslaughter typically have a more lenient punishment scheme than murder because the criminal intent is less heinous (N.R.S. § 200.080, 2011). Often manslaughter functions as an imperfect *defense* to murder, based on the less serious sentencing options. In general, voluntary manslaughter is **graded** higher than involuntary manslaughter (N.R.S. § 200.090, 2011). Some states divide manslaughter into degrees, rather than classifying it as voluntary and involuntary, with first-degree manslaughter punished more severely than second-degree manslaughter (N.Y. Penal Law §125.20, 2011). The Model Penal Code grades all manslaughter as a felony of the second degree (Model Penal Code § 210.3(2)) and grades negligent homicide as a felony of the third degree (Model Penal Code § 210.4(2)).

Figure 9.9 Diagram of Homicide



Key Takeaways

- Murder is a killing supported by the criminal intent of malice or purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to life. Manslaughter is a killing supported by malice negated by a heat of passion, reckless, or negligent criminal intent.
- Voluntary manslaughter is a killing that occurs during an adequately provoked heat of passion.
- An adequate provocation is one sufficient to goad a reasonable person into killing and that actually provokes the defendant into killing.
- A killing must occur during a heat of passion to be classified as voluntary manslaughter. If a killing occurs before the heat of passion is provoked or after the heat of passion has cooled, it probably will be classified as murder.
- Voluntary manslaughter is supported by murder intent that has been negated in an adequately provoked heat of passion. Involuntary manslaughter lacks murder intent altogether.
- The three types of involuntary manslaughter are misdemeanor manslaughter, reckless or negligent involuntary manslaughter, and vehicular manslaughter.
- Manslaughter is typically graded lower than murder. Voluntary manslaughter is typically graded higher than involuntary manslaughter. The Model Penal Code grades all manslaughters as felonies of the second degree and grades negligent homicide as a felony of the third degree.

Exercises

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. How does the Model Penal Code classify criminal homicides?
2. Read *Stevens v. State*, 691 N.E.2d 412 (1997). Why did the Indiana Supreme Court affirm the lower court's decision to refuse a jury instruction on voluntary manslaughter in this case? The case is available at this link: http://scholar.google.com/scholar_case?case=17476255529720247 33&q=

stevens+v.+state+691+ne2d+412&hl=en&as_sdt=2002&as_vis=1.

3. Read *Tripp v. State*, 374 A.2d 384 (1977). In this case, the defendant killed his ex-girlfriend, her mother, her niece, and her son. Did the Maryland Court of Appeals hold that *the victim* must be the source of adequate provocation in a voluntary manslaughter case? The case is available at this link: http://scholar.google.com/scholar_case?case=17743318345966072534&hl=en&as_sdt=2002&as_vis=1.
4. Read *Walker v. Superior Court*, 47 Cal.3d 112 (1988). What was the basis for the involuntary manslaughter charge against the defendant in this case? Did the California Supreme Court uphold this charge? The case is available at this link: http://scholar.google.com/scholar_case?case=11713950418773441100&hl=en&as_sdt=2&as_vis=1&oi=scholarr.

Law and Ethics

Should Killing an Abortion Doctor Be Voluntary Manslaughter?

Scott Roeder left his pew during a church service, walked up to a well-known abortion doctor, and deliberately shot him in the head, killing him. During Roeder's trial for first-degree premeditated murder, the defense asked the court to allow a second charge of voluntary manslaughter. The defense claimed that defendant Roeder was acting in *defense of others* in the attempt to save the lives of unborn children (USA Today, 2010).

1. What are some of the consequences of allowing the charge of voluntary manslaughter in this situation?

Check your answer using the answer key at the end of the chapter.

Scott Roeder Verdict Video

Scott Roeder Convicted of Murder

Scott Roeder's murder verdict is shown in this video:

" href="http://www.youtube.com/watch?v=lhWyubMcEV0" class="replaced-iframe" onclick="return replaceIframe(this)">(click to see video)

References

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Cal. Penal Code § 191.5, accessed February 7, 2011, http://law.onecle.com/california/penal/191.5.html.

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Ohio v. Shane, 63 Ohio St.3d 630 (1992), accessed February 24, 2011, http://scholar.google.com/scholar_case?case=8752055493993855988&q=voluntary+manslaughter+spouse+act+of+adultery&hl=en&as_sdt=2,5.

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21 O.S. § 711(1), accessed July 28, 2010, http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=69314.

9.7 End-of-Chapter Material

Summary

Homicide is the killing of one human being by another. Criminal homicide is either murder or manslaughter. Some states and the federal government also criminalize the killing of a fetus. Suicide is usually not criminal, although assisted suicide could be.

Many jurisdictions follow the common law and define murder as the killing of a victim with malice aforethought. Malice can be either a specific intent to kill, which is express malice, or the intent to do serious bodily injury, or depraved heart, which is implied malice. The Model Penal Code defines murder intent as purposely, knowingly, or recklessly under circumstances indicating extreme indifference to life. A killing by the transmission of AIDS can either be murder, if the transmission is deliberate, or manslaughter, if the transmission is inadvertent.

Most jurisdictions divide murder into degrees of seriousness. First-degree murder is the most serious, can merit the death penalty in certain jurisdictions, and generally includes premeditated murder, murder by a specified means, and serious felony murders. Premeditated murder is typically a killing supported by specific intent to kill combined with cool reflection and planning. Murder by a specified means is killing with a specific heinous method. Felony murder is a homicide that occurs during the commission or attempted commission of a felony. Felony murder lacks murder intent; the defendant need only possess the intent required for the felony. Felony murder can be graded as first, second, or third degree, depending on the felony. The Model Penal Code classifies all murders as first-degree felonies.

Second-degree murder is often defined as any murder that is not first degree. Typically, second-degree murder intent is the intent to inflict serious bodily injury or a depraved heart intent. Second-degree murder is usually graded lower than first-degree murder but higher than manslaughter.

In many jurisdictions, manslaughter is an unlawful killing without murder intent. Most jurisdictions divide manslaughter into voluntary and involuntary. The Model Penal Code classifies all manslaughters as felonies of the second degree. Voluntary manslaughter is a killing that occurs during a heat of passion inspired by adequate provocation from the victim, negating murder intent. Involuntary manslaughter can be a killing that occurs during the commission or attempted commission of a misdemeanor or a reckless or negligent killing, depending on the jurisdiction. Involuntary manslaughter can also be vehicular manslaughter when the killing occurs while driving a vehicle recklessly, negligently, or under the influence of alcohol or drugs. The Model Penal Code classifies negligent killings as negligent homicide and a felony of the third degree.

You Be the Judge

Read the prompt and then decide whether you would **affirm** or **reverse** the lower court. Review the case and see how the judges or justices actually ruled. Check your answers using the answer key at the end of the chapter.

1. The defendant shot and killed his ex-girlfriend, who was pregnant. The defendant did not know she was pregnant, nor was it obvious from her appearance. The lower court reversed a jury verdict of second-degree murder of the fetus, and the prosecution appealed. Would you **affirm** or **reverse**? *People v. Taylor*, 86 P.3d 881 (2004). The case is available at this link: http://caselaw.lp.findlaw.com/data2/californiastatecases/s112443.pdf.
2. The defendant held his wife and two small children hostage at gunpoint in a train compartment for three

days. The wife died of a bullet wound and one of the children died of dehydration. The defendant was convicted of first-degree murder for the child's death, based on the specified means of "starvation." The defendant appealed because there was *no evidence* of *specific intent to kill* the child. Would you **affirm** or **reverse**? *State v. Evangelista*, 353 S.E.2d 375 (1987). The case is available at this link: http://scholar.google.com/scholar_case?case=5876855373898791 35&hl=en&as_sdt=2&as_vis=1&oi=scholarr.

3. The defendant was charged with felony murder for the death of his girlfriend's mother. The underlying felony was cruelty to an elderly person. The defendant and his girlfriend had removed the victim from an assisted living facility so that they could control her Social Security checks. Thereafter, they neglected to care for her and she died from this neglect. The defendant claimed that he had *no duty of care* for his *girlfriend's mother*. The lower court denied his motion for a new trial. Would you **affirm** or **reverse**? *Wood v. State*, 620 S.E.2d 348 (2005). The case is available at this link: http://law.justia.com/cases/georgia/supreme-court/2005/s05a0839-1.html.
4. The defendant held the victim, his ex-wife, hostage in her home with a gun. When an oil truck pulled into her driveway, she smirked at the defendant because she knew the confrontation was over. The defendant shot and killed her and claimed that the *smirk* was *adequate provocation*. The court held that the defendant was not entitled to a jury instruction on voluntary manslaughter. Would you **affirm** or **reverse**? *State v. Warmke*, 879 A.2d 30 (2005). The case is available at this link: http://scholar.google.com/scholar_case?case=7047276887490940793&q=State+v.+Warmke,+879+A.2d+30+%282005%29.&hl=en&as_sdt=2,6&as_vis=1.

Cases of Interest

- *United States v. Watson*, 501 A.2d 791 (1985), discusses premeditation in a short period of time: http://www.scribd.com/doc/10079243/United-States-v-Watson.
- *Calderon v. Prunty*, 59 F.3d 1005 (1995), discusses lying in wait: http://openjurist.org/59/f3d/1005.
- *Mullaney v. Wilbur*, 421 U.S. 684 (1975), discusses the burden of proof for voluntary manslaughter: http://supreme.justia.com/us/421/684/case.html.

Articles of Interest

- Assisted suicide: http://phoenixcriminallawnews.com/2011/04/lawrence-egbert-of-final-exit-network-acquitted-of-manslaughter.html
- Utah bill that criminalizes miscarriage: http://abcnews.go.com/Health/utah-abortion-bill-punishing-miscarriages-preventing-crime/story?id=9955517
- Prosecution of Michael Jackson's doctor for involuntary manslaughter, http://www.cbsnews.com/stories/2011/01/25/eveningnews/main7282905.shtml
- HIV as a deadly weapon: http://www.johntfloyd.com/is-hiv-a-deadly-weapon/

Websites of Interest

- Fetal homicide statutes: http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx
- Information about assisted suicide: http://www.assistedsuicide.org
- State statutes on the criminal transmission of HIV: http://www.cdc.gov/hiv/policies/law/states/exposure.html

Statistics of Interest

- Crime, including homicide: https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/offenses-known-to-law-enforcement/expanded-offense

Answers to Exercises

From Section 9.1 "Homicide"

1. The fundamental difference between homicide and suicide is the identity of the **victim**. In a homicide, the victim is another human being. In a suicide, the victim is the perpetrator, which is one of the reasons that homicide is often criminal and suicide is not.
2. The US Supreme Court held that the right to assist a suicide is not a fundamental liberty interest protected by the **due process clause** in the Fourteenth Amendment.

Answers to Exercises

From Section 9.2 "Murder"

1. Jay has the criminal intent of **depraved heart**. Jay's conduct in shooting at a tree in a public place might cause someone's death, which indicates that Jay is indifferent to whether he takes a life. This indifference is a form of implied malice, knowingly, or recklessly manifesting extreme indifference to the value of human life.
2. Yes, this is true. Because Jay used a revolver, the prosecutor has the benefit of the deadly weapon doctrine in many jurisdictions, *alleviating his burden of proving criminal intent*.
3. The US Court of Appeals for the Eighth Circuit held that teeth can constitute a deadly weapon in *any case*, whether or not the defendant has contracted the HIV virus. The court thereafter affirmed the defendant's conviction for assault with a deadly weapon.

Answers to Exercises

From Section 9.3 “First-Degree Murder”

1. This killing could be first-degree **premeditated murder** or first-degree **murder by a specified means**. The facts indicate a willful, deliberate, premeditated killing. Johnnie evidences a specific intent to kill the leader of a rival gang. He indicates planning by putting his gun in the glove compartment of his car and driving to the gas station on Friday night where he suspects Marcus will be present. He kills Marcus by shooting him in a manner calculated to cause death. In addition, first-degree murder by a specified means frequently includes drive-by shooting as a method of killing.

2. The Tennessee Supreme Court held that the defendant’s failure to make a timely police report and concealment of the murder weapon did not prove that the murder was premeditated. The Court stated the following:

   One who has recently killed another person recklessly, passionately, or even negligently may be extremely hesitant to reveal the details of the crime, and yet not be guilty of first-degree murder…One who kills another in a passionate rage may dispose of the weapon when reason returns just as readily as the cool, dispassionate killer (State v. West, 2010).

3. The **motive** was to exact revenge. The defendant and victim had a relationship fraught with abuse, most of it based on the defendant’s desire to control the victim. The **planning** was as follows: the defendant selected the day of the killing with care, made a copy of the key to his son’s house, rented a minivan with tinted windows and altered the interior, sent four letters to his son that he knew the victim, a postal employee, would deliver, packed the murder weapon and supplies in the minivan, called his son’s house to ensure his son had left, arrived early at his son’s house, and prepared the interior for the killing. **Preconceived design** is shown by the following actions: The defendant shot the victim several times with the shotgun he brought to his son’s house. He paused to reload and also to retrieve a handgun from the snow in between shots.

Answers to Exercises

From Section 9.4 “Felony Murder”

1. The Minnesota Supreme Court reversed the court of appeal and held that felon in possession of a firearm and possession of a stolen firearm are not felonies *inherently dangerous to life*, so they cannot be predicate felonies for a felony murder conviction. The Court stated the following: “Applying the statute as previously interpreted by us to this record, we conclude that the predicate offenses of felon in possession of a firearm and possession of a stolen firearm are not inherently dangerous. While the *use* of a firearm can pose significant danger to human life, simple possession—standing alone—does not” (People v. Anderson, 2010).
2. Kurt did not commit felony murder in this case because he had reached a place of *temporary safety*, so the felony had ended.
3. The US Supreme Court based its holding on the *Eighth* and *Fourteenth* amendments. Primarily, the Court determined that the death penalty was cruel and unusual punishment under the circumstances.

Answers to Exercises

From Section 9.5 "Second-Degree Murder"

1. There is no evidence of premeditation, and Kurt did not kill the homeless person using a specified means. This is not a first-degree felony murder (based on the felony of robbery) because the felony had ended when the killing occurred. Thus this is most likely **second-degree** murder.
2. The California Court of Appeals upheld the defendant's second-degree murder charge and stated that it was up to the trier of fact to determine the probability of death and the subjective mental state of the defendant.
3. The Mississippi Court of Appeals held that putting a gun to someone's forehead and pulling the trigger indicates *depraved heart intent*, even if the defendant believes the gun to be unloaded.

Answers to Exercises

From Section 9.6 "Manslaughter"

1. The Model Penal Code classifies criminal homicides as felonies of the first, second, and third degree, depending on the defendant's intent. Murder is supported by purposeful, knowing, or extremely reckless intent and is a felony of the first degree. Manslaughter is supported by reckless intent, or is a murder that is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse, and is a felony of the second degree. Criminal homicide committed with negligent intent is a negligent homicide and is a felony of the third degree.
2. The Indiana Supreme Court held that a jury instruction on voluntary manslaughter was inappropriate because a reasonable person would not be provoked by words alone. In this case, a ten-year-old boy threatened to expose sexual molestation by the defendant, who was twenty years old. The Court held that this threat was not **adequate provocation**.
3. The Maryland Court of Appeals held that *the victim* must be the source of the adequate provocation in a voluntary manslaughter case. Thus the defendant could not claim voluntary manslaughter when he killed his ex-girlfriend's family members because he was provoked only *by her*.
4. The defendant was charged with involuntary manslaughter because she treated her daughter's meningitis with prayer, rather than obtaining medical care. The California Supreme Court upheld the involuntary manslaughter charge, in spite of the First Amendment **free exercise clause** and the Fourteenth Amendment **due process clause**.

Answer to Law and Ethics Question

1. The first problem with extending the defense of voluntary manslaughter to the deliberate killing of an abortion doctor is the fact that the abortion doctor is acting *legally*. Extending the defense in this manner opens the door to a voluntary manslaughter charge for a defendant who (1) kills an individual authorized to execute prisoners pursuant to the death penalty or (2) is a soldier who is going off to war. Another problem with extending the defense to include Roeder's conduct is the lack of imminence. As discussed in Chapter 5 "Criminal Defenses, Part 1", defense of others requires an **imminent** threat. No imminent threat was present when the abortion doctor was in church. Removing the imminence requirement allows defendants to calmly

and with deliberation kill victims and thereafter claim voluntary manslaughter—the *antithesis* of heat of passion. Thus the judge presiding over Roeder's trial allowed the defense arguments but thereafter precluded the voluntary manslaughter charge (USA Today, 2010).

Answers to You Be the Judge

1. The California Supreme Court **reversed**, holding that implied malice does not mean that the defendant needs to be aware of the risk to a *specific victim*.
2. The Supreme Court of North Carolina **affirmed** because there is no need to prove specific intent to kill when a murder is by a specified means.
3. The Supreme Court of Georgia **affirmed** because the defendant voluntarily and knowingly took the victim into his home and agreed to care for her, creating the duty to act.
4. The Supreme Court of Maine **affirmed** because the defendant initiated the confrontation.

References

People v. Anderson, 666 N.W. 2d 696, 700 (2003), accessed July 30, 2010, http://www.lexisone.com/lx1/caselaw/freecaselaw?action=OCLGetCaseDetail&format=FULL&sourceID=bdjhdg&searchTerm=ejhU.Iaea.aadj.ebKG&searchFlag=y&l1loc=FCLOW.

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USA Today, "Man Testifies he Killed Kansas Abortion Doctor," accessed July 27, 2010, http://www.usatoday.com/news/nation/2010-01-28-tiller-murder-trial_N.htm.