

**TITLE XLV.**  
**Criminal Code.**

**CHAPTER 939.**

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PRELIMINARY PROVISIONS.

939.01 Name and interpretation of code. Title XLV may be cited as the criminal code but shall not be interpreted as a unit. Crimes committed prior to July 1, 1956 are not affected by the criminal code.

939.03 Jurisdiction of state over crime. (1) A person is subject to prosecution and punishment under the law of this state if:

(a) He commits a crime, any of the constituent elements of which takes place in this state; or

(b) While out of this state, he aids and abets, conspires with, or advises, incites, commands, or solicits another to commit a crime in this state; or

(c) While out of this state, he does an act with intent that it cause in this state a consequence set forth in a section defining a crime; or

(d) While out of this state, he steals and subsequently brings any of the stolen property into this state.

(2) In this section "state" includes area within the boundaries of the state, and area over which the state exercises concurrent jurisdiction under Article IX, section 1, Wisconsin constitution.

939.05 Parties to crime. (1) Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although he did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.

(2) A person is concerned in the commission of the crime if he:

(a) Directly commits the crime; or

(b) Intentionally aids and abets the commission of it; or

(c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. Such a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime. This paragraph does not apply to a person who voluntarily changes his mind and no longer desires that the crime be committed and notifies the other parties concerned of his with-

drawal within a reasonable time before the commission of the crime so as to allow the others also to withdraw.

Aiding and abetting and conspiracy discussed. *State v. Nutley*, 24 W (2d) 527, 129 NW (2d) 155.

A person can be convicted of a crime which he has caused another to commit even though the other was acquitted on grounds of insanity. *Fritz v. State*, 25 W (2d) 91, 130 NW (2d) 279.

A contention that there was a fatal variance between pleading and proof in that defendant was charged with the substantive crime violated rather than as aider and

abettor or coconspirator was devoid of merit, since under both case law and the clear language of this section defendant could be so charged and convicted as a principal. The supreme court commends the practice of referring to this section by its number in the information in those instances where the district attorney knows in advance of trial that his proof is such that a conviction can only be based upon participation as described in that section. *La Vigne v. State*, 32 W (2d) 190, 145 NW (2d) 175.

**939.10 Common-law crimes abolished; common-law rules preserved.** Common-law crimes are abolished. The common-law rules of criminal law not in conflict with the criminal code are preserved.

Notwithstanding 939.10, the supreme court has power to develop the rule in insanity in criminal cases. *State v. Esser*, 16 W (2d) 567, 115 NW (2d) 505.

The distinction between accessories and

principals at common law and common-law crimes have been abolished in this state by this section. *Carter v. State*, 27 W (2d) 451, 134 NW (2d) 444, 136 NW (2d) 561.

**939.12 Crime defined.** A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime.

**939.14 Criminal conduct or contributory negligence of victim no defense.** It is no defense to a prosecution for a crime that the victim also was guilty of a crime or was contributorily negligent.

**939.20 Provisions which apply only to the criminal code.** Sections 939.22 and 939.23 apply only to crimes defined in the criminal code. Other sections in ch. 939 apply to crimes defined in other chapters of the statutes as well as to those defined in the criminal code.

**939.22 Words and phrases defined.** In the criminal code, the following words and phrases have the designated meanings unless the context of a specific section manifestly requires a different construction:

(2) "Airgun" means a weapon which expels a missile by the expansion of compressed air or other gas.

(4) "Bodily harm" means physical pain or injury, illness, or any impairment of physical condition.

(6) "Crime" has the meaning designated in s. 939.12.

(8) "Criminal intent" has the meaning designated in s. 939.23.

(10) "Dangerous weapon" means any firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or great bodily harm, or any other device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm.

(12) "Felony" has the meaning designated in s. 939.60.

(14) "Great bodily harm" means bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.

(16) "Human being" when used in the homicide sections means one who has been born alive.

(18) "Intentionally" has the meaning designated in s. 939.23.

(20) "Misdemeanor" has the meaning designated in s. 939.60.

(22) "Peace officer" means any person vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes.

(24) "Place of prostitution" means any place where a female habitually engages in nonmarital acts of sexual intercourse or sexual perversion for money.

(28) "Property of another" means property in which a person other than the actor has a legal interest which the actor has no right to defeat or impair, even though the actor may also have a legal interest in the property.

(30) "Public officer"; "public employe". A "public officer" is any person appointed or elected according to law to discharge a public duty for the state or one of its subor-

dinate governmental units. A "public employe" is any person, not an officer, who performs any official function on behalf of the state or one of its subordinate governmental units and who is paid from the public treasury of the state or subordinate governmental unit.

(32) "Reasonably believes" means that the actor believes that a certain fact situation exists and such belief under the circumstances is reasonable even though erroneous.

(36) "Sexual intercourse" requires only vulvar penetration and does not require emission.

(40) "Transfer" means any transaction involving a change in possession of any property, or a change of right, title, or interest to or in any property.

(42) "Under the influence of an intoxicant" means that the actor's ability to operate a vehicle or handle a firearm is materially impaired because of his consumption of an alcoholic beverage, a narcotic drug or other intoxicating substance.

(44) "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

(46) "With intent" has the meaning designated in s. 939.23.

(48) "Without consent" means no consent in fact or that consent is given for one of the following reasons:

(a) Because the actor put the victim in fear by the use or threat of imminent use of physical violence on him, or on a person in his presence, or on a member of his immediate family; or

(b) Because the actor purports to be acting under legal authority; or

(c) Because the victim does not understand the nature of the thing to which he consents, either by reason of ignorance or mistake of fact or of law other than criminal law or by reason of youth or defective mental condition, whether permanent or temporary.

See note to 943.32, citing *Rafferty v. State*, 29 W (2d) 470, 138 NW (2d) 741.

**939.23 Criminal intent.** (1) When criminal intent is an element of a crime in the criminal code, such intent is indicated by the term "intentionally", the phrase "with intent to", the phrase "with intent that", or some form of the verbs "know" or "believe".

(2) "Know" requires only that the actor believes that the specified fact exists.

(3) "Intentionally" means that the actor either has a purpose to do the thing or cause the result specified or believes that his act, if successful, will cause that result. In addition, except as provided in sub. (6), the actor must have knowledge of those facts which are necessary to make his conduct criminal and which are set forth after the word "intentionally".

(4) "With intent to" or "with intent that" means that the actor either has a purpose to do the thing or cause the result specified or believes that his act, if successful, will cause that result.

(5) Criminal intent does not require proof of knowledge of the existence or constitutionality of the section under which he is prosecuted or the scope or meaning of the terms used in that section.

(6) Criminal intent does not require proof of knowledge of the age of a minor even though age is a material element in the crime in question.

#### INCHOATE CRIMES.

**939.30 Solicitation.** Whoever, with intent that a felony be committed, advises another to commit that crime under circumstances which indicate unequivocally that he has such intent may be fined not more than \$2,500 or imprisoned not to exceed the maximum provided for the completed crime, but in no event to exceed 5 years, or both; except that for a solicitation to commit a crime for which the penalty is life imprisonment the actor may be imprisoned not more than 10 years.

**939.31 Conspiracy.** Whoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both not to exceed the maximum provided for the completed crime; except that for a conspiracy to commit a crime for which the penalty is life imprisonment, the actor may be imprisoned not more than 30 years.

This section does not apply where the conspiracy is charged as a theory of prosecution as a principal for a substantive conspiracy is charged as a theory of prosecution as a substantive inchoate crime. *State v. Nutley*, 24 W (2d) 527, 129 NW (2d) 155.

**939.32 Attempt.** (1) Whoever attempts to commit a felony or a battery as defined by s. 940.20 or theft as defined by s. 943.20 may be fined or imprisoned or both

not to exceed one-half the maximum penalty for the completed crime; except that for an attempt to commit a crime for which the penalty is life imprisonment, the actor may be imprisoned not more than 30 years. Whoever attempts to commit a battery as defined in s. 940.205 may be imprisoned not more than one year in the county jail.

(2) An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that he does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that he formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

**History:** 1967 c. 216.

Crime of attempted rape discussed. Oakley v. State, 22 W (2d) 293, 125 NW (2d) 657.

Where defendant by overt acts indicated an intent to rape, he could be convicted of an attempt even though he desisted when he learned of the woman's pregnancy. Her condition was not an extraneous factor under (2). Le Barron v. State, 32 W (2d) 294, 145 NW (2d) 79.

An attempt to violate 944.12 (enticement

for immoral purposes) is complete when defendant takes action in furtherance of his intent. The refusal of the child to co-operate is an extraneous factor which prevents completion of the offense. Huebner v. State, 33 W (2d) 505, 147 NW (2d) 646.

Arrest without warrant for attempt crimes. Boyle, 46 MLR 227.

Requirements for conviction of attempt to commit crime discussed. 1960 WLR 516.

Withdrawal as a defense. 1962 WLR 596.

#### DEFENSES TO CRIMINAL LIABILITY.

**939.42 Intoxication.** An intoxicated or a drugged condition of the actor is a defense only if such condition:

(1) Is involuntarily produced and renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed; or

(2) Negatives the existence of a state of mind essential to the crime.

**939.43 Mistake.** (1) An honest error, whether of fact or of law other than criminal law, is a defense if it negatives the existence of a state of mind essential to the crime.

(2) A mistake as to the age of a minor or as to the existence or constitutionality of the section under which the actor is prosecuted or the scope or meaning of the terms used in that section is not a defense.

**939.45 Privilege.** The fact that the actor's conduct is privileged, although otherwise criminal, is a defense to prosecution for any crime based on that conduct. The defense of privilege can be claimed under any of the following circumstances:

(1) When the actor's conduct occurs under circumstances of coercion or necessity so as to be privileged under s. 939.46 or 939.47; or

(2) When the actor's conduct is in defense of persons or property under any of the circumstances described in s. 939.48 or 939.49; or

(3) When the actor's conduct is in good faith and is an apparently authorized and reasonable fulfillment of any duties of a public office; or

(4) When the actor's conduct is a reasonable accomplishment of a lawful arrest; or

(5) When the actor's conduct is reasonable discipline of a minor by his parent or a person in loco parentis; or

(6) When for any other reason the actor's conduct is privileged by the statutory or common law of this state.

**939.46 Coercion.** (1) A threat by a person other than the actor's co-conspirator which causes the actor reasonably to believe that his act is the only means of preventing imminent death or great bodily harm to himself or another and which causes him so to act is a defense to a prosecution for any crime based on that act except that if the prosecution is for murder the degree of the crime is reduced to manslaughter.

(2) It is no defense to a prosecution of a married woman that the alleged crime was committed by command of her husband nor is there any presumption of coercion when a crime is committed by a married woman in the presence of her husband. Married women shall be judged according to the standard set out in sub. (1).

**939.47 Necessity.** Pressure of natural physical forces which causes the actor reasonably to believe that his act is the only means of preventing imminent public disaster, or imminent death or great bodily harm to himself or another and which causes him so to act, is a defense to a prosecution for any crime based on that act except that if the prosecution is for murder the degree of the crime is reduced to manslaughter.

**939.48 Self-defense and defense of others.** (1) A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating

what he reasonably believes to be an unlawful interference with his person by such other person. The actor may intentionally use only such force or threat thereof as he reasonably believes is necessary to prevent or terminate the interference. He may not intentionally use force which is intended or likely to cause death or great bodily harm unless he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself.

(2) Provocation affects the privilege of self-defense as follows:

(a) A person who engages in unlawful conduct of a type likely to provoke others to attack him and thereby does provoke an attack is not entitled to claim the privilege of self-defense against such attack, except when the attack which ensues is of a type causing him to reasonably believe that he is in imminent danger of death or great bodily harm. In such a case, he is privileged to act in self-defense, but he is not privileged to resort to the use of force intended or likely to cause death to his assailant unless he reasonably believes he has exhausted every other reasonable means to escape from or otherwise avoid death or great bodily harm at the hands of his assailant.

(b) The privilege lost by provocation may be regained if the actor in good faith withdraws from the fight and gives adequate notice thereof to his assailant.

(c) A person who provokes an attack, whether by lawful or unlawful conduct, with intent to use such an attack as an excuse to cause death or great bodily harm to his assailant is not entitled to claim the privilege of self-defense.

(3) The privilege of self-defense extends not only to the intentional infliction of harm upon a real or apparent wrongdoer, but also to the unintended infliction of harm upon a third person, except that if such unintended infliction of harm amounts to the crime of injury by conduct regardless of life, injury by negligent use of weapon, homicide by reckless conduct or homicide by negligent use of vehicle or weapon, the actor is liable for whichever one of those crimes is committed.

(4) A person is privileged to defend a third person from real or apparent unlawful interference by another under the same conditions and by the same means as those under and by which he is privileged to defend himself from real or apparent unlawful interference, provided that he reasonably believes that the facts are such that the third person would be privileged to act in self-defense and that his intervention is necessary for the protection of the third person.

(5) A person is privileged to use force against another if he reasonably believes that to use such force is necessary to prevent such person from committing suicide, but this privilege does not extend to the intentional use of force intended or likely to cause death.

(6) In this section "unlawful" means either tortious or expressly prohibited by criminal law or both.

Model instruction 805, Wis. J I—Criminal, Part I (prescribed where self-defense is an issue), is consistent with the legislative standard of self-defense and is a correct statement of the legal principles applicable thereto. The portions of the preceding instruction which qualify the privilege of self-defense to the standard of "what a person of ordinary intelligence and prudence would have done in the position of the defendant under the circumstances existing at the time

of the alleged offense" correctly enunciate the controlling criterion by directing the jury to apply the objective standard of the ordinary intelligent and prudent person, limited to one in the position of the defendant under the circumstances existing at the time of the alleged offense—thus giving the jury sufficient latitude to consider all of the motivating factors at the time and place. *State v. Kanzelberger*, 28 W (2d) 652, 137 NW (2d) 419.

**939.49 Defense of property and protection against shoplifting.** (1) A person is privileged to threaten or intentionally use force against another for the purpose of preventing or terminating what he reasonably believes to be an unlawful interference with his property. Only such degree of force or threat thereof may intentionally be used as the actor reasonably believes is necessary to prevent or terminate the interference. It is not reasonable to intentionally use force intended or likely to cause death or great bodily harm for the sole purpose of defense of one's property.

(2) A person is privileged to defend a third person's property from real or apparent unlawful interference by another under the same conditions and by the same means as those under and by which he is privileged to defend his own property from real or apparent unlawful interference, provided that he reasonably believes that the facts are such as would give the third person the privilege to defend his own property, that his intervention is necessary for the protection of the third person's property, and that the third person whose property he is protecting is a member of his immediate family or household or a person whose property he has a legal duty to protect, or is a merchant and the actor is the merchant's employe or agent.

(3) In this section "unlawful" means either tortious or expressly prohibited by criminal law or both.

## PENALTIES.

**939.60 Felony and misdemeanor defined.** A crime punishable by imprisonment in the state prison is a felony. Every other crime is a misdemeanor.

This section distinguishes felonies from misdemeanors, but not applicable to misdemeanors on the basis of punishability, but does not necessarily control or determine the place where the actual confinement is to be served. 939.60 must be considered as a general statute defining felonies and misdemeanors, but not applicable to specific case when the crime is expressly designated to be a misdemeanor. *Pruitt v. State*, 16 W (2d) 169, 114 NW (2d) 148. The classification of crimes in Wisconsin. *Lipton*, 50 MLR 346.

**939.61 Penalty when none expressed.** Common-law penalties are abolished. Whenever a person is convicted of a crime for which no penalty is expressed, he may be fined not more than \$250 or imprisoned not more than one year in county jail.

**939.62 Increased penalty for habitual criminality.** (1) If the actor is a repeater, as that term is defined in sub. (2), and the present conviction is for any crime for which imprisonment may be imposed (except for an escape under s. 946.42) the maximum term of imprisonment prescribed by law for that crime may be increased as follows:

- (a) A maximum term of one year or less may be increased to not more than 3 years.
- (b) A maximum term of more than one year but not more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 6 years if the prior conviction was for a felony.
- (c) A maximum term of more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 10 years if the prior conviction was for a felony.

(2) The actor is a repeater if he was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which he presently is being sentenced, or if he was convicted of a misdemeanor on 3 separate occasions during that same period, which convictions remain of record and unreversed. It is immaterial that sentence was stayed, withheld or suspended, or that he was pardoned, unless such pardon was granted on the ground of innocence. In computing the preceding 5-year period, time which the actor spent in actual confinement serving a criminal sentence shall be excluded.

(3) In this section "felony" and "misdemeanor" have the following meanings:

(a) In case of crimes committed in this state, the terms do not include motor vehicle offenses under chs. 341 to 349 and offenses handled through juvenile court proceedings under ch. 48, but otherwise have the meanings designated in s. 939.60.

(b) In case of crimes committed in other jurisdictions, the terms do not include those crimes which are equivalent to motor vehicle offenses under chs. 341 to 349 or to offenses handled through juvenile court proceedings under ch. 48. Otherwise, felony means a crime which under the laws of that jurisdiction carries a prescribed maximum penalty of imprisonment in a prison or penitentiary for one year or more. Misdemeanor means a crime which does not carry a prescribed maximum penalty sufficient to constitute it a felony and includes crimes punishable only by a fine.

**Cross Reference:** For procedure, see 959.12.

A misdemeanor remains a misdemeanor at the time of sentencing. *Harms v. State*, 36 W (2d) 282, 153 NW (2d) 78.

## RIGHTS OF THE PROSECUTION.

**939.65 Prosecution under more than one section permitted.** If an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provisions.

The same act may form the basis for a crime punishable under more than one statutory provision, but this section does not mean the same crime; it means different crimes having some similar but not identical elements. *State v. Roggensack*, 15 W (2d) 625, 113 NW (2d) 389, 114 NW (2d) 459. Charging, convicting and sentencing the multiple criminal offender. *Remington and Joseph*, 1961 WLR 528.

**939.66 Conviction of included crime permitted.** Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following:

- (1) A crime which does not require proof of any fact in addition to those which must be proved for the crime charged; or
- (2) A crime which is a less serious type of criminal homicide than the one charged; or
- (3) A crime which is the same as the crime charged except that it requires recklessness or negligence while the crime charged requires a criminal intent; or
- (4) An attempt in violation of s. 939.32 to commit the crime charged; or
- (5) The crime of attempted battery when the crime charged is rape, robbery, mayhem or aggravated battery or an attempt to commit any of them.

This section, which prescribes that upon prosecution for a crime the actor may be convicted of either the crime charged or the lesser "included crime," but not both, is inapplicable to prosecution for both burglary and theft although arising out of the same transaction, for while it may be that the theft supplies the felonious intent for burglary, the theft is not an "included crime" of the burglary. Cullen v. State, 26 W (2d) 652, 133 NW (2d) 284.

The rule is that there must be a reasonable ground for a conviction on the lesser charge and an acquittal of the greater

charge before the trial court will be justified in submitting lesser degrees of homicide than that charged in the information. If the evidence in such a case warrants submission of lesser degrees of the offense, failure to do so results in undeniable prejudice to the defendant. Weston v. State, 28 W (2d) 136, 135 NW (2d) 820.

It is not error to refuse to submit included crimes unless there is reasonable ground on the evidence, in the judgment of the court, for a conviction of the lesser offense and not the greater. Commodore v. State, 33 W (2d) 373, 147 NW (2d) 283.

#### RIGHTS OF THE ACCUSED.

**939.70 Presumption of innocence and burden of proof.** No provision of the criminal code shall be construed as changing the existing law with respect to presumption of innocence or burden of proof.

**939.71 Limitation on the number of convictions.** If an act forms the basis for a crime punishable under more than one statutory provision of this state or under a statutory provision of this state and the laws of another jurisdiction, a conviction or acquittal on the merits under one provision bars a subsequent prosecution under the other provision unless each provision requires proof of a fact for conviction which the other does not require.

**939.72 No conviction of both inchoate and completed crime.** A person shall not be convicted under both:

(1) Section 939.30 for solicitation and s. 939.05 as a party to a crime which is the objective of the solicitation; or

(2) Section 939.31 for conspiracy and s. 939.05 as a party to a crime which is the objective of the conspiracy; or

(3) Section 939.32 for attempt and the section defining the completed crime.

**939.73 Criminal penalty permitted only on conviction.** A penalty for the commission of a crime may be imposed only after the actor has been duly convicted in a court of competent jurisdiction.

**939.74 Time limitations on prosecutions.** (1) Except as provided in sub. (2), prosecution for a felony must be commenced within 6 years and prosecution for a misdemeanor or for adultery within 3 years after the commission thereof. Within the meaning of this section, a prosecution has commenced when a warrant or summons is issued, an indictment is found, or an information is filed.

(2) Notwithstanding that the time limitation under sub. (1) has expired:

(a) A prosecution for murder may be commenced at any time;

(b) A prosecution for theft against one who obtained possession of the property lawfully and subsequently misappropriated it may be commenced within one year after discovery of the loss by the aggrieved party, but in no case shall this provision extend the time limitation in sub. (1) by more than 5 years.

(3) In computing the time limited by this section, the time during which the actor was not publicly a resident within this state or during which a prosecution against him for the same act was pending shall not be included. A prosecution is pending when a warrant or a summons has been issued, an indictment has been found, or an information has been filed.