Themis
Bar Review
A UWorld Company

LAW SCHOOL ESSENTIALS:

CRIMINAL LAW

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I. GENERAL PRINCIPLES

The elements of a criminal offense include the *mens rea*, or guilty mind; the *actus reus*, the bad or unlawful act; and causation. With the exception of strict liability crimes, which have no *mens rea*, every statute defining a substantive criminal offense proscribes a particular *mens rea* and *actus reus* that must be proved by the prosecution beyond a reasonable doubt in order for criminal liability to result.

EXAM NOTE: Remember that your professor may prefer to focus on the Model Penal Code, the common law, or the law of a particular state. Keep this in mind when preparing for your exam and when you analyze each element of a crime. If possible, look at prior exams to get a sense of what your professor tends to test.

A. *ACTUS REUS* — ACTS AND OMISSIONS

Before there can be a crime, there must be a criminal act (*actus reus*). The criminal act must be a voluntary, affirmative act causing a criminally proscribed result. The act requirement may also be satisfied by an "omission" or failure to act under circumstances imposing a legal duty to act. A bad thought standing alone cannot result in criminal liability.

1. Physical Act

In general, a criminal act must be a physical act. A bad thought standing alone cannot result in criminal liability.

a. Speech

Speech can constitute a physical act. For example, in the crime of extortion, the verbal threat is the act. A mere statement of intent generally would not be enough to constitute an *actus reus*, but speech that encourages someone to commit a crime could be an *actus reus*.

b. Possession

Possession of an object can constitute a physical act. Generally, there must be conscious knowledge of the possession of the object, but the possessor need not know that such possession is illegal. Under the Model Penal Code, possession can be a criminal act only if the defendant knew she had possession of the object and was aware of such possession for a sufficient period to have been able to terminate such possession. MPC § 2.01(4).

2. Voluntary Act

The criminal act must be physical and voluntary. Actions during unconsciousness, sleep, or hypnosis are not voluntary. Other acts that are not considered voluntary are reflexive or convulsive acts, and conduct that is not the product of the actor's determination.

Example: Person A pushes Person B into a bystander, injuring the bystander. Person B cannot be held criminally liable.

If an epileptic knows of the possibility of a seizure and engages in the voluntary act of driving a car, has a seizure while driving, and causes a fatal accident, the epileptic is criminally responsible.

Example: An epileptic may still be criminally responsible if (i) he knows of the possibility of seizure; and (ii) the last act was voluntary.

The best example where liability is not generally imposed is for acts committed while sleep-walking.

2. Failure to Act When Duty Exists

A legal duty to act and the failure to do so results in criminal liability in these five instances:

i) Imposed by statute (e.g., obligation to file tax return; obligation to register for selective service);

ii) Contract (e.g., lifeguard saving drowning person; nanny who neglects a baby's care);

iii) Special relationship (e.g., parent's duty to her child, or duty to one's spouse);

iv) Detrimental undertaking (e.g., when defendant, with no duty otherwise, undertakes to assist a victim, leaving the victim in worse condition after such assistance); and

v) Causation (e.g., failing to aid after causing victim's peril).

The defendant must have knowledge of the facts giving rise to the duty to act and fail to act. Additionally, it must be reasonably possible for the defendant to perform the duty.

Contrast absence of a duty: When there is not a duty to act, a defendant is not criminally liable by failing to help others in trouble. A mere bystander has no duty to act. Note that no matter how unsympathetic your professor may make the bystander seem for not acting, there is generally no legal duty to act if the bystander had no involvement with the peril.

EXAM NOTE: If your exam contains more than one actor, ask yourself what is different about the actions of each actor, and ask what makes one actor liable for something that the other may not be liable for. It is unlikely the professor is asking you to answer the same thing for each actor. Figure out what facts are different and how they may change the result as to each one.

B. *MENS REA*—STATE OF MIND

Mens rea is the requirement of a guilty mind or legally proscribed mental state a defendant must possess in order to commit a crime. Except for strict liability crimes, a crime is committed when a criminal act (*actus reus*) is coupled with a guilty mind—both the mental and physical elements exist at the same time. Strict liability crimes have no *mens rea* requirement and only require an *actus reus*.

1. Specific Intent Crimes

Specific intent crimes require that the defendant possess **a subjective desire, specific objective, or knowledge to accomplish a prohibited result**. When dealing with specific intent crimes, it is necessary to identify specific intent for two reasons. First, the prosecution must prove the specific intent in order to prosecute the defendant; and second, certain defenses (e.g., voluntary intoxication and unreasonable mistake of fact) are applicable only to specific intent crimes.

At common law, the specific intent crimes include:

i) **F**irst-degree murder;

ii) **I**nchoate offenses (attempt, solicitation, conspiracy);

iii) **A**ssault with intent to commit a battery; and

iv) **T**heft offenses (larceny, larceny by trick, false pretenses, embezzlement, forgery, burglary, robbery).

EXAM NOTE: A simple way to remember the common-law specific intent crimes is by using the mnemonic "FIAT." Whenever a fact pattern defines the crime as requiring "the intent to…," the crime is a specific intent crime.

2. Malice Crimes

The crimes of common law murder and arson require **malice**, **a reckless disregard of a high risk of harm**. Although these two crimes appear to have an "intent" requirement (e.g., intent to kill), malice only requires a criminal act without excuse, justification, or mitigation. Intent can be inferred from the accomplishment of the act.

3. General Intent Crimes

General intent crimes require only the **intent to perform an act** that is unlawful. Examples include battery, rape, kidnapping, and false imprisonment.

Motive is not the same as intent. The motive is the reason or explanation for the crime and is immaterial to the substantive criminal offense.

a. Transferred intent

When a defendant acts with an intent to cause harm to one person or object and that act directly results in harm to another person or object, the defendant can be liable for the harm caused under the doctrine of transferred intent.

Example: D points a gun at A, intending to shoot and kill A, but accidentally shoots and kills B instead. D is guilty of two crimes: the murder of B under the doctrine of transferred intent and the attempted murder of A.

Note that the doctrine of transferred intent applies only to "bad aim" cases and not to cases of mistaken identity.

Example: If D shoots at A and hits A, although mistakenly believing that A is B, the doctrine of transferred intent is unnecessary because D hit the very body he intended to hit; the intent, therefore, does not need to be transferred—D is guilty of shooting A.

Transferred intent, also known as the unintended victim rule, is usually confined to homicide, battery, and arson. Any defenses that the defendant could assert against the intended victim (e.g., self-defense) may also transfer to the unintended victim.

Note that transferred intent does not apply to attempted crimes, only completed crimes.

Example: D shoots at A with the intent to kill him, but D instead shoots B. The shot does not kill B, but merely injures her. D can be convicted of the attempted murder of A and of battery against B, but cannot be convicted of the attempted murder of B.

The Model Penal Code, while not specifically recognizing the doctrine of transferred intent, does recognize liability when purposely, knowingly, recklessly, or negligently causing a particular result is an element of an offense. This element

can be established even if the actual result is not within the purpose or contemplation of the defendant, or is not within the risk of which the defendant is aware, so long as the result differs from the intended, contemplated, or probable result only insofar as (i) a different person or different property is harmed or (ii) the contemplated injury or harm would have been more serious or more extensive than the harm actually caused. MPC § 2.03.2(2, 3).

4. Model Penal Code

A crime defined by statute generally states the requisite *mens rea*. The following levels of culpability are based on the Model Penal Code ("MPC").

a. Purposely

When a defendant acts "purposely" his conscious objective is to engage in the conduct or to cause a certain result. MPC 2.02(2)(a).

b. Knowingly or willfully

"Knowingly" or "willfully" requires that the defendant be **aware that his conduct is of the nature required by the crime** or that circumstances required by the crime exist. In other words, the defendant must be aware or know that **the result is practically certain to occur** based on his conduct. MPC 2.02(2)(b).

c. Recklessly

"Recklessly" requires the defendant **to act with a conscious disregard of a substantial and unjustifiable risk** that a material element of a crime exists or will result from his conduct. The risk must constitute a gross deviation from the standard of conduct of a law-abiding person. MPC 2.02(2)(c). Mere realization of the risk is not enough.

d. Negligently

A defendant acts "negligently" when that defendant **should be aware of a substantial and unjustifiable risk** that a material element of a crime exists or will result from his conduct. The risk must constitute a gross deviation from the standard of care of a reasonable person in the same situation. MPC 2.02(2)(d). Furthermore, similarly to tort law, violation of a statute or ordinance may be evidence of liability.

e. Hierarchy of mental states

The MPC mental states are ordered from negligence as the lowest degree of fault to purposefully as the highest level of fault. Consequently, if a statute specifies a mental state, proof of a more culpable mental state satisfies the mens rea requirement. For example, if a statutory crime required that an act be undertaken knowingly, establishing that the act was committed purposefully satisfies the mens rea requirement with respect to that act. MPC § 2.02(5).

f. *Mens rea* not stated

If the requisite *mens rea* is not stated in a criminal statute, it is established if the defendant acted at least recklessly. If the *mens rea* does not state the culpable mind applicable to all material elements of the crime, then the *mens rea* applicable to one material element is applicable to all material elements, unless a contrary purpose plainly appears. MPC § 2.02(3),(4).

5. Strict Liability Crimes

A strict liability crime does not require a *mens rea*. Examples of strict liability crimes include statutory rape, bigamy, regulatory offenses for public welfare, regulation of food, drugs, and firearms, and selling liquor to minors.

a. Public welfare offense

A public welfare offense is a strict liability crime for which no *mens rea* is required. Conduct that is subject to stringent public regulation includes that which could seriously threaten the public's health or safety or is inherently dangerous.

Examples: Typical examples include adulteration of food or drugs, regulation of waste disposal, and selling liquor to minors.

b. Degree of penalty

In general, when courts look to determine whether a crime is a public welfare offense, the degree of the penalty imposed by the statute can often be determinative if the statute is unclear. Thus, if the penalty imposed is severe (e.g., the crime is classified as a felony), a court looking at the issue may find an intent requirement in the statute and treat the offense as not a strict liability crime.

c. Statutory interpretation

Statutes rarely specifically state that strict liability is imposed. Rather, they generally just omit any *mens rea* requirement at all. Courts are then faced with a statutory interpretation requirement to decide if the legislature really meant to impose strict liability. If the statute is complex, but easy to innocently violate, or imposes a severe penalty, a court may be likely to find a *mens rea* requirement and therefore avoid finding strict liability.

EXAM NOTE: When given a statute on an exam, read that statute carefully for hints about the *mens rea* requirement. Look for words like "with intent" (specific intent crime), "knowingly" or "recklessly" (general intent crime), or no mention of *mens rea*, which may be a strict liability crime.

6. Vicarious Liability

Vicarious liability differs from strict liability in that strict-liability crimes require only a personal act on the part of the defendant (*actus reus*); vicarious liability crimes do not require an *actus reus* by the defendant. Instead, vicarious liability imposes criminal liability on the defendant for the *actus reus* of a third party.

a. Application to strict-liability crimes

Courts often impose vicarious liability for strict-liability crimes, most commonly when an employer or principal is vicariously liable for the crimes of an employee or agent. However, sometimes it is unclear whether the legislature intended for vicarious liability to apply to a strict-liability offense. When the punishment for a strict-liability crime is light, courts are more likely to find that vicarious liability applies. The modern trend is to limit vicarious liability to regulatory crimes.

Vicarious liability may present due process issues because it can involve criminal liability without a personal act on the part of the defendant. Although imprisonment for a faultless crime may have constitutional due process implications, when the punishment for a crime is merely a fine, the application of vicarious liability is unlikely to constitute a denial of due process.

b. Application to corporations

When dealing with corporations, common law held that corporations had no criminal liability because a corporation could not form the necessary *mens rea*. Modern statutes, on the other hand, impose vicarious liability on corporations when the offensive act is performed by an agent of the corporation acting within the scope of his employment or when the act is performed by a high-ranking corporate agent who likely represents corporate policy. Under the MPC, a corporation may be held criminally liable if (i) the corporation fails to discharge a specific duty imposed by law, (ii) the board of directors or a high-ranking agent of the corporation acting within the scope of his employment authorizes or recklessly tolerates the offensive act, or (iii) the legislative purpose statutorily imposes liability on a corporation for a specific act. The individual agent of the corporation who violated the statute may also be held criminally liable, and the corporation's conviction does not preclude conviction of the individual. MPC § 2.07.

7. Causation

When mens rea is a requirement of a crime, that mens rea must generally cause the actus res. In addition, the defendant's act must cause the particular result made unlawful by statute.

8. Mistake as a Defense

a. Mistake of fact

1) Negation of intent

Mistake of fact may negate criminal intent but it must be an "honest mistake." The defense applies differently between specific and general intent crimes. Mistake of fact is never a defense to a strict liability crime because strict liability offenses do not have a *mens rea.*

2) Reasonableness of mistake

a) Specific intent crimes

A mistake of fact is a defense to a specific intent crime, even if the mistake is unreasonable.

Example: An athlete takes an expensive gold watch from a table mistakenly thinking that it was her inexpensive black plastic sports watch. Even though the athlete's mistake of fact is unreasonable, the athlete lacks the intent to steal necessary to commit larceny, a specific intent crime.

b) General intent and malice crimes

A mistake of fact must be reasonable in order to be a defense to a general intent or malice crime.

3) MPC approach

Under the MPC, a mistake or ignorance of fact that negates the required state of mind for a material element of a crime is a defense.

EXAM NOTE: When considering a mistake of fact defense, consider whether the crime the defendant is charged with is one of specific intent, general intent, or strict liability.

b. Mistake of law

Mistake or ignorance of the law generally is not a valid defense, except when:

i) There is reliance on the decision of a court, administrative order, or official interpretation of the law determined to be erroneous after the conduct;

ii) A statute defining a *malum prohibitum* crime (i.e., a crime for engaging in conduct not obviously wrong, such as a failure to obtain a license) was not reasonably made available prior to the conduct; or

iii) An honestly held mistake of law negates the required intent.

Example: A forcibly takes money from B to settle a debt that B owed to A. A has the mistaken belief that the law allows for self-help in such situations. A's belief negates the specific intent required for the crime of robbery (i.e., the specific intent to gain control over the property of another person).

Incorrect or bad legal advice from an attorney is not itself a valid mistake-of-law defense, but it may negate the required intent or mental state for a material element of the crime.

Similarly, a mistake of law as to the existence of a defense does not permit a defendant to raise the defense unless one of the exceptions enumerated above applies.

EXAM NOTE: There are some modern statutory crimes that expressly require a defendant to know of a legal prohibition. Read any statute that your professor gives you carefully to determine if it contains such a requirement.

C. JURISDICTION

Criminal jurisdiction addresses the authority of the federal and state governments to create criminal laws and the courts to enforce those laws.

1. Constitutional Limits on Authority

a. State authority

State authority to create crimes is based on the states' broad, inherent police power that is implicitly recognized by the Tenth Amendment.

b. Federal authority

Federal authority to create crimes is limited. There is no federal common law of crimes; all are statutory. Under the U.S. Constitution, Congress is granted power over only a handful of crimes, including treason and currency counterfeiting.

c. State and federal authority

Under the Constitution, neither federal nor state governments may criminalize conduct that has already occurred (i.e., an ex post facto law) or impose punishment without a trial (i.e., a bill of attainder). The Due Process Clauses of the Fifth and Fourteenth Amendments prevent both federal and state governments from imposing criminal liability without giving clear warnings as to the conduct prohibited. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162-63 (1972) (vagrancy ordinance struck down as "void for vagueness").

Additionally, many jurisdictions are in the process of eliminating multiple convictions against a defendant with more than one offense if those multiple offenses were all part of the same criminal transaction. Some states have statutorily prohibited such convictions, while other states apply the doctrine of merger or double jeopardy to eliminate the multiple convictions.

2. Territorial Considerations

a. Federal

Congress has the power to criminalize conduct occurring over federally owned or controlled territory (national parks or the District of Columbia), United States nationals abroad, and conduct on ships or airplanes.

b. State authority

A state has the authority to prosecute a person for a crime committed within the state and for a crime that is only partly committed within the state if an element of the crime is committed within the state. In addition, the following actions may also be prosecuted by the state:

i) Conduct outside the state that constitutes an attempt to commit a crime within the state;

ii) Conduct outside the state that constitutes a conspiracy to commit an offense within the state when an overt act in furtherance of the conspiracy occurs within the state;

iii) Conduct within the state to commit attempt, solicitation, or conspiracy of a crime in another jurisdiction when the state and the other jurisdiction recognize the crime; and

iv) The failure to perform outside the state a duty imposed by the state.

D. PARTIES TO A CRIME

Under the modern rule, in most jurisdictions, the parties to a crime can be a principal, an accomplice, and an accessory after the fact.

At common law, the principal was called the principal in the first degree, and an accessory who was actually or constructively present at the scene of the crime was called the principal in the second degree. An accomplice who was not present at the crime scene was called an accessory before the fact or after the fact, depending on when he provided assistance.

1. Principal

A principal is the person whose **acts or omissions are the *actus reus*** of the crime, or, in other words, the perpetrator of the crime. The principal must be actually or constructively present at the scene of the crime. A principal is constructively present when some instrumentality he left or controlled resulted in the commission of the crime.

If two or more people are directly responsible for the *actus reus*, they are joint principals (i.e., co-principals).

2. Accomplice Liability

An accomplice (i.e., an accessory before the fact or a principal in the second degree) is a person who, with the requisite mens rea, aids or abets a principal prior to or during the commission of the crime.

Note: In general, the mental state required for accomplice liability is the intent to assist the principal in committing the underlying crime. If, however, the underlying crime requires only recklessness or negligence as a *mens rea*, most jurisdictions require only this lesser *mens rea* for accomplice liability with regard to that crime.

a. Accomplice's status

Some states draw a distinction between an accessory before the fact and a principal in the second degree based upon presence at the scene of the crime. An accomplice who is physically or constructively present during the commission of the crime is a principal in the second degree. For example, a getaway driver some distance from the scene is deemed constructively present and will be considered a principal in the second degree.

An accomplice who is neither physically nor constructively present during the commission of the crime, but who possesses the requisite intent, for example someone who helped plan the crime or acquired tools or weapons necessary to commit the crime, is an accessory before the fact.

b. Accomplice's mental state

1) Majority rule

Under the majority and MPC rule, a person is an accomplice in the commission of an offense if he acts with the purpose of **promoting or facilitating** the commission of the offense. The accomplice must solicit, aid, agree, or attempt to aid in the planning or commission of the crime, with the intent that the crime actually be committed. Model Penal Code § 2.06(3). Mere knowledge that another person intends to commit a crime is not enough to make a person an accomplice.

2) Minority rule

A minority of states hold a person liable as an accomplice if he **intentionally or knowingly** aids, induces, or causes another person to commit an offense. *See, e.g.*, Ind. Code Ann. § 35-41-2-4. Under the minority rule, any voluntary act that actually assists or encourages the principal in a known criminal aim is sufficient for accomplice liability even if the person does not act with the intent of aiding the commission of the crime.

3) Criminal facilitation

In jurisdictions that have adopted the majority rule, a person encouraging or assisting a criminal who is not guilty of the crime itself as an accomplice may be guilty of a lesser crime, such as criminal facilitation.

4) Reckless or negligence mental state crimes

When the crime committed by the principal only requires the principal to act recklessly or negligently (e.g., involuntary manslaughter), a person may be an accomplice to that crime under the majority rule if the person merely acts recklessly or negligently with regard the principal's commission of the crime, rather than purposefully or intentionally. *See* Model Penal Code § 2.06(4).

c. Accomplice's criminal liability

An accomplice is responsible for the crime to the same extent as the principal. If the principal commits crimes other than the crimes for which the accomplice has provided encouragement or assistance, an accomplice is liable for the other crimes if the crimes are the natural and probable consequences of the accomplice's conduct.

Example: D encourages E to burn V's house and E does so. The fire spreads to W's house and it was foreseeable that it would do so. D is an accomplice to the burning of W's house.

An accomplice may be criminally liable even though the accomplice cannot be a principal.

Example: A woman who could not commit rape at common law as a principal could be liable for rape if she aided the male principal (e.g., restraining the victim) in his rape of the victim.

d. Withdrawal

To legally withdraw (and therefore avoid liability for the substantive crime), the accomplice must (i) repudiate prior aid, (ii) do all that is possible to countermand prior assistance, and (iii) do so before the chain of events is in motion and unstoppable.

A mere change of heart, flight from the crime scene, arrest by law enforcement, or an uncommunicated decision to withdraw is ineffective to constitute withdrawal. Notification to the legal authorities must be timely and directed toward preventing others from committing the crime.

EXAM NOTE: Be careful not to confuse these rules with the rules regarding withdrawal for inchoate offenses such as solicitation, attempt, and conspiracy. The rules are different.

e. Persons not accomplices

1) Class protected by a statute

A person who is a member of the class protected by a statute cannot be an accomplice. For example, a girl who is below the age of consent is not liable as an accomplice to her own statutory rape, even if she gave encouragement to the male defendant.

2) Crime requiring a second person

If the crime requires another party, the other party is not, simply by engaging in the criminal act, guilty of the crime as an accomplice. For example, the buyer of drugs is not guilty of the crime of distributing drugs simply by purchasing the drugs (but he may be guilty of a different crime).

3) Innocent agent

An "innocent agent" would not be an accomplice.

Example: A is duped by D into taking her friend's laptop and delivering it to D, who had told A that the laptop was really his and that the friend had meant to return it to him. While D may be liable as a principal for larceny of the laptop, A, an innocent agent, would not be guilty of any crime either as a principal or an accomplice.

f. Effect of principal's status

At common law, the accomplice could be convicted of a crime only if the principal was also previously convicted of the crime. However, a principal in the second degree could be convicted even if the principal in the first degree was not convicted. A small minority of jurisdictions still subscribes to this approach. By statute, however, in most jurisdictions, an accomplice may be convicted of a crime even if the principal is not tried, is not convicted, has been given immunity from prosecution, or is acquitted.

3. Accessory After the Fact

An accessory after the fact is a person who aids or assists a felon in avoiding apprehension or conviction after commission of the felony. An accessory after the fact must know that a felony was committed, act specifically to aid or assist the felon, and give the aid or assistance for the purpose of helping the felon avoid apprehension or conviction. An accessory after the fact is not subject to punishment for the crime committed by the felon, but instead has committed a *separate crime*, frequently labeled "obstruction of justice" or "harboring a fugitive."

a. Failure to report a crime

The mere failure to report a crime does not by itself make a person an accessory after the fact (though it may be a separate crime if a statute specifically makes it a crime to fail to report a crime). However, a person who gives false information to the police in order to prevent the apprehension of a felon can be an accessory after the fact.

b. Misprision of felony

Misprision is a common-law misdemeanor that punishes a failure to report or the hiding of a known felon.

The defendant must have (i) had full knowledge that the principal committed and completed the felony alleged, (ii) failed to notify the authorities, and (iii) taken an affirmative step to conceal the crime. *U.S. v. Ciambrone*, 750 F.2d 1416, 1417 (1986).

c. Compounding a crime

A person who receives valuable consideration for agreeing not to prosecute a crime may be guilty of compounding a crime.

E. RESPONSIBILITY

1. Insanity

Insanity encompasses mental abnormalities that may affect legal responsibility. It is a legal term rather than a psychiatric term. The four tests for insanity are the *M'Naghten* test, the irresistible-impulse test, the *Durham* rule, and the Model Penal Code test. These tests expressly exclude the "sociopathic" or "psychopathic" criminals who have a tendency to commit antisocial and sometimes violent acts and are incapable of experiencing guilt; the fact that a defendant has such tendencies does not mean that he has the requisite mental disease or defect. A defendant who puts his sanity at issue can be compelled to submit to psychiatric testing after being informed of his Fifth Amendment rights.

EXAM NOTE: Remember that the elements for insanity under any of these standards must have been present at the time of the crime that is at issue for insanity to be a defense to that crime.

a. M'Naghten test

Under the M'Naghten test, the defendant is not guilty if, because of a defect of reason due to a mental disease, the defendant did not know either (i) the nature and quality of the act or (ii) the wrongfulness of the act.

Without knowing that the act is wrong, a defendant could not have formed the requisite criminal intent. Therefore, it is important to assess whether the defendant's actions would have been criminal if the facts, as he believed them to

be, supported his delusions. However, a defendant is not necessarily exculpated simply because he believes his acts to be morally right, although a few states do allow for such a defense. Loss of control because of mental illness is not a defense under this test. This is the "right from wrong" test.

b. Irresistible impulse test

Under the "irresistible impulse" test, the defendant is not guilty if he lacked the capacity for self-control and free choice because mental disease or defect prevented him from being able to conform his conduct to the law. The loss of control need not be sudden. This is an impulse the defendant cannot resist.

c. Durham rule

Under the Durham rule, a defendant is not guilty if the unlawful act was the product of the defendant's mental disease or defect, and would not have been committed but for the disease or defect. This is the "but for" test.

d. Model Penal Code test

The Model Penal Code combines the M'Naghten and irresistible impulse tests. The defendant is not guilty if, at the time of the conduct, he, as a result of a mental disease or defect, did not have substantial capacity to appreciate the wrongfulness of the act, or to conform the conduct to the law.

EXAM NOTE: Again, when preparing for your exam, remember to consider which insanity rule your professor focused on in class. If it is unclear from a fact pattern which insanity rule applies, be prepared to discuss what would happen to the defendant under each of the different standards.

e. Burden of proof

In the majority of jurisdictions, the defendant has the burden of proving insanity. The level of proof required in these jurisdictions can be either a preponderance of the evidence or clear and convincing evidence. Other jurisdictions require the defendant to overcome the presumption of sanity by introducing evidence of the defendant's insanity, and then shift the burden of persuasion to the prosecution, which has to prove beyond a reasonable doubt that the defendant is sane.

f. Incompetence to stand trial

There is a distinction between the assertion of the insanity defense as a defense to a crime and the assertion of insanity as a basis for not having a defendant stand trial on the grounds of incompetence. Generally, a defendant will be held incompetent to stand trial if she is unable to understand the proceedings against her and assist counsel in her defense. In many jurisdictions, the burden of proof with regard to incompetence to stand trial is statutorily placed on the defendant.

2. Intoxication

Intoxication can be caused by any substance (e.g., alcohol, drugs, or prescription medicine). There are two types of intoxication defenses, voluntary and involuntary.

a. Voluntary intoxication

Voluntary intoxication is the intentional taking of a substance known to be intoxicating; actual intoxication need not be intended.

1) Specific intent crimes

Voluntary intoxication is a defense to specific intent crimes if it prevents the formation of the required intent. Without the required intent, not all of the elements of the crime can be established. For example, intoxication may prevent the formation of the premeditation required for first-degree murder, but not second-degree murder.

Under the MPC, voluntary intoxication is a defense to crimes for which a material element requires a mental state that is purposely or knowingly and the intoxication prevents the formation of that mental state. MPC § 2.08(1),(2).

2) When inapplicable

Voluntary intoxication is not a defense when the intent was formed before intoxication, or the defendant becomes intoxicated for the purpose of establishing the defense of voluntary intoxication. Voluntary intoxication is not a defense to crimes involving malice, recklessness, or negligence, or for strict liability crimes.

Note: Although common law murder and arson sound like specific intent crimes as they require the "intent to kill" or the "intent to burn," they are malice crimes and the specific intent defenses (e.g., voluntary intoxication) do not apply.

b. Involuntary intoxication

Involuntary intoxication is a defense when the intoxication serves to negate an element of the crime, including general as well as specific intent and malice crimes. To be considered involuntary, the intoxicating substance must have been taken:

i) Without knowledge of the intoxicating nature of the substance, including substances taken pursuant to medical advice; or

ii) Under duress.

Although intoxication and insanity are two separate defenses, excessive drinking and drug use may bring on actual insanity. Thus, intoxication can give rise to an insanity defense if the requirements for that defense are met.

3. Immaturity/Infancy

At common law, a child under the age of seven could not be convicted of a crime. A child at least seven years old but less than 14 years old was rebuttably presumed to be incapable of committing a crime. A child at least 14 years old could be charged with a crime as an adult.

Modern statutes have modified this and provide that no child can be convicted of a crime until a certain age is reached, usually between the ages of 11 and 14.

F. TYPES OF CRIMES

There are two basic types of crimes—felonies and misdemeanors. A felony is a crime that is punishable by death or imprisonment for more than one year; a misdemeanor is a crime punishable by imprisonment for one year or less or by a fine or by both.

II. HOMICIDE

A. DEFINITION

Homicide is the killing of a living human being by another, and includes the offenses of murder and manslaughter. At common law, homicide was divided into three categories: (i) homicide justified by law, (ii) criminal homicide, and (iii) excusable homicide. Criminal homicides were divided into three offenses: murder, voluntary manslaughter, and involuntary manslaughter.

Common-law murder is the unlawful killing of another living human being with malice aforethought. Malice can be shown by any one of the following states of mind: (i) intent to kill, (ii) intent to do serious bodily injury, (iii) reckless indifference to human life (depraved-heart murder), and (iv) intent to commit a felony (felony murder). (*See* § II.B., Types of Homicide, *infra*.) Manslaughter includes two types: voluntary and involuntary. Voluntary manslaughter involves an intentional killing, and involuntary manslaughter is an unintentional killing.

1. Killing a Person

In order for a homicide to occur, a living human being must die. A body need not be found; death can be established by circumstantial evidence.

A person cannot be killed twice. Shooting a corpse is not homicide, but can be a crime (e.g., abuse of a corpse).

At common law, a fetus is not a living person.

2. Causation

To prove a homicide, the prosecution must show that the defendant caused the victim's death. The prosecution must prove both actual and proximate causation.

a. Actual cause

If the victim would not have died **but for** the defendant's act, then the defendant's act is the actual cause (i.e., cause-in-fact) of the killing. When the defendant sets in motion forces that led to the death of the victim, the defendant is the actual cause of the victim's death.

Example: A mechanical device set up by the defendant kills an individual. The defendant is considered to have caused that individual's death.

1) Substantial factor

Actual causation can be found when there are multiple causes, (i.e., other persons are also responsible for the victim's death) and the defendant's act was a substantial factor in causing the death.

Simultaneous acts by different individuals who are acting independently may each be considered the actual cause of a victim's death, even though the victim would have died in the absence of one of the acts.

Example: Two individuals simultaneously shoot a third individual. Either of the shots would have killed the victim. Each shot is considered the actual cause of the victim's death.

2) Independent cause

A defendant's act will not be deemed the cause when a victim is killed by an independent cause before the defendant's act can kill the victim.

Example: A plans to kill B by stabbing him. A approaches B, finding him lying on the bed in a nonresponsive state. A assumes that B is asleep and stabs him multiple times. In reality, however, B had died one hour previously due to a massive heart attack. A's actions did not cause B's death; therefore, there is no homicide (A may be guilty of attempted murder).

3) Victim's preexisting condition

A victim's preexisting condition that contributes to the victim's death does not supplant the defendant's conduct as an actual cause of the victim's death.

Example: A victim has heart condition. The defendant hits the victim with a club intending to kill the victim, but the blow would not have killed the victim if the victim had not had the heart condition. The defendant's actions are nevertheless the actual cause of the victim's death.

4) Mercy killing

Providing a person with the **means** by which that person can commit suicide generally does not make the provider guilty of murder as an accomplice (because suicide is not homicide) but instead guilty of a lesser crime, such as assisting a suicide. Note, however, that consent is not a defense to homicide, so a "mercy killing" (i.e., euthanasia) can be a criminal homicide even if the person was willing to die because of a painful terminal illness.

b. Proximate cause

Proximate cause (i.e., legal cause) exists only when the defendant is deemed legally responsible for a homicide. For the defendant to be legally responsible for a homicide, the death must be foreseeable. A death caused by the defendant's conduct is deemed foreseeable if death is the natural and probable result of the conduct. Even if there is some intervening act, the defendant will still be held responsible unless the intervening act was so out-of-the-ordinary that it would be unjust to hold the defendant criminally responsible for the outcome. Or, as the MPC explains it, when the injury suffered is generally of the type intended by the defendant, proximate causation exists if the injury is "not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense." MPC § 203(2)(b). Actions by a third party (e.g., negligence by the doctor treating the victim), as well as actions by the victim (e.g., suicide to escape the pain that resulted from the injuries inflicted by the defendant), are generally foreseeable. However, actions by third parties will relieve the defendant of liability if they are independent of the defendant's conduct and unforeseeable, or dependent on the defendant's conduct and "abnormal" (i.e., not just unforeseeable, but unusual or extraordinary in hindsight). 2 Wayne R. LaFave, Substantive Criminal Law § 14.5(d), at 453 (2d ed. 2003). Actions by a force of nature that are not within the defendant's control are generally not foreseeable (e.g., a lightning strike that kills a victim the defendant tied to a tree).

An act that accelerates death is a legal cause of that death.

EXAM NOTE: A common situation in which the issue of proximate cause arises is when the felony murder rule applies. A frequently applied standard is that the homicide must be a natural and probable consequence of the defendant's actions.

c. Year and one day rule

At common law, the defendant's act was conclusively presumed not to be the proximate cause of the killing if the victim died more than one year and one day

after the act was performed. Most states have either abolished this rule or have extended the time period of responsibility.

B. TYPES OF HOMICIDE

1. Murder

Common-law murder is the:

i) Unlawful (i.e., without a legal excuse);

ii) Killing;

iii) Of another human being;

iv) Committed with **malice aforethought**.

"Malice aforethought" includes the following mental states: intent to kill, intent to inflict serious bodily injury, reckless indifference to an unjustifiably high risk to human life (depraved heart), or the intent to commit certain felonies (felony murder).

a. Intent to kill

Conduct, accompanied by the intent to kill, which is the legal cause of the death of a living person, constitutes intent-to-kill murder unless the legal circumstances surrounding the homicide are such that the crime is reduced to voluntary manslaughter. An inference of intent to kill may be made if an intentional use of a deadly weapon was used in the commission of the crime.

Example: A intends to kill B, and by his conduct of shooting B, kills him.

b. Intent to inflict serious bodily harm

A person who intends to do serious bodily injury or "grievous bodily harm," but actually succeeds in killing, is guilty of murder despite the lack of intention to kill.

Example: A intentionally hits B over the head with a baseball bat, intending to hurt B but not kill him, and B later dies from a skull fracture.

Intent to inflict serious bodily harm is an unintentional killing that results in death.

Intent to inflict serious bodily harm can be inferred from the use of a deadly weapon to inflict the bodily injury.

c. Depraved heart

A killing that results from reckless indifference to an unjustifiably high risk to human life is a depraved-heart murder.

Example: A stands on top of a highway overpass and for a joke drops a bowling ball into on-coming traffic, resulting in the death of B, a passing motorist.

Depraved-heart murder is an unintentional killing that results in death. There is a split among jurisdictions as to whether the requisite depravity exists when a defendant is actually unaware of the risk involved in the conduct, but the majority of states and the MPC impose liability only when the defendant actually realizes the danger. (The minority objective standard imposes guilt if a reasonable person would have recognized the danger.) Note that even those states that ordinarily follow a subjective standard allow a conviction if the reason the defendant failed to appreciate the risk was due to voluntary intoxication.

Generally, reckless driving alone will not lead to a charge of depraved-heart murder. Such a charge would be appropriate only if the reckless driving was

extreme, such as if it were combined with intoxication or other aggravating factors. *See, e.g.*, *Cook v. Commonwealth*, 129 S.W.3d 351 (Ky. 2004) (an intoxicated defendant driving at an excessive speed); *State v. Woodall*, 744 P.2d 732 (Ariz. Ct. App. 1987) (intoxicated defendant drove almost 70 mph on a 40-mph double curve).

d. Felony murder

Felony murder is an unintended killing proximately caused by and during the commission or attempted commission of an inherently dangerous felony. The felonies traditionally considered inherently dangerous are: **B**urglary, **A**rson, **R**ape, **R**obbery, and **K**idnapping. [Mnemonic: **BARRK**]. (Common-law felonies also include murder, manslaughter, mayhem, and sodomy, but the BARRK crimes are most commonly tested in the context of felony murder; neither murder nor manslaughter can be the basis for a felony-murder charge.) To convict a defendant of felony murder, the prosecution must establish the underlying felony and that the defendant committed that felony. In addition, in most states, any aggravated felony committed with the use of a dangerous weapon is subject to the felony-murder rule. However, such an aggravated felony must be independent of the killing itself to qualify as an underlying felony for felony murder (e.g., aggravated battery cannot be the basis for a felony-murder charge).

Example: X accidentally shoots the owner of a home while committing a burglary. X can be charged with felony murder.

There is no charge of attempted felony murder if the unintended victim does not die. Generally, co-felons (including accessories) are vicariously liable for the death if the death is a foreseeable consequence of the underlying inherently dangerous felony.

If one of two co-felons kills the other during the commission or attempted commission of a dangerous felony, this will also constitute felony murder. If the co-felon is killed by a victim or a police officer, though, the defendant is generally not guilty of felony murder.

Note: The underlying felony will generally "merge" into the crime of felony murder for the purposes of Double Jeopardy. That is, the predicate felony is generally deemed a lesser-included offense of the felony murder. For example, in the majority of jurisdictions, a defendant who kills the proprietor of a store while committing a robbery can be punished only for felony murder; the robbery conviction would "merge" into the felony-murder conviction. A minority of jurisdictions have enacted statutes explicitly allowing cumulative punishment for both the felony murder and the underlying felony.

1) Defenses to felony murder

One of the following circumstances can constitute a defense to a felony-murder charge:

i) A valid defense to the underlying felony;

ii) The felony was not distinct from or independent of killing itself (e.g., aggravated battery);

iii) Death was not a foreseeable result or a natural and probable consequence of the felony (i.e., there was no proximate causation); or

iv) Death occurred after the commission of the felony and the ensuing flight from the scene of the crime.

2) Killing by felony victim or police

a) Death of bystander

When **someone other than a co-felon** is killed by a police officer or dies as a result of resistance by the victim of the felony, the felon's liability for that death will depend on whether an agency theory or proximate-cause theory is applied. Under an agency theory, the felon will not be liable for the death of a bystander caused by a felony victim or police officer because neither person is the felon's agent. Under the proximate-cause theory, liability for the bystander's death may attach to the felon because the death is a direct consequence of the felony.

The same analysis is applicable when a victim of the underlying felony or a police officer is killed by someone who is not one of the felons.

b) Death of co-felon

When a co-felon is killed by a victim or a police officer either in self-defense or to prevent escape, under the *Redline* doctrine (*Commonwealth v. Redline*, 391 Pa. 486 (1958)), the defendant is generally not guilty of felony murder. The killing by the victim or the police officer is considered justifiable homicide. Some jurisdictions even extend this to the situation in which a co-felon kills herself. If one co-felon kills another co-felon while committing the underlying felony, jurisdictions are split on allowing a felony murder charge.

2. Statutory Crimes of Murder

At common law, there were no degrees of murder. Under modern statutory rules, murder is generally divided into two degrees: first-degree and second-degree murder.

a. First-degree murder

First-degree murder is generally defined as a deliberate and premeditated murder. First-degree murder, defined in this manner, is a specific-intent crime, which means that specific-intent defenses are available for a defendant (*see* I.B.1. Specific Intent Crimes, *supra*). In addition, felony murder is frequently classified as first-degree murder.

1) Created by statute

Because the specific criteria for first-degree murder are established only by statute, a homicide cannot be first-degree murder without a corresponding statute.

2) Premeditation

The distinguishing element of first-degree murder is premeditation, meaning the defendant reflected on the idea of killing or planned the killing. The amount of time needed for premeditation may be brief. It must be long enough after forming the intent to kill for the defendant to have been fully conscious of the intent and to have considered the killing (i.e., a time for reflection). This requirement does not apply to felony murder.

3) During the commission of an inherently dangerous felony

If a murder is committed during the perpetration of an enumerated felony, it may be first-degree murder. The most commonly enumerated felonies are **B**urglary, **A**rson, **R**ape, **R**obbery, and **K**idnapping. [Mnemonic: **BARRK**].

NOTE: A homicide committed during the commission of an inherently dangerous felony may be treated as first or second-degree murder depending upon the jurisdiction.

4) Heinous murder

A murder resulting from an egregious act, such as ambush (i.e., lying in wait), torture, bombing, terrorism, or poisoning, may be classified as first-degree murder.

b. Second-degree murder

Second-degree murder is a homicide committed with the necessary malicious intent: the intent to kill, the intent to do great bodily injury, or a depraved-heart murder. In addition, a murder that occurs during the commission of a felony other than the felonies that trigger first-degree murder may statutorily be treated as second-degree murder.

EXAM NOTE: Be sure to differentiate between second-degree murder and first-degree murder when answering exam questions. First-degree murder is a specific intent crime, whereas second-degree murder, like common law murder, is a malice crime.

3. Voluntary Manslaughter

Voluntary manslaughter is homicide committed with malice aforethought, but also with mitigating circumstances.

a. "Heat of passion"

Murder committed in response to adequate provocation (i.e., in the "heat of passion") is voluntary manslaughter. The "heat of passion" means that the defendant was provoked by a situation that could inflame the passion of a reasonable person to the extent that it could cause that person to momentarily act out of passion rather than reason. The defendant cannot have been set off by something that would not bother most people.

EXAM NOTE: Remember that "heat of passion" is NOT a defense; it merely reduces murder to voluntary manslaughter.

1) Adequate provocation

A serious battery, a threat of deadly force, or discovery of adultery by a spouse constitutes adequate provocation. Usually mere words, such as taunts, do not.

While an intentional killing committed when resisting arrest is generally murder, the intentional killing can be manslaughter if the arrest is unlawful and the defendant acts in the "heat of passion."

2) "Cooling off"

If there was sufficient time between the provocation and the killing for a reasonable person to cool off, then murder is not mitigated to manslaughter. If there was sufficient time to cool off for a reasonable person even though the defendant himself did not regain self-control, the murder is not mitigated to manslaughter.

EXAM NOTE: If the fact pattern shows that there was sufficient time to cool off and the defendant did not calm down, the murder is not mitigated to manslaughter.

Second provocation: Even when the defendant has "cooled off," a second encounter with the victim may give rise to another situation in which the defendant acts in the "heat of passion."

3) Causation

There must be a causal connection between provocation, passion, and the fatal act. There will.

4) Transferred provocation

When, because of a reasonable mistake of fact, the defendant is in error in identifying her provoker or accidentally kills the wrong person, she will be guilty of voluntary manslaughter if that would have been her crime had she killed the provoker. If, however, the defendant, in her passion, intentionally kills another person known to her to be an innocent bystander, then there will be no mitigation, and murder, rather than voluntary manslaughter, will apply.

b. Imperfect defense

In many states, murder may be reduced to voluntary manslaughter when the defendant contends that his use of deadly force was necessary in defense of himself or others, but (i) the defendant started the altercation or (ii) the defendant unreasonably (if truly) believed in the necessity of using deadly force.

For a more detailed discussion of imperfect self-defense and self-defense for an initial aggressor, *see* § V.B.1, Self-Defense, *infra*.

4. Involuntary Manslaughter

Involuntary manslaughter is an unintentional homicide committed with criminal negligence (recklessness under the MPC) or during an unlawful act.

a. Criminal negligence

Criminal negligence is grossly negligent action (or inaction when there is a duty to act) that puts another person at a significant risk of serious bodily injury or death. It requires more than ordinary negligence for tort liability and something less than the extremely reckless conduct required for depraved-heart murder. For example, the failure of a parent, under a duty of care, to provide medical care to a sick minor child constitutes criminal negligence.

Under the Model Penal Code rule, the defendant must have acted recklessly, which is a "gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation." MPC § 2.02(2)(c). The defendant must have been actually aware of the risk his conduct posed.

b. Unlawful act

The unlawful act may occur in one of two ways:

i) Under the misdemeanor-manslaughter rule, which is a killing committed in the commission of a *malum in se* (wrong in itself) misdemeanor; or

ii) A killing committed in the commission of a felony that is not statutorily treated as first-degree felony murder or second-degree murder.

The term "*malum in se*" means "wrong in itself," or "inherently evil," and includes crimes such as assault and battery. "*Malum prohibitum*" refers to wrongs that are merely prohibited, (i.e., not inherently immoral or hurtful, but wrong due to a statute), such as a parking violation, smuggling, or failure to obtain a license. A homicide resulting from a wrong that is *malum prohibitum* will constitute involuntary manslaughter only if the unlawful act was willful or constituted criminal negligence.

c. Causation

There must be a causal connection between the unlawful act and the death for involuntary manslaughter to apply.

III. OTHER CRIMES

A. CRIMES AGAINST PROPERTY

1. Larceny

Larceny is the:

i) Trespassory;

ii) Taking and;

iii) Carrying away;

iv) Of the personal property;

v) Of another;

vi) With the intent to permanently deprive that person of the property (i.e., intent to steal).

a. Trespass

The property must be taken without the owner's consent. If the original taking was without consent, yet was not unlawful because there was no intent to steal at the time of the taking, larceny may be committed at a later time if the intent to steal is later formed. Under the "continuing trespass" rule, the original trespass is deemed to be "continuing" in order for the criminal act to coincide with the criminal intent. The defendant's original taking must have been wrongful (e.g., a taking based on knowledge that the property belonged to another, such as a taking with the intent to borrow and return the property).

b. Taking

The taking (also known as caption) requirement is satisfied by any trespassory removal of the property from the owner's possession into another's control.

1) Destruction of property in owner's possession

The destruction of property while it is in the owner's possession (e.g., breaking an object held by the owner) is not a taking.

2) Use of agent

If the defendant uses an agent, even one unaware of the defendant's criminal intent, a taking occurs.

c. Carrying away (asportation)

The carrying away requirement (also known as asportation) is satisfied by even a slight movement of the property (e.g., inches).

d. Personal property

The property taken must be personal, not real property. Electricity or gas supplied by a utility constitutes personal property.

1) Intangibles

At common law, only tangible property could be the subject of a larceny. Today, larceny has generally been expanded to include intangibles. Documents that represent the rights to intangible property (e.g., stocks, bonds) are treated as personal property.

2) Services

Modern theft statutes usually criminalize obtaining services without paying for them (i.e., the theft of services).

3) Real property items

The taking of fixtures (i.e., items affixed to real property) or real property items (e.g., trees, unharvested crops) is not larceny when the defendant's act of severance occurs immediately before the carrying away of the fixture or other real property items. However, when the real property items have previously been severed from the land by the owner, they become personal property (e.g., picked apples), and the carrying away of such items can be larceny.

e. Another's property

The property must be in the possession of someone other than the defendant.

Contrast with embezzlement: For embezzlement, the defendant is legally entrusted with the property by the owner and then the defendant later fraudulently converts the property to his own use. With larceny, the initial taking must be trespassory; there cannot be lawful entrustment by the owner. This is the main difference between the two crimes.

1) Owner of property

The owner of property (i.e., a person who has title to it) can commit larceny when someone other than the owner (e.g., lessee) is entitled to current possession of the property.

2) Thief

Larceny may even be committed against a thief. The taking of stolen property taken from a thief can constitute larceny unless the taker has a superior possessory interest in the property (e.g., an owner or a lessee of the property).

3) Joint owners

A joint owner of property who takes possession of the property from a co-owner is not guilty of larceny because the taker has an equal right to possess the property.

4) Constructive possession

"Constructive possession" means legal possession if factual possession does not exist.

An owner has constructive possession of property when actual possession, but not title, is taken from her by fraud. The crime is called "larceny by trick." *See* § III.A.3, Larcen by Trick, *infra*.

a) Employee's control over employer's property

Low-level employees can only be guilty of larceny whereas high-level employees are typically guilty of embezzlement. An employer generally has constructive possession of property in the hands of a lower-level employee. Such an employee has custody, not possession, of the employer's property. A higher-level employee (e.g., company president) who has greater authority with respect to the employer's property may have possession of, rather than custody of, such property and may be guilty of embezzlement, rather than larceny, for taking the property.

b) Bailee possession

A bailee is guilty of larceny if, with intent to steal, the bailee opens and takes property from closed containers belonging to the bailor. Otherwise, the bailee simply has possession.

5) Abandoned vs. lost property

Property that has been abandoned by its owner (i.e., the owner has surrendered all rights to the property) is not subject to larceny. Property that has been lost by its owner can be the subject of larceny if, at the time of the finding, the finder knows the owner or believes that he can locate the owner and the finder possesses the necessary intent to permanently deprive the owner of the property.

6) Mistakenly delivered property

Property that has been mistakenly delivered may be the subject of larceny if the recipient of the property realizes that a mistake has been made at the time of the receipt of the property and the recipient possesses the necessary intent to permanently deprive.

a) Special problems

When a defendant takes legitimate possession of an item, but he discovers another item enclosed in the larger item (the container), the issue arises as to whether the defendant had possession of the enclosed item at the time the defendant legitimately possessed the larger item. If so, there is no larceny because the defendant has not taken the property from another's possession. However, determining whether or not there is possession is a difficult task. Larceny may depend on whether or not the parties intended to transfer the container. If the intent is to transfer, then no larceny is committed because the defendant effectively takes immediate possession of both items. A few states hold that the defendant does not take possession of the enclosed property until he discovers it. At which point, if he forms the intent to keep the property, then he is guilty of larceny.

f. Intent to permanently deprive

Larceny is a **specific intent** crime. At the time of the taking, the intent to permanently deprive the owner of the property must be present at the time of the taking. There is no defense of restoration if the defendant later has a change of

heart and restores the property to the rightful owner. The crime is complete at the time of the taking.

Examples: The intent to permanently deprive the owner of the property can occur when the defendant takes property with the intent to claim a reward, the defendant intends to throw away or abandon the property, the defendant intends to sell the property back to the owner, or the defendant intends to pledge or pawn the property without being able to redeem it.

1) Insufficient intent

The necessary specific intent does not exist when the defendant's intent is to:

i) Borrow property with the ability to return it;

ii) Pay for merchandise that she has the means to buy; or

iii) Take money as repayment of a debt.

a) Intent to borrow

If the defendant intends only to borrow the property with the ability to do so, then larceny does not occur because there is no intent to permanently deprive the owner of the property, (e.g., borrowing a car to run an errand).

EXAM NOTE: If property is taken with the intent to return the property and is accidently damaged or destroyed, larceny has not occurred.

Example: D takes A's car to run an errand. On the way back to A's house, D is in a car accident and A's car is totaled. D is not guilty of larceny.

b) Intent to pay

A defendant's intent to pay for property is not sufficient to prevent larceny when the property is not offered for sale.

c) Repayment of debt

If a defendant takes property with the honest belief that she is entitled to the property as repayment of a debt (i.e., a claim of right), then the taking does not constitute larceny. (Note, however, that a claim of right cannot serve as a justification for robbery in most states.)

d) Rewards

A defendant intending to return property in expectation of claiming a reward has not committed larceny, unless his intent is to return the property only upon receiving the reward.

2) Sufficient intent

There is sufficient intent if the defendant intends to create a substantial risk of loss or if the defendant intends to sell the goods back to the owner.

3) Time for measuring intent

The intent to permanently deprive is generally measured at the time of the taking. The continuing trespass rule may apply to stretch the time at which intent is measured. *See* § III.A.3.a.1, *supra*.

2. Larceny by Trick

Larceny by trick is

i) Larceny

ii) Accomplished by fraud or deceit

iii) That results in the conversion of the property of another.

Larceny by trick requires that the defendant fraudulently induce the victim to deliver possession of, but not title to, the property to the defendant.

a. False representation of material present or past fact

The representation (whether oral, written, or by actions) must be false in fact and be of a material past or present fact. A prediction about a future event, a false promise, or an opinion such as sales talk or puffing is not sufficient.

b. Reliance by the victim

The victim must rely upon the false representation, and that reliance must cause the victim to give possession to the defendant. This standard is subjective, not objective.

c. Conversion of property

Unlike larceny, larceny by trick requires that the property be converted. Property is converted when the defendant, in a manner so serious as to deprive the victim of the use of the property, deprives the victim of possession of the property or interferes with the property. The deprivation must be substantial enough to justify a court to order the defendant to pay the full fair market value of the property.

Contrast with false pretenses: Under larceny by trick, the defendant obtains possession. Under false pretenses, the defendant obtains title. *See* § III.A.5, False Pretenses *infra.*

3. Forgery

Forgery is the:

i) Making;

ii) Of a false writing;

iii) With apparent legal significance; and

iv) With the intent to defraud (i.e., make wrongful use of the forged document).

a. Making

Making includes creating, altering, or fraudulently inducing another to sign a document when that person is unaware of the significance of the document. The defendant need not use the document; the crime is complete upon the "making" of the document. When property is acquired by use of the forged document, the defendant may also be guilty of another crime, such as false pretenses (*see* § III.A.5, False Pretenses, *infra*).

b. False writing

The writing itself must be false, instead of merely including false information in an otherwise genuine document. (Note: Signing another person's name on a check or other commercial paper makes the check itself false.) When there is an alteration, the alteration must be material.

c. Apparent legal significance

A document has legal significance if it has value beyond its own existence. A contract, deed, will, or check has value beyond the document itself; a painting does not.

d. Intent to defraud

The defendant must intend to make wrongful use of the writing, (e.g., cashing a check with a forged drawer's signature). There must be intent to defraud, even if no one actually is defrauded.

4. Embezzlement

Embezzlement is the:

i) Fraudulent;

ii) Conversion;

iii) Of the property;

iv) Of another;

v) By a person who is in lawful possession of the property.

a. Conversion

Conversion is a serious interference with the owner's rights to the property by inappropriately using property held pursuant to a trust agreement either by selling it, damaging it, or unreasonably withholding possession. The defendant need not personally benefit from the conversion. No movement or carrying away of the property is required. If it is unclear whether there was a conversion of the property, the victim must demand a return of the property and the embezzler must refuse to return the property before a claim for embezzlement can be made.

b. Intent to defraud

The defendant must intend to defraud the owner of the property. If the defendant intends to return the exact property that is converted and has the ability to do so at the time that the intent is formed, the defendant lacks the intent to defraud the property owner. If the defendant intends to return similar property or the cash equivalent of the value of the property, the defendant has the intent necessary to commit embezzlement. A conversion pursuant to a claim of right also is not embezzlement.

c. Type of property

Property that is subject to larceny is also subject to embezzlement. In some states, real property, as well as personal property, may be embezzled.

d. Another's property

The property embezzled must belong to another. The inability to fulfill a contractual obligation (e.g., pay back a loan) is not embezzlement.

e. Lawful possession

The embezzler must be in lawful possession of the property at the time that the intent to defraud occurs, although some states limit embezzlement to property entrusted to the embezzler.

Example: O's car breaks down and he entrusts it to M, a mechanic, for repair. M fixes the car and then sells it to T. M has committed embezzlement. He was a bailee of the car, in lawful possession, when he sold it to the T.

5. False Pretenses

False pretenses (also called "obtaining property by false pretenses" or "larceny by false pretenses") is:

i) Obtaining title to the property;

ii) Of another person;

iii) Through the reliance of that person;

iv) On a known false representation of a material past or present fact; and

v) The representation is made with the intent to defraud.

a. Title must pass

Title to the property must pass from the victim to the defendant. Title can be obtained without possession of the property, but mere possession does not constitute false pretenses. If the defendant subjectively believes that he owns the property in question, he will not be guilty of false pretenses.

Contrast larceny by trick: Mere possession of the property without legal title by a defendant can be sufficient for larceny by trick.

b. Type of property

Generally, property that may be subject to larceny is also subject to false pretenses.

c. False factual representation

The representation must be false and must be of a material past or present fact. A prediction about a future event, a false promise, or an opinion, such as sales talk or puffing, is not sufficient. The representation may be made orally, in writing, or by actions (e.g., resetting a car's odometer). Silence does not constitute a representation, even when the defendant is aware of the owner's misunderstanding, unless the defendant caused the misunderstanding or the defendant has a fiduciary obligation to the victim.

d. Reliance by the victim

The victim must rely upon the false representation, and that reliance must cause the victim to pass title to the defendant. This standard is subjective, not objective.

e. Intent to defraud

The defendant must know that the representation is false and specifically intend to defraud. Most courts find that a defendant acts knowingly and has knowledge of a particular fact when he is aware of a high probability of the fact's existence and deliberately avoids learning the truth. A few states require actual knowledge of a particular fact.

A defendant has the intent to defraud required to establish false pretenses when she intends that the person to whom the false representation is made will rely upon it.

6. Robbery

Robbery is:

i) Larceny;

ii) From the person or presence of the victim;

iii) By force or intimidation.

a. Elements of larceny

All of the elements of larceny are necessary for robbery. Larceny is the (i) trespassory, (ii) taking and carrying away, (iii) of the personal property of another, (iv) with the intent to steal (*see* III.A.1. Larceny, *supra*).

b. From the person or presence

The property taken must be on the victim's person or within the victim's reach or control (from the presence of the victim). For example, if a victim is restrained by the defendant within the victim's home prior to the seizure of the property, items taken from the entire house can be treated as "from the victim's presence."

c. By force or intimidation

The taking of the property must be accomplished by force or intimidation. The force or imitation must occur before the taking, simultaneously with the taking, or immediately following the taking to retain the stolen property or to effect an escape.

1) Force

The force used by the defendant must be more than the amount necessary to effectuate taking and carrying away the property.

When a pickpocket takes the victim's property without the victim's knowledge, the taking does not constitute robbery unless the victim notices the taking and resists. Similarly, most state courts that have considered the issue have said that purse-snatching is not robbery unless additional circumstances transform the larceny into a robbery. Such circumstances are present when the victim notices the taking and resists, or when the victim is intimidated, knocked down, struck, or injured by greater force than is required to carry away the property.

> **EXAM NOTE:** Regarding the degree of force necessary for robbery, remember that slight force is sufficient. Common law required that the force must be manifested immediately before or at the same time as the taking, while the modern trend in many jurisdictions is that the force may be immediately following the taking (e.g., during escape).

2) Intimidation

The threat must be of immediate serious physical injury to the victim, a close family member, or other person present. A threat to damage or destroy property, other than the victim's home, probably is not sufficient.

d. Merger

Larceny, assault, and battery all merge into robbery or attempted robbery.

7. Extortion

a. Common law

At common law, extortion was the unlawful taking of money by a government officer.

b. Modern approach

Most jurisdictions have enacted statutes that more broadly define extortion as the taking of money or property from another by threat. In most jurisdictions, it is the making of threats (rather than obtaining the property) that is the essence of the crime. In a minority of jurisdictions, however, the accused must actually obtain the property to be guilty.

Extortion differs from robbery in two respects:

i) The threats need not be of immediate harm, nor need they be of a physical nature (e.g., threatening future exposure of the victim's marital infidelity); and

ii) The property intended to be taken need not be on the victim or in his presence.

8. Burglary

Common law burglary is the:

i) Breaking and;

ii) Entering;

iii) Of the dwelling;

iv) Of another;

v) At nighttime;

vi) With the specific intent to commit a felony therein.

a. Breaking

Breaking is accomplished by using force to create an opening into a dwelling, such as by shattering a window or kicking in a door. The force used may be slight, such as opening an unlocked door or window.

Note: It is not a breaking to enter a dwelling through an open door or window, unless the opening must be enlarged in order to allow the entry.

1) Breaking without use of force

If entry is obtained by fraud or threat, there is a breaking. If the defendant had consent by the owner to enter, no breaking occurs unless the consent was obtained by fraud or the defendant exceeded the scope of such consent.

2) Breaking within dwelling

If entry is gained with consent, a breaking can still occur if the defendant breaks into a part of the dwelling structure, such as by opening a closet door or wall safe. The mere opening of an object within the dwelling, such as a desk drawer, trunk, or box, does not constitute a breaking.

3) Use of force to exit—No breaking

The use of force to exit a dwelling does not constitute a breaking.

Most states now require only that the defendant enter the premises; a breaking is not required. The common law requires a breaking.

b. Entering

Entering occurs when any portion of the defendant's body (e.g., a hand through a broken windowpane) or an instrument used by the defendant to gain entry (e.g., rock thrown through a window), crosses into the dwelling without permission through the opening created by the breaking.

EXAM NOTE: Breaking and entering need not happen at the same time, but the entering must follow the breaking.

c. Dwelling of another

A dwelling is a structure regularly occupied for habitation. It need not be occupied at the time of the breaking, but must not be abandoned.

All states have statutes that expand the type of structure to include non-dwellings, such as businesses, buildings, or cars, and surrounding areas, such as the yard.

The dwelling must be that of another person. A person cannot burglarize his own dwelling, but the owner of a dwelling who has transferred the possessory interest to another (e.g., a tenant) can be guilty of burglary.

d. Nighttime

Nighttime occurs during the period of darkness between sunset and sunrise. It is not considered nighttime if there is sufficient natural daylight to see the burglar's face.

The common law required that the breaking and entering occur during nighttime. Only a very few states require that all forms of burglary be committed at night, although many states impose more severe penalties on nighttime burglaries.

e. Specific intent to commit a felony

At the time of the breaking and entering, the defendant must have the intent to commit a felony (e.g., larceny, robbery, rape, murder, etc.) inside the dwelling.

A defendant who fails to commit the underlying felony may nevertheless be guilty of burglary as well as attempt with regard to the underlying felony. If the underlying felony is completed, it does **not** merge with the burglary.

Many states have broadened the scope of the crimes intended to be committed to include misdemeanor thefts.

9. Arson

Arson is the:

i) Malicious;

ii) Burning;

iii) Of the dwelling;

iv) Of another.

a. Malice

Malice does not require ill will. The defendant is not required to intend to burn the dwelling of another; it is sufficient that the defendant performs an act with reckless disregard that creates a substantial risk of such burning.

b. Burning

The damage to the dwelling must be caused by fire. Smoke damage alone is insufficient. In addition, the damage must affect the structure of the building; mere scorching (i.e., discoloration due to heat) of the walls and burning of the contents of the dwelling are insufficient. When the dwelling is constructed of wood, there must be at least a charring of the wood (i.e., damage to the wood itself).

c. Another's dwelling

Ownership is not required. The test is whether a person has the right to possession or occupancy of the dwelling. Many states have expanded arson to include the burning of one's own dwelling. At common law, however, the burning of one's dwelling (house burning) that was located near other houses or in a city was only a misdemeanor, and burning one's own building for insurance fraud was not considered arson.

Most states have expanded arson to include the burning of buildings other than dwellings, but burning the contents of a building alone does not constitute arson.

10. Possession Offenses

Possession of a prohibited object (e.g., drug paraphernalia, burglar's tools) or a substance (e.g., illegal narcotics) is unlawful if the defendant exercises control over such object or substance. The defendant is not required to be aware that possession of the object is illegal. Dominion and control must exist for a period long enough to have provided the defendant with an opportunity to cease such dominion and control.

11. Receiving Stolen Goods

Receiving stolen property is a statutory crime that requires:

i) Receiving control of stolen property;

ii) Knowledge that the property is stolen; and

iii) Intent to permanently deprive the owner of the property.

Knowledge that the property is stolen must coincide with the act of receiving the property. Only control, not possession, is necessary. The goods must have actually been stolen at the time they are received and the defendant must believe that they have been stolen.

12. Legislative Changes to Theft Crimes

There are several changes made to the common law property offenses under the MPC and through states' criminal codes. Larceny, false pretenses, embezzlement and receipt of stolen goods are treated as a single statutory crime of theft. The definition of property has been expanded to cover intangibles, services, and documents. In addition, the defendant need only have unauthorized control over the property.

B. CRIMES AGAINST THE PERSION

1. Battery

Battery is the:

i) Unlawful;

ii) Application of force;

iii) To another person;

iv) That causes bodily harm to that person or constitutes an offensive touching.

a. Unlawful

"Unlawful" means that the force is applied without legal excuse. Excessive use of force by a police officer during an arrest is unlawful.

b. Application of force

The touching, however slight, must result in bodily harm (e.g., a bruise) or an offensive touching (e.g., an unwanted kiss). The force can be applied by a third party acting under the defendant's direction or by an object controlled by the defendant (e.g., a brick thrown by the defendant).

Example: D hits H in front of H's wife, W. W is so upset at D's action that she suffers a seizure. D cannot be charged with battery against W, as there was no physical touching. D can, of course, be charged with battery for hitting H.

c. To the person of another

The application of force to an object near, carried by, or attached to the victim constitutes a battery if the victim suffers bodily harm or an offensive touching.

Example: A battery occurs if a defendant kicks a cane used by a victim for support causing the victim to fall and injure herself.

d. Requisite intent

Battery is a general intent crime that includes not only intentional conduct but also criminal negligence (i.e., conduct that carries a high degree of risk to others).

e. Consent defense

Although consent is generally not a defense to a crime, consent may be a defense to a battery. Consent may be explicit (e.g., a signed authorization for surgery) or implicit (e.g., participation in an athletic event).

f. Aggravated battery

Battery may carry a greater penalty, by statute, when serious bodily injury is inflicted or bodily injury is caused by the use of a deadly weapon.

2. Assault

Assault is:

i) An attempt to commit a battery; or

ii) Intentionally placing another in apprehension of imminent bodily harm.

***Battery Distinguished*:** The defendant **must** cause bodily injury or actually touch the victim (or something attached to his person) for a battery to occur. An assault can occur if the defendant does not touch the victim.

a. Attempted battery

The defendant must take a substantial step toward the commission of a battery. Like all attempt crimes, the defendant must have the specific intent to commit a battery.

b. Fear of harm

The "fear of harm" type of assault (also called "apprehension assault") is a general intent crime—the defendant must intend to cause bodily harm or apprehension of such harm. The victim's apprehension must be reasonable. Unlike attempted battery, because actual apprehension is necessary, the victim's lack of awareness of the threat of harm is a defense to this type of assault.

c. Consent defense

As is the case with battery, consent may be a defense to assault.

d. Aggravated assault

Assault may carry a greater penalty, by statute, when a deadly weapon is used.

3. Mayhem

Mayhem is a common-law felony battery that causes the dismemberment or permanent disfigurement of a person. It is the equivalent of modern statutory aggravated battery.

4. Kidnapping

Kidnapping is the:

i) Unlawful;

ii) Confinement of a person;

iii) Against that person's will;

iv) Coupled with either:

a) The movement; or

b) The hiding of that person.

Note: There is no requirement for a ransom demand in order to establish kidnapping.

a. Unlawful

The unlawful requirement excludes legally sanctioned actions, such as the imprisonment of a felon by the state after his conviction.

b. Confinement

The victim's freedom of movement must be significantly restricted. It is not enough that the victim is prevented from taking a path or entering an area; the victim must be prevented from leaving an area or compelled to go to a place the victim does not want to go.

c. Against the victim's will

The confinement must be accomplished by force, threats, or fraud.

Consent of the victim to the confinement is a defense if given by a person with the capacity to consent. A child cannot consent to be taken out of the control of a parent or guardian.

d. Movement

The victim need only be moved a short distance (e.g., forced from driver's seat into the trunk of car). If the kidnapping occurs incident to another crime (e.g., robbery), the movement must be more than is necessary for the commission of that crime in order for a defendant to be liable for both kidnapping and the separate offense.

e. Hidden location

Instead of movement, the victim may be concealed for a substantial period of time at a hidden location.

f. Enhanced punishment

A kidnapping that results in bodily injury, interferes with a governmental function, or is done for the purpose of collecting a ransom may be subject to enhanced punishment, by statute.

5. False Imprisonment

False imprisonment is the:

i) Unlawful;

ii) Confinement of a person;

iii) Without consent.

a. Unlawful

The confinement is unlawful unless is it consented to or specifically authorized by law.

b. Confinement

Confinement may be effected by forcing a person to go where he does not want to, or preventing him from going where he does want so long as no alternative routes are available to him. This may be done by actual force, threat of force, or a show of force.

3. Consent

To be effective, consent must be given freely, and the one consenting must have the capacity to do so.

C. RAPE AND STATUTORY RAPE

1. Rape

Rape is:

i) Unlawful;

ii) Sexual intercourse;

iii) With a female;

iv) Against her will by force or threat of immediate force.

Most modern statutes are gender-neutral and have replaced the force requirement with lack of consent.

a. Unlawful—exclusion of husband

At common law, a husband could not rape his wife. Most states have either abolished this restriction or removed the immunity if the husband and wife have separated or filed for divorce.

b. Sexual intercourse

Actual penetration, however slight, is required; emission is not.

c. With a female

Traditionally, the victim of rape could only be a woman. Most states recognize homosexual rape as a crime labeled "sexual assault" rather than rape. Most states also have defined rape in a gender neutral manner; under such statutes, a woman could be the perpetrator of a rape.

d. Without consent

When a woman consents to sexual intercourse, rape has not occurred. Consent does not exist if intercourse is procured by force or threat of harm, or when the female is unable to consent due to a drug-induced stupor or unconsciousness.

1) Threat of harm

Consent is ineffective if a woman consents to sexual intercourse due to threat of harm, although the harm threatened must be imminent and must involve bodily harm. Economic duress is not sufficient.

2) Fraud

Fraud rarely negates consent. Consent obtained by fraud regarding the nature of the act itself—fraud in factum (e.g., the defendant convinces victim the act is not intercourse but part of a medical exam)—is not a valid defense. Consent obtained by fraud in inducement (e.g., a promise of marriage in exchange for sex) is a valid defense.

3) Resistance of victim

Resistance of the victim is not required, but can be evidence of the victim's lack of consent.

e. Intent

Rape is a general intent crime requiring only the intent to commit intercourse without consent of the female. Intent is negated if a defendant reasonably believes the victim's lack of resistance indicates consent.

2. Statutory Rape

Statutory rape is sexual intercourse with a person under the age of consent. It is a strict-liability crime with respect to the age of the victim. Consent by the underage victim is not a defense. A defendant's reasonable mistake of fact concerning the victim's age is not a defense.

IV. INCHOATE CRIMES

The term "inchoate" literally means "unripened." With an inchoate offense, the intended crime need not be committed to be guilty. The inchoate offenses are solicitation, conspiracy, and attempt. Inchoate offenses are specific intent crimes.

A. MERGER

Traditionally, under the doctrine of merger, if a person's conduct constitutes both a felony and a misdemeanor, then the misdemeanor merges into the felony, and the person can be convicted of the felony but not the misdemeanor. However, if the crimes are of the same degree, i.e., all felonies or all misdemeanors, then there is no merger of the crimes.

Modern law does not subscribe to the doctrine of merger based on the felony-misdemeanor distinction, but does apply this doctrine with respect to solicitation and attempt and the solicited or completed crime. A defendant may be tried, but not punished, for solicitation and the completed crime or for attempt and the completed crime. Solicitation and attempt are said to "merge" into the completed crime.

Contrast conspiracy: Unlike a solicitation and attempt conviction, a conviction for conspiracy does *not* merge into a conviction for the completed crime.

In addition, a defendant may be tried, but not punished, for more than one inchoate offense (i.e., solicitation, conspiracy, and attempt) based on conduct designed to culminate in the commission of the same crime. MPC 5.05(3).

Note: The Double Jeopardy Clause generally prohibits a defendant from being convicted of both a crime and a lesser-included offense (i.e., an offense all the elements of which are also elements of the more-significant crime), such as robbery and larceny. Many jurisdictions characterize this prohibition as a "merger" of the lesser-included offense into the greater.

B. SOLICITATION

Solicitation is the:

i) Enticing, encouraging, requesting, or commanding of another person;

ii) To commit a crime;

iii) With the intent that the other person commits the crime.

1. Encouragement

The encouragement may take the form of enticement, incitement, request, or command. The crime is completed upon the encouragement. The other person need not agree to commit the crime.

2. Relationship to Other Crimes

If the other person does agree, the solicitor and the person being solicited may also become co-conspirators.

3. Defenses to Solicitation

a. Renunciation

At common law, renunciation was no defense to solicitation. Under the Model Penal Code, voluntary renunciation may be a defense, provided the defendant thwarts the commission of the solicited crime.

b. Factual impossibility

Factual impossibility is not a defense to solicitation. If a solicitor is part of group that was meant to be exempted by the statute, the solicitor cannot be guilty of solicitation (e.g., minor female soliciting sex cannot be guilty of statutory rape).

Example: D goes into a bar and asks X to kill D's husband. If X says no, D can be charged with the crime of solicitation. If X says yes, D can be charged with conspiracy to commit murder. If X actually kills D's husband, the solicitation charge would merge

into the underlying murder charge. D could then be charged with both conspiracy to commit murder (which does not merge—see the discussion below) and murder, but not solicitation (which does merge).

C. CONSPIRACY

Conspiracy is:

i) An agreement;

ii) Between two or more persons;

iii) To accomplish an unlawful purpose;

iv) With the intent to accomplish that purpose.

The majority rule and federal law, as well as the MPC, now require the commission of an overt act, which can be legal or illegal, in furtherance of the conspiracy to complete the formation of the conspiracy. At common law, no overt act was required for the conspiracy to be complete.

1. Agreement

The agreement need not be a formal document, or even in writing; an oral agreement is sufficient. An agreement need not be specifically articulated, but can be inferred from a concerted action by the defendants. Thus, depending on the circumstances, silence could even indicate agreement.

EXAM NOTE: Watch out for a situation in which a defendant shares an objective of the conspiracy, but helps the conspirators secretly, without their knowledge. There is no agreement with the defendant, so there cannot be a conspiracy. Note that the defendant could still be charged with aiding and abetting the conspirators' crime.

2. Number of Conspirators

At common law, there is no such thing as a unilateral conspiracy because two or more persons are required to form a conspiracy. This is often referred to as a "bilateral" approach to or theory of conspiracy.

However, the modern trend and the MPC is to allow a "unilateral" conspiracy. Under this approach, the focus of liability is on the individual defendant and his agreement to the object of the conspiracy. A unilateral conspiracy may be formed when *only one party* actually agrees, such as when another party merely feigns agreement, or if the alleged co-conspirators are ultimately acquitted.

a. Feigned agreement

When only one conspirator has the intent to agree, such as when the other conspirator is a governmental agent or pretends to go along with the crime to warn police, there is a conspiracy under the "unilateral" approach but there is no conspiracy at common law unless another participant is involved.

b. Protected by statute

When the purpose of a criminal statute is to protect a type of person (e.g., a statutory rape statute protects the underage participant), there is no conspiracy between the protected party and the targeted defendant.

c. Wharton Rule

Under the Wharton Rule, if a crime requires two or more participants (e.g., adultery) there is no conspiracy unless more parties than are necessary to

complete the crime agree to commit the crime. Although there is no conspiracy, the participants may be found guilty of the underlying crime itself. Because the MPC does not require the participation of at least two conspirators, this rule does not apply to conspiracies under the MPC.

d. Corporation and its agents

A corporation can conspire with its own agents with some limitations. In some jurisdictions, there can be no conspiracy between a corporation and a single agent of that corporation. A conspiracy between the corporation and multiple agents of the same corporation may in most jurisdictions satisfy the plurality requirement. A corporation or its agents can enter into a conspiracy with another corporation or agents of that corporation.

e. Prosecution of other conspirators

A conspirator cannot be convicted of conspiracy if all other conspirators are acquitted at the same trial. In other circumstances, such as when co-conspirators are never tried or apprehended, a conspirator may be convicted of conspiracy if the prosecution proves the existence of a conspiracy.

f. Spouses as co-conspirators

Common law did not consider husband and wife as co-conspirators because the law viewed them as a single entity. However, they could, as an entity, conspire with a third person. Nearly every jurisdiction has abolished this common law concept.

3. Unlawful Purpose

Under federal law and the modern trend, "unlawful purpose" is limited to criminal conduct. In some states, even the achievement of a lawful purpose through illegal means can be the subject of a conspiracy. If, however, the conspirators simply conspire to do something that is not illegal, they cannot be found guilty of conspiracy, even if they believed that what they were planning to do was illegal.

4. Specific Intent

Conspiracy is a specific intent crime. A conspirator must have the intent to agree, and the intent to commit the criminal objective. The intent to agree may be inferred from conduct of the parties.

Example: Conspiracy to commit arson requires specific intent, even though the substantive offense of arson only requires malice. Similarly, a conspiracy to commit a strict-liability crime requires intent.

Because the intent to agree and commit the crime are elements of conspiracy, criminal liability for a conspiracy cannot be based solely on knowledge of the existence of the conspiracy. For example, a merchant who supplies goods to a conspirator knowing that the conspirator intends to use the goods in furtherance of the objective of the conspiracy is not a member of the conspiracy simply because the merchant possessed such knowledge. Instead, the merchant must take an additional step to show such intent, such as selling the goods at an exorbitant price, basing the price of the goods on a percentage of the conspiracy's "take," or ordering specially manufactured goods that the merchant does not normally sell.

5. Overt Act Requirement

An overt act was not required at common law, but it is now a required element of a conspiracy under federal law, the MPC, and in a majority of states. When an overt act

is required, the conspiracy crime is not complete until the overt act is performed in furtherance of the conspiracy. The overt act can be performed by any co-conspirator, with or without the knowledge of all co-conspirators. The overt act can be lawful or unlawful. However, the MPC does not require an overt act if the conspiratorial crime is a felony in the first or second degree.

Contrast attempt: To constitute attempt, the defendant must have taken a substantial step toward commission of the crime. A mere preparatory act is insufficient for attempt.

6. Scope of Conspiracy

a. Crimes committed by co-conspirators

Under the Pinkerton rule, a conspirator can be convicted of both the offense of conspiracy and all substantive crimes committed by any other co-conspirators acting in furtherance of the conspiracy. Under the Model Penal Code, the minority view, a member of the conspiracy is not criminally liable for such crimes unless that member aids and abets in commission of the crimes.

b. Multiple crimes, single conspiracy

A single conspiracy may have numerous criminal objectives. Not all of the co-conspirators even need to know the identities of all of the other co-conspirators or all of the details of the criminal organization. It is only necessary that all co-conspirators agree to further the common scheme or plan. Multiple conspiracies arise when the objectives and/or crimes are not committed in furtherance of the same agreement, common scheme, and plan.

c. Unknown conspirators, single conspiracy

1) Chain relationship

Persons who do not know each other can be members of the same conspiracy if there is a **community of interest** in the achievement of the object of the conspiracy. A community of interest is usually found when the activities of each person resemble links of a chain, such as a scheme to acquire and distribute drugs. In such a conspiracy, all of the members of the community of interest are liable for the acts of the others in furtherance of the conspiracy.

2) Hub-spoke relationship

A scheme that resembles a hub with spokes, such as the processing of fraudulent loans by one person that were submitted by numerous other individuals, is less likely to have a community of interest. In such a case, the "hub" and each "spoke" are usually treated as having formed a separate conspiracy from all of the other hub-spoke combinations. Thus, the common hub will be liable for all of the conspiracies, but the spoke members are not liable for the acts of the other conspirators.

7. Impossibility

Factual impossibility (that it was factually impossible to complete the intended crime) is not a defense to conspiracy. Legal impossibility (that the intended act is not criminal in nature) may be a defense if the object of the agreement is not a crime.

Example: A and B agree to steal a painting from a house at night when the owners are out of town. The painting turns out to be missing from the house on the night that they break and enter to steal it. A and B will still be liable for conspiracy to commit burglary, despite the factual impossibility.

8. Withdrawal

a. Effect on liability for conspiracy

At common law, withdrawal was not a defense to conspiracy because the conspiracy is complete as soon as the parties enter into the agreement. Under the federal rule, which is also the majority rule, withdrawal is possible between the date of the agreement and the commission of the overt act. In order to withdraw, notice must be communicated to the other co-conspirators, or the police must be advised of the existence of a conspiracy in a timely manner. Upon completion of the overt act, the conspiracy is formed and withdrawal is no longer possible. Under the MPC and the minority view, subsequent withdrawal is possible only if the defendant acts voluntarily to "thwart the success" of the conspiracy.

b. Effect on liability for substantive crimes

A defendant may limit his liability as a co-conspirator for the substantive crimes that are the subject of the conspiracy by withdrawing from the conspiracy at any time after it is formed. For this purpose, he may withdraw by giving notice to his co-conspirators or timely advising legal authorities of the existence of the conspiracy even though such an action does not thwart the conspiracy.

While a defendant is not liable as a co-conspirator for crimes committed in furtherance of the conspiracy after an effective withdrawal from the conspiracy, the defendant may nevertheless be liable as an accomplice for subsequent crimes committed by his former co-conspirators for which he has given aid. (*See* I.D.2.c. "Withdrawal," *supra*.)

9. Termination

It is important to determine when a conspiracy ends for purposes of determining the statute of limitations and the admissibility of acts or declarations made by the conspirators in furtherance of the crime. Generally, the act of concealing the conspiracy is not treated as a part of the conspiracy.

10. Punishment

Jurisdictions vary widely with regards to penalty provisions for conspiracies. Some jurisdictions make conspiracy a misdemeanor regardless of the objective, while other jurisdictions provide maximum sentencing depending on the objective. Still others allow for a permissible maximum, regardless of the objective. Nevertheless, sometimes the sentencing for conspiracy is more severe than the punishment for the crime itself.

D. ATTEMPT

An attempt requires a specific intent to commit a criminal act coupled with a substantial step taken toward the commission of the intended crime, which fails to be completed. An attempt is:

i) A **substantial step** towards the commission of a crime; coupled with

ii) Intent to commit the crime.

If the crime is successfully completed, the attempt is merged into the completed crime.

1. Substantial Step Test

A subjective test, called the "substantial step" test, is applied to determine whether an attempt has occurred. Under this test, conduct does not constitute a substantial step

if it is in mere preparation; the act must be conduct that tends to effect the commission of a crime.

a. Acts

Any of the following acts may constitute a substantial step if they corroborate the defendant's criminal purpose (From the MPC):

i) Lying in wait, searching for, or following the intended victim;

ii) Unlawful entry into the place contemplated for the commission of the crime;

iii) Enticing the intended victim to go to such place;

iv) Possession of materials specially designed for committing the crime;

v) Possession of materials to be used in the commission of the crime at or near the place of commission; and

vi) Soliciting an innocent agent to engage in criminal conduct.

b. "Dangerous proximity" test

Some states continue to apply the traditional common-law "dangerous proximity" test. Under this test, an attempt does not occur until the defendant's acts result in a dangerous proximity to completion of the crime.

EXAM NOTE: Remember, a substantial step for purposes of attempt is not equivalent to the overt act required for a conspiracy. It is a much more significant act.

2. Specific Intent

The defendant must possess the specific intent to perform an act or attain a result, which, if completed, would constitute the target crime, even if the target crime is not a specific intent crime.

Example: Arson is not a specific intent crime, but attempted arson is. An attempt to commit a strict liability crime is also a specific intent crime.

There is no attempt to commit negligent crimes like involuntary manslaughter because a defendant's act cannot be both intentional and negligent.

3. Impossibility

Impossibility is not a defense to attempt if the crime attempted is factually impossible to commit due to circumstances unknown to the defendant. If, however, the act intended is not a crime (i.e., a legal impossibility), the defendant is not guilty of attempt. In such a case, even when statutes purport to have done away with the impossibility defense, there is always a provision that allows for legal impossibility.

Example: D shoots V, believing that V is sleeping. V actually was already dead. D is guilty of attempted murder, but not murder.

4. Abandonment

At common law, once the defendant has taken a substantial step toward the commission of the offense, the defendant may not legally abandon the attempt to commit the crime because of a change of heart. Upon the completion of a substantial step, the crime of attempt is completed; there can be no abandonment or withdrawal.

Some states do recognize voluntary abandonment as a defense to attempt. Even then, abandonment is not voluntary if it is motivated by a desire to avoid detection, a decision to delay commission of the crime until a more favorable time, or the selection

of another similar objective or victim. Abandonment by the defendant does not constitute a defense for an accomplice who did not join in the abandonment or withdrawal.

V. DEFENSES

A. GENERALLY

1. Justification and Excuse

Defenses may be divided into the categories of justification and excuse. When the defendant's actions, despite being criminal, are socially acceptable, the defendant has acted justifiably. Self-defense and defense of others are examples of justification defenses. When the defendant has a disability that makes the defendant not responsible for her actions, the defendant's criminal behavior is excused. Insanity, intoxication, and duress are examples of excuse defenses. This distinction does not affect the applicability or operation of these defenses.

2. Mistake of Fact

When a defendant is factually mistaken (e.g., the defendant thinks that the victim is holding a pistol that instead is a toy gun), the defendant may generally rely on a defense if the mistake is a reasonable one. In determining the reasonableness of the mistake, the defendant's physical characteristics, experiences, and knowledge are taken into account. An unreasonable factual mistake is a defense only to a specific intent crime.

B. SPECIFIC DEFENSES

1. Self-Defense

One who is not the aggressor is justified in using reasonable force against another person to prevent immediate unlawful harm to himself. The harm to the defendant must be imminent, not a threat of future harm. The defendant can use only as much force as is required to repel the attack.

a. Deadly force

Deadly force is force that is intended or likely to cause death or serious bodily injury. Deadly force may be justified in self-defense only when it is reasonably necessary to prevent death or serious injury or to prevent the commission of a serious felony involving a risk to human life.

b. Nondeadly force

Nondeadly force is force that is not intended or likely to cause death or serious bodily injury and may be used to repel nondeadly force.

c. Retreat

There is never an obligation to retreat before employing nondeadly force. Under the majority view, retreat is not required even when deadly force is used in self-defense. Under the minority view (states that follow the so-called "retreat doctrine"), retreat is required if it can be safely accomplished. Even under the minority view, however, retreat is never required when the person employing deadly force is in his own home (i.e., the "castle doctrine").

d. Imperfect right of self-defense

Imperfect self-defense occurs when the person claiming self-defense unjustifiably kills the attacker. The purpose of the rule is to reduce the charge from murder to voluntary manslaughter. The rule, adopted in most states, is applied when the

defendant cannot claim perfect self-defense for some reason. For example, a defendant honestly but unreasonably believes that deadly force is required to prevent death or serious bodily injury.

e. Aggressor's right to use self-defense

It is possible for an initial aggressor to gain the right to act in self-defense in two circumstances: (i) an aggressor using nondeadly force is met with deadly force, or (ii) the aggressor must, in good faith, completely withdraw from the altercation, and must have communicated that fact to the victim.

2. Defense of Others

A person has the right to defend others under the same circumstances that self-defense would be acceptable. Defense of others is not limited to defending family members, but extends to anyone the defendant reasonably believes has the right of self-defense.

3. Defense of Property

A person in lawful possession of property that is threatened by the conduct of another, and who has no time to seek assistance from law enforcement, may take reasonable steps, including the use of nondeadly force to protect the property. To use force, the defender must reasonably believe that the real property is in immediate danger of unlawful trespass or that personal property is in immediate danger of being carried away and that the use of force is necessary to prevent either. The force cannot be unreasonably disproportionate to the perceived harm.

There is no right to use deadly force in defending property, with one exception. Generally, a person may use deadly force to prevent or terminate forcible entry into a dwelling if the occupant reasonably believes that the intruder intends to commit a felony inside. The use of deadly force against an intruder exiting the dwelling is generally not permissible. A deadly mechanical device cannot be used to protect property, although non-deadly mechanical devices or objects (such as barbed wire) may be used.

Note: Any right to use deadly force in the protection of a dwelling is limited to the dwelling (i.e., one's occupied residence). Thus, a gardening shed on the edge of the property would likely not be covered by this right. Any room in the residence, however, would be covered.

EXAM NOTE: When analyzing a question in which it appears someone harmed or killed another to protect property, consider whether that person could argue that they were really attempting to protect their own life or the life of another (e.g., using deadly force to prevent someone from stealing a car if there is a baby in the car).

4. Arrest

A police officer or a person acting under police direction is justified in using reasonable force to make a lawful arrest or to prevent the escape from one already in lawful custody.

a. Right to arrest

The right of a police officer to arrest a suspect is often specified by statute. A police officer can lawfully arrest a suspect, with or without a warrant, if the suspect has committed a crime in the officer's presence or if the officer has probable cause to believe that the defendant committed a felony offense outside of his presence. A civilian acting without police direction in making an arrest (e.g., a "citizen's

arrest") who makes a mistake, even a reasonable mistake, as to the commission of the crime is not entitled to rely on this defense, but may do so if the civilian makes a reasonable mistake as to the identity of the perpetrator of the crime.

b. Use of force to arrest

A police officer can use nondeadly force to arrest a suspect. A police officer can use deadly force to arrest a suspect if the suspect represents a threat to either the officer or third parties.

c. Resisting unlawful arrest

A defendant may use nondeadly force to resist an unlawful arrest, but never deadly force. Some jurisdictions do not permit the use of force at all and require defendants to seek legal redress for an unlawful arrest.

5. Prevention of Crimes

Anyone can use deadly force to prevent the commission of a serious felony involving a risk to human life, and may use nondeadly force to prevent the commission of a felony or a breach-of-the-peace misdemeanor. A private citizen who makes a mistake, even a reasonable mistake, as to the commission of a serious felony by the victim is not entitled to rely on this defense.

6. Public Authority

Actions taken by public officials pursuant to legal authority (e.g., court ordered seizure of property, state-sanctioned executions) are justified.

7. Parental Authority

The use of reasonable force in the exercise of parental authority (i.e., discipline) by a parent or by a person in charge of a child (e.g., a teacher), is justified if exercised for the benefit of the minor child.

8. Duress

A third party's unlawful threat which causes a defendant to reasonably believe that the only way to avoid death or serious bodily injury to himself or another is to violate the law and causes the defendant to do so, allows the defendant to claim the duress defense. The defendant's fear of harm must have been both an actual fear and objectively reasonable.

Duress is not a defense to intentional murder. A defendant charged with felony murder may claim duress as a defense to the underlying felony and avoid conviction for felony murder.

9. Necessity

If the forces of nature (e.g., storm, fire) cause the defendant to commit what would otherwise be a crime, the defendant may be justified in doing so based upon necessity. The law prefers that the defendant, when faced with two evils, avoids the greater evil by choosing the lesser evil, e.g., the destruction of property to prevent the spread of a fire.

The defendant is not entitled to assert necessity if he set the natural forces in motion (e.g., set the fire) or if there is a reasonably apparent noncriminal alternative. In addition, economic necessity does not justify theft. For example, an unemployed worker may not steal food from the grocery store.

Necessity is a result of natural forces; duress results from human actions.

Note, though, that the MPC does not explicitly limit the defense of necessity to natural forces.

EXAM NOTE: While the defendant may escape criminal liability, the defendant may be compelled by tort law to reimburse the victim for any losses.

10. Consent

Consent of the victim is not a defense to a crime unless the consent negates a required element of the crime or precludes the harm sought to be avoided by the crime. Such consent must be voluntarily and freely given, involve no fraud, and given by one competent to consent.

Consent is a defense to rape (unless the woman is a minor), since rape is defined as sexual intercourse without consent. Consent is also a defense to kidnapping if an adult (but not a minor) consents to traveling with the defendant.

a. Bodily injury

Consent to bodily injury or to conduct that may cause bodily injury may constitute a defense when the injury is not serious or, with regard to a sporting event or similar activity, the conduct and injury are reasonably foreseeable (i.e., boxing).

b. Ineffective consent

Consent may be ineffective when given by a legally incompetent person; by a victim who is unable to make a reasonable judgment due to age, mental disease or defect, or intoxication; or by a victim whom the law seeks to protect. Consent obtained by fraud, duress, or deception may also be ineffective.

11. Entrapment

Entrapment is the conception and planning of an offense by a law enforcement officer, and his procurement of its commission by a defendant who would not have committed that offense except for the trickery, persuasion, or fraud of the officer. If an officer merely offers an already-predisposed person the opportunity to commit a crime, it is not entrapment. In other words, the defendant must lack any pre-disposition to commit the crime. Entrapment can occur through the use of an undercover agent, but not by a private citizen. The modern trend allows a defendant to deny participation in an event, yet still raise the defense of entrapment. Traditionally, the defendant was precluded from using the entrapment defense if he denied his participation in the event.

a. Subjective approach

The subjective approach to defining entrapment is the majority position among the states and has also been adopted by the U.S. Supreme Court. Under this approach, the focus is on the defendant. Entrapment occurs when (i) the crime is induced by a government official or agent, and (ii) the **defendant was not predisposed** (i.e., ready and willing) to commit the crime.

b. Objective approach

Under the objective approach, which has been advanced by the MPC and adopted by a few states, the **focus is on the government's action** and the effect those actions would have on a hypothetical innocent person. This approach requires the government official or agent to have induced or encouraged the defendant to commit a crime by employing methods of persuasion or inducement that **create a substantial risk** that the crime will be committed by an otherwise law-abiding citizen.

12. Alibi

An alibi is a defense whereby a defendant denies his participation in a crime because he asserts that he was elsewhere when the alleged crime was committed. An alibi is not an affirmative defense; the defendant is not required to prove that he was elsewhere when the crime was committed. Instead, the burden remains on the prosecution to prove that the defendant was the person who committed the crime.