NAILING  THE BAR

Simple CRIMES Outline

Tim Tyler, Ph.D., Attorney at Law

NINETY PERCENT of the LAW in NINETY PAGES®

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NINETY PERCENT of the LAW in NINETY PAGES.®

It takes thousands of pages to completely explain the law of **CRIMES**. But such extensive knowledge is unnecessary to succeed in law school or on bar examinations.

This book gives a simple explanation of the common law of **CRIMES** and broadly adopted modern rules for beginning law students. The purpose of this book is to provide law students with an **understanding** of **basic criminal law** without a lot of unnecessary blather.

This book simply tells beginning law students the **BLACK LETTER LAW** and **BRIGHT LINE RULES** they need to know to succeed in law school. The explanation is given in **plain English** with the aid of **examples**. Other than that, this book deliberately avoids or minimizes discussion of case law and historical development.

The reason for this deliberate omission is that extensive discussion of case law, minority holdings and historical development is **UNNECESSARY** and often **more CONFUSING than helpful** to beginning law students trying to gain a basic understanding of the law.

YOUR PROFESSORS will probably focus on the details of the law in one or more narrow areas of their personal interest. Those details may not be covered in sufficient depth here. **As you realize a need for more detailed knowledge** in a particular and narrow area of law, consult an appropriate **hornbook from your library** or some other authoritative reference source.

OTHERWISE, THIS BOOK HAS ALL THAT YOU NEED to quickly understand the basic rules of law.

UNDERSTANDING THE LAW IS NECESSARY BUT NOT ENOUGH to succeed in law school! You must also be able to **explain** how the law applies to fact patterns presented on examinations.

THEREFORE, after you have developed an understanding of the law of crimes using this book, you MUST make additional efforts to prepare for your law school exams in crimes. To do that, use Nailing the Bar's **How to Write Crimes Law School and Bar Exams (Ce)**.

To test your knowledge and prepare for multiple-choice exams, use Nailing the Bar's **333 Multiple-Choice Questions for First-Year Law Students (MQ1e)**.

Details on that publication and how to obtain it are given at the back of this book.

Case Briefs, Commercial Outlines, and Law School

Law school students are generally told to buy the latest edition of hard-bound casebooks and hornbooks that are inordinately expensive.

A big part of your "law school education" is the gradual realization that you can learn the law better, faster, and much cheaper by using "commercial outlines" and "canned briefs" than by trying to read casebooks and hornbooks. These materials explain the law to you in understandable terms. And if you want to see the original case decision, why not go on the internet to see the real case decision? One excellent source for viewing federal cases and the cases of many states is **http://lp.findlaw.com**. Why not read what the justices really said instead of trying to decipher a hacked up version?

Mistakes You Find

We make mistakes like everyone else. If you find mistakes in this book please tell us so we can correct them. By "mistake" we mean typos, calculation errors, reference errors and things like that. Just send us a message **at info@practicalsteppress.com**.

But we definitely do not want to hear about differences of opinion about arguable issues. So if your professor says the rule is different that what we say here, humor your professor. But also do your own independent study and decide those issues for yourself.

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Chapter 1: Criminal Law Overview

Criminal Law is one of the simpler areas of law. The focus in law school and Bar exams is generally on the issues of "What **common law crimes** can the defendant be charged with?" "What **plausible defenses** can the defendant raise?" And, "How does **broadly adopted modern law compare** to common law?"

When Bar Examiners test you on criminal law principles, they test you on **common law** principles and **broadly adopted modern rules**. There are a lot of people eager to tell you about things like the "Model Penal Code". But that has not been broadly adopted. And it is not what the Bar Examiners want to hear. So citing ideas that are not actually adopted law on Bar Exams is a very bad idea. The purpose of this book is to help you succeed, so here you are only going to be told about **common law and broadly adopted modern rules**. [1]

Precision of terminology and attention to exact language is extremely important in all legal studies. You must pay attention to the **exact words** used to explain the law and strive to use **exact words** in answering law school examinations! It is tempting to argue that quibbling over **exact words** is "merely semantics." Of course it is. So what? Remember this:

SEMANTICS is the mother's milk of lawyers!

A **crime** is usually a **wrongful act** against society for which the state seeks punishment. However, occasionally it is a deliberate **breach of a duty to act**. In the explanation given below the phrase "**criminal act**" always includes deliberate criminal breaches of duties to act.

Usually the criminal acts must be **done with criminal intent**, but there are a few **strict liability crimes** for which the prosecution does not have to prove criminal intent. The strict liability crimes are explained below.

All criminal prosecutions have are brought by **public prosecutors** (NOT private parties) to **punish** defendants for their **criminal acts**.

1. Coordinating this Outline with Your Class

Every criminal law professor teaches this subject in a different order. Some start with "crimes against property" followed by "crimes against the person". Some start with solicitation and conspiracy, and some save those issues for the end of the class.

This outline starts with some basic ideas, but also includes some issues that you will not fully understand until it is covered in your class later. Consequently you should read this outline first, and then read it a second time before you take exams.

[1] Law professors and legal writers often sit on various committees that dream up "uniform codes", "restatements" and "model codes". Sometimes legislatures adopt those ideas, and they can become "broadly adopted". That is when you need to know and cite the law, and that is what you will learn here. But when those ides are not broadly adopted, they are not the law to be citing on a Bar Exam.

2. Criminal Law Distinguished from Criminal Procedure

Criminal law classes traditionally teach about the felonies recognized by the common law, the legal elements the prosecution must prove for each crime alleged, affirmative common law defenses, and broadly adopted modern rules of criminal law.

Criminal procedure classes traditionally teach about the guarantees established by the 4th, 5th, 6th, and 8th Amendments to the U.S. Constitution to prevent the federal government from unfairly prosecuting individuals for crimes. Those guarantees were later extended to bind States to many of the same rules by the 14th Amendment.

Some criminal law concepts lie in the gray area between these two broad subject areas. They are seldom tested, but should be explained so they don't fall through the cracks.

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A. Corpus Delicti

Before a defendant can be charged with any crime there must be a reasonable proof that a crime has actually been committed. The presentation of evidence that proves a crime has been committed is called the **corpus delicti.** Corpus delicti roughly means "body of the crime".

Generally corpus delicti means that **a defendant cannot be convicted of a crime solely on the basis of a confession**. And as a corollary many Courts have held that a defendant **cannot be convicted of a crime solely on the basis of an accusation by an accomplice**.

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B. Probable Cause

A defendant cannot be prosecuted for a crime unless there is **evidence supporting a reasonable suspicion a crime has been committed and the defendant is the person who committed it**. This is called **probable cause**.

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C. Court Jurisdiction

State Courts **have general jurisdiction over all crimes that occur within the State**. But if a crime crosses State lines or defendants are outside State lines, special rules have been developed.

- **Homicides**: Under common law proper jurisdiction was in the State **where a mortal wound was inflicted**. Modernly some States exercise jurisdiction **if death occurs within the State**.
- **Theft crimes**: Under common law proper jurisdiction was in the State **where property was stolen**. Modernly some States exercise jurisdiction **if stolen property is found** within the State.

- **Conspiracies**: Under common law proper jurisdiction was in the State **where a conspiracy formed**. Modernly some States only exercise jurisdiction if the conspiracy **goal is to commit a crime within** the State.
- **Incitement of crimes**: Under common law States often lacked jurisdiction to prosecute defendants who incited crimes within the State if they were physically outside the State. Modernly States often exercise jurisdiction over any defendant causing crimes to occur within the State regardless of the defendant's physical location.

3. Criminal Prosecutions Distinguished from Tort Actions

Criminal prosecutions should not be confused with tort actions. Criminal actions are "**prosecutions**" while tort actions are "**civil actions**".

Prosecutions are "**criminal actions**" brought by and on behalf of **the State** against defendants who commit **wrongful acts against society**. In contrast, **tort actions** are "**civil actions**" brought by and on behalf of **plaintiffs** against defendants for **wrongful acts against the plaintiff**. The plaintiffs are usually private (non-government) parties, but that does not necessarily have to be true. A government agency can bring a tort action against a defendant the same as private parties.

The purpose of a **criminal action** is to punish "**criminals**", not to award money judgments to plaintiffs. The purpose of a **civil action** is to **obtain a money judgment** against the defendant to **compensate** the plaintiff **for damages**, to prevent the defendant from reaping **unjust enrichment** (legal restitution), and only occasionally to **financially punish** the defendant from wrongful acts in the future (exemplary damages).

The **burden of proof in a criminal action** is to prove each legal element of the crime **beyond a reasonable doubt**. In contrast the **burden of proof in a tort action** is to prove each legal element by a **preponderance of the evidence**.

Criminal defendants are found **"guilty"**. Tort defendants are "**liable**" but **never "guilty"**.

4. The Crimes of Interest

Criminal law classes focus on **common law** crimes and a few **broadly adopted rules** and either totally ignore or give passing reference to many, many other crimes. For purposes of exams, only common law crimes and broadly adopted rules are tested to any extent.

Your professors and text books may briefly mention or list other crimes but they are not of much interest and discussing them on exams, other than giving passing reference to them is a **waste of time**.

For example, do not waste time discussing joy riding (taking cars with intent to return), extortion, black mail, prostitution, pandering, perjury, subornation, misprision, drug offenses, vandalism, malicious mischief, disturbing the peace, child abuse, smuggling, "aggravated" assault, traffic offenses, or weapons violations. Often these crimes should not be mentioned at all. Otherwise, only explain and discuss them very briefly.

Often exam questions mention that two or more defendants are engaged in some sort of criminal activity (e.g. smuggling) as part of the fact pattern, but it is not the sort of crime that is the focus of law school exams. The purpose of that is only to create a "story line" so other criminal law issues such as **vicarious liability** are raised as issues for discussion. So you need to recognize and explain the defendants were engaged in criminal activity (e.g. smuggling) only to the extent it is necessary to analyze and discuss the true focus of the question (e.g. vicarious liability).

As a general rule the **amount of exam time to spent** discussing a crime should reflect the amount of **class time spent** discussing the same subject.

5. Classification of Crimes

Crimes are classified in the study of criminal law for various purposes.

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A. Felonies vs. Misdemeanors

Crimes are classified as **felonies** or **misdemeanors** based on the **severity of the maximum possible punishment**. Felonies are generally crimes **punishable by death or imprisonment for more than a year**. Any crime that is not a felony is a misdemeanor.

Whether a crime is a felony depends on the punishment possible, not the punishment actually suffered. A person may be a felon even though they never were imprisoned.

Defendants convicted of felonies are often unable to vote, obtain certain licenses (e.g. to be a notary public), get a passport, sit on a jury or hold public office.

It is common for law students to memorize which crimes were felonies under the early common law and which were not. That is generally a waste of time. Save your brain for something else.

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B. Inherently Dangerous Felonies

At common law certain felonies were considered so inherently dangerous that any death caused by acts done during the commission of those felonies could be prosecuted as a murder under the "Felony-Murder Rule" as long as the death was caused by the inherent dangers of the crime. The Felony-Murder Rule will be explained in greater detail later in the explanation of murder.

Modernly the courts have generally held that unless defined otherwise by statute the Felony-Murder Rule is restricted in its application to only those felonies that were recognized as dangerous under common law. Those now consist of only **burglary, rape, robbery** and **arson.** The other dangerous common law felonies have changed to something else. [2] Although legislatures can expand this list, courts have held that the list cannot be expanded by judicial interpretation.

[2] Mayhem is now felony battery and will still be sufficient for charging murder based on intent to cause 'great bodily injury'. Sodomy without consent is now considered 'rape' and qualifies for the Felony-Murder Rule under that heading. Sodomy with consent is now considered a recreational activity.

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C. Degrees of Murder

Under common law there were no degrees of murder, but modernly statutes define **first-degree murders.** This is explained in more detail below in the explanation of murder. All murders that are not first-degree are classified as second-degree murder.

6. Order of Presentation and Burden of Proof

The prosecution in every criminal action has the burden of **proving each and every required legal element of an alleged crime beyond a reasonable doubt**. The process of doing that is called presentation of the **case-in-chief**, and it is the first phase of every trial.

While the prosecution is presenting its case-in-chief, the defense may challenge the reliability of prosecution witnesses, exhibits and testimony through cross-examination of the prosecution's witnesses. These challenges are a type of **passive defense**.

After the prosecution presents its case-in-chief it "rests". Then the defense takes the floor and gets to present its "defense", and can present its own witnesses, exhibits and testimony.

The "defense" argument combines both **passive defenses** and **affirmative defenses**. **Passive defenses** are evidence presented by defendants suggesting the prosecution **has not met or cannot meet its burden** to prove one or more required legal elements of the alleged crime beyond a reasonable doubt. An example of a passive defense might be testimony that the defendant did not intend to hurt an alleged victim.

Affirmative defenses are claims by defendants that even if the prosecution can prove every required legal element of the alleged crime, **the defendants had a legal right to act** as they did anyway. An example of an affirmative defense might be testimony that the defendant was acting in self-defense.

A defendant cannot raise affirmative defenses until after the prosecution has rested, and if an affirmative defense is claimed the defense has the **burden to prove each required legal element** of the claimed affirmative defense.

All the defense has to do is create "reasonable doubt". It does not have to prove anything with a "preponderance of evidence" or prove anything "beyond a reasonable doubt".

7. The Criminal Act– Actus Reus

ALL criminal prosecutions must prove the defendant **deliberately committed a criminal act** (including deliberate breaches of duties to act). This deliberate act is called the **actus reus** (evil act) of the crime. There are no exceptions to this rule. No defendant can be convicted of any crime unless it can be proven they deliberately committed a criminal act.

The simplest and most obvious passive defense is a claim the defendant did not commit the criminal act claimed.

> **For example:** Dan is charged with robbing a store. The prosecution must prove the store was robbed and that Dan is the one who robbed it. Dan's obvious passive defense is to claim he is NOT the one who robbed the store.

Crimes alleging a **deliberate breach of a duty to act** are called **criminal negligence**, and **recklessness** is a closely related concept.

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A. Criminal Negligence

Criminal negligence is a **deliberate breach of a pre-existing duty to protect others from foreseeable extreme risks**. It is a criminal act when it causes a criminal result.

> **For example:** Buffy deliberately leaves her infant Sonny in the car on a hot day. He dies. She had a duty to protect Sonny from harm because he was her child, and she deliberately breached her duty by leaving him in the car. Buffy can be charged with involuntary manslaughter based on criminal negligence.

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B. Recklessness

Recklessness is a **deliberate creation of foreseeable extreme risks to others**. It is, by itself, a criminal act when it causes a criminal result.

> **For example:** Dan and Dick engage in a street race. A pedestrian gets killed. They deliberately created foreseeable extreme risks to others. They can be charged with involuntary manslaughter based on recklessness.

8. The Strict Liability Crimes

A few crimes are **strict liability crimes**. That means the only thing the prosecution has to prove is that the defendant **committed a criminal act**. The prosecution does not have to prove defendants **intended** to commit the criminal acts, that they **knew** the acts they did were illegal, or that they intended for their acts to **cause a criminal result**.

The three categories of strict liability crimes are:

- Sexual acts with minors (e.g. statutory rape, child molestation, etc.);
- Traffic offenses (e.g. speeding, reckless driving, etc.); and
- Regulatory offenses (e.g. violating occupational safety rules).

> **For example:** Dan is 25 and he is charged with having sexual intercourse with Vickie, who is only 15 years old. If the prosecution proves Dan had sex with Vickie, he is guilty of having sexual relations with a minor and it **doesn't matter what he knew or thought**

because this is a **strict liability crime**. If his attorney tries to introduce evidence that he thought Vickie was an adult or was willing to have sex with Dan the judge will exclude the evidence and chastise the attorney for being an idiot.

9. Criminal Intent – Mens Rea

For **ALL** crimes that are not **strict liability** crimes the prosecution must prove the defendant acted with **criminal intent**, and that **evil intent** is called the **mens rea** of the crime. It is also referred to as **malice**.

The **nature of the criminal intent** the prosecution must prove **varies** depending on the crime charged. The differences are both subtle and important. The mens rea necessary to convict a defendant for one crime may be insufficient to convict them for a different crime. The necessary "malice" that must be proven for one crime, like murder, is very different from the sort of "malice" that must be proven for a different crime like arson.

Since **criminal intent** must be proven almost every time by the prosecution, **lack of intent** is also one of the most common **passive defense** arguments raised by defendants.

When there is no express statement of "intent" by a defendant the prosecution must argue **actions imply intentions**. This is called **implied criminal intent**.

> **For example:** Dan is charged with battery for punching Vick in the nose. The prosecution must prove Dan punched Vick and intended to punch Vick. But if the prosecution presents evidence Dan did punch Vick, that fact alone implies he intended to punch Vick. If Dan claims it was an accident or some sort of involuntary act on his part he has the burden of explaining how or why he punched Vick without meaning to.

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A. Specific Intent Crimes

Some crimes are **specific intent crimes**. Specific intent crimes are criminal acts done with **intent to cause a specific criminal result**. But the **prosecution usually does NOT have to prove any criminal result actually occurred** when a specific intent crime is charged.

> **For example:** Dan gets drunk and starts riding around on Vick's bicycle. He is charged with larceny. Larceny is a specific intent crime, so the prosecution must prove Dan **intended to permanently deprive** Vick of his bicycle. But it does NOT have to prove Vick actually lost his bicycle.

The specific intent crimes are:

- Solicitation (to commit some other crime);
- Conspiracy (to pursue some illegal goal);
- Assault;
- Theft (larceny, embezzlement, receiving and false pretenses);
- Robbery;

- Burglary;
- Attempted crimes (any attempted crime);
- Receiving stolen property;
- Voluntary manslaughter (requires intent to kill); and
- Murder (when intent to kill is alleged).

Of these crimes the exceptional situations when the prosecution must prove the defendant **specifically intended** to cause a criminal result and DID cause a criminal result are **voluntary manslaughter** and **murder with intent to kill**. Those two crimes require the prosecution to prove the defendant **intended to kill** someone and **did kill** someone. For the other crimes above the prosecution does not have to prove that any "harmful" result occurred at all.

> **For example:** Dan decides to break into Vickie's house to steal money. He climbs in through an open window, but then changes his mind and leaves without taking anything and without causing any damage. He is still guilty of both burglary and attempted larceny because he entered the house with the **specific intent** to steal.

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B. General Intent Crimes

Crimes that are not specific intent crimes are **general intent crimes**. General intent crimes are **criminal acts that cause a criminal result**. The prosecution must prove the defendant intentionally committed a criminal act, but it **does not have to prove the defendant intended to cause a criminal result**. The criminal act may be **criminal negligence** or **recklessness**.

> **For example:** Dan gets drunk, drives recklessly, crashes and kills Vickie. He is charged with involuntary manslaughter. Involuntary manslaughter is a general intent crime, so the prosecution only has to prove Dan **intentionally drove** while he was drunk (the **criminal act**). That was **reckless** because he deliberately created foreseeable extreme risks to others and it **caused the death** of Vickie (the **criminal result**). The prosecution does not have to prove Dan intended to kill anyone.

The general intent crimes are:

- Battery;
- Arson;
- Rape;
- Criminal negligence (e.g. child endangerment);
- Recklessness (e.g. reckless endangerment);
- Involuntary manslaughter; and
- Murder (when intent to kill is not alleged).

For ALL of these crimes the prosecution must prove the defendant **caused a criminal result**.

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C. Importance of Distinguishing Specific and General Intent Crimes

The importance between **specific intent** crimes and **general intent** crimes is that for both types of crimes the prosecution must prove the defendants acted with **criminal intent**, and criminal intent may be **implied** by the acts of defendants. But defendants charged with **general intent** crimes are not allowed to claim their actions were the result of an **innocent mistake** UNLESS a reasonable, sober person might have made the same mistake. Defendants charged with **specific intent** crimes can claim their actions were the result of any innocent mistake, whether it is a reasonable mistake or not.

This difference is most important when voluntary intoxication is raised as a defense.

> **For example:** Dan gets drunk and thinks his girlfriend Buffy would enjoy it if he went to her house and had sex with him. So he goes into her house and has sexual intercourse with her against her will. Dan is charged with **burglary** and **rape**. Burglary is a specific intent crime and the prosecution must prove Dan entered the house without consent for the specific purpose of raping Buffy, not to have consensual sex with her. Rape is a general intent crime and the prosecution must prove Dan intentionally had sexual intercourse with Buffy, and it was done without her consent. If Dan claims he was so drunk he thought Buffy wanted to have sex with him at the moment he entered the house, and the jury believes that, his intoxication is a valid defense to the **burglary** charge because prosecution for that requires proof beyond a reasonable doubt that he intended to rape Buffy at that moment, not to have consensual sex with her. But if Dan claims he was too drunk to realize Buffy was unwilling to have sex with him at the moment of sexual intercourse that is no defense to the rape charge because it is a **general intent** crime and a reasonable sober person would not have made that mistake.

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D. No Transferred Intent in Criminal Law

Transferred intent is an intentional tort concept, not a crime concept. There is no "transferred intent" in criminal law. **Crimes are offenses against society** and society punishes criminal defendants, not individual plaintiffs.

If defendants commit criminal acts, and act with the necessary criminal intent, they have offended society as a whole and are liable for prosecution, **no matter how inept the defendants are**, and **regardless of whom they injure**. And there does not even have to be any injury to anyone or anything at all for specific intent crimes to be committed.

> **For example:** Marvin wants to kill Alice. He shoots and accidentally kills Betty instead. He is guilty of the murder of Betty because he intended to kill someone (Alice) and did kill someone (Betty). It does not matter that the person he killed was not whom he intended.

When a defendant deliberately **exposes others to foreseeable extreme risks**, causing injury, they are liable for the criminal result based on a finding of **criminal negligence** or **recklessness** rather than based on the concept of transferred intent. This is a very subtle difference.

> **For example:** Marvin wants to frighten Alice. He shoots and accidentally shoots Betty instead. If Betty sues him for **tortuous battery** he generally will be held liable based on the concept of **transferred intent**. But if Marvin is prosecuted for **criminal battery** he will be guilty because he deliberately shot the gun **recklessly**.

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E. Implied Intent and Mistake of Fact

Actions imply intentions, but if the actions are the result of a **mistake of fact** the implication can be negated. A claim of **mistake of fact** is a valid passive defense argument when there is no evidence to expressly prove criminal intent, and criminal intent is only implied by the acts of the defendant.

1) Any mistake of fact is a valid defense to specific intent crimes

Any mistake of fact is a valid defense argument to a **specific intent crime** if it tends to negate a finding of implied criminal intent.

> **For example:** Cheney shoots his lawyer in the face and he is charged with **attempted murder**. His act **implies criminal intent** to kill his lawyer. But he may argue he thought his gun was not loaded. If the finder of fact (e.g. a jury) believes his story, **no matter how unreasonable** it seems to be, it **negates a finding of implied criminal intent** because attempted murder is a **specific intent** crime.

2) Only reasonable mistakes of fact are defenses to general intent crimes

A mistake of fact is NOT a valid defense to a **general intent crime** UNLESS it is a **reasonable** mistake. That means the finder of fact must conclude a <u>reasonable person with the same knowledge and in the same position as the defendant</u> could make such a mistake.

> **For example:** Cheney shoots his lawyer in the face and he is charged with **reckless endangerment**. His act **implies criminal intent** to deliberately create foreseeable extreme risks to his lawyer. But he may argue he thought his gun was not loaded. His claim will NOT **negate a finding of implied criminal intent** (deliberate creation of extreme risks) unless the finder of fact finds his mistake was <u>reasonable</u>.

10. Criminal Intent and Act Must Coincide

As stated above, all crimes require proof of a **criminal act** (actus reus). And all crimes except the strict liability crimes also require proof of **criminal intent**. When criminal intent (mens rea) is a required legal element, the prosecution must also prove the required criminal intent **existed at the same time** as the criminal act. This is called **coincidence**. If the defendant does not have criminal intent at the time of the criminal act there is no crime.

> **For example:** Dan decides to murder his co-tenant Vick so he buys some poison (he has criminal intent). He hides the poison in the refrigerator in his room intending to put his plan into action the next week. A day later Vick sneaks into Dan's room looking for a beer,

drinks the poison by mistake and dies. Dan cannot be charged with the death of Vick because he **never acted with intent** to kill Vick.

11. Prosecution Must Often Prove Lack of Consent

When **lack of consent** is a legal element of a crime the burden is on the prosecution to prove it, not on the defense to disprove it. This is substantially different from tort law. [3]

- **Trespassory takings**: For **larceny** the prosecution must prove the defendant took something without the consent of the "rightful possessor".
- **Trespassory conversion**: For **embezzlement** the prosecution must prove the defendant converted personal property to personal use without the consent of the "rightful possessor".
- **Trespassory entry**: For **burglary** the prosecution must prove a structure was entered without consent of the "rightful occupants".
- **Trespassory touching**: For **battery** the prosecution must prove a touching was not consensual, and for **rape** the prosecution must prove sexual penetration was not consensual.

- **Consent obtained by misrepresentation or duress**: Consent obtained by misrepresentation or duress is always legally invalid.

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A. Consent by Parties Lacking Capacity is Invalid

Legal consent cannot be given by a person lacking capacity to consent.

> **For example:** Lolita is 16 years old, and she lets Juan put a tattoo on her breast that says, "Property of Juan". Juan is guilty of **battery** the same as he would be if he had tied Lolita up and did the same thing against her express will because she is a minor and **cannot legally consent** to this "touching" which is patently harmful to her (even if she thinks it is a good thing at the moment).

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B. Consent Obtained by Fraud or Duress is Invalid

Consent is only effective if it is **voluntary** and given by a **fully informed** person. Therefore, there is no effective consent if the victim of a crime "consents" under **duress** or because of a **trick** or **misrepresentation**.

However, there are two types of "fraud" and consent obtained by one type is effective.

[3] In tort law lack of consent is not a legal element for the plaintiff to prove. Rather if a defendant claims the plaintiff consented to some act, it is an affirmative defense and the burden is on the defendant to prove it.

1) Fraud in the factum

Fraud in the factum is a factual misrepresentation of a proposed act. Consent to an act obtained by fraud in the factum is NOT effective.

> **For example:** Pauly Shore has sex with Jennifer Lopez by entering her room in the dark and impersonating Julio Iglesias. J-Lo was misled as to the true fact about who she was having sex with, so it was **fraud in the factum**. That makes her consent ineffective and Pauly is guilty of rape.

2) Fraud in the inducement

Fraud in the inducement is a misrepresentation of the benefits to be expected from a proposed act. Consent to an act obtained by fraud in the inducement IS legally effective.

> **For example:** Pauly Shore has sex with Jennifer Lopez by falsely promising he will marry her. After having sex Pauly refuses to marry her. J-Lo was only misled about the benefits she would receive, so this is **fraud in the inducement**. That makes her consent effective, so Pauly is NOT guilty of rape.

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C. Illegal Consent

Generally the law will not recognize consent to a battery that threatens great bodily injury, and a victim cannot effectively consent to be maimed, killed or otherwise seriously injured.

12. Criminal Causation

All general intent crimes require the prosecution to prove that the defendant CAUSED a **criminal result**. Two **specific intent** crimes, **voluntary manslaughter** and **murder with intent to kill** also require the prosecution to prove the defendant CAUSED a **criminal result**, a homicide.

Causation in criminal law is exactly the same as causation in tort law. This is often covered in much more detail in tort classes and in tort outlines so it will only be explained briefly here.

The prosecution must prove the acts of the defendant were the **actual cause** and the **proximate** (legal) **cause** of the required **criminal result**. **Actual cause** means the criminal result would not have occurred **but for** the acts of the defendant. When there are two or more criminal defendants, **substantial factor** analysis applies the same way it applies in tort law.

Proximate cause means the acts of the defendant were the direct and natural cause of a criminal result through a chain of events that was not broken by an **unforeseeable intervening event**. An unforeseeable intervening event is a **reasonably unforeseeable act by a third party** or an **act of God or nature** occurring after the defendant's wrongful act that is **also an actual cause** of the criminal result.

An event is **reasonably unforeseeable** to a defendant if it is improbable or unlikely. The fact that an event is "possible" does not make it probable or likely. It is possible you will win the lottery. But it is not very likely.

Crimes and **intentional torts** are, by law, **unforeseeable acts** UNLESS defendants know, at the time they act, that their acts are likely to cause subsequent criminal acts or intentionally tortuous acts by others. So they are usually unforeseeable intervening events.

Negligent acts by others are, by law, **reasonably foreseeable** and are never unforeseeable intervening events.

If criminal acts cause **foreseeable results** they generally are the proximate cause of the result even though the result occurs by an **unforeseeable sequence of events**. And if criminal acts cause a result through a **foreseeable sequence of events** they generally are the proximate cause of the result, even though the result that occurs was unforeseeable. But if a criminal act causes an **unforeseeable result** through an **unforeseeable sequence of events**, it generally DOES break the chain of causation and the defendant is relieved of criminal liability.

> **For example:** Dan poisons Vick, intending to murder him. Vick is taken to the hospital where Dr. Doug determines Vick is certain to die an excruciating death. Dr. Doug euthanizes Vick to put him out of his misery (deliberately kills him). Since that is an **unforeseeable criminal act** it cuts off Dan's liability and he can not be prosecuted for murder. He can only be prosecuted for **attempted murder**.

13. Direct and Vicarious Criminal Liability

Defendants are **directly liable** for their own criminal acts, but they may also be **vicariously liable** for the criminal acts of accomplices and co-conspirators, even if they were not present and knew nothing of those other crimes.

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A. Direct Liability

Defendants are always **directly liable** for their **own criminal acts**.

- If the criminal acts comprise **strict liability crimes** they are **directly liable** and no criminal intent is necessary;
- If the criminal acts are done with specific intent they are **directly liable** and no criminal result is necessary;
- If the criminal acts are done with **general intent causing a criminal result** they are **directly liable**.

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B. Vicarious Liability of Accomplices and Conspirators

Defendants may be **vicariously liable** for the criminal acts of others under two theories: **accomplice liability** and **conspiracy liability**.

1) Accomplice liability

Accomplices are people who are either **directly liable** for committing crimes OR **vicariously liable** because **their own criminal acts directly and naturally caused the crime** to be committed or because they helped the criminals **escape arrest**, **escape prosecution**, or **otherwise benefit** from the crime after it was committed.

Under common law accomplices were often divided into groups called **principals** and **accessories**, and those groups were sub-divided again into **principals in the first degree, principals in the second degree, accessories before the fact**, and **accessories after the fact.** Modernly these categories have largely been abandoned and explaining all of this on exams is largely a waste of time.

All that is important modernly is that all accomplices are liable for crimes their own criminal acts **directly and naturally helped cause** or if they **knowingly help** criminals after crimes have been committed.

2) Conspiracy liability

Conspirators are people who agree to work together to pursue an illegal goal. The "illegal goal" is usually a crime. After defendants join a conspiracy they are **vicariously liable** for all crimes committed by co-conspirators within the scope of the conspiracy agreement. The **conspiracy ends** when the conspiracy goal is **abandoned or attained**.

> **For example:** Huey urges Louie and Dewey to rob a bank, and he tells them they should take a hostage to help them escape. Louie and Dewey decide to rob the bank, but they agree they will not take any hostages. When Louie shows up to rob the bank Dewey is not there. Louie robs the bank by himself, and he takes a teller hostage. All three are subsequently arrested.
>
> State v. Louie: Louie is **directly liable** for **robbery** and **kidnapping** because he committed both those crimes himself.
>
> State v. Huey: Huey is an **accomplice**, **not a conspirator** because he urged Louie and Dewey to rob the bank and take a hostage but never agreed to help them. He is **vicariously liable** for both **robbery** and **kidnapping** because he urged them to commit those crimes. They were the **direct and natural result** of his own criminal act, **solicitation** of **robbery** and **kidnapping**.
>
> State v. Dewey: Dewey is a **conspirator** and **not an accomplice** because he **agreed to help** rob the bank but **never did actually help** rob the bank at all. He is **vicariously liable** for **robbery**, because when Louie committed that crime it was within the scope of their agreement. But he is NOT liable for kidnapping because that was **NOT within the scope** of their agreement since they had specifically agreed they would NOT kidnap a hostage.

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C. Vicarious Liability of Employers

There are two situations in which an employer may be vicariously liable for the criminal acts of an employee.

1) Corporate liability for acts of officers and directors

Corporations can be assessed criminal fines for decisions of officers and directors that cause criminal law violations. [4]

2) Strict liability for violation of regulatory rules

An employer may be strictly liable for violations of regulatory rules by their employees.

> **For example:** Kraft hires Yang to supervise cheese production. Yang deliberately adulterates the cheese with a chemical that will cut costs, increasing his year-end bonus. The FDA can levy fines against Kraft for Yang's acts, even though Kraft was totally unaware of what he was doing.

14. Lesser Included Offenses and Merger

A lesser included offense is **a crime that must be proven** by the prosecution in order to prove a "larger" crime was committed that requires proof of the lesser crime as an element of the larger crime.

> **For example:** Robbery is a larceny from a person by use of force or fear to overcome the will of the victim to resist. In proving a robbery was committed the prosecution must automatically prove **larceny** was committed. The prosecution must also prove the defendant either committed **battery** (to overcome the victim by force) or **assault** (to frighten the victim into submission). So other crimes are always **lesser included offenses** of robbery. In finding defendants guilty of robbery the finder of fact necessarily must find them guilty of one or more of these lesser included crimes as well.

When defendants are charged with crimes that embody lesser included offenses **ALL of the crimes can be charged** but if the defendant is found guilt of a "larger" crime the lesser included offenses **merge** into it and the defendant cannot be punished for the lesser included offenses in addition to punishment for the larger crime.

> **For example:** Dan is charged with **assault**, **larceny**, and **robbery**. He can be found guilty of all three crimes, but if he is convicted and sentenced for robbery the other two crimes merge into that conviction as lesser included offenses and he cannot be convicted and punished for the lesser included offenses in addition to the robbery charge.

[4] All fines levied by government agencies are "criminal" punishments.

Chapter 2: Solicitation and Conspiracy

Whenever there are two or more defendants involved in the commission of a crime the crimes of **solicitation** and **conspiracy** are suggested, and this raises the issue of **vicarious liability**. [5] Vicarious liability was explained briefly in Chapter 1.

In any exam situation solicitation and conspiracy are the first crimes you should consider discussing if there is more than one possible defendant because they are the first crimes that occur. One defendant says to the other, "Let's rob the bank" or something like that (solicitation), and the other says, "Ok!" (conspiracy). But if there is no evidence to prove which defendant came up with the idea to commit the crime, skip "solicitation" and just discuss "conspiracy".

1. Solicitation

Solicitation is the criminal act of urging another person to commit a crime. The prosecution only has to prove **two (2) legal elements**: that the defendant urged another person to commit some act, and that the act urged would have been a crime if it was committed. [6]

If the party the defendant urges to commit the crime **refuses the suggestion** the defendant is **directly liable** for the crime of **solicitation** as an accomplice.

The crime of solicitation should always be identified with the crime urged. For example it should be called "solicitation to commit murder", "solicitation to commit larceny", etc.

If the party the defendant urges to commit the crime does in fact commit the crime urged, the defendant is **directly liable** for solicitation AND **vicariously liable** as an **accomplice** for the crime committed. But **solicitation is a lesser included offense** of the crime urged, so it will **merge** into the crime committed. That means the defendant can be found guilty of both crimes by the finder of fact (e.g. jury) but will only be **convicted and punished** for the greater crime urged and not solicitation for urging it.

> **For example:** Able urges Baker to rob a bank. If Baker does not rob the bank Able can only be charged with and convicted of the crime of **solicitation to commit robbery**. But if Baker does rob the bank Able is directly liable for **solicitation to commit robbery** and **vicariously liable** for the robbery that he caused. He can be charged with both crimes. If he is found guilty of both crimes the **solicitation merges** into the robbery charge and he will only be **convicted and punished** for the robbery.

There is no such crime as "solicitation to commit conspiracy", and "attempted solicitation" is almost impossible. It would require a very odd fact pattern in which a defendant urges someone else to commit a crime but the "message" gets lost in transit.

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[5] If your professor saves discussion of solicitation, conspiracy and vicarious liability for the end of the class (e.g. second semester), you will find that all of the questions on your midterm exams involve criminals acting alone and the questions on your finals involve two or three criminals acting together.

[6] The prosecution does NOT have to prove the defendant KNEW the act would be a crime. Everyone is presumed to know the law and IGNORANCE OF THE LAW IS NO DEFENSE.

A. Legal Impossibility and Attempt

For the crime of solicitation to actually be committed, the act urged by the defendant must be a crime for the person urged to actually do. If the act urged would not be a crime, urging it is not a crime. This is called a **legal impossibility**.

Whether the act urged is a crime or not a crime is determined by LAW and not by the opinion or belief of the defendant. [7] This is why you are going to law school. If opinions determined legality you would be going to "opinion" school instead of law school. [8]

> **For example:** Tom says to Dick, "Steal that car." Dick responds, "Dude, that's my car!" Tom is not guilty of solicitation because it is **legally impossible** Dick to commit a crime by taking his own car.

As illustrated by the example above, a defendant may urge another person to do something that would be a crime for the defendant to do but is not a crime for the person urged to do it. In some situations the defendant may be charged with **attempting** to commit a crime by using the person urged as an **instrumentality** of the crime.

> **For example:** Alfalfa gives 5-year-old Spanky a loaded gun and says, "Kill my wife." Under common law Spanky is too young to be charged with any crime. Therefore this is NOT solicitation to commit murder. Instead Alfalfa is **attempting to commit murder** by using Spanky as the "instrumentality" of his own crime.

2. Conspiracy

A conspiracy is an **agreement** between two or more people to **work together to attain an illegal goal**. The "illegal goal" is usually a crime, but does not necessarily have to be a crime. Under common law the prosecution only had to prove **two (2) legal elements**: that the parties **agreed to work together**, and their **goal was illegal**. But modernly many jurisdictions require a **third element**: that one of the parties **overtly act** in some manner in pursuit of the agreed goal. A criminal conspiracy is a felony, even if the "illegal goal" is not a felony or even a crime at all.

The crime of conspiracy should always be identified with the illegal goal. For example it should be called "conspiracy to commit murder", "conspiracy to commit larceny", etc.

> **For example:** Andy and Gomer agree to illegally remove some voters from the voter registration roles so Andy will be re-elected Sheriff of Mayberry. It is illegal, but it might not be a crime for either of them to do this alone. But once they form a criminal conspiracy to do it, it is a felony. In this case it would be "conspiracy to deny civil rights". Modernly many jurisdictions require at least one of the conspirators to commit some overt act in furtherance of the conspiracy goal.

[7] If criminals could escape prosecution merely because they are ignorant of the law they would all plead ignorance and the prisons would be empty.
[8] Unfortunately a lot of law students want to tell everyone in class "their opinion".

Defendants who agree to aid conspiracies become **conspirators** and are **directly liable** for the crime of **conspiracy** whether they take any action to further the conspiracy or not. Conspirators who commit crimes within the scope of the agreement are **directly liable** for those crimes, and all of the other co-conspirators are **vicariously liable** for those crimes under **conspiracy liability theory**.

Conspiracy is not a lesser included offense of any other crime so it will not "**merge**" into the other crimes committed. If a finder of fact (e.g. jury) finds a defendant is guilty of conspiracy and any other crimes, the defendant will be **convicted and punished** for the crime of conspiracy AND all the other crimes.

There is no such crime as "**attempted conspiracy"**. If a defendant urges someone else to help them commit a crime, and the effort fails, it is the crime of **solicitation**. If a defendant urges someone else to pursue an illegal goal that is NOT a crime, and the effort fails, it is simply no crime at all.

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A. Actual Agreement is Necessary

An **actual agreement** is a necessary element of a conspiracy, but **implied agreement** may be proven by **joint action**. But a conspiracy cannot be based on a "feigned" agreement.

> **For example:** OJ offers to pay Fuhrman, an undercover police officer, $10,000 to murder his ex-wife. Fuhrman pretends to agree. In most Courts OJ can be charged with **solicitation** to commit murder and **attempted murder**, but not with '**conspiracy** to commit murder' because it takes at least **two defendants** to form a conspiracy and Fuhrman's agreement was a sham.[9]

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B. Two or More Conspirators Required

There must be at least **two or more defendants agreeing to pursue an illegal goal** for a conspiracy to exist, but **a single conspirator can be convicted** if the other is dead, missing, unavailable for trial or for some other reason immune from prosecution.

But **if one defendant is tried and acquitted**, most jurisdictions will not allow other defendants to be tried for being in a conspiracy with the acquitted defendant.

> **For example:** Dan and Dick are accused of conspiracy to rob a bank. Dan is tried for conspiracy and acquitted. Most jurisdictions will not allow Dick to be tried for being in a conspiracy with Dan after Dan has been acquitted of being in a conspiracy with Dick.

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[9] This seems obvious because otherwise OJ's criminal liability for conspiracy would arbitrarily depend on whether Fuhrman, a police officer, pretended to agree or did not pretend to agree. Due process demands that criminal liability be determined by the acts of a defendant, not arbitrarily depend on the acts of others, especially the police.

C. The Wharton Rule

Under the **Wharton Rule**, broadly adopted law, two people cannot be guilty of conspiracy if the illegal purpose of the agreement requires two people to accomplish. The most commonly tested crime in this respect is **receiving stolen property**. It takes two people to commit the crime of "receiving stolen property" because one has to be the "receiver" and one has to be the "deliverer" of the stolen goods. So, there have to be **at least three conspirators** for the crime of "conspiracy to receive stolen property" to be legally possible. This is frequently tested.

Some other crimes that it takes two people to commit are **adultery, gambling, bribery, sales of contraband** and **dueling**.

> **For example:** Zonker offers to sell dope to Duke, and Duke agrees to buy it. Zonker and Duke can be charged with 'trafficking in illegal narcotics' but not with the additional, second crime of '**conspiracy** to traffic in illegal narcotics' because it necessarily takes two people to traffic in narcotics (a buyer and a seller).

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D. Vicarious Liability under Conspiracy Theory

Vicarious liability based on **conspiracy theory** was explained in some detail earlier in Chapter 1. Generally, every conspirator is **vicariously liable** for all crimes committed by every other conspirator **during** the conspiracy and **within the scope** of the conspiracy. Some professors stress this as the "Pinkerton Rule" and others do not.

Crimes by co-conspirators are "**within the scope of the conspiracy**" if they are **foreseeable crimes done in furtherance** of the conspiracy goal, but not if they are crimes clearly outside the agreement between the conspirators, even if they were "foreseeable".

In many jurisdictions a party that **joins an existing conspiracy** becomes liable for all **prior crimes** of the other conspiracy members that were committed within the scope of the conspiracy agreement, even if the party joining the conspiracy was unaware of those crimes. Other jurisdictions do not follow this view.

Conspirators are vicariously liable for criminal acts of all co-conspirators that are within the scope of the conspiracy even if acts done would not have been crimes if the conspirator had done it themselves.

> **For example:** Dan and Paul live in an apartment. Dan and Dick agree to steal Paul's jewelry. Dan leaves the apartment door unlocked one night so Dick can enter to take Paul's jewelry. Dick has committed burglary. And Dan is vicariously liable for that burglary, even though it would not have been a burglary for Dan to enter his own apartment the same way.

Vicarious liability based on conspiracy theory ends when the conspiracy ends. And **a conspiracy ends** when the illegal goal of the conspiracy is **attained** or **abandoned**. Crimes committed after the conspiracy ends are not "within the scope" of the conspiracy.

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E. Comparison of Conspiracy and Accomplice Liability

Vicarious liability based on accomplice theory was also explained in Chapter 1. Generally, every person who commits a crime is **vicariously liable** for all subsequent crimes the first crime **causes other people to commit**. Causation was explained in Chapter 1.

A criminal act **actually causes** other crimes to be committed if they would not have occurred **but for** the first crime, and the first crime act is the **proximate cause** of subsequent crimes if they were **likely to occur** and **foreseeable** as a **direct and natural result** of the first crime through an **unbroken chain of causation**.

> **For example:** Ken kidnaps Vickie intending to hold her for ransom. He locks her in the basement of the house he rents with Buddy, a known sex offender. When Ken is out Buddy goes into the basement and rapes Vickie. Ken is **vicariously liable for rape** on **accomplice theory** because Vickie would not have been raped by Buddy at all **but for** the fact he kidnapped her and left her in a place where she was **likely** to be raped. And Buddy's crime was **foreseeable** as a **direct and natural result** of what Ken had done. Ken is NOT liable base on **conspiracy theory** because he and Buddy **never agreed** they were going to rape Vickie.

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F. Defense of Withdrawal

> Withdrawal is a common defense to a charge of **vicarious conspiracy liability**. It will be explained in Chapter 17.

Chapter 3: Criminal Battery

Under common law the crime of **battery** is a **deliberate act** done **to cause and which does cause** an unlawful **harmful or offensive touching** of the victim.

A deliberate act is one done **for the purpose of causing harm or offense** or **with knowledge it creates extreme risks** of harm or offense.

The crime of battery is very similar to the tort of battery but there is an important difference:

- **Criminal battery** is an action by the State to punish defendants for deliberately acting to cause victims harm or offense by touching them or with knowledge the act done created extreme risks of the harm or offense that resulted;

- **Tortuous battery** is an action by the plaintiff to obtain compensation from defendants for intentionally causing a touching that, in turn, caused harm or offense, whether the harm or offense that resulted from the act was foreseeable or not, and whether it was intended or not.

  For example: Dan hits Vick in the face with a banana cream pie as a friendly joke, not intending to cause any harm. Unfortunately Vick is allergic to bananas and goes blind. Dan is liable to Vick for **tortuous battery** because he intended to cause a "touching", did cause a touching, and the touching caused injury. That means he is civilly liable for all of Vick's medical expenses and lost future income. But Dan is not guilty of **criminal battery** because he did not intend to harm Vick and did not deliberately create foreseeable extreme risks of harm.

Battery is a **general intent** crime, so the prosecution only has to prove the defendant deliberately committed a criminal act that produced a criminal result, but the prosecution does not have to prove the defendant **specifically intended** to cause the criminal result.

> **For example:** Dan shoots a bullet near Vick intending to only frighten him as a joke. But he accidentally shoots off Vick's nose. In an action for criminal battery the prosecution only has to prove Dan **recklessly created foreseeable extreme risks**, and that in turn **caused injury**. It does not have to prove Dan specifically intended to cause the injury Vick suffered. The fact Dan thought this would be funny is entirely irrelevant because he deliberately created the extreme risks that foreseeably injured Vick.

Although criminal battery usually involves someone being badly injured the **touching** necessary for criminal battery may also be **offensive**.

> **For example:** Purvis intentionally "rubs" his body against a young girl on the crowded city bus in a sexually offensive manner. Purvis may be charged with battery (sexual battery) because his act is reasonably offensive, even though she is not physically harmed.

A criminal battery may also be based on criminal negligence, a deliberate breach of a duty to protect others from foreseeable extreme risk of harm. In some cases the "harmful touching" simply means a "harmful effect".

> **For example:** Matt deliberately neglects to care for his invalid grandfather Gramps, and Gramps suffers from bedsores as a result. If Matt had a duty of care, he could be charged with criminal battery. The "harmful touching" can be thought of as the "harmful effect" Matt's breach had on Gramps.

The prosecution must show the acts of the defendant were unlawful because it was **non-consensual** and **not privileged** by law. If the acts were consensual or legal there can be no battery because there was no "unlawful" touching.

If there is effective consent there is no "victim." For consent to be effective the "alleged victim" must be **fully informed**, have **capacity** to consent and give consent **voluntarily.** Consent to certain types of bodily contact is implied by social custom, and consent may be implied by conduct.

There is **no such crime as attempted battery** because an attempted battery is a criminal assault.

Modern statutes also often use the term "assault" to describe acts that are actually batteries at common law, and this can get law students very confused.

> **For example:** A statute may define the use of a weapon to batter someone as being "aggravated assault" instead of a "battery".

The news media may also describe acts that are actually batteries at common law as "assaults".

> **For example:** The newspaper reports, "A woman reported she was sexually assaulted in the park." That usually means she was the victim of sexual battery.

Chapter 4: Criminal Assault

Under criminal law **assault** is EITHER an **attempted battery** OR an **intentional act to cause** a victim to be **apprehensive of an imminent battery**. Battery is explained below.

An intentional act is one done for the purpose of causing the result that occurs.

The crime of assault is very different from tortuous assault because in tort law a plaintiff must prove the act of the defendant actually caused apprehension of a battery, and in criminal law the prosecution does not have to prove that at all.

- **Criminal assault** is an action by the State to punish defendants for deliberately attempting to cause victims to suffer a harmful or offense touching or deliberately attempting to cause them to be apprehensive of a harmful or offense touching, whether any apprehension actually occurred or not;

- **Tortuous assault** is an action by the plaintiff to obtain compensation from defendants for intentionally causing them to be apprehensive of a harmful or offense touching, and reasonable apprehension must occur.

  For example: Dan shoots at Vick and misses. Vick is deaf and hears nothing. Dan can be prosecuted by the State for criminal assault because he attempted to cause a battery. He is not liable to Vick for tortuous assault because Vick did not suffer any 'apprehension'.

Assault is a **specific intent** crime. That means the prosecution must prove the defendant intentionally act for the **specific purpose** of causing a battery or apprehension of an imminent battery.

Special attention should be paid to threatening words because **words alone are usually NOT enough** for a charge of assault. Usually some **menacing conduct in addition to words** is necessary. Furthermore, a **conditional threat** is usually not sufficient. In this regard criminal and tort law are the same.

> **For example:** Bluto tells Popeye, "Next week I will beat you up." Bluto cannot generally be charged with either tort or criminal assault because Popeye cannot reasonably believe a battery is imminent since the threat is conditioned by the term "next week."

But, a threat demanding that the victim relinquish legal rights usually is sufficient.

> **For example:** Bluto orders Popeye to be quiet saying, "If you don't shut your yap I will beat you up." Bluto can be charged with both tort and criminal assault because Popeye has a right to speak and did not speak because he was apprehensive of an immediate battery.

There is no such crime as "attempted assault" because criminal assault is either an attempted battery or an act taken with the intent to cause apprehension, whether it causes apprehension or not. In other words, criminal assault does not require that there be any harm caused. All that is required is that the defendant commit some ACT with the SPECIFIC INTENT of either causing a battery or fear of a battery.

Chapter 5: Rape

Under common law rape was the criminal act of a man having sexual intercourse with a female without her consent.

Common law held that only a female could be raped, vaginally, and only by a male. And it was legally impossible for a husband to rape his wife because marriage was deemed to create implied consent to sexual intercourse. But, it was rape if a husband forced his wife to have sex with any other man. Also, a boy under the age of 14 was deemed **incapable** of committing rape. Modernly some states still require independent proof a defendant under the age of 14 is capable of the sex act beyond a reasonable doubt.

These long outdated common law rules are legal trivia but they may still appear on law school exams.

Rape requires “sexual intercourse” and/or "sexual penetration." This is the **actus reus** of the crime. Any penetration, no matter how slight, without consent is sufficient.

Common law defined other sex crimes as sodomy or simply as battery.

Modernly, sex crimes are defined statutorily. Rape generally can be charged against defendants of either sex, the victims can be of either sex, and anal sex is generally codified as rape rather than sodomy. Oral sex may also be codified as rape, but it can also be codified separately. Other sex crimes that lack penetration may be classified as "attempted rape", "sexual assault," "sexual battery", "indecent exposure", “lewd and lascivious conduct”, etc.

Rape was considered **an inherently dangerous felony** at common law and that generally remains the modern view.[10] Therefore a death caused by commission of a rape may be charged as murder under the Felony-Murder Rule, and a murder caused by rape is generally classified by statute to be first-degree murder.[11] The Felony-Murder Rule and first-degree murder will be explained in greater detail later in the discussion of murder.

> **For example:** Dan forces Buffy into his car, intending to have sex with her. She screams. Vick hears the scream and comes running to Buffy’s aid. Dan accidentally runs over Vick, killing him. Dan can be charged with murder under the Felony-Murder Rule because he was attempting rape and it caused a death.

Lack of consent must be proven as an element of the crime by the prosecution, and that is generally done by simply having the victim testify. There is **NO requirement that the victim put up a "reasonable" amount of resistance** or display an unwillingness to have sexual intercourse. All that matters is that the victim did not effectively consent to the act of sexual intercourse. And, consent must be **actual** and **voluntary** by a **fully informed** victim with **capacity** to consent. Consent is an issue of fact that the finder of fact may find to have been **implied** by the circumstances and actions of the "victim."

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[10] But some courts have held that rape does not necessarily imply intent to cause ‘great bodily injury’.

[11] Rape “causes” a death even if the rape victim commits suicide out of shame or depression caused by the rape.

> **For example:** Dan sneaks a drug into Bambi's drink, and she gets dopey. He asks her if she would like to have sex, and she says, "Damn! Yes!" Dan may be charged with rape because Bambi's consent was not voluntary, and she lacked the capacity to consent because she was "dopey." Perhaps all's fair in love and war, but it's not legal.

As explained in Chapter 1, consent is not effective if it is the result of a misrepresentation of **fact** so that the victim **does not knowingly consent to sexual intercourse with the defendant**. This is a **fraud in the factum.** But consent is effective if it is the result of a misrepresentation of the **benefit** the victim will enjoy because she is knowingly consenting to sexual intercourse with the defendant. This is a **fraud in the inducement**.

> **For example:** Andy tells Paris he is dynamite in bed. She consents to sexual intercourse based on his claim. She is very disappointed at his performance. Andy can NOT be charged with rape because she knowingly consented to have sexual intercourse with him. His misrepresentation was a fraud in the inducement.

Rape is a **general intent** crime. This means the prosecution must prove the defendant intentionally acted to have sexual intercourse, and it was done without the other person's effective consent. The prosecution does NOT have to prove the defendant acted with the specific intent of having non-consensual sexual intercourse.

> **For example:** Andy finds Bambi passed out drunk. He starts having sexual intercourse with her sincerely believing that she will not mind. He can be charged with rape whether she would mind or would not mind later because she clearly has not "consented" to have sex with him since she is unconscious.

A **mistake of fact** is no defense to a general intent crime unless the mistake is reasonable given the circumstances. If the defendant is intoxicated, that can only be taken into consideration by the finder-of-fact (e.g. jury) it if is involuntary intoxication. If the defendant is voluntarily intoxicated the finder-of-fact must consider whether a reasonable sober person could have made the same mistake.

> **For example:** Andy gets drunk and has sexual intercourse with Paris, thinking that she is consenting. Paris later claims she remained silent Andy is very violent when he is drunk. Andy may be charged with rape but may be able to defend his action if the jury finds a reasonable and sober person would have made the same mistake under the same circumstances.

Statutory rape is sexual intercourse with a person below the statutory age of consent, and any person that commits the act is generally **strictly liable** because consent is legally impossible. This was explained above in Chapter 1. In most States a **mistake of fact is no defense**, regardless of whether it is reasonable or not, but there are always going to be borderline cases.

> **For example:** Bob, who is 19, has consensual sex with Lolita two days before her 18th birthday, the age of consent set by statute. Since Lolita lacks capacity to consent to sexual intercourse, Bob may be charged with rape the same as if he had forced Lolita to have sexual intercourse with him at gunpoint. **It is no defense** that Lolita claimed to be 18, looked 18, was almost 18, that Bob reasonably believed she was 18, or that Bob sincerely believed the "age of consent" in this State is 17.

Attempted rape is the crime of attempting to have sexual intercourse with a person **knowing** that they do not consent. It is a **specific intent** crime (as are all "attempted" crimes). This means that the defendant must act in an effort to have sexual intercourse with a person **with knowledge** that the person does not (or legally cannot) consent to have sexual intercourse.

Factual impossibility is not a defense to attempted rape unless it would be totally impossible to rape a person in the manner attempted. [12] A **mistake of fact** is not a defense unless it negates the implication the defendant acted with criminal intent. And **legal impossibility** is a defense if the act attempted or intended by the defendant would not have been rape, even if it had been completed. This is explained in more detail in the Chapter on "Attempted Crimes".

> **For example:** Dwayne drugs Pat and attempts to have non-consensual sexual intercourse. Dwayne fails because he is unable to maintain an erection. Dwayne is liable for attempted rape because his "mistake" about his ability to get an erection does not negate the criminality of his intent.

Perhaps the single most important fact pattern for you to watch out for on an exam question is the following:

> **For example:** Abe and Bob agree to kidnap Vickie for ransom. Abe knows Bob is a registered sex offender so he has Bob swear he will not try to have sex with Vickie. Bob swears he will not. After Vickie is kidnapped Abe goes out and Bob has sex with Vickie by promising he will let her go if she does. After having sex with Vickie, Bob laughs at her, calls her stupid and tells her she won't be freed until the ransom is paid. Vickie commits suicide in humiliation. Is Abe liable for first degree murder, and if so why?
>
> 1) Abe participated in the kidnapping, so he is **directly liable** for that crime.
> 2) **Bob raped Vickie** because her consent was the product of duress.
> 3) **Abe is not liable for Vickie's rape as a conspirator** because it was contrary to the conspiracy agreement between Abe and Bob.
> 4) Instead, Abe is **vicariously liable** for the rape as an **accomplice** because the rape was a foreseeable crime, actually and proximately caused by the kidnapping.
> 5) The rape caused the suicide, so the **suicide was a homicide** actually and proximately caused by Bob's act of raping Vickie.
> 6) Rape is one of the **inherently dangerous felonies**, so any death caused by rape qualifies as a murder under the **Felony-Murder Rule**.
> 7) The events form a **foreseeable and unbroken chain of causality**, and Abe is **vicariously liable** for the rape and murder of Vickie as an **accomplice**.
> 8) Murder caused by a rape is almost always one of the "**enumerated felonies**" for **first-degree murder**, so Abe liable for first degree murder.

The Felony-Murder Rule and first-degree murder will be explained in greater detail later in the discussion of murder.

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[12] For example, Bevis tries to rape Cleopatra using transcendental meditation to effect an out-of-body experience transcending time and space.

Chapter 6: Arson

Under common law **arson** was the **malicious burning** of the **dwelling of another**.

A dwelling was a home where people live and sleep. Arson was considered an offense against the sanctity of the home, and prosecution for the crime was intended to **protect dwellings of others** and did not apply to the burning of other structures. The structure burned had to be the place where **another person** dwelled, meaning a residence. If the defendant owned the dwelling burned, it was still arson if another person dwelled in the same building.

Besides the dwelling, the burning of **buildings within the curtilage**, the yard around the dwelling, also supported a charge of arson.

Modernly the arson has been expanded to be the **malicious burning of any property** protected by statute, regardless of ownership. The malicious burning of structures, forests, grasslands, and vehicles is almost always arson in every modern jurisdiction.

Arson is an inherently dangerous felony both at common law and modernly. Therefore a death caused by arson may be charged as murder under the Felony-Murder Rule, and a murder caused by arson is generally a first-degree murder by statute. The Felony-Murder Rule and first-degree murder will be explained in greater detail later in the discussion of murder.

Arson is a **general intent** crime. This means the prosecution has to prove the defendant deliberately and **maliciously** started a fire that burned property protected by statute (e.g. a forest). The prosecution does not have to prove the defendant acted with the specific intent of burning the property that was actually burned.

The prosecution must show **malice**. This is the **criminal intent** for arson. **Malice for arson** means the defendant acted for a **wrongful or malicious purpose**. This generally means they deliberately acted **to harm others** or **knowing others would be harmed**.

Under common law negligence, even criminal negligence, was not enough to constitute malice.

> **For example:** Bored, Abe throws a lighted match on the ground in his back yard. A grass fire suddenly bursts out of control and burns down Bob's house. Abe will NOT be liable for arson because his act was not intended to hurt anyone or done with knowledge that anyone would be harmed. It was merely negligent.

The burning does not necessarily have to be illegal, and illegality alone is not sufficient.

> **For example:** Abe starts a fire to burn some of his own rubbish in his own backyard without a "burn permit" as required from the Air Quality Control District. The fire gets out of control and burns down Bob's house. Abe is not criminally liable for arson because his act, although illegal, was not done with the intent of harming others.

The **criminal act** (actus reus) for arson is **deliberately starting** a fire.

> **For example:** Abe turns in a false alarm as an act of vandalism. While the Fire Department is responding to the false alarm Bob house burns down from a kitchen fire. Abe can NOT be charged with arson because he did not start the kitchen fire.

Arson only requires a **slight burning of property protected by statute**. Structures do not have to be totally destroyed or even seriously damaged. Mere "singeing" or "charring" are all it takes to support a charge of arson. But part of the structure must be burned. If only furniture within a structure burns there is no burning of the "structure" and no arson. But if anything permanently attached to a structure is burned it is arson the same as if the structure itself was burned. In every case mere "smoke" damage is insufficient to support a charge of arson.

> **For example:** Dan attempts to cut the lock off the storage shed in Vick's back yard with a propane torch to steal his lawnmower. The torch isn't hot enough to melt the lock and only singes it. Discouraged, Dan gives up. Dan might be charged with arson because the shed is a **building within the curtilage** of Vick's dwelling, and he **maliciously burned** the lock by singeing it. But it depends on what kind of lock it is. If the lock is permanently attached to the shed, it is part of the shed and burning the lock is equivalent to burning the shed. But if the lock is a "padlock" that comes completely off when it opens, the lock is not part of the shed, and burning the lock is not equivalent to burning the shed.

Attempted arson is the crime of attempting to burn protected property. It is a **specific intent** crime (as are all "attempted" crimes). This means that the defendant must start a fire or attempt to start a fire for the specific purpose of burning protected property.

As with any crime, **mistake of fact** is not a defense to attempted arson unless it negates a finding of **implied criminal intent**. **Legal impossibility** is only a defense if the act attempted by the defendant would not have been arson if completed. This is explained in more detail in the Chapter on "Attempted Crimes".

> **For example:** Wong angrily sets fire to Yan's garbage can in Yan's garage. Yan smells the fire and drags the can out of the garage before any damage is done to the garage. Wong may be charged with attempted arson of Yan's garage since it would have been burned with reasonable certainty to some extent but for Yan's swift intervention.

Chapter 7: Larceny

There are four crimes "against property" discussed in law school and tested on Bar exams. The only one clearly recognized by common law was **larceny**. Under common law **larceny** is the **trespassory taking and carrying** away of the **personal property of another** with **intent to permanently deprive** the lawful possessor. Modernly it is generally codified as theft.

All larcenies were felonies under common law. Modernly takings of property worth more than a statutory amount (e.g. $500) are classified as **grand larcenies**, **felonies**, and takings of property worth less than the statutory amount are classified as **petty larcenies**, **misdemeanors**. The distinction between these categories is the severity of the penalty.

If a person is charged with **grand larceny** the prosecution must prove the goods stolen exceeded the statutory limit. [13]

Larceny was a common law felony but not considered "inherently dangerous". The Felony-Murder Rule does not apply to deaths caused by commission of larceny, and cannot be used to charge murder if defendants are only convicted of larceny. [14]

Larceny is a **specific intent** crime. The prosecution must prove the defendant **specifically intended** to permanently deprive the lawful possessors of property in their possession. A **lawful possessor** is anyone with possession of the property before the defendant takes it. It does not necessarily have to be the "owner" of the property.

Larceny was the only "theft" crime recognized by common law. Thefts by other means such as the use of **false pretenses** and **embezzling** property that had been "entrusted" to the defendant were statutorily created later.

Modernly the distinction between larceny, embezzlement and false pretenses seems silly. But larceny was a felony, and a crime the lower classes might commit. In England children were hanged for picking pockets. Embezzlement was a crime of a higher class perhaps.

Modernly larceny and other theft crimes have been codified as "theft" but law school and Bar exams extensively test fine-point distinctions between them anyway.

1. Trespassory Taking of Possession

A **trespassory taking** is an essential element of the crime of larceny. After a trespassory taking the defendant has **unlawful possession** of the property. If a defendant receives possession of property with permission of the lawful possessor, and without intent to steal, the defendant receives **lawful possession**. In that case a later wrongful taking of the proper is **embezzlement**, not larceny.

Trespassory taking means the defendant either 1) **took possession without consent** from the lawful possessor OR 2) **took possession with the intention of stealing** it. Therefore, the

[13] This may seem obvious but when tested by the Bar a substantial number of students totally miss this.
[14] This was tested on the June 2009 FYLSX and a substantial number of students missed this.

prosecution generally must either prove the defendant took possession of goods **without consent** from the owner or **with the intention of stealing** at the time goods were taken into possession.

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A. Taking without Consent

Typically the **trespassory taking** for a larceny is committed by "stealth" or a "grab and run" such as a shop lifting or purse snatching. Therefore, any time the defendant takes goods or currency without the lawful possessor's permission there is a trespassory taking except in the case of lost property. Special rules applied to that situation and they are explained below.

The **lawful possessor** of property is a party with superior rights of possession to the defendant, even that person's right of possession is inferior to some other party. Under common law a person who gets possession of property first has a superior right of possession to all later possessors. But the **lawful owner** of property is the person who "owns" it. That means the person who has "lawful title" to it, and the lawful owner has superior rights to all other possessors.

> **For example:** Tom has $20. He is the **lawful owner** of the currency with superior rights to anyone else. He accidentally drops his currency on the street. Dick sees Tom drop the currency so he picks it up and pockets it intending to steal it. He has committed larceny against Tom because he has taken the currency with intention of depriving Tom, who is both the **lawful owner and the lawful possessor**. Then Harry picks Dick's pocket and takes the $20. Harry has also committed larceny against Dick, because Dick had the currency first. That gave him a superior right of possession to Harry, so he was the lawful possessor as to Harry, but not as to Tom.

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B. The Relation Back Doctrine

If property is taken without consent it is a trespassory taking even if the defendant had no intent to steal it at the time of the taking, except in the case of lost property as explained below. The taking of the property is a "**continuing trespass"** or continuing wrongful act. If the defendant later decides to steal the goods most Courts hold that the criminal intent "relates back" to the original taking. So a larceny will generally be found where goods are taken without permission even if the intent to steal the goods forms later.

> **For example:** Kramer takes Neumann's car without permission intending to return it later. Then Kramer decides to keep the car and never give it back to Neumann. Kramer's original taking was trespassory because it was without permission, and his later decision to steal the car forms **criminal intent that relates back** to the original taking to establish a larceny in most Courts.

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C. Taking with Intent to Steal

If any defendant obtains possession of property while harboring intent to steal it, it is **unlawful possession**, a trespassory taking, and larceny from the beginning, except when the property has been abandoned and no longer belongs to anyone.

2. Taking Lost Property

The common law developed special rules when lost property was taken. These are extensively tested.

Lost property is property that has been misplaced by the lawful possessor and not abandoned or mislaid. Property is abandoned when the lawful possessor discards it, never intending to take it back. **Abandoned property cannot be stolen** because it no longer belongs to anyone.

Mislaid property is property deliberately set aside by the rightful possessor with an intention of returning to get it, even if they forget where they put it.

> **For example:** Kramer puts his garbage out at the curb for the garbage truck to pick up. It is **abandoned**. Neumann parks his car around the block and then forgets where he left it. It is **mislaid**. Elaine drops a $20 bill as she walks down the sidewalk without realizing it. It is **lost**.

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A. Taking Lost Property of Unidentifiable Owner

If defendants find property **lost** by **unidentifiable owners** it is **NEVER a larceny**.

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B. Taking Lost Property of Identifiable Owner

If defendants find property **lost** by **reasonably identifiable owners** and **intend to keep it for themselves**, it is **ALWAYS a larceny**.

If defendants find property lost by **reasonably identifiable owners intending to return it**, but later decide to keep the property for themselves the **Courts are SPLIT**:

- Under one view the **Relation Back Doctrine** makes possession a continuing trespass and the decision to keep the property **relates back** to the original finding to make the taking a **larceny**;

- Under the other view possession is lawful and the property is **held in trust** for the true owner by the finder. So the decision to keep the property violates the trust and makes continuing possession an **embezzlement**. This was especially true if the **common carrier doctrine** applied. That is explained below. Embezzlement is explained in the next Chapter.

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C. The Common Carrier Doctrine

If property is lost or misplaced on a **common carrier** such as a bus, taxi, train, ship, or airplane, the common law generally held that the operator of the conveyance had a **legal duty to take possession** of the property and hold it in **constructive trust** for the rightful owner. Therefore, most common law Courts held the finder of such property had **lawful possession.** As a result, any subsequent theft of the property by the finder was **embezzlement**, not larceny. Often this was the view even if the finder intended to steal the property at the time of discovery.

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D. Taking Lost Property Found in Containers

If defendants get **lawful possession of containers** and then discover lost or misplaced property is inside the containers, the law is the same as for any other type of lost property UNLESS the original owner gave possession of the container to the defendant **knowing something was inside the container**.

If original possessors convey possession of containers knowing they contain something, but without knowing exactly what, Courts are SPLIT:

- Under one view defendants given **containers known to contain something** have **lawful possession** of everything they receive and it is **never larceny** for the defendant to keep it;

- Under the other view defendants given **containers known to contain something** ONLY have **lawful possession** of the containers and the type of contents normally to be expected in that type of container and it is **larceny** for the defendant to keep anything unexpected.

  For example: Kramer gives Neumann his old coat. Neumann finds a $20 bill in the pocket and decides to keep it. If Kramer did not know there was anything in the pocket at all, Neumann has committed larceny because he has taken lost property knowing who it belongs to. If Kramer knew there was something in the pockets when he gave Neumann the coat, the $20 belongs to Neumann and he has not committed larceny because currency is something to be expected to be in a coat pocket.

3. Taking Abandoned Property

As stated earlier, taking **abandoned property** is **never a trespassory taking** and **never a larceny** because it is not the property of "another".

4. Taking Possession by Trick

A defendant who takes possession of personal property **intending to steal** it never gets "lawful possession". Since possession is always unlawful, it is **ALWAYS a trespassory taking** and a completed larceny at the moment the property is taken by the defendant.

If defendants get possession of property by actions and under circumstances that imply intent to convey the property to its rightful owner, but their true intent is to steal, it is a **larceny by trick**. If defendants get possession by any express **misrepresentation, trick** or **ruse** it is also a **larceny by trick**. So any time defendants get unlawful possession by any means other than just "grabbing and running" it is a **larceny by trick**.

> **For example:** Postal comes to Owen's door to deliver a package for Neighbor. Owen knows Postal is at the wrong address, but he silently accepts delivery anyway intending to keep the package. Owen has committed **larceny by trick** at the moment he takes possession.

5. Possession Distinguished from Custody

The common law distinguished between a receipt of **possession** and a receipt of **custody**. **Custody** means the defendant has only been given very limited use and control of goods. **Possession** means the defendant was given a much broader right to use and control the property. And **lawful possession** means defendants did not intend to steal when the lawful owner gave them possession.

> **For example:** Company gives Tom, a drug company sales representative, a car to drive to visit customers. Tom has **possession** of the car because he has been authorized to drive it when and where he wants. If he received the car without any intent to steal it, he has **lawful possession.** Tom turns the car over to the parking valet when he dines at Chez Snooty, a fancy French restaurant. The valet only has **custody** of the car, NOT possession, because he is only being allowed to drive the car to a parking space.

If the defendant only receives **custody** and does not receive **possession** any theft at any time is a **trespassory taking** and the crime is always **larceny** or **larceny by trick**, and NEVER **false pretenses** or **embezzlement**.

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A. Thefts by Employees

Employees are often given control over the employer's property. Only custody is given, not possession, unless the employee is given **broad powers of use and control** over the employer's property. For example, the busboy at a restaurant only has custody of the dishes, not possession. If he steals the dishes it is **always larceny**.

Company **managers** always have possession of property placed under their control. If they receive control without any intent to steal they have lawful possession. If they steal property in their lawful possession it is **embezzlement**, not larceny.

Employees authorized to **take and use company property away from the business location** (e.g. a laptop computer, company car) have **possession**, not just custody. And employees like bookkeepers generally have **possession** of the company funds. If these employees take possession without intent to steal, they have **lawful possession.** If the employee with lawful possession steals, it is **embezzlement**, not larceny.

> **For example:** Sam, a traveling salesman, is assigned a company car. One day he disappears with the car. He had **lawful possession** of the car because it was assigned to him for his regular use. So his crime is not larceny and it is **embezzlement**.

So anytime an employee steals from an employer the position of the employee (e.g. manager, clerk, etc.) is an important determinant as to whether the crime committed is larceny or embezzlement.

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B. Thefts by Servants and Low-Level Employees

Under common law, when a **master** gave a **servant** control of property usually only **custody** was given. The same rule applied between **employers** and **low-level employees**. So if the master sent a servant with goods or currency to be taken somewhere, the servant only got **custody** and any theft by the servant on the way to the place he was sent was **larceny**.

> **For example:** Young Frankenstein sends his servant Igor with a £10 note to buy a brain at the morgue. Igor gives the £10 note to Inga for a romp in the hay. This is **always a larceny**, never embezzlement, because Igor only had custody, not lawful possession.

But if a **third party** entrusted goods or currency to a **servant for delivery back to the master** AND the **servant did not get possession with intent to steal**, the servant got **lawful possession**. In such a case any subsequent theft was **embezzlement**.[15]

> **For example:** Igor buys a brain at the morgue for £9 and gets £1 in change. He has lawful possession of both. But as he travels to Dr. Frankenstein's castle he decides to use the extra £1 to buy ale at the pub. Since he had lawful possession his crime is **embezzlement**, not larceny.

So anytime a servant (or low-level employee) steals property from a master (or employer) it is a larceny unless a third party gave the servant the property for conveyance to the master AND the servant accepted possession with an honest intention of giving it to the master. In that one case, alone, a servant (or low-level employee) has **lawful possession** (and not "mere custody") so a subsequent theft is an **embezzlement** and **NOT larceny**.

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C. Bailments and Breaking Bulk Doctrine

The act of entrusting chattel into the care of another is a **bailment.** The person entrusted with the chattel is a **bailee**. And the person who entrusts chattel to a bailee is a **bailor**. For example, putting

[15] This same principal holds for employees given money or property by customers to be conveyed to the employer.

goods in a warehouse creates a bailment. A bailee who accepts possession of goods without any intent to steal always gets **lawful possession**, not just custody. If the bailee receives goods with intent to steal, the bailee has **unlawful possession**, and any subsequent theft is always a **larceny by trick**.

But if a bailee gets lawful possession and subsequently steals an entire container of goods (e.g. steals an entire barrel of whiskey), the crime is **embezzlement**, not larceny.

But if the bailee **breaks open a container** of goods and steals from inside the container (e.g. taps a barrel of whiskey, takes some out and reseals the barrel) the taking is trespassory, and the crime is larceny, not embezzlement. This was called the **Breaking Bulk Doctrine**.

> **For example:** Gallo stores barrels of wine in Thirsty's warehouse. If Thirsty accepted the goods with intent to steal, he has **unlawful possession** and ANY theft is a **larceny by trick**. If he accepted the goods without any intent to steal he has **lawful possession** of the containers. If he later decides to steals an entire barrel, it is **embezzlement**. But if he later opens a barrel and drinks some of the wine, he has **broken bulk** and the theft is a larceny, NOT embezzlement.

6. Carrying Away

Larceny requires proof the defendant **carried away** the property stolen, but this is almost always a technicality. Only the slightest movement is necessary, and any "taking" of the property is enough to satisfy the requirement.

> **For example:** Dodger picks up a diamond ring at the jewelry store intending to steal it. Then he changes his mind and puts it back. Dodger can be charged with larceny because there was a trespassory taking and carrying away as soon as he moved the ring with intent to steal it. Putting the ring back does not "undo" the crime.

If there is no **carrying away** or movement of property in any manner the crime of larceny is not complete. But the facts may support a charge of **attempted larceny**.

7. Personal Property of Another

Larceny requires a theft of the **tangible personal property of another.** The property is the property of "another" if **another person is the "legal owner"**. Abandoned property does not belong to anyone and cannot be "stolen".

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A. Personal Property for Larceny

Larceny only applies to the theft of **personal** property of another person that can be "taken and carried away". That includes the theft of currency and negotiable securities, but it does not include wire-transfers out of bank accounts, use of stolen credit cards, passing bad checks, misappropriation of funds, pirating of patent rights, copyrights, secret formulas or any other "intangible personal property" because those cannot be physically "taken and carried".

Modernly the **theft of documents** such as lottery tickets is larceny because the tickets are carried away, depriving the owner of the ability to redeem or sell the tickets.

There can be **no larceny of real property** because it cannot be "taken and carried". Some (not all) common law Courts held that the theft of **property attached to the land** could not be a larceny because it was "real property" at the time it was taken by the thief. The modern view is that property attached to the land is "converted" into personal property when it is severed from the land and carried away.

> **For example:** Drifter steals an apple from Farmer's tree. Some old common law Courts held Drifter could not be charged with larceny because the apple was Farmer's real property when it was hanging on the tree. The modern view is that the apple became personal property when Drifter picked it so he can be charged with larceny.

Larceny applies to the theft of **contraband** (such as illegal drugs) if it has value and belongs to a person with a superior right of possession.

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B. Lost Property

Lost property is the property of another, but as explained above the **taking** of lost property is NOT a trespassory taking in certain situations.

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C. Roaming Animals

At common law farm animals that roam such as horses, cows and sheep were personal property and could be the subject of larceny, but pets that naturally roam, such as cats and dogs, could not be "stolen" because they were not effectively "possessed." Modernly all **domesticated** animals are "owned" and can be the subject of larceny.

But roaming **wild** animals, such as rabbits and deer, are "of the land" and are the personal property of the land occupier where the animal is located.

> **For example:** Farmer shoots a pheasant on his farm. It belongs to Farmer at the time he shoots it because it is on his land. But if it flies across the property line after it is shot and falls to the earth dead on Neighbor's farm it becomes Neighbor's pheasant not Farmer's. If Farmer goes onto Neighbor's farm to get the dead pheasant he is committing larceny because the pheasant became the personal property of Neighbor as soon as it crossed the property line. [16]

[16] Neighbor catches Farmer trying to take the pheasant and says, "Hey, that's my pheasant!" Farmer says, "No, I shot it on my farm and it belongs to me." Neighbor says, "It fell on my farm so it belongs to me." Farmer says, "I shot it on my land and its mine." So Neighbor says, "Ok, we have to settle this by common law." Farmer asks, "What is that?" Neighbor says, "First I kick you in the groin, then you kick me in the groin, then I kick you, and so on until one of us quits." Farmer says, "Well…Okay." So Neighbor kicks Farmer in the groin so hard he writhes about on the ground screaming in agony for 20 minutes. Slowly Farmer struggles to his feet and says, "Ok, it's my turn now." Neighbor says, "You can have the pheasant," and walks away.

8. Intent to Permanently Deprive

Larceny is a **specific intent** crime and the prosecution must prove the defendant took the property **with the intent of either permanently depriving** the lawful owner or else using the property in a way that **substantial risked permanent deprivation**.

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A. No Larceny if no Intent to Permanently Deprive

There is no larceny if the defendant **took the property with a reasonable intention of returning it** unless the defendant later decides to steal the property.

> **For example:** Joy takes Owen's car for a joyride without permission intending to return it. Unfortunately he gets hit by a drunk driver and the car is destroyed. Joy can NOT be charged with larceny because he did not take the car while intending to permanently deprive. Destruction by the drunk driver was not reasonably likely to occur.

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B. Subsequent Decision to Permanently Deprive Relates Back

As explained above, under the RELATION BACK DOCTRINE a subsequent decision to steal "relates back" to a trespassory taking and makes the original taking a larceny.

> **For example:** Joy takes Owen's car without permission for a joyride intending to return it but later decides to keep it. The original taking was trespassory and the intent to permanently deprive "relates back" to make the original taking a larceny.

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C. Taking with Intent to Substantially Risk Loss

A trespassory taking is a larceny if **the intended use creates substantial risks the lawful owner will be permanently deprived** of possession.

> **For example:** Joy goes joyriding in Owen's car and leaves it parked the next morning near Owen's house. It is not larceny because taking **did not create substantial risks of permanent deprivation**.

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D. Taking with Intent to Pawn and then Return

It is larceny if the defendant takes property intending to borrow against it (pawn it) and later return it because that creates substantial risks the property will be permanently lost.

> **For example:** Getz takes Coltrane's saxophone and pawns it for money to bet at the racetrack. He wins, gets the saxophone out of hock and returns it. It is larceny because his actions created substantial risks Coltrane would be permanently deprived.

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E. Taking with Intent to Demand Reward for Return

It is a larceny if the defendant takes property intending to sell it back to the owner or to demand a reward for returning it.

> **For example:** Dan steals Timmy's dog, Lassie, intending to return it in exchange for a reward. He is guilty of larceny because his intent was to permanently deprive Timmy of either the dog or the money he would have to pay to get the dog back.

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F. No Larceny if Trying to Recover Legal Debt

There is NO larceny if the defendant takes property believing it is rightfully his, or **openly takes** property that is not his in order to recover a legal debt owed to him by the "victim."[17]

> **For example:** Vickie invests $5 with Madoff. Madoff won't give her back her money. So Vickie takes Madoff's dog, Mangy, and says, "Fine. I will sell your mutt to get my money back and send you the surplus." Vickie may NOT be charged with larceny because her intent is to recover money lawfully owed her.

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G. Taking for Charitable Reasons

It is larceny to take the property of others with intent to permanently deprive regardless whether the defendant seeks personal gain or intends to benefit others.

> **For example:** Benny steals Vick's car and donates it to the Sisters of Perpetual Disappointment School for Wayward Girls. It is larceny because his intent is to permanently deprive Vick of his car.

9. Attempted Larceny

Attempted larceny is the crime of attempting to take and carry away the property of another with intent to permanently deprive. It is a **specific intent** crime (as are all "attempted" crimes). This means that the defendant must act with the **specific intent of permanently depriving** another of property.

[17] The debt has to be a legal debt and not some illegal claim of debt.

Chapter 8: Embezzlement

Embezzlement is the crime of **trespassorily converting** personal property that has been **entrusted** to the defendant by another **to their personal use**. Modernly it is generally codified as theft. Often it is held that there must either be intent to permanently deprive or else there is substantial risk of loss to the rightful owner.

The entrustment of personal property creates a bailment, and the defendant in these cases is a bailee. The party entrusting personal property to the defendant is a bailor. The bailor may or may not be the "owner" of the property.

The **actus reus** for embezzlement is the trespassory conversion of property to personal use by the defendant bailee, and the **mens rea** is the intent to misuse the property of the bailor.

Embezzlement is a **specific intent** crime and the prosecution must prove the defendant **specifically intended to misuse** the bailor's property. Whether it is a felony or misdemeanor, and its exact application depends on statutory provisions.

Embezzlement was originally created by statute because the common law would not hold bailees who stole property from bailees guilty of larceny since they had "lawful possession".

Embezzlement applies and larceny does not apply if 1) there was an **entrustment** of property into the care of the defendant, 2) the defendant **received the property without intent to steal**, and 3) the defendant later **converted the property to personal use**.

1. Entrustment

Embezzlement requires an **entrustment**, a voluntary and knowing **delivery of possession** of personal property to the defendant bailee, who receives possession with an honest intention of holding the property for the benefit of the entrusting party, the bailor. Entrustment means the person given possession has **broad control** over the property. However special rules applied to lost property.

As explained above, common law held that only custody was given, not possession, when a **master gave property to a servant** for delivery to a third party. The same rule applies when an employer gives property to a low-level employee for the same purpose. But an entrustment was implied when a **third party** gave property to a servant **for conveyance to the master** because the third party gave the servant total control over the property. In that case servants received possession and not mere custody. The same rule applied to low-level employees.

When property is given to a person with limited authority or for a limited purpose there is only a grant of **custody** and not a delivery of possession or entrustment. But when property is given to a person with broad authority or broad control over it there is a delivery of **possession** and an **entrustment**.

2. Lost Property

Embezzlement is statutory. Most embezzlement statutes did not impose "involuntary bailments" on the finders of lost goods, so larceny rules concerning lost goods usually applied.

However Courts were often SPLIT on this issue as explained above. And the **common carrier doctrine** did impose a duty to take and hold lost property on a common carrier. [18]

So when lost property was found by a defendant who **honestly intended to return it to the rightful owner** some Courts held the property was **held in trust** by the defendant, and any later decision to misuse the property for personal use was embezzlement and not a larceny.

3. Lawful Possession

Embezzlement only applies if the defendant receives **lawful possession.** Larceny applies, and not embezzlement, if the defendant **does not have lawful possession**. The defendant only has **lawful possession** if 1) he or she received the property with the owner's **effective consent** or 2) **found lost property** and 3) took possession **without intent to steal**.

Possession is wrongful in all situations when the defendant takes possession of goods with **intent to steal**.[19] Therefore possession is wrongful and the theft is a **larceny by trick,** not embezzlement in the view of most Courts in most situations.

As explained above, there is also a **trespassory taking** under the BREAKING BULK DOCTINE if the defendant takes lawful possession of containers without any intention of stealing, but later **breaks into the containers** to steal the contents. This is a trespassory taking if the containers were entrusted to the bailee with an understanding they were not to be opened.

4. Statutory Rules

Embezzlement was primarily statutory, and some statutes limited to defendants who were **employees** or **agents** of the property owner or otherwise held the subject property in a **fiduciary capacity.**

The statutory rules did not usually apply unless the subject property had been knowingly and voluntarily entrusted to the defendant.

5. Wrongful Intent

Whether embezzlement required an **intention to permanently deprive** or simply **intent to misappropriate** or **misuse** goods was defined by statute. Generally the defendant may be charged with embezzlement for misusing entrusted property with a **fraudulent intent**. And there is sufficient intent to charge embezzlement in every situation where the defendant acts with an

[18] On exam questions property seems to get lost in “taxicabs” a lot.
[19] Except perhaps the case of lost property on a “common carrier” as discussed earlier.

apparent intent to permanently deprive. But embezzlement often **does NOT require intent to permanently deprive** if the conversion creates substantial risk of loss to the rightful owner.

> **For example:** Betty Bookkeeper uses a forged check to take money from School District of Friday to gamble at the Indian Casino. She intends to return the money on Monday. She hits the jackpot and returns the money as she intended. It is still **embezzlement** because she **converted** money **entrusted** to her to her **own personal use** in a manner risking loss.

6. Personal Property for Embezzlement

Embezzlement applies to the conversion of any personal property, whether it can be "carried away" or not. Consequently it applies to many thefts that larceny does not including the trespassory conversion of funds by wire-transfer out of bank accounts, use of stolen credit cards, passing bad checks, and misappropriation of funds, and the pirating of patent rights, copyrights, secret formulas or any other "intangible personal property".

7. Attempted Embezzlement

Attempted embezzlement is possible but unlikely to arise in any law school exam. It would entail a person that has lawful possession of goods, wishes to misuse or take them and is unable to do so. This is not a likely exam issue because it demands a very tortured fact pattern.

8. Embezzlement vs. Larceny

The distinction between embezzlement and larceny depends on a careful application of larceny rules. If larceny applies, embezzlement does not. If larceny does not apply, embezzlement may apply. Courts have often been split on difficult fact patterns, so you may have to 'argue' the facts both ways.

> **For example:** Dan goes to Tom's store and buys a cigarette lighter. He gives cashier Bob $10. As soon as Dan leaves the store Bob pockets the $10. Since Dan gave the $10 to Bob **for delivery to Tom**, the owner of the store, the common law rule is that Dan has entrusted Bob (the low-level employee) with possession for delivery to the employer, Tom. That hints of embezzlement. But since Bob took the money "as soon as Dan left" he must have intended to steal it at the time of receipt. That makes his act **larceny by trick.** Since the facts are uncertain, you should explain your knowledge of the law and analyze both crimes.

Chapter 9: False Pretenses

False pretenses is the statutory crime of obtaining **title** (i.e. "ownership" and not just possession) to property by intentional use of **misrepresentations of fact**. Originally false pretenses statutes concerned personal property only, but the crime has been generally extended to all thefts of "title" to property. Modernly it is codified as "theft".

The **actus reus** for false pretenses is obtaining title to property by means of false representations, and the **mens rea** is the intent to defraud.

False pretenses is a **specific intent** crime, meaning that the prosecution has to prove the defendant acted with a specific intent to obtain title to the victim's property by fraud. Whether it is a felony or misdemeanor and its exact application depends on statutory provisions.

It is the crime of false pretenses and not larceny when the defendant **obtains title** to the property.

1. Transfer of Title

False pretenses only applies if the defendant obtains **title** to property. Title means "ownership". Title is transferred to the defendant if property is **sold** to the defendant or **money** is paid to the defendant.

> **For example:** Dan goes to Bob's store and cashes a check for $100. The check is worthless because Dan closed the account a year earlier. Dan can be charged with false pretenses because he **obtained title** to the money Bob handed him in exchange for the check. He misrepresented by his words and conduct that the check was valid.

If the property owner only transfers **possession** and does NOT deliver title false pretenses cannot be charged. In that case the crime is **larceny by trick** because the defendant obtained possession by misrepresentation. It could NOT be **embezzlement** because obtaining possession by misrepresentation never gives the defendant lawful possession.

> **For example:** Dick goes to the back of Paul's store and shows a forged receipt and loading tag to get a refrigerator loaded onto his truck. This is larceny by trick and not false pretenses because he is only getting possession of the refrigerator, not ownership of it.

2. False Representation of Fact

False pretenses requires a **false representation of fact** by the defendant by **words or conduct**. The actions of the defendant must be **intentional**, calculated to induce reliance by the victim whose property is stolen, and they must actually cause the victim to **convey title** to property (not just possession).

This may include the use of counterfeit currency, forged documents, false weights, worthless checks, a forged will, or stolen credit cards. Some affirmative misrepresentation is necessary.

However, statements of opinion and "puffing" are not sufficient to prove false pretenses. In most jurisdictions this is true even if the statements are knowingly false.

> **For example:** Paul buys a ring for $30 and sells it to Vick for $100 saying, "This ring normally sells for over $1,000." Paul cannot be charged with false pretenses because his statements were "puffing" and not statements of fact. [20]

Further, promises of future conduct are not sufficient to prove false pretenses, even if knowingly false, in most jurisdictions. In only a minority of jurisdictions a false statement about intentions to act in the future is considered a false statement about "state of mind" sufficient for a charge of false pretenses.

> **For example:** Don buys a ring from Vern and says, "I will pay you tomorrow," but really has no intent of doing that. In most Courts Don CANNOT be charged with false pretenses, because his statement is only about future conduct.

But consider this very similar situation:

> **For example:** Don buys a ring from Vern and says, "I am getting my paycheck tomorrow, and I will pay you as soon as I get it", but knows he is not getting any paycheck the next day, and isn't going to pay at all. In most Courts Don CAN be charged with false pretenses because his statement concerns more than future conduct.

3. Actual Reliance

A charge of false pretenses requires proof that the victim of the crime **actually relied** on the misrepresentations of the defendant and **transferred title** to property as a result. However, the reliance by the victim does NOT have to be reasonable reliance, so the prosecution does not have to prove a "reasonable person" would have believed the defendant.

4. Wrongful Intent

A charge of false pretenses requires proof of **scienter.** That means proof that the defendant made false representations **knowingly** with **intent to defraud.** "Knowingly" means that the defendant either knew his or her statements of fact were false at the time or knew they were making the statements with conscious disregard for the truth. Intent to defraud means that the statements were made for the purpose of wrongfully depriving the victim of property.

> **For example:** Dick owes Pete $100 and won't pay. Pete sells Dick a fake "Picasso" for $100 to get his money back. Pete cannot be charged with false pretenses because Dick owed him the money and Pete's intent was only to recover that which was lawfully his.

[20] It may be "false advertising" or a "deceptive trade practice" but it is not the crime of false pretenses.

5. Attempted False Pretenses

Attempted false pretenses is the crime of attempting to defraud a victim of property by using a false representation of fact. Modernly it might be charged as "attempted fraud."

> **For example:** Dick tries to buy merchandise in Pete's store with a stolen credit card. Pete discovers the card is stolen and Dick runs from the store. Dick can be charged with "attempted false pretenses".

6. False Pretenses vs. Larceny by Trick

False pretenses is obtaining **title to property** by use of a false representation of fact while larceny by trick is obtaining only **possession of property** by use of a false representation of fact.

> **For example:** Dan **rents** a car with a forged check. This is **larceny by trick** only because **title** to the car did not pass to Dan. But if Dan **bought** a car with a forged check it would be **false pretenses** because **title** to the car would pass to him.

Whether a theft of **money** is a **larceny by trick** or **false pretenses** requires careful application of larceny rules. If larceny applies, false pretenses does not.

Chapter 10: Receiving Stolen Property

Receiving stolen property is the last of the four "theft" crimes discussed in law school and tested on Bar exams. It is strictly statutory, not a common law crime.

Receipt of stolen property is the act of **knowingly conveying possession** of **stolen property**. The party giving possession and the party receiving possession are equally liable, so the name of the crime is a misnomer. It should be though of as "conveying" stolen property.

Property is "stolen" if it has been taken from the rightful possessor **without permission** or **consent**, **express or implied**, and **continues to be beyond the control** of the rightful possessors or the police. It is a legal "status" of property.

The stolen property is often sold by a thief to a "fence", but that is not necessarily the case. A "fence" is a person who regularly buys and sells stolen property. Any conveyance for any reason makes both parties equally liable.

A person who asks another to receive stolen goods or to help find a person who will receive stolen goods commits the crime of **solicitation to receive stolen property** if the person they ask knows the goods are stolen and would be liable for the crime of receiving if they were to accept the goods.

The aspects of the crime most tested on exams are 1) the application of the **Wharton Rule** for conspiracy, and 2) the application of **legal impossibility** as a defense when goods that are **believed to be stolen** are conveyed between defendants but the goods are not actually "stolen" because the police have let the goods be taken in order to track them from the "thief" to a "fence".

1. Distinction between Accomplice and Receiver

Those who receive stolen property after it has been stolen must be distinguished from those who are accomplices as **accessories after the fact**.

A **receiver of stolen property** is any person who receives stolen goods knowing it is "stolen", but does not do anything to help the original thief escape arrest, evade prosecution or otherwise profit from the original crime beyond buying the stolen goods.

An **accessory after the fact** is a person who knowingly helps a thief escape arrest, evade prosecution, or profit from the theft.

> **For example:** Dan steals the Mona Lisa, tells Art, and asks him to look from someone who will buy it. Dan has committed the crime of **soliciting to receive stolen goods** because he has asked Art to commit that crime. Art asks Col if he would like to buy the painting. Art has **solicited** Col to receive stolen property IF Col knows the painting is stolen. Art has also helped Dan and has not "received" any stolen goods. So Art is an **accomplice** as an **accessory after the fact** and NOT a "receiver" of stolen goods. Col agrees. If Col knows the painting has been stolen he agreeing to receive stolen property. Col is receiving to help himself, NOT to help Dan and Art. So he is a "**receiver**", NOT an accomplice. Under the **Wharton Rule** there must be more than two people involved in an

agreement to receive stolen property for their agreement to comprise a **conspiracy**. Art **impliedly agreed** to help Dan when he sought out Col, and Col **agreed to receive** the stolen goods. So three people, Dan, Art and Col, are **all in agreement** commit the crime of receiving, and they can be charged with **conspiracy**. If Col receives the stolen goods all three can be charged with the crime of **receiving stolen property**. If they are convicted of that crime the solicitation of Art by Dan, and the solicitation of Col by Art will both "merge" into that crime and those two defendants cannot be convicted of the solicitations as separate crimes. If something prevents Col from receiving the painting while it is still "stolen" all three can still be charged with **attempted receipt of stolen property**, and the solicitations still merge into that crime.

2. Application of Wharton Rule

The **Wharton Rule** prevents prosecution of only two people for the crime of "**conspiracy to commit receiving of stolen property**". This is frequently tested, so anytime the crime of receiving stolen property is suggested consider discussion of the Wharton Rule.

For three people to commit the crime of conspiracy to receive stolen property there must be at least three people, and all three of them must be parties to a **single agreement**.

For example: Tom asks Dick to help him steal a truckload of whiskey from the docks for $1,000. Dick agrees. Tom tells Dick to take the whiskey to a warehouse and leave it. Tom asks Harry if he will buy the stolen whiskey for $5,000. Harry agrees. Dick steals the whiskey at the docks, drives the truck to the warehouse and leaves it. Tom and Dick were in a **conspiracy to commit larceny** of the whiskey because Dick agreed to help Tom commit that crime. But Dick was NOT in any agreement that the whiskey would be delivered to a "receiver". He did not know who Bob was, and Bob did not know who Dick was. Dick did not get a share of Tom's profit; he just got a set payment. There was no communication from Dick to Bob, directly or through Tom. So **conspiracy to receive stolen property** CANNOT be charged, and Dick did not commit receiving stolen property. Likewise, Bob did not help steal the whiskey, and he cannot be charged with larceny or conspiracy to commit larceny.

3. Attempted Receipt and Legal Impossibility

If a defendant **commits an act**, and **the done act is not a crime**, then typically NO CRIME has been committed, <u>even if the defendant thinks it is a crime</u>. Simply "thinking it is a crime" does not make a legal act a crime.

And if a defendant **attempts an act**, and the act **would not have been a crime** if it had been completed as intended any "attempted crime" is typically held to be **legally impossible**, <u>even if the defendant thought it was a crime</u>. Again, simply "thinking it is a crime" does not make an attempted act a crime.

But **receiving stolen property** is generally viewed as an EXCEPTION to this general rule. The logical problem that arises with the crime of receipt of stolen property, as opposed to other crimes, is that property that has been stolen, or property that defendants try to steal loses its "status" as being "stolen" if police discover the plot and do not intervene. After that the goods are no longer

"stolen" and the crime of "receiving stolen property" is a legal impossibility. Since "receiving" is an impossibility it seems by logical extension the crime of "attempted receipt" also would be legally impossible. But the practical effect of that is that "fences" would almost never be prosecuted because the only practical way to find them is to track stolen property to its final destination.

Modernly the majority of Courts have resolved this logical inconsistency by recognizing **attempted receipt of stolen goods** as an EXCEPTION to the general rule regarding legal impossibility. If property is **conveyed between parties** who reasonably believe the goods are stolen the Courts now generally find them liable for the crime of **attempted receipt of stolen property** even if the goods are not actually "stolen" because the police or other parties have discovered the plot and decided to let the goods be delivered to catch the "fence" who was to receive the goods. This is a very narrow rule, not all jurisdictions agree, and it is heavily tested.

Chapter 11: Robbery

Robbery is use of **force or fear** to commit a **larceny from the person of another** by **overcoming the will or ability to resist**. Robbery is more a crime against the person than a "theft" crime.

Robbery is a serious and inherently dangerous felony. A death caused by a robbery may be charged as murder under the Felony-Murder Rule, and a murder caused by commission of a robbery is generally a first-degree murder. The Felony-Murder Rule and first-degree murder will be explained in greater detail later in the discussion of murder.

Robbery is a **specific intent** crime. The prosecution must prove the defendant acted intentionally to **use force and fear to overcome the will or ability of others to commit a larceny.**

Larceny is always a **lesser included offense of robbery**. In addition, most robberies include either an **assault** or a **battery** as a **lesser included offense**, depending on whether the defendant used **fear of a battery** or actual **forceful touching** to complete the robbery.

Defendants can **usually be charged** with **larceny** and **assault and/or battery** when being charged with robbery, but if they are convicted of robbery the lesser included crimes of larceny and assault and/or battery usually merge into the robbery. But in some circumstances explained below the crimes of assault and/or robbery may be separate offenses.

1. Force or Fear Used to Overcome Victim

To prove robbery the prosecution must show that the defendant deliberately used force, threats, fear or intimidation to **overcome the will or ability of the victim or some other person to resist the theft.**

> **For example:** Dan jumps into Vick's car and starts driving away. Ned, a neighbor, sees the theft and tries to stop Dan. Dan **threatens** Ned, and he retreats. Dan is liable for robbery because he **used fear** to commit the larceny.[21]

While **assault** generally requires an attempted battery or threat of an **imminent** battery, a robbery CAN be charged based on threats of **future harm** if any type.

> **For example:** Dick says to Vick, "Give me your lunch money or I will poison your dog next week." Vick hands him the money. Dick can be charged with robbery because he used fear to overcome Vick's will to resist the theft. But he cannot be charged with assault or battery.

It is **legally impossible** to "rob" dead, sleeping or unconscious people because no "fear or force" can be used to overcome their "will to resist" the taking.

[21] The larceny is a continuing crime here because Dan is continuing to 'take and carry away'. But if Dan was half a block away before Ned saw him and tried to stop him there is a good argument the "larceny" was completed before Ned became involved, and what Ned was trying to do was "recover stolen property" rather than stop a larceny in progress.

2. A Larceny from the Person

The term "**from the person**" means from the grasp, clothing, body or immediate presence of the robbery victim. Every robbery must have a victim. If there is no "victim" from whom property is taken, there is no robbery.

The larceny from the person must occur at the same time fear and/or force are used to overcome the victim's resistance.

> **For example:** Doug calls Vickie and says, "I'm stealing your car. Don't tell the cops or I'll kill you!" Doug cannot be charged with robbery because he did not commit a **larceny from the person**. It is not a "larceny from the person" because Vickie was not near the car. Instead, this would be "extortion" a subject seldom taught or tested in law school.

3. Attempted Robbery

Attempted robbery is frequently tested. It is the crime of attempting to commit a larceny from the person of a victim by use of force or fear. It (and all "attempted" crimes) is a **specific intent** crime. This means that the defendant must act in a specific effort to rob the victim.

As with any other crime, **mistake of fact** is not a defense to attempted robbery unless it negates a finding of implied criminal intent based on the defendant's actions. **Legal impossibility** is a defense if the act attempted or intended by the defendant would not have been robbery, even if it had been completed. This is explained in more detail in the Chapter on "Attempted Crimes".

Legal impossibility is a claim **the act done or attempted would not constitute the crime charged** even if it had been completed.

> **For example:** Dan sees Vick sitting on a park bench and demands his money. But Vick died from a heart attack an hour earlier. Dan can NOT be charged with **attempted robbery** because a dead man has no "will" that can be overcome by force or fear. Since Dan cannot "rob" a dead man, his act does not constitute an "attempted robbery". [22]

Mistake of fact is a claim **the act done or attempted was done because of an innocent mistake**, so the finder of fact should not find that the acts done by the defendant **imply criminal intent**.

> **For example:** Dan threatens Vick and demands his wallet, but Vick is unafraid and tells Dan to get lost. Dan can be charged with **attempted robbery** because he attempted to use threats to facilitate larceny, even though the attempt failed. The fact that Vick was unafraid does not negate Dan's **implied criminal intent**.

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[22] This is an application of the general rule. As discussed earlier, Courts have created an exception to this general rule when it comes to the crime of **receiving stolen property**. In that exceptional case an attempt is the crime of "attempted receipt of stolen property" even though the completed act is NOT the crime of "receiving stolen property".

Chapter 12: Burglary

Under common law **burglary** was a **trespassory breaking** and **entering** of the **dwelling of another** in the **night** with **intent to commit a felony**. It was a crime against the sanctity of the home.

At common law all larcenies were felonies so the phrase "with intent to commit a felony" included intent to commit larceny. Modernly some larcenies are classified as misdemeanors. Even so, a trespassory entry into a structure to commit a larceny still qualifies as a burglary.

Modernly burglary has been substantially modified by statute and case law and is generally **any trespassory entry** to **any structure** at **any time** with **intent to commit a felony or larceny**.

On exams focus usually should be placed on explaining whether the defendant could be charged with burglary under common law, and if not whether the defendant could be charged with burglary under the modern view.

Burglary is a serious and inherently dangerous felony. Like arson, burglary was a crime against the sanctity of the dwelling or home. A death caused by commission of a burglary may be charged as murder under the Felony-Murder Rule, and a murder caused by burglary is generally a first-degree murder. The Felony-Murder Rule and first-degree murder will be explained in greater detail later in the discussion of murder.

The **common law definition** of burglary has more elements the prosecution must prove than any other crime. The elements can be remembered by the mnemonic BEDONI, representing the elements of breaking, entry, dwelling, of others, night and intent.

Burglary is a **specific intent** crime. This means the prosecution has to prove the defendant entered a structure <u>specifically intending to commit a felony or larceny</u>.

Every time defendants can be charged with burglary or attempted burglary they can also be charged with attempting the "felony" or "felony or larceny" that was the purpose of the defendants at the time they committed burglary. That other crime <u>does not merge</u> into the burglary.

> **For example:** Tom breaks into a store in the middle of the night and steals a TV. He can be charged with both burglary and larceny because the larceny does not merge into the burglary.

1. Breaking

At common law burglary prosecution required proof the defendant "broke" into a dwelling by opening a door or window. Entry through an <u>open</u> door or window was insufficient to prosecute for burglary under common law because there was no "breaking" involved.

The "**act of breaking**" was considered to be a **separate and distinct legal element** from the "**act of entry**" unless the entry was a **constructive breaking** as explained below.

A single act can constitute BOTH an "act of breaking" AND an "act of entry" intended to carry out the criminal intent of the defendant.

> **For example:** Dan, intending to murder Vick, shoots at Vick through a CLOSED window, breaking the glass. Dan CAN be charged with burglary at both common law and modernly because there was a **"breaking"** when he broke the window and an **"entry"** because the bullet was shot into the structure to kill Vick.

Under the view of most Courts, if a breaking is committed with intent to enter and commit a felony or larceny, but no entry occurs, the breaking is only an **attempted burglary**. This is true even if the "act of breaking" inadvertently causes some object to enter. Burglary can only be charged when an object or instrumentality enters into a structure when that is purposeful to commit the "felony or larceny" intended by the defendant. This is the general view modernly.

> **For example:** Dan throws a rock through Vick's window intending to reach in to unlock the door, enter and murder Vick. After the window breaks Dan gets frightened and runs away. While Dan threw the rock into the structure, that "act" was only for the purpose of breaking, not to kill Vick. Therefore, Dan generally could not be charged with burglary because he did not "enter". Dan could only be charged with attempted burglary (and attempted murder). BUT if Dan actually reached his hand in through the broken window to unlock the door he COULD be charged with burglary.

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A. Acts Constituting a Breaking for Common Law Burglary

The common law originally required defendants to open closed doors and windows to establish a "breaking" had occurred. Over time this requirement evolved until almost any act that enlarged an "opening" was sufficient, even raising a shade or pushing back a curtain.

But breaking remained a necessary element of common law, and there is **no common law burglary if the accused entered through an open door or window** without enlarging the opening.

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B. Breaking "IN" Required

The "breaking" for a burglary prosecution must be **for entry** and not exit from a structure. The focus of the law was that the "sanctity" or "security" of the home was violated when a defendant breaks in. Therefore, if the defendant was already inside a dwelling with consent of the owner, breaking out of the home with intent to commit a felony was NOT considered to be a burglary.

> **For example:** Gary is invited to Vick's birthday party. During the party Gary steals a TV from a back bedroom, kicks open the back door and runs away. This would NOT be a common law burglary because **the breaking was to get out, not in**.

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C. Constructive Breaking under Common Law

Under common law there were **three (3) situations** in which the Court could find there was a **constructive breaking** simply because there had been an "entry". These situations were entry of dwellings by 1) **threats** of violence, 2) **tricks** and deceptions, and 3) with the aid of a **conspirator**.

1) Entry by threat

Under common law entry into a dwelling in the night by means of **threats** was a **constructive breaking** and burglary could be charged.

> **For example:** The Wolf says, "Open the door or I'll blow your house down." The Little Pig opens the door and the Wolf runs in and eats him. This would be a burglary based on **constructive breaking** because **threat was used to open the door**.

2) Entry by trick

Under common law entry into a dwelling in the night by means of **deception** was a **constructive breaking** and burglary could be charged.

> **For example:** The Wolf says, "Open the door, it's me your sweet old Grandmother." Little Red Riding Hood opens the door and the Wolf runs in and eats her. This would be a burglary based on **constructive breaking** because **trick was used to open the door**.

3) Entry by aid of conspirator

Under common law entry into a dwelling in the night with the aid of a conspirator was a **constructive breaking** and burglary could be charged.

> **For example:** Goldilocks tells Baby Bear, "Leave your door open tonight. I will come in steal all the porridge. Then meet me in the forest and we will share it!" Baby Bear agrees and leaves the door open that night. Goldilocks sneaks in the house and steals the porridge. This would not be a burglary for Baby Bear to steal the porridge because he has permission to be inside the house and has not "broken in". But it is a burglary based on **constructive breaking** (for both Baby Bear and Goldilocks) because Goldilocks was **allowed in by a conspirator**.

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D. Constructive Breaking under Modern Law

Modernly the concept of **constructive breaking** has generally been broadened to any **trespassory entry** with intent of committing a felony or larceny. A trespassory entry is any done **without permission**, including but not limited to entries by means of threat, trick or aid of a con-conspirator as was the case under the common law view.

> **For example:** Dan shoots at Vick through an OPEN window intending to kill him. Dan can NOT be charged with EITHER burglary OR attempted burglary under common law because the window was open and there was NO **breaking and no act attempting a breaking.** Further, there is **no constructive breaking** under the common law view because the window was not opened as a result of **threat, trick** or aid of a **co-conspirator**. Without a breaking there could be no common law burglary and without an attempted breaking there could be no attempted burglary. But under the broadly adopted modern view Dan caused a **trespassory entry** when he shot through the window, a **constructive breaking** under the modern view, so Dan CAN be charged with burglary modernly.

Trespassory entry is explained more below.

On law school exams the common law breaking requirement should be thoroughly discussed in comparison to the modern rules whenever a burglary is suggested but the "breaking" appears questionable because the accused entered through an **open** door or window.

2. Trespassory Entry

A burglary prosecution requires proof the defendant **trespassorily entered** the dwelling, structure or other "protected place". That means **entry without permission**.

The prosecution must prove some part of the defendant's body or some instrumentality or object under the defendant's control entered the structure, if only slightly and momentarily or else there is no burglary and only **attempted burglary** can be charged. Also, the entry must be for a purpose other than just to complete the breaking itself.

As explained above the common law only recognized three situations in which an entry comprised a **constructive breaking** and under the broadly adopted modern view any **trespassory entry** supports a finding that a **constructive breaking** has taken place.

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A. Entry without any Permission is Always Trespassory

Entry to any "protected structure" without ANY permission to enter, express or implied, is a trespassory entry.

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B. Entry at Improper Time is Trespassory

Virtually all Courts agree that entry to any "protected structure" at an **improper time** when there is no permission to enter, express or implied, is a trespassory entry.

> **For example:** Tom enters Harry's grocery store to steal in the middle of the night when the store is closed for business. All Courts would agree that Tom can be charged with burglary because he had no permission to go in the store in the night when the store is not open for business.

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C. Entry by Improper Means is Trespassory

Virtually all Courts agree that entry to any "protected structure" by an **improper means** by which there is no permission to enter, express or implied, is a trespassory entry.

> **For example:** Tom and Dick both intend to shoplift from Harry's grocery store. Tom enters during business hours by the front door. Dick enters by going in the back door that says "employees only". All Courts would agree that Dick can be charged with burglary because he had no permission to go in the employee entrance. Courts would be less in agreement whether Tom can be charged with burglary since he had permission (implied) to enter the store through the front door during business hours.

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D. Entry for Criminal Purpose – Statutory "Commercial Burglary"

Some jurisdictions, by statute, hold that an entry of a "protected structure" for a **criminal purpose** is a burglary. This may be called "**commercial burglary**" Many other States have not adopted this view, and it is contrary to the approach suggested by the Model Penal Code.

> **For example:** Sticky goes into the Walgreen's through the front door, during business hours, and steals some M&M candies. He may be charged with "burglary" in some States. But the prosecution may have to prove he intended to steal the candy when he entered, depending on statutory wording.

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E. Implied Consent and Revocation

Permission to enter a structure may be **implied**. There is **implied consent** to enter retail stores by the doors meant for customers to enter, and there is **express consent** to enter when there is a sign in the window that says "OPEN". But there is no implied consent to enter stores that are not "open" for business. If a store has signs posted in areas saying "employees only" there is no consent to enter those areas.

Permission to enter a "protected place" may be **revoked**. To be effective **notice of revocation must be actually received** by the defendant. Any entry after permission to enter is revoked entry is trespassory.

3. Dwelling of Another

As with arson, the crime of burglary was an offense against the sanctity of "dwellings", people's **homes**, and **buildings within the curtilage**, the area around the dwelling.

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A. Structures Modernly

Modernly burglary statutes are generally extended to all structures and not just dwellings. It may also be extended to vehicles such as automobiles, trucks, railroad cars and vessels.

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B. Interior Compartments

Generally a trespassory entry into **interior rooms or compartments** within a structure is a sufficient "breaking and entry" for burglary if the compartment is large enough to be a "room", but not if it is too small to constitute a "room". Under common law the breaking had to be into a room within a dwelling. Modernly it can be a breaking into any compartment of any structure that would qualify for "burglary" in general.

> **For example:** George goes to Bill's house for a party. George opens the safe in the bedroom and steals money. George CAN be charged with burglary **if the safe is big enough** to be considered an interior compartment of the dwelling, but not if it is small.

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C. Structure of Another

At both common law and modernly burglary cannot be charged against defendants that break into structures that they have a right to enter anyway. Therefore the structure or interior compartment entered must belong to another person who has a right of exclusive possession as to the defendant.

> **For example:** Tom and Dick rent an apartment together. Dick locks Tom out without a key. Seeking revenge, Tom breaks into the apartment and steals Dick's TV. If the TV is in the living room Tom can NOT be charged with burglary because he had a right to go there and did not break into the building of "another". But if the TV was in Dick's private bedroom Tom CAN be charged with burglary because he broke into an internal compartment that he had no right to enter.

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D. Hotels

Under both common law and modernly a hotel is not the "dwelling" of the guests. So breaking into guests' rooms at hotels was not a common law burglary UNLESS the hotel manager resided on the premises. If the hotel manager lived in the hotel, his part of the hotel was his dwelling and all of the other rooms of the hotel were within the "curtilage" of that dwelling. In that case if anyone besides the hotel manager broke into any room at the hotel it was burglary. But the hotel manager

could enter any room in the hotel to steal without it being burglary because the entire hotel was his "dwelling", none of the rooms were the dwelling of "another", and he had the right to enter all of the rooms of "his dwelling".

> **For example:** Norman lives at the Bates Motel. He rents a room to Marion. Norman goes "psycho", breaks into Marion's room and kills her in the shower. Under common law Norman could NOT be charged with burglary because the hotel was his "dwelling", he had a right to enter every room within the curtilage of his "dwelling", and Marion's room was not the "dwelling of another". [23]

4. In the Nighttime

Under common law the crime of burglary was an offense in the **nighttime** because it was intended to protect the sanctity of the home when people were sleeping. The crime punished entries in **darkness** and not particular times of day. But the requirement was often rigidly applied so that **both the breaking and the entry** had to be perpetrated in darkness.

> **For example:** Tom breaks open the window of Dick's house during the day and comes back to enter later that night to steal. At common law he could NOT always be charged with burglary because the **breaking was by day**, even if the entry was by night.

However the two acts did not have to be accomplished at the same time.

> **For example:** Tom opens the window of Dick's barn on Monday night but is frightened away. On Tuesday night he returns and enters through the window he opened the prior evening. At common law he COULD be charged with burglary because both the **breaking and the entry were at night**, even though they were on different nights.

Modernly burglary has been extended to all times and lighting conditions.

5. With Intent to Commit a Felony

Under common law the necessary **criminal intent** for burglary was **intent to commit a felony**. The common law felonies were the **murder, rape, manslaughter, robbery, sodomy, larceny, arson, mayhem** and **burglary** [Mnemonic = MR & MRS LAMB.] **Assault and battery were not felonies** at common law. So NO burglary was committed under common law when the defendant simply broke into a dwelling to frighten and beat the occupants. Modernly these are often felonies.

At common law larcenies were felonies, but modernly some petty larcenies or petty thefts are classified as misdemeanors. Nevertheless, entry with intent to commit even a petty theft still supports a burglary charge. Therefore the intent element in the definition of **burglary** often is restated as, **"…with intent to commit a felony or larceny."**

However, burglary is often defined wrongly as, "…with intent to commit a felony or larceny **therein**." This is WRONG because burglary does NOT require that the intended felony be committed "within the dwelling." Although most burglary scenarios involve a felony being

[23] Of course Norman could be accused of murder.

committed within the structure entered, this is not a strict requirement of the crime. Rather, the **purpose of the breaking and entering must be to carry out the intended felony or larceny** regardless of "where" that is intended to occur.

> **For example:** Bob breaks and enters Tom's house to learn the password to Tom's offshore bank account so he can go back to his own home and steal all of Tom's money by means of a wire transfer. Bob CAN be charged with burglary even though the felony he intends to commit will not be committed "within" Tom's home. Bob **broke** and **entered** Tom's **dwelling** with intent to commit, and for the purpose of **committing a felony** (false pretenses), and that is all that matters.

At both common law and modernly, prosecution for burglary requires proof the defendant had the specific intent of committing a felony **at the time of both the breaking and entry.**

> **For example:** Mary opens the window of Bob's house one night when she is visiting to get some fresh air. The next night she decides to steal his TV so she sneaks back in through the open window. Mary can NOT be charged with burglary because **she did not break** (open the window) **with intent to steal.**

If criminal intent is not expressly shown by the evidence, **actions imply intentions.** If defendants commit felonies or larcenies immediately after they enter a structure it implies they intended to commit those crimes at the moment of entry. Otherwise it implies they did not.

> **For example:** Hansel and Gretel, lost in the woods, enter Witch's house. They stay the night and leave the next day with the TV. Absent more evidence they generally can NOT be charged with burglary because the fact they did not immediately steal the TV implies they **did not have intent to steal at the time they broke and entered.**

The crime of burglary is **complete** as soon as the entry takes place. Once the entry has taken place, **voluntary abandonment is not a defense.**

6. Attempted Burglary

Attempted crimes are explained below. The crime of attempted burglary can be charged whenever the defendant **goes near a structure intending to break into it for the purpose of committing some other felony or larceny.**

> **For example:** Hansel and Gretel go to the Witch's house intending to break in and eat the furniture. But when they get there they discover the Witch is home. So they leave. They can be charged with both **attempted burglary** and **attempted larceny** because they got dangerously near to committing their intended crimes.

7. Review of Modern Changes

The modern statutory changes to the definition of burglary have been largely explained above. However, the changes are so important they are worth a brief review:

- Burglary is generally extended to **all times** of the day;
- Burglary is generally extended to a wide **variety of structures**;
- Intent to commit **larceny is still sufficient** to support a charge of burglary even if the larceny is no longer classified as a felony;
- Breaking and entering with **intent to commit assault or battery** often supports a burglary charge modernly even though those were not common law felonies;
- No **physical breaking** is needed if a **constructive breaking** is shown because of **trespassory entry**;
- Courts are in some disagreement whether there is a **trespassory entry** when the defendant has permission to enter the structure for other purposes.

Chapter 13: Attempted Crimes

An **attempted crime** is a **substantial step** taken with the **specific intent to commit** that crime.

"Attempt" is often spoken of as if it were a crime of its own. But it makes no sense saying "attempt" by itself. If an attempted crime is being discussed, say what crime you are talking about. Saying "attempted murder" or "attempted larceny" makes a lot more sense than just saying "attempt".

Every completed crime embodies the crime of "attempting" that crime as a **lessor included offense**. The defendants can be charged with both the intended crime and the crime of "attempting" to commit the crime, but defendants cannot be convicted of both because attempting a crime **merges** into the intended crime completed. If the intended crime fails the crime of "attempting" that crime does not merge and can be charged as a crime in and of itself.

An attempt to commit a felony is a felony as well, and an attempt to commit an inherently dangerous felony is also an inherently dangerous felony.

1. Specific Intent

Any attempted crime is a **specific intent** crime. This means the prosecution has to prove the defendant took a substantial step intending to commit **the specific crime** that he or she is being accusing of attempting. This requirement produces some noteworthy results.

First, it is almost impossible to commit the crime of **"attempted solicitation"** because a solicitation actually is an attempt, in and of itself, to get another person to commit the crime urged. So the crime is complete as soon as the defendant urges another person to commit a crime, whether the urging is successful or not.

Further it is almost impossible to commit the crime of **"attempted conspiracy."** Any suggestion by a defendant that others join in a crime is the crime of solicitation. So an attempt to form a conspiracy is usually the crime of solicitation rather than "attempted conspiracy."

And, there can be **no crime of "attempted assault"** because any act taken with the **specific intent of causing a victim apprehension** of a battery is, in itself, an assault whether the attempt is successful or not in producing its criminal result. Any attempt to cause an assault is an assault.

Further, there is **no crime of "attempted battery"** because an "attempted battery" is the crime of **assault.** Assault is a crime in itself so there is no crime of "attempted battery."

And, as explained above, any "asportation" of property with intent to permanently deprive completes a larceny, so the crime of **"attempted larceny"** only occurs in the odd circumstance when the defendant tries to commit a larceny but is unable to find or move the goods.

Attempted receipt of stolen property is problematic as explained above. If goods are under the watch of the police or lawful owner at the time they are delivered, they are **no longer stolen**, and it becomes **legally impossible** for the receiving party to receive "stolen goods". Most Courts have

resolved this conundrum by concluding the crime is **attempted receipt of stolen property** as long as the defendants think it is stolen property at the time they receive the goods.

Attempted murder can only be charged, and proven, based on proof of **intent to kill**. Nothing less will support the charge. There are **no degrees** of attempted murder, so there is **no "attempted first-degree murder"** and **no "attempted second-degree murder"**. Attempted murder requires a willful, deliberate and premeditated act done with intent to kill, so if such an act causes a death, the resulting crime will usually be first degree murder. But if death does not occur the criminal act is attempted murder.

> **For example:** Dan decides to kill Vick so he puts a bomb under Vick's bed. If the bomb kills Vick this is **first-degree murder** because Dan has willfully, deliberately killed him with premeditation. If the bomb fails to kill Vick it is **attempted murder**. But it would never be "attempted first-degree murder".

Further, there is **no such crime as "attempted manslaughter."** A charge a crime was "attempted" requires proof the defendant acted with **specific intent to commit the crime** but, as explained below, voluntary manslaughter can not be premeditated, and an involuntary manslaughter cannot be with intent to kill. So, an "attempted manslaughter" would require the proof of elements that are inconsistent with the crime of manslaughter in either case. [24]

> **For example:** Dan puts a bomb in Vick's bed. If he intends to kill Vick it is **attempted murder**. If not, it is **assault** unless it physically hurts Vick, and then it is **battery**. If it accidentally kills Vick it is "involuntary manslaughter". But there is no scenario in which it could logically be considered "attempted manslaughter".

Because of the above rules, the "attempted" crimes tested in law school are attempted **rape, arson, larceny, burglary, robbery, murder,** and **receiving stolen property**. Of this group the most commonly tested attempted crimes are the latter three, **attempted robbery**, **attempted murder** and **attempted receipt of stolen property**.

2. Substantial Steps

An attempt to commit any crime is complete at the instant and place when the defendant takes the first **substantial step** toward commission of the intended crime with the specific intent of committing that crime.

The **substantial step** sufficient to prove a crime was attempted requires **more than planning and preparation** and must show the defendant **came dangerously close to completion** of the criminal goal.

Whether a crime is a "legal impossibility" must be judged **at the moment of each substantial step**. This is the subject of many law school exams and is explained more below.

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[24] Cases have concluded that "attempted manslaughter" is possible, but they are based on tortured logic.

A. Preparation is not a Substantial Step

Steps taken **in advance** of the commission of a crime are **mere preparation** and are not sufficient to constitute an attempted crime. Typically steps taken in preparation would include obtaining weapons, preparing disguises, advance surveillance and planning.

In contrast to mere preparation, the act of **embarkation** to complete the crime is a **substantial step** IF embarkation places the defendants **dangerously close** to completion.

Acts by two or more defendants that are not sufficient to charge an attempted crime may still be sufficient "overt acts" to charge a conspiracy to commit the crime.

> **For example:** Tom and Dick get guns and disguises, draw up diagrams of a bank, watch the bank for days and prepare an escape plan. But they never get the nerve to rob the bank, and eventually give up the idea. They can NOT be charged with attempted robbery, but they CAN be charged with **conspiracy to rob** the bank because their acts were sufficient to be the **overt steps** necessary to prove conspiracy.

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B. Steps Close to Completion are Substantial

To prove an attempted crime the prosecution must show the defendant's acts brought them **dangerously close to completion** of the crime. That makes them substantial steps.

Whether an attempt can be charged **before embarkation** depends to some degree on the **seriousness** of the intended crime. Where the intended crime is not as serious, such as a larceny, the court will require more evidence of dangerous closeness to completion of the crime. Where the crime is more serious, such as murder, the court may be less demanding and hold that **presence with intent and apparent ability** to complete the crime is sufficient.

Voluntary abandonment is generally NOT a defense if the abandonment occurs after any substantial step has been taken. But voluntary **abandonment prior to the substantial step** is always a complete defense because it negates the substantial step itself, and that is an essential element that must be proven when any attempted crime is charged.

> **For example:** Tom decides to kill Dick. He makes intricate plans and takes several steps. But then he decides not to kill Dick. If he **abandoned** the idea **before** taking any **substantial step** toward commission of the crime he cannot be charged with attempted murder, and if he abandoned the idea **after** he takes a substantial step he can be charged.

Many law school exam situations involve the question of whether the defendant got "dangerously close enough" to completing the intended crime to be charged with attempting the crime. Often the defendant intends to rob a bank or murder a person but abandons the effort or is prevented from doing so by other factors. Generally, if the defendant has **embarked with intent to complete the crime** and gets **reasonably close** in terms of **time and space** that is a **substantial step** and the attempted crime can be charged **unless** the crime is **legally impossible at each and every substantial step**. If the defendant has embarked with intent to complete a crime but has not gotten

dangerously close to committing the intended crime, the attempt of the crime generally can NOT be charged.

> **For example:** Tom and Dick plan to rob a New York bank. Then they get in their car and leave to commit the robbery. The car breaks down before they reach the bank, and they are arrested. They can be charged with attempted robbery IF they were **dangerously close to commission** of the crime. But they cannot be charged with attempted robbery if they were in Iowa because they were too far away from the bank in New York to have taken a "substantial step".

3. Defense of Mistake of Fact

The prosecution always has the burden of proving the defendant committed a **criminal act**. And the prosecution must always prove the defendant acted **with criminal intent**, except in the case of the few crimes that are considered strict liability crimes. Those were explained in Chapter 1.

Mistake of fact is a **passive defense** that the prosecution's claim that the defendant's criminal intent is implied by his actions is incorrect because the defendant's actions were the result of an **innocent mistake of fact**.

> **For example:** Tom takes Dick's hat as he leaves a restaurant, and he is charged with larceny. He is charged with larceny. The prosecution must prove Tom acted with the **specific intent** of **permanently depriving** Dick of his hat. Its best evidence is that **his actions implied his intentions**. So if Tom took the hat, he must have intended to keep it. If Tom attacks the prosecution's argument with a counter-argument that he took the hat by mistake, because he has a hat very similar to it and confused Dick's hat with his own hat, that is a **passive defense** (because it is attacking the prosecution's case).

Mistake of fact is always allowed if it is an attack on a prosecution argument the defendant's **criminal intent is implied** by the defendant's actions. This is true <u>whether the crime charged is an attempted crime or a completed crime</u>. It is never a defense if the criminal intent of the defendants is a given fact because then criminal intent is a given fact and not just "implied".

> **For example:** Tom takes Dick's hat as he leaves a restaurant, and he is charged with larceny. He admits he took Dick's hat intending to keep it. After that admission Tom's criminal intent is no longer an "issue" and he will not be allowed to raise "mistake of fact" as a defense at all.

4. Defense of Factual Impossibility

If an attempted crime is charged the prosecution must prove the defendant took a **substantial step** toward commission of the crime alleged. **Factual impossibility** is a **passive defense** that the acts of the defendant <u>were not substantial steps</u> because commission of the crime allegedly attempted would be **factually impossible** to commit by the means attempted in any event.

> **For example:** Tom decides to kill Bill. So Tom buys a voodoo doll, names it Bill, sticks pins into the doll, dances about nude and chants mystical incantations amid clouds of incense, all the while honestly believing this is going to kill Bill. If charged with attempted

murder the prosecution must prove these were **substantial steps** toward commission of murder. If Tom attacks the prosecution's argument with the counter-argument that none of these acts were substantial steps because it is **factually impossible** to kill a person in this manner it is a **passive defense**.

Obviously, a claim of **factual impossibility** is only a valid defense to an attempted crime charge because if the crime is actually committed it must not have been impossible after all.

Factual impossibility is never a valid defense if the **acts done** by the defendant **could have succeeded** but for some flaw in execution or fortuitous turn of events.

> **For example:** Squeeky intends to kill President Ford. She gets a .45 automatic pistol, loads it with ammo, cocks it, hides behinds a tree, jumps out, points it at the President from a few feet away and pulls the trigger. Fortunately she failed to put a round in the firing chamber. Squeeky is charged with attempted murder. She cannot plausibly argue that she did not take a **substantial step** simply because she failed to load the gun properly. It is quite possible to kill someone this way and people are killed this way with guns all the time. She came dangerously close to killing the President so "factual impossibility" is simply not a plausible defense.

5. Defense of Legal Impossibility

As explained immediately above, if an attempted crime is charged the prosecution must prove the defendant took a **substantial step** toward commission of the crime alleged. **Legal impossibility** is a **passive defense** that none of the acts of the defendant were substantial steps because commission of the crime allegedly attempted would be **legally impossible** to commit at the time of each act done. This is very similar to a claim of **factual** impossibility except that it is a claim that even if it were **factually** possible to commit the crime alleged at some other time, it was **legally impossible** to commit the crime at every time the defendant acted.

It is settled law that certain acts cannot be charged as attempted crimes because they are legally impossible to be prosecuted as the crime allegedly attempted. Among them are attempted murder of people who are already dead, attempted larceny of property that already belongs to the defendant, and attempted burglary of one's own home.

> **For example:** After many years in prison Squeeky again decides to kill President Ford. She gets another pistol, loads it with ammo, cocks it, sneaks up to where Ford is, jumps out, points it at the President from a few feet away and pulls the trigger. But President Ford already died from natural causes and even though she shoots his corpse, it has no effect. Squeeky is charged with attempted murder. She can clearly argue that it is impossible to kill a dead man, so she did take a **substantial step** toward killing anyone at all. Killing a dead President (or anyone else who is already dead) is "legally impossible". It is irrelevant that she could have killed him before he died because she did not try to kill him before he died.

Legal impossibility was discussed earlier with respect to attempted receipt of stolen property. In the view of most Courts it is not legally impossible to **attempt to receive stolen property** simply

because the property received has been tracked by the police. But that seems to be a special case because of the peculiarity of the crime.

This is obviously only a valid defense to an attempted crime charge because if the act attempted was actually completed it would be clear whether or not it was a completed crime at all.

> **For example:** Roman gives Pimp $10,000 and tells him to get him a 15 year-old girl for sex. In other words, he intends to commit statutory rape. Pimp finds Lucy, an adult who looks young and hires her to have sex with Roman. Roman cannot be accused of statutory rape because Lucy is a consenting adult. Roman cannot be accused of attempted rape because he completed the act he intended. Although Roman wanted to have sex with a girl below the age of legal consent **he did not**. It is simply a **legal impossibility** to accuse him of attempting to commit a crime when he completed the act he intended to complete, and as completed it was not a crime.

But if a defendant is accused of an attempted crime, and the intended crime was legally possible at any time the defendant acted, legal impossibility is not a defense to the crime of attempt.

> **For example:** Ruby, intends to kill Oswald. He lurks around the Dallas police station for an hour. Then Oswald is brought out on a gurney and Ruby shoots him. But it turns out Oswald committed suicide minutes earlier. Ruby CAN be charged with **attempted murder** because it was **not legally impossible** to murder Oswald when he **first got dangerously close to completion of the crime.** Oswald was still alive as he "lurked about", Ruby was "dangerously close" to completion of his crime, and the crime was legally possible at that time.

6. Defense of Mistake of Law

Mistake of law is never a valid criminal defense because every person has a responsibility to know the law and is presumed to know the law. Otherwise the law would be determined by the crackpot ideas of each individual and the world would have no legal structure at all.

> **For example:** Drifter attempts to take Owen's aluminum cans honestly believing that it is not a crime to steal property worth less than $20. His mistake is a mistake of law, and it is not a valid defense. Although he may argue he had no intent to break the law, he committed an illegal act with intent to commit that act. Whether he realized it was illegal or not is irrelevant. Therefore, his mistake is no defense.

Conversely a defendant's mistake about law is never going to make an act a crime if that act otherwise would have been legal. The law determines what is legal and not the mistaken notions of the individual.

> **For example:** Drifter takes aluminum cans that Owen has abandoned, believing that he is committing a crime. Drifter can NOT be charged with larceny because abandoned property cannot be stolen. His evil intent does not create a crime where no crime otherwise exists.

Further, an attempted act cannot be a crime if the same act would not have been a crime upon its completion.

Chapter 14: Murder

Murder is an **unlawful homicide**, the **killing** of one **human being by another**, with **malice aforethought**.

Malice for murder is 1) **intent to kill**, 2) **intent to cause great bodily injury**, 3) **intent to commit an inherently dangerous felony**, the **Felony-Murder Rule**, or 4) **deliberate creation** of **extreme risks to others** with **awareness** of the risks and a **conscious disregard**, the **Depraved Heart Murder Theory**. Malice may be express (i.e. stated in words) or implied by actions.

At common law there were no degrees of murder but modernly **first-degree murder** is generally codified as one that is 1) a **willful, deliberate** and **premeditated** killing, 2) a killing done by an **enumerated means**, or 3) a killing caused by **commission of an enumerated felony**.

The above three paragraphs comprise the core definition of what a murder is, and what should always be said about it on a law school or Bar exam. It is probably the most extensively tested of all crimes in law school, and failure to say the above completely and accurately often dooms law students to failure.

To prosecute a defendant for murder the prosecution MUST prove the defendant acted with **malice aforethought**. That simply means that at the time of the homicide the defendant harbored "malicious" intent, a desire to do one of the wrongful things or cause a harmful result set forth above.

1. Unlawful Homicide

In every murder action the prosecution must prove there was an **unlawful homicide**. Homicide is the **killing of one human being by another**. Homicide alone is not a crime. Homicide is just a legal element the prosecution must prove in murder and manslaughter prosecutions.

All homicides are unlawful EXCEPT for public executions and killings during wars (declared by Congress). ALL other homicides are unlawful. Every time a person is killed in an auto accident it is an unlawful homicide. But it is seldom a crime.

Even if homicides are crimes, they may be "justified" by self-defense or some other affirmative defense. But in every case, whether accidental or justified homicides are still "unlawful".

So don't obsess over the "unlawful" aspect of homicide and instead focus on whether there was any homicide at all.

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A. The Death of a Human Being

The prosecution in every murder or manslaughter action must prove a human being has been killed. Sometimes this is impossible because there is no body, no **corpus delicti**.

Even if there is a body, it does not always prove a human being died. A **human being** is a **person** that has been **born alive** and has **not yet died**. A person who has not been born alive is a fetus, not yet a human being. A person who has died is a **corpse** and not a human being any more.

Getting obsessed with what the terms "born alive" and "death" mean in scientific terms is a waste of time unless the situation is very odd. The jury knows what birth and death mean in most cases.

Modernly some statutes may define "**fetal murder**" as the crime of murdering a fetus. This is a change in the definition of what murder is, not a change in the definition of what a human being is. Approximately half the jurisdictions in the United States have some type of "fetal murder" rule but they vary and there appears to be no broadly adopted rule on this.

There are no fetal-manslaughter rules.

On law school and Bar examinations any death of a "fetus" or a baby "born dead" calls for at least an explanation of what homicide means, what a human being is, and possibly some explanation of **fetal murder statutes**. And any shooting of a corpse calls for explanation of **legal impossibility**.

Never believe or say that in some states a fetus is classified as a human being. If that were so, death certificates would be issued for dead fetuses, there would be funerals for fetuses, there would be wrongful death actions for fetuses, fetuses would be inherit estates, and Courts would appoint guardians ad litem to represent the rights of live fetuses in legal actions.

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B. A Killing by another Human Being

In any murder or manslaughter action the prosecution must prove that the victim's death **was caused by** the acts, or wrongful failures to act, of **another human being**, the defendant. This requires a proof of **causality** as was explained in detail in Chapter 1. You should review that explanation and it will not be repeated here except for a few additional comments.

Often the cause of a death is a given fact, and in that case it requires little discussion. Other times causality is questionable and it requires detailed discussion.

> **For example:** Bob shot and killed Vick. Obviously Bob committed homicide because he shot and killed Vick. Nothing more needs to be said about it.

A person with a **pre-existing duty** to act may cause a homicide by a breach of that duty, whether the breach is deliberate or accidental.

> **For example:** Dan is driving his car and carelessly causes an accident killing Vick. Dan had a **duty** to drive carefully, he breached his duty, and it killed Vick. Dan has committed homicide.

Whether a homicide is deliberate, accidental, justified, criminal, etc. is totally irrelevant to the issue of whether there was a homicide at all.

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C. Homicide by Suicide

Suicide is the killing of a person by their own action, and not a killing of a human being by another person, UNLESS the suicide is **caused** by another person. If a suicide is **caused** by another person, it is a "**homicide by suicide**". **Causality** here is exactly as explained in Chapter 1 and the discussion there should be reviewed.

> **For example:** Dr. Evil locks Austin Powers in a dungeon and tortures him. Eventually Austin commits suicide to escape the torment. Dr. Evil CAN be charged with murder because **his wrongful acts drove Austin to suicide**. Dr. Evil is the **actual cause** of death because Austin would not have committed suicide **but for** the torture, and Dr. Evil is the **proximate cause** of death because Austin's suicide was the direct and natural result of his tortuous acts.

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D. Homicide by Instrumentality

Clearly one person kills another when a knife or gun are used as the murder instrument. And the defendant can use another **person** to kill the victim by means of a **hired killer** or a **dupe**. But **any instrumentality** can be the cause of murder if the defendant **set events into motion that resulted in the death of the victim.** In particular, a murder may be accomplished by forced **suicide** as explained immediately above or else by putting the victim at the peril of **natural** or even **legal and administrative forces.**

> **For example:** Queen Evil gives Sleeping Beauty a poison apple. Beauty is placed on life support. Eventually Beauty is "brain dead".[25] After Tom DeLay exhausts his photo-ops Beauty is taken off life support and her heart stops beating. Queen Evil is the actual cause of death, not the doctor that took her off live support, because Queen Evil placed Beauty in a position where death was inevitable. It was inevitable because she was "brain dead" and the doctor had a legal and moral duty to take Beauty off life support.

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E. The Year and a Day Rule

Under common law proximate cause for a homicide was terminated **a year and a day** after the date of the defendant's act. Modernly this time period has been extended by statute because of medical advances. Still, proximate causality becomes more difficult to prove beyond a reasonable doubt as the time between cause and effect lengthens.

> **For example:** Cheney shoots his lawyer in the face. The bullet is difficult to remove so it is left in place. The bullet damages the lawyer's health. He dies 40 years later at 80 years of age. Is Cheney the cause of the lawyer's death?

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[25] She wasn't too brainy to begin with. She mostly talked to birds and squirrels.

F. Pre-Existing Conditions do not Cause Death

Pre-existing conditions are not intervening forces that terminate causality. They are conditions that existed before the defendant acted, and the defendant acted subject to that existence.

> **For example:** Dan stabs Vick. Vick has hemophilia and he bleeds to death. Dan is still the cause of Vick's death. He is not relieved from liability because of Vick's pre-existing health problem. A **pre-existing condition** is NOT an "intervening" force.

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G. Failure to Intervene does not Cause Death

Failure of other parties to intervene is not an intervening force that terminates causality, even if the party that fails to act deliberately breaches a duty to act. It is a possibility that exists before the defendant acts, and the defendant acts subject to that possibility.

> **For example:** Dan throws Vick in a lake and he drowns because bystanders make no effort to rescue him. Dan is not relieved from liability because nobody else rescued Vick.

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H. Intended Results Doctrine

Even when a series of unforeseeable events, including independent intervening events, break the chain of causation in an unexpected manner, the defendant may still be liable for a homicide if 1) the defendant **acted with intent** to cause a homicide and 2) the **intended homicide results**. This may be called the **Intended Results Doctrine**.

> **For example:** Dan makes a bomb, intending to blow up Vick. He wraps the bomb up to make it look like a "birthday present", addresses it and sends it to Vick. But the mail truck is stolen, it crashes into a river, the package floats to shore without any address label. Then the package with the bomb is picked up by a passerby and thrown in the garbage. Then a garbage man is blown up while collecting the trash. Typically all of these events might terminate proximate causation. But Dan would still be charged with murder in most Courts because **he intended to kill Vick,** and **he did kill someone**. The fact that the chain of causation was unforeseeable is irrelevant.

2. Homicide with Malice Aforethought

The **mens rea** or evil intent for murder is **malice aforethought.** This means that the defendant **did not kill spontaneously** or as a result of malice that suddenly arose at the same instant the killing act was committed. In other words, before acting the defendant consciously decided to act in some manner that maliciously caused the death of the victim. There is no precise "time limit" for how long this process of "conscious decision" must take.

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A. Aforethought Distinguished from Premeditation

All murders are committed with malice aforethought, but many are not premeditated. **Malice aforethought** means that the defendant **did not merely act spontaneously** in response to a sudden event.

> **For example:** Prankster jumps out of a closet dressed like a zombie and scares Shaky. Shaky spontaneously stabs Prankster in the chest with a kitchen knife he happened to be carrying before he realizes it is not a 'real' zombie. Shaky cannot be charged with murder because he did not act with malice aforethought. In fact, he cannot be charged with any crime at all because he acted without criminal intent.

Premeditation means the defendant **contemplated taking action** and acted based on a **conscious decision** as opposed to actions done **on impulse**. A killing committed **on impulse** is not premeditated, but it may not be spontaneous either. Therefore impulse killings can still be murders.

> **For example:** Prankster jumps out of a closet dressed like a zombie and scares Shaky. Shaky is furious when he realizes the 'zombie' is really Prankster. On impulse angrily stabs Prankster in revenge. Shaky can be charged with murder because even though he acted on an impulse, he did not act spontaneously. Rather he had time to become angry, contemplate his actions, and he acted as a result of a conscious decision.

Deaths caused by the commission of inherently dangerous crimes, such as robbery, or the deliberate creation of extreme risks to others are homicides with malice aforethought because the acts done are inherently malicious.

> **For example:** Earthy, a member of "Save the Snails", makes a bomb, intending to blow up "Chateau d' Escargot", a French restaurant in the middle of the night when nobody would be there. He has no intention or desire to hurt anyone. He just wants to save snails. Since he deliberately created extreme risks to others he is acting with **malice aforethought**.

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B. Intent to Kill

Malice for murder may be an **express** or **implied intent to kill**. Express intent to kill is some expressed statement of intent such as, "I will kill you!" Implied intent to kill is evidenced by some action such as shooting or stabbing a victim multiple times or causing bodily injury almost certain to cause death.

Some professors and legal writers state that the use of a "deadly weapon" implies intent to kill, and this is often called the "**Deadly Weapons Doctrine**". This is just totally wrong, and it is a settled matter of law that it is wrong. The use of a gun or knife or bomb or some such weapon DOES NOT justify a finder of fact (e.g. jury) in concluding a defendant acted with intent to kill UNLESS the weapon is **used in a manner that is almost certainly calculated to cause death**.

This is all a very confused idea because the term "deadly weapon" actually means ANY object that is **used in a manner that is almost certainly calculated to cause death**. So ANY object

used in a manner calculated to cause death is a "deadly weapon", and in that sense the use of a "deadly weapon" certainly does imply intent to kill, simply because intent to kill is what defines the object used as a "deadly weapon".

> **For example:** Tom discovers Dick has eaten his last Krispy Kreme donut and reacts by shooting him. There is NOT ENOUGH EVIDENCE to prove Tom intended to kill Dick. The mere fact that he shot Dick with a gun does NOT support a jury finding that Tom intended to kill Dick.

This is a heavily tested issue, especially with respect to **attempted murder**. Remember, the mere act of shooting a victim with a gun or stabbing with a knife is NOT sufficient evidence to prove intent to kill, and intent to kill MUST BE PROVEN when attempted murder is charged.

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C. Intent to Cause Great Bodily Injury

Malice for murder may be an **express** or **implied intent to cause great bodily harm**. Express intent to cause great bodily harm is some expressed statement of intent but usually intent to cause great bodily harm is **implied by some action** to cause injury such as shooting or stabbing a victim.

Many Courts have held that the act of shooting or stabbing a victim **IS sufficient** for a finder of fact (e.g. jury) **to find implied intent to cause great bodily harm** in situations where there is <u>not enough evidence to find intent to kill</u>.

> **For example:** Tom discovers Dick has eaten his last Krispy Kreme donut and reacts by shooting him. Dick gets a blood infection and dies. There is not enough to prove Tom intended to kill Dick, but there IS enough evidence to prove Tom **intended to cause great bodily harm**.

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D. The Felony-Murder Rule

Under common law **Felony-Murder Rule** (FMR) malice aforethought is implied when the defendant commits an **inherently dangerous felony** causing a death.

1) The "inherently dangerous felonies"

The term "inherently dangerous felony" means **rape, robbery, arson** and **burglary**. It is essential to understand this rule does not apply to any other felony, no matter how "dangerous" it may be under common law. In particular, the common law Felony-Murder Rule <u>does not apply to kidnapping</u>. That is stressed because it is a common misconception.

The Felony-Murder Rule applies every time a rape, robbery, arson or burglary is committed, no matter how "safe" the circumstances of the particular crime.

> **For example:** Dan robs a bank and carefully walks away. The stress of the event causes a 99-year-old customer to have a heart attack and die. Dan CAN be charged with murder because the death was caused by the robbery.

The common law Felony-Murder Rule does not apply to any other felonies, no matter how dangerous the circumstances.

> **For example:** Roman sells a 13-year-old school girl heroin and she dies from an overdose. Roman can NOT be charged with murder based on the common law Felony-Murder Rule because the death was not caused by a traditionally recognized "inherently dangerous felony".

Statutes can modify the Felony-Murder Rule to expand it to cover other felonies, but there is no broadly adopted modification so it cannot be tested and should not be assumed. Instead you should stick to the common law rule and apply that.

2) The purpose of the Rule

The **purpose** of the Felony-Murder Rule at common law was to deter criminals from committing those inherently dangerous crimes that might inadvertently cause the more serious crime of homicide. This is a major subject of law school examination.

Almost always statutes proscribe the murders caused by inherently dangerous felonies to be first-degree murders, but not necessarily. Do not confuse the Felony-Murder Rule with First-Degree Murder statutes.

3) The underlying crime must be charged and proven

For the Felony-Murder Rule to apply, making the death caused by commission of an inherently dangerous felony a murder, the underlying "inherently dangerous felony" must be **charged and proven**. If the defendant is not convicted of the "inherently dangerous felony" the FMR will not apply at all.

4) Death must be caused by the inherent dangers

For the FMR to apply, making a death caused by commission of an inherently dangerous felony a murder, the death must be **caused by the inherent dangers of the crime**.

> **For example:** Dan drives to the bank intending to rob it. But he sees police nearby and changes his mind. As he drives out of the bank parking lot he runs over and kills a child who has negligently stepped in front of the car. Dan can NOT be charged with murder because the child's death was **NOT caused by the type of acts that make robbery "inherently dangerous".**

> **For example:** Dan, in a rage, spontaneously kills Vick by shooting into Vick's house. Although shooting the bullet into the house supports a charge of burglary, the burglary does not support a finding of first degree murder under the FMR because the death was not caused by the inherently dangerous nature of burglary.

5) Death must be caused by acts within the res gestae

For the FMR to apply, making a death caused by commission of an inherently dangerous felony a murder, the death must be **caused by acts done within the scope of the crime**. The "scope of a crime" is called the **res gestae** of the crime, and that is comprised of the sequence of actions beginning with the first **substantial step** that marks the beginning of the crime and continuing until the defendant is either **arrested** or has **left the scene of the crime** and **escaped** to a place of relative refuge following the crime.

If the act that causes a homicide occurs in the planning stages **before** the **substantial step** that marks the beginning of the crime attempt, or **after** the crime has been **abandoned** or **completed** and the defendants have **left the scene of the crime** and **reached a place of relative safety** the death falls **outside the res gestae** of the crime and the Felony-Murder Rule generally can NOT be applied.

The crime is not complete if the defendants are still being **chased by police**, so all deaths caused by "hot pursuit" are within the res gestae and can be the basis for application of the FMR.

> **For example:** Dan robs a bank. Police identify him from surveillance video and surround his apartment. The stress of the event causes a 99-year-old neighbor to have a heart attack and die. Dan CANNOT be charged with murder because the death was caused by acts done outside the **res gestae** of the crime. The **res gestae ended when he left the bank** and got to the relative safety of his apartment.

6) FMR establishes direct liability

The Felony-Murder Rule is a basis for finding all defendants who are **directly liable** for commission of an inherently dangerous felony to be **directly liable** for murder for deaths that result rather than vicariously liable regardless of which defendant (if any) directly caused the death.

> **For example:** Tom and Dick rob a bank. They are both directly liable for the robbery. During the robbery Tom kills the security guard. Both are **directly liable** for murder under the Felony-Murder Rule too. Dick is not just "vicariously liable" as a conspirator or accomplice because he was **directly liable** for the robbery.

7) The Redline Rule

Under the **Redline Rule** (*Commonwealth v. Redline*) which is followed by the vast majority of states, a defendant can NOT be charged with murder under application of the Felony-Murder Rule for the **death of a co-felon** at the hands of an **innocent party** such as the **police,** a **bystander** or a **crime victim**. [26] But if the person killed is not one of the defendant's co-felons, any death caused by the commission of the felony is chargeable against each felon as a murder.

[26] The Redline Rule is followed by almost all States except California and Massachusetts. Those States apply the "provocative act doctrine" which holds surviving criminals liable for murder if co-criminals are killed by police, bystanders or victims. California Bar Exams require criminal law answers to be based on "broadly adopted law", not California law, so the "provocative act doctrine" should not be mentioned on those exams. Instead, the Redline Rule should be discussed.

> **For example:** Tom and Dick rob a bank. During the robbery a guard kills Dick. Under the **Redline Rule** Tom can NOT be charged with murder based on the FMR because Dick was a **co-felon** who was killed by an **innocent third party**.

8) Unforeseeable deliberate acts of third parties cut off liability

The Felony-Murder Rule is subject to the same rules of causality that apply to all crimes. Unforeseeable acts of third parties that are not privileged by an affirmative defense such as "self defense" are **independent intervening events** that cut off liability.

> **For example:** Bob burgles Owen's home. Owen hears the break-in, goes berserk and chases Bob down the street, shooting at him. Owen accidentally kills Neighbor. The killing took place **because** Bob committed burglary and **within the res gestae** of the burglary. And accidental deaths are one of the inherent dangers of burglary. But Owen's act was an **unforeseeable act** that was not justified. Owen was NOT acting in self defense or trying to prevent a felony in progress. His act was not privileged. It was illegal and criminal. As such it was **unforeseeable** and it cut off Bob's liability for the death.

9) No such thing as "felony murder"

There is no such crime as "felony murder". ALL murders are felonies. There are no "misdemeanor murders". So saying, "Dan can be accused of felony murder," just reveals ignorance. If you mean to say, "Murder based on the Felony-Murder Rule" then say that and don't say "felony murder".

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E. Depraved Heart Murder Theory

Under common law **Depraved Heart Theory**, malice aforethought is implied when the defendant **deliberately creates extreme risks** to others with **awareness** of the risks and a **consciously disregard** for the risks causing a death.

> **For example:** Juan drives down the street shooting into houses at random to show his "homies" he is uno macho hombre. Juan can be charged with murder for any death caused because he **deliberately created extreme risks** to human life with **awareness** of the risks and a **consciously disregard** for the risks.

The difference between a death caused by **criminal negligence** or **recklessness** and a prosecution for murder under Depraved Heart Theory is that a murder prosecution must prove the defendant was both **aware** of the risks and **consciously ignored** or disregarded the dangers others were being exposed to by the defendant's actions.

Avoid saying "Depraved Heart murder". The correct phrase is "murder based on Depraved Heart theory". And never say "wanton conduct" or "reckless disregard". Those terms are so vague they are beyond understanding. Use the terms everyone can understand – <u>deliberate</u> acts that <u>create deadly risks</u> with <u>awareness</u> risks are being created and <u>conscious disregard</u> for those risks.

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F. Resistance to Arrest

Some common law Courts held that malice for murder was implied if a homicide was **caused by the defendant forcibly resisting arrest**. This idea has been rejected by many or most Courts modernly and it is not worth discussing on an exam.

3. Degrees of Murder

At common law there were no degrees of murder but modernly a **first-degree murder** is a homicide that is 1) **willful, deliberate** and **premeditated**, 2) caused by commission of a statutorily **enumerated felony** or 3) committed by a statutorily **enumerated means**. All murders that are not in the first-degree are murders in the **second degree**. Jurisdictions use varying terms.

The degree of murder is almost totally unrelated to the four "types of malice" upon which a murder conviction is based. It is **totally wrong** (and a common mistake of law students) to think that murders based on the Felony-Murder Rule are always first-degree murder or that Depraved Heart Murder is always second-degree murder.

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A. Willful, Deliberate and Premeditated Homicide

A **willful, deliberate** and **premeditated homicide** is almost always codified as first-degree murder.

A murder is **willful** if the defendant wanted to kill or hurt the victim. A murder is **deliberate** if the defendant intended to kill the victim, and **premeditated** if the defendant consciously decided to kill the victim before acting.

These words are all subject to some debate and interpretation. At one extreme a killing may be clearly willful, deliberate and premeditated, and at the other extreme it is clearly not. But between those two extremes it will be arguable and open to interpretation.

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B. Homicide Caused by Committing Enumerated Felonies

The "enumerated felonies" for first-degree murder almost always include the same "inherently dangerous felonies" for application of the Felony-Murder Rule. But in addition many other "felonies" may be enumerated because they are of particular interest to the various State legislatures. For example deaths caused by certain kidnapping situations may be prosecuted as first-degree murder.

But the various "enumerated felonies" for charging first-degree murder vary widely by State. On examinations all that has to be said is that whether or not a death is first degree murder because it was caused by commission of a felony depends on the statute in the State where the death occurred.

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C. Homicide Caused by Enumerated Means

The "enumerated means" for first-degree murder typically include the use of poison, torture or ambush. Any murder by these means is usually a first-degree murder regardless of other circumstances.

But again, States vary widely regarding the "enumerated means" for first-degree murder.[27]

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D. Second Degree Murder

Any murder that is not first-degree murder is second degree murder. That is all you need to say and all you should say. Do not say, "Depraved heart murder is in the second degree." That is totally wrong.

4. Mitigating Factors

An unlawful homicide is not necessarily a murder, even when a defendant intends to kill. Mitigating factors may cause the killing to be spontaneous and without "malice aforethought". Mitigating factors may reduce a murder from first-degree murder to second-degree, reduce a killing from murder to manslaughter, or make a homicide merely a "wrongful death". The finder of fact has considerable leeway in this regard.

> **For example:** Batman and Robin get in a fist-fight. Robin becomes enraged and deliberately kills Batman. It might be argued that Robin did not have intent to kill before the fight, so there was no malice aforethought sufficient to support a charge of murder.

5. Specific and General Intent

Application of the terms "specific intent" and "general intent" to murder is somewhat pointless.

Sometimes it is said that first-degree murders are specific intent crimes and all others are general intent crimes, but that is not true. First-degree murder is whatever the Legislature defines it to be. Often it is defined to be murders caused by enumerated means or during the commission of an enumerated felony, and that has nothing to do with a specific intent to cause a death.

Likewise, many homicides are the result of an intent to kill but they are not first-degree murders.

Overall, discussion of "specific" and "general" intent with regard to murder is a waste of time.

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[27] California, for example, includes "train wrecking" as an "enumerated means" for first-degree murder, but not truck wrecking, plane wrecking or boat wrecking.

Chapter 15: Manslaughter

Manslaughter is an unlawful homicide without malice aforethought. That does not mean it is "without malice". All crimes require "malice". Malice is simply **criminal intent**.

"Malice" for manslaughter means the defendant had a wrongful or criminal intent at the time of the killing.

Manslaughter may be either **voluntary manslaughter** or **intentional manslaughter**. Between jurisdictions the crime is given various names such as "criminal homicide" or "misdemeanor manslaughter".

1. Voluntary Manslaughter

Voluntary manslaughter is an **intentional**, unlawful homicide with malice, but without malice aforethought, because the intent to kill arose spontaneously the result of a **sudden, impulsive intent to kill** in a **fit of rage or heat of passion** resulting from **adequate provocation**. The lack of "malice aforethought" is what separates voluntary manslaughter from an intentional murder.

Voluntary manslaughter may also be charged instead of murder when a defendant commits an intentional homicide with an **honest but unreasonable belief** that deadly force is justified. This may involved an **aggressor using deadly force** in self-defense or a defendant using **deadly force defending an aggressor**. This may be called an "**imperfect**" claim of self-defense or defense of others.

In any of these situations the finder of fact has considerable leeway to find the defendant guilty of voluntary manslaughter rather than murder.

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A. Adequate Provocation

Voluntary manslaughter may be found when a defendant spontaneously and intentionally kills in a **sudden heat of passion** caused by **adequate provocation.** Adequate provocation is **wrongful conduct by the victim** that was sufficient to cause a **reasonable person** to be raised to such a fit of rage or heat of passion that they would be **impelled to kill**.

Adequate provocation requires **wrongful conduct by the victim** of the homicide. The conduct might consist of an **assault** or **battery** that caused the defendant to become enraged and strike back at the victim in retaliation. The act of the victim might be an isolated incident or part of a series of attacks. The more threatening or offensive the victim's conduct, the more adequate the provocation.

> **For example:** In the Hillbilly Bar Billy held Vick from behind while Dirk urinated on his new cowboy boots. After everyone had a good laugh at Vick's expense he pulled out his pocketknife and stabbed Billy to death in a blind rage. Vick may be charged with voluntary manslaughter rather than first-degree murder because his act was an **immediate response** to **wrongful and highly offensive conduct** by the victim.

The rage of passion may be the **cumulative result** of a series of wrongful acts by the victim such that no one act was adequate but the last act was the "straw that broke the camel's back."

> **For example:** Bully tormented Purvis at school every day and made his life miserable. Frequently he would vandalize Purvis' locker, push him around and embarrass him. One day Bully gave Purvis a "wedgie" in front of Betty Sue Dunn, the hottest cheerleader on the squad. Enraged, Purvis jammed a yellow number two pencil in Bully's ear three-fourths of the way to the pink eraser. Purvis may be charged with voluntary manslaughter rather than murder because this was the cumulative result of many wrongful acts by Bully.

The rage of passion may result from **wrongful acts** by the victim **against the defendant's family** or arise from **mutual combat** between the defendant and the victim.

Insulting words or gestures are generally **NOT** sufficient by themselves to constitute adequate provocation. If combined with **assault or battery** the combination may be deemed adequate.

> **For example:** Vick tells Dan, "Your mother wears combat boots." Dan responds by killing Vick. Dan should be convicted of murder and NOT voluntary manslaughter because no reasonable person would be moved to kill by such a lame insult.

A rage of passion is adequate if a reasonable person would have been enraged in the same circumstance, **even if the rage is based on a reasonable mistake of fact.** But the mistake of fact must generally be reasonable.

A rage of passion is adequate, even if it is the result of an **insane delusion**, if **a reasonable person believing the delusion would have become enraged.**

> **For example:** Dan suffers from an insane delusion that he has a daughter. To torment him Vick brags to Dan, "I raped your daughter." Dan responds by killing Vick. Dan may be charged with voluntary manslaughter instead of murder if a reasonable person would be moved to a heat of passion by Vick's claim **if the person actually believed he had a daughter**.

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B. Killing in the Heat of Passion

Voluntary manslaughter generally must occur **soon after the provocation**, while the defendant is in a **heat of passion**, **without delay** sufficient to allow the passions of a reasonable person to calm enough he or she would no longer be impelled to kill.

Voluntary manslaughter is NOT an appropriate alternative to a murder charge if the intentional homicide is merely for **revenge, vengeance,** to **protect family honor** or otherwise to **prosecute blood feuds**. Consequently there is no rationale for charging voluntary manslaughter rather than murder if the defendant has adequate "cooling down" time between the act of provocation and the act of killing.

A defendant has enough time to "cool down" if a **reasonable person** would have calmed down under the **same circumstances**. If the defendant was subject to **mental or physical factors** that might affect his or her mental state, such as darkness, intoxication, sleepiness, mistake or fatigue, the defendant's actions would be judged against those a **reasonable person** would take if suffering from the same mental and physical conditions.

But the reasonable person test does not adopt a defendant's proclivity to seek vengeance or harbor grudges.

> **For example:** Ahmad suspects Abdul has been having sex with his wife. Ahmad tells his brothers about this. Together they accost Abdul the next day and stab him to death. Ahmad and his brothers should be convicted of murder and NOT just voluntary manslaughter because they were acting to protect "**family honor**" and not because they were suddenly moved to a murderous rage.

The reasonable person test for a **child defendant** is the behavior of a **reasonable child of the same age, experience and intelligence.**

In many jurisdictions the reasonable person test for a defendant with **diminished mental capacity** is whether a reasonable person suffering from the same diminished mental capacity would become enraged and remain enraged as the defendant claims to have been.

> **For example:** Dan White killed San Francisco Mayor Moscone and Harvey Milk after eating Twinkies. A San Francisco jury believed White was suffering from stress, and possibly that the preservatives, artificial additives and other substances in the Twinkies also caused him to suffer diminished capacity. He was found guilty of voluntary manslaughter, not murder. [28]

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C. Imperfect Defenses

Juries have broad leeway when deciding if a homicide should be punished as a murder or as manslaughter when both crimes are charged. [29]

Juries may find defendants guilty of voluntary manslaughter instead of murder when the defendant commits an intentional homicide with an **honest but unreasonable belief** that his or her use of deadly force was justified. These are situations where the defendant 1) **used unreasonable force** in self-defense or the defense of others, 2) used deadly force to defend another person who was **the aggressor** in a fight, 3) used **deadly force to defend property**, 4) used deadly force against a **fleeing criminal**, or 5) used deadly force because of an **unreasonable mistake**.

> **For example:** Vick tries to break into Dan's house. Dan accosts him outside the house with a gun and yells, "Freeze!" Vick starts to run so Dan deliberately shoots him in the back as he flees. Dan claims he thought he could legally shoot Vick because he was a

[28] This was called the "Twinkie defense".

[29] If a District Attorney believes the evidence fully supports a finding of murder, the crime of manslaughter might not be charged so that the jury is denied the option to convict the defendant of the lesser crime. But this ploy can backfire and result in a "hung jury" or even an acquittal.

burglar. A finder of fact (e.g. jury) MAY find Dan guilty of voluntary manslaughter as an alternative to murder.

2. Involuntary Manslaughter

Involuntary manslaughter is an **unintentional**, unlawful homicide. Malice for involuntary manslaughter is:

1) **Recklessness**, the **deliberate creation of extreme risks** to others,
2) **Criminal negligence**, a **willful (deliberate or conscious) breach of a pre-existing duty to act** to protect others from extreme risks, or
3) The **commission of a malum in se crime** that is not one of the "inherently dangerous felonies" sufficient to charge murder under the Felony-Murder Rule.

The **actus reus** for involuntary manslaughter is the unlawful homicide.

A death caused by criminal negligence may be called various things including "reckless homicide" and "negligent manslaughter". And a death caused by commission of a crime may be called "misdemeanor manslaughter" or "criminal manslaughter".

Professors and legal writers often say involuntary manslaughter is "without malice aforethought" but that is incorrect. [30] Involuntary manslaughter actually requires "malice aforethought" because it requires a death caused by recklessness, criminal negligence or commission of a crime. Any and all of those three acts constitute "malice aforethought", but simply not the types of "malice aforethought" that supports a murder charge. Don't say this on an exam or confront your professor about it, but clearly intent to sell heroin to school children suggests as much "malice aforethought" as intent to rob a liquor store.

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A. Criminal Negligence and Recklessness

Criminal negligence and recklessness were explained above in Chapter 1.

The difference between **regular negligence** and **criminal negligence** is that criminal negligence is a deliberate breach of a duty, as opposed to an inadvertent or accidental breach, exposing others to extreme risks. The risks involved must be likely risks and **not merely 'possible' risks.**

> **For example:** Don deliberately leaves his infant, Sonny, in his car on a hot day while he gambles in the casino. That is criminal negligence because he deliberately breached his duty to protect his child.

The difference between **recklessness** and **criminal** negligence is that recklessness deliberately creates extreme risks to others while criminal negligence is a deliberate breach of a duty to protect others from extreme risks that exist through no fault of the defendant.

[30] I was taught this in law school and defined involuntary manslaughter that way for many years before I realized the nonsense of it.

> **For example:** Don deliberately puts his infant, Sonny, into his hot car before he goes to gamble in the casino. That is recklessness because he deliberately created the extreme risks to his child.

The difference between involuntary manslaughter because of criminal negligence ('negligent manslaughter') or recklessness ('misdemeanor manslaughter') and murder based on the Depraved Heart Theory is that a murder conviction requires proof defendants acted with **awareness** of and **conscious disregard** for the risks created by their actions. In contrast prosecution for involuntary manslaughter does not require proof of awareness and conscious disregard.

> **For example:** Don leaves his infant, Sonny, in his car before he goes to gamble in the casino and Sonny dies from the heat. To convict Don for murder the prosecution must prove Don **was aware** of the dangers his acts created **and ignored** the dangers. To convict Don for involuntary manslaughter the prosecution only has to prove that Don's actions **caused Sonny to die from exposure** to extreme risks, whether Don was aware of the risks or not.

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B. Misdemeanor Manslaughter

The term "**misdemeanor manslaughter**" is an **involuntary manslaughter caused** by the **commission of a crime** that is not one of the "inherently dangerous felonies" that can be charged as murder based on the Felony-Murder Rule.

The name "misdemeanor manslaughter" is a misnomer because the crime committed can actually be a felony. For example, a death caused by a drug overdose might be called "misdemeanor manslaughter" even if the drug offense is a felony. And every manslaughter is a felony as well.

The same crime is sometimes called 'criminal manslaughter'. That name makes more sense and will be used here.

Prosecution for criminal manslaughter requires a death to be caused by commission of a crime that is **bad in itself** or **inherently wrongful** as opposed to a mere regulatory violation. A crime that is inherently wrongful is called a **malum in se** crime while regulatory violations are called **malum prohibitum.** Malum in se crimes are said to be crimes of "moral turpitude".

> **For example:** Driver accidentally runs a stop sign and hits Pedestrian. Drover cannot be charged with **criminal manslaughter** merely because he ran the stop sign because traffic laws are regulatory in nature, not "malum in se" crimes.

For involuntary manslaughter to be charged on a misdemeanor manslaughter (criminal manslaughter) theory, the death must be **caused by acts done during the commission of the crime** in the same exact way as explained above with respect to the Felony-Murder Rule.

3. Accidental Deaths

Involuntary manslaughter cannot be charged because of deaths that occur merely because of ordinary negligence. That means that if the defendant **did not deliberately act to create extreme risks to others** and **did not deliberately breach a duty causing others to be exposed to extreme risks** there has been NO CRIME and involuntary manslaughter can NOT be charged.

Typically deaths that occur because of **traffic accidents, medical malpractice, design flaws, product liability** or **failure to maintain** property or equipment are simply not criminal matters because no deliberately wrongful act is involved.

Never assume that every death justifies a criminal charge. Other than the few strict liability crimes (statutory rape, traffic offenses and regulatory violations) every crime requires some form of **criminal intent** (mens rea).

Criminal intent for voluntary manslaughter is the intent to kill the victim.

Criminal intent for misdemeanor manslaughter (criminal manslaughter) is the intent to commit a crime that causes the death of the victim.

Criminal intent for involuntary manslaughter based on recklessness or criminal negligence is the deliberate creation of extreme risks to the victim or else the deliberate breach of a duty to act to protect the victim from extreme risks.

Any a homicide committed without one of these forms of criminal intent is merely an accident, no matter how tragic, and cannot be charged as a crime.

> **For example:** Driver is blinded by the sun as he drives his car and he runs over a child that is walking across the street. While tragic, this is not a crime because 1) he did not intend to kill the child, 2) did not intend to commit the crime that caused the death (e.g. did not intend to drive recklessly), 3) did not deliberately cause the danger that killed the child, and 4) did not deliberately breach his duty to drive carefully.

Chapter 16: Miscellaneous Crimes

There are a number of miscellaneous crimes that are more or less **legal trivia.** They are seldom the main focus of law school examination. But, your professor may be exception to that rule, so you should learn a minimal amount about them.

Some of the miscellaneous crimes were important and serious felonies at common law, such as **mayhem** and **sodomy.** But these crimes are of little importance modernly or have been incorporated into the definition of other serious felonies (e.g. sodomy without consent is now classified as rape.)

Some of the miscellaneous crimes are considered much more serious today than they were under common law, such as **kidnapping**.

However, it is important for a law student to know the **definition of these crimes** and **address them as issues of discussion** if they are presented in law school exam questions. These miscellaneous crimes are presented here in alphabetical order.

1. Bribery

Bribery is the statutory crime of giving or taking something of value with the intent of influencing the conduct of a public official or private citizen performing an official act. For example, it is bribery to pay a citizen to vote a certain way in a public election. In some jurisdictions the **promise** of a gift of value is a sufficient act. The crime may be applied both to the person giving and the person receiving the thing of value.

Bribery is virtually never tested on law school or bar exams.

2. Compounding

Compounding (also called "compounding a felony") is the common law misdemeanor of exchanging something of value in consideration of an agreement to withhold evidence or forebear prosecution of a crime. Modernly compounding may be a felony. The crime may be committed by anyone in a position to provide evidence about or pursue prosecution of a crime, including a crime victim. However, statutes may authorize parties to compromise the settlement of civil complaints that may constitute misdemeanors.

> **For example:** George discovers that Danny is the one who robbed the local bank. Danny offers to give George $1,000 if he will keep his mouth shut. If George takes the $1,000 in exchange for his silence he has committed the crime of **compounding**.

On law school and bar exams "spotting" the issue of compounding may gain you extra points, but it is not a crime of great interest.

3. Forgery, Uttering and Counterfeiting

Forgery occasionally appears on law school exams in a fact pattern intended to elicit discussion of **larceny by trick**. If a character in an essay question forges documents to steal something explain and discuss the crime of forgery briefly. And if the document is actually used, the crime of **uttering** has been committed, and you should explain and discuss the crime of uttering briefly as well. But the real focus of discussion should be **larceny by trick**.

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A. Forgery

Forgery is the fraudulent making or alteration of a written document in a manner that makes it appear to establish or prove legal rights or obligations. Forgery of an altered document must change its appearance to change its legal significance.

Forgery is a **specific intent** crime, and the prosecution must prove the defendant changed the document **with intent to defraud** others or make some other wrongful use of the document.

The crime is complete as soon as the document is created or altered with the fraudulent intent. At common law forgery was a misdemeanor, but it is generally a felony by statute.

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B. Uttering

Uttering is the crime of presenting or offering a counterfeit or forged instrument as being genuine while knowing it to be false. It was a common law misdemeanor but may be a felony modernly. It is often combined in statute with forgery.

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C. Counterfeiting

Counterfeiting is the crime of **making false money** in the appearance of genuine money. Counterfeiting is usually the forgery of money paper.

The crime of **counterfeiting** is almost never tested or of much interest in law school.

4. Fraud

Criminal fraud is the act of intentionally and knowingly misrepresenting or concealing material facts to obtain services from or permanently deprive others of property. **False pretenses**, **larceny by trick**, **forgery**, **uttering** and **counterfeiting** are specific types of fraud recognized by the common law, but modernly other criminally fraudulent acts such as "insurance fraud" and "false advertising" are often recognized.

To prove "fraud" of this type the prosecution generally must prove the defendants deliberately misrepresented or concealed or failed to reveal important facts that they had a duty to reveal. Mere

expressions of opinion or "touting" the benefits others would receive from some commercial transaction are not "fraud".

> **For example:** Swifty sells Bonnie a car by telling her it is "reliable", has "good tires" and "low mileage". All of those statements are mere "sales pitches" and do not constitute "criminal fraud", even if Swifty knows the car is less reliable, has tires more worn, and has higher mileage than some other cars. BUT if Swifty says these things knowing the car's odometer has been turned back or that the car has been salvaged from flood waters, the same statements become misrepresentations of material fact and he is guilty of fraud.

5. Extortion and Blackmail

Under common law **extortion** was the misdemeanor crime of a public official collecting an unlawful fee under color of office, and only a public officer could commit extortion. Modernly extortion has been extended to any unlawful use of intimidation to obtain something of value, short of robbery.

Blackmail is extortion using threats to accuse someone of **criminal or immoral behavior**.

Extortion is different from **robbery** because the prosecution in a robbery action must prove the defendant committed larceny from the person of the victim. If there is no larceny from the person of the victim the crime committed is extortion, not robbery.

> **For example:** Dan forces Paris to give him a role in her next movie by threatening to release sex tapes that would be damaging to her career. Dan has committed **blackmail**, a form of **extortion**, not robbery because he has not taken any personal property from Paris.

Statutes generally classify extortion as a felony.

6. Kidnapping

Under English common law **kidnapping** was the misdemeanor of **seizing** a person AND **taking** them out of the country. In the early United States common law kidnapping required the victim to be moved against their will from one State to another. This is legal trivia seldom tested on law school exams.

Kidnapping is NOT and never has been one of the "inherently dangerous felonies" recognized by the common law for application of the Felony-Murder Rule. This is a common misunderstanding by law students.

Modernly kidnapping is a felony defined by statue. Generally kidnapping statutes require **false imprisonment** combined with either 1) **forced movement of the victim** causing **harm,** 2) **forced movement** for an **independent wrongful purpose,** 3) **intent to secretly confine** the victim or 4) **intent to remove** the victim to another country or state. Many statutes prescribe a harsher penalty in the case of **kidnapping for ransom.**

Frequently a death caused by a kidnapping for ransom is enumerated as a first degree murder.

The vast majority of kidnappings in the United States appear to involve parental custody disputes and the movement or concealment of children in violation of court orders.

Kidnapping occasionally appears on law school exams in a fact pattern to elicit discussion of vicarious liability. In those situations kidnapping should be explained and discussed briefly but the main focus should be on whether the vicarious liability that results is based on conspiracy theory or accomplice theory.

"**False imprisonment**" should not be mentioned or discussed on a criminal law exam. That term should only be used on tort exams. [31]

"False arrest" should never be said on ANY law school exam. It is not a legal term.

7. Mayhem

At common law **mayhem** was the felony of permanently and maliciously maiming a person in a manner that left them less able to defend themselves or attack others in combat.

Modernly mayhem is a statutory felony, and generally means **deliberately and maliciously permanently maiming or disfiguring** a person. Malice means **intent to maim or disfigure** the victim or acts done with substantial knowledge it will result.

Mayhem is virtually never going to be tested on a law school exam.

8. Misprision of a Felony

Under very old common law **misprision of a felony** was a misdemeanor for failing to act to prevent or report a felony committed by some other person. It is no longer of any interest because modernly individuals generally have **no duty** to prevent or report crimes.

Discussion of misprision on a law school exam is almost always a mistake. Fact patterns that concern defendants who learn of crimes committed by others are always intended to elicit discussion of other issues such as conspiracy, vicarious liability, receiving stolen property, or possibly compounding.

9. Perjury and Subornation

Perjury is the crime of giving **false testimony under oath** regarding material facts. **Subornation** is the crime of knowingly causing perjury by another person. Perjury requires proof the defendant stated material facts to be true 1) **knowing** they were false or 2) **believing** them false, or 3) **without knowledge** whether they were true or not. Perjury and subornation are felonies.

[31] At common law "false imprisonment" was the misdemeanor of confining a person without movement sufficient to charge "kidnapping". This is legal trivia, never tested, and should never be mentioned on an exam.

Chapter 17: Affirmative Criminal Defenses

Criminal law recognizes most of the same defenses that tort law recognizes in intentional tort actions. As with tort law defenses can be either **passive defenses** or **affirmative defenses**. Passive and affirmative defenses were explained in general terms in Chapter 1.

Affirmative criminal defenses are claims by a criminal defendant that even if the prosecution has proven every required element of the crime charged, **the defendant's act was still privileged by law**. When a defendant claims an affirmative defense, the defendant has the burden of proving each and every element of an affirmative defense.

> **For example:** Dan intentionally shot and killed Vick. That is all the prosecution has to prove to support a finding of murder. But at trial Dan can raise the **affirmative defense** of self-defense. If Dan claims he acted in self-defense it is an affirmative defense that he was privileged to use reasonable force to protect himself. Dan has the burden of proof. If Dan convinces the jury it is an **absolute defense** and he cannot be convicted of ANY crime at all. If Dan merely raises some reasonable doubt in the minds of the jury he MUST be found "not guilty" as to murder, but the jury still may find him guilty of a lesser included offense.

A silly mnemonic for criminal defenses is:

Baby MICE Drive PANDAS to Drink

This stands for the criminal defenses of **infancy, mistake, insanity, consent, entrapment, duress, prevention of crime, authority of law, necessity, defense of property, another or self, intoxication.** Some of these are affirmative defenses and others are passive defenses.

1. Defense of Infancy

Under common law it was **conclusively presumed** that a child under the age of 7 years could NOT form criminal intent. There was a **rebuttable presumption** that a child between the ages of 7 and 14 could NOT form criminal intent. And, there was a **rebuttable presumption** that a child of 14 or older COULD form criminal intent.

Modernly this may be defined by statute, but generally a claim that a juvenile defendant was "too young" to form criminal intent is called a **defense of infancy**.

In a homicide prosecution (i.e. a prosecution for murder or manslaughter) **defense of infancy** may be cited as a **mitigating factor** that might cause the jury to reject a more severe finding, and it may be an absolute defense.

Since **criminal intent** is an element the prosecution must prove, this is a **passive defense**.

> **For example:** Tom goes into the bank with a gun and demands all the money. He is charged with robbery. The prosecution must prove Tom had the **specific criminal intent of permanently depriving the bank** of its money. But if Tom is only six years old he can raise the **defense of infancy** to argue he was too young to form that intent.

2. Defense of Mistake

The defense of **mistake of fact** and **mistake of law** were explained earlier along with **factual impossibility** and **legal impossibility** in Chapter 3 with respect to attempted crimes.

3. Defense of Insanity

Under criminal law a defendant cannot be convicted of a crime if they were **legally insane** at the time of the criminal act. **Insanity** is often a defense to murder. But it can be a defense to other crimes as well, such as larceny caused by kleptomania. Jurisdictions are split on the exact definition of legal insanity. There are three main views.

Do not discuss "insanity" as a defense on an exam unless the facts expressly state the defendant has some psychological disorder.

Again, since **criminal intent** is an element the prosecution must prove, this is a **passive defense**.

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A. The M'Naughten Rule

Under the **M'Naghten Rule** defendants are legally insane if **because of a disease of the mind** they 1) **do not know what they are doing** (incapable of knowing the nature of their acts) OR 2) **do not know what they are doing is morally wrong**.

> **For example:** Hannibal suffers from a psychotic delusion that Clarise is a pumpkin pie. He cuts Clarise up and eats her. Hannibal can raise the defense of insanity under the M'Naghten Rule because he **did not know he was cutting up a human**.

The M'Naughten Rule is the oldest and most accepted of all "insanity defenses" and you should always be prepared to define and explain it on exams.

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B. The Irresistible Impulse Rule

Some jurisdictions have adopted the **irresistible impulse** test which holds a defendant is legally insane if a **disease of the mind caused them to suffer an irresistible impulse** to commit the criminal act, even if the defendant knows what he is doing and knows it is morally wrong.

> **For example:** Hannibal knows Clarise is a human, and he knows it is wrong to eat her, but he **just can't stop himself**.

The Irresistible Impulse Rule is the second most common "insanity defense" and it is easy to explain so you should explain it on exams also.

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C. Model Penal Code

The American Law Institute has proposed a "Model Penal Code" definition for legally insanity. It defines legal insanity as a **mental disease** that makes a defendant **substantially unable** to 1) **know a criminal act is wrong** or 2) to **obey the law**.

This is not broadly adopted law and not what Bar examiners want to hear about, so who cares? If professors insist on hearing about this, humor them. But question why.

4. Defense of Consent

Consent is the defense that the victim of an alleged crime consented to the defendant's act. Where consent is a required element of the charged crime, the burden is on the prosecution to prove a lack of consent and a claim the "victim" consented is a **passive defense**. For example, rape is a crime of sexual intercourse without consent, so lack of consent by the victim is an element the prosecution must prove. In that case a claim of consent by the defense is a passive defense.

If lack of consent is NOT an element the prosecution must prove it MAY be an affirmative defense. But often consent is not a valid defense at all. For example, "consent" by a murder victim or victim of great bodily injury is never a defense because a victim cannot legally consent to such a crime.

If consent is a defense at all, it is not effective unless the consent is **voluntary** and given by a **fully-informed** person with **legal capacity** or authority to consent. Therefore, consent obtained by trick, threat or from a minor or person lacking capacity to consent is not effective.

The crimes for which voluntary, knowing consent is an effective defense are **rape** (not statutory rape of course), **theft** (larceny, embezzlement, false pretenses), **burglary**, **kidnapping**, and **battery** without breach of peace or great bodily injury.

Forgiveness by a victim after the fact is never a defense to any crime because crimes are offenses against the state, not against the victim.

5. Defense of Withdrawal

Withdrawal is a defense to **vicarious liability** for crimes committed by co-conspirators and accomplices after the defendant "withdraws" from some criminal activity. It is an **affirmative defense**, and the burden is on defendants raising the defense to prove they 1) **voluntarily stopped** participating in some criminal activity, 2) **informed their co-conspirators or accomplices** they were stopping, and 3) **acted to stop or dissuade** the co-conspirators or accomplices from continuing the criminal activity.

The "action" taken by defendants to stop or dissuade co-conspirators or accomplices from continuing their criminal acts must be sufficient to relieve the defendant from further liability. Some jurisdictions require defendants to tell the police about the criminal activity.

Withdrawal is never a defense as to crimes already committed by the defendant, by co-conspirators or by accomplices. It is only a defense as to **vicarious liability** for subsequent crimes committed by co-conspirators or accomplices.

> **For example:** Tom tells Dick and Harry they should rob a bank. This is the crime of **solicitation to commit robbery**. Later Dick and Harry tell Tom they are going to rob the bank as he suggested. Thinking better of it, Tom tells them it is a stupid idea, and they should not rob the bank. Dick and Harry ignore his advice and rob the bank anyway. If tried for **bank robbery**, Tom may raise the **defense of withdrawal** to avoid **vicarious liability** for that crime (as an accomplice) because he tried to dissuade Dick and Harry from robbing the bank. But he cannot escape prosecution for solicitation because he committed that crime BEFORE he did anything to withdraw from the plot.

6. Defense of Entrapment

Entrapment is the defense that the criminal act was the product of police action and not the intended result of the defendant. This is an **affirmative defense**, and it often involves situations where a police agent pretends to be an accomplice in the commission of the crime charged. There is a SPLIT of law on this defense.

Under the MAJORITY view (including federal law) entrapment is a valid defense only if the defendant was **not predisposed** to commit the crime. In this case the police must **instigate** the crime by **originating the criminal plan** and the defendant **would not likely have committed it otherwise**.

> **For example:** Norm, an undercover agent, asks Dan, "Want to buy some cheap dope?" If Dan buys the drugs and is charged with **drug possession**, he can claim entrapment if he can prove he was not predisposed to buy the drugs before Norm approached him.

Under the MINORITY view entrapment is a valid defense, even if the defendant was predisposed to commit the crime, if the **police conduct was so reprehensible and outrageous it cannot be condoned** by the Court.

> **For example:** Norm, an undercover cop, repeatedly offers to sell Dan drugs, knowing that Dan a recovering addict. Dan eventually succumbs to temptation and buys dome drugs. Even though Dan was predisposed to buying the drugs, this still may be held to be entrapment because it is reprehensible for the police to knowingly tempt drug addicts to commit crimes they are attempting to avoid.

If an undercover police agent acts in concert with other criminal defendants the other defendants are not vicariously liable for the acts of the police agent, and if potential “victims” agree to cooperate with the police, their agreement may constitute consent as to the acts of the defendant.

> **For example:** Norm, an undercover cop, agrees to help Dan break into a store as part of an effort to infiltrate a burglary ring. The store owner is secretly notified and agrees to cooperate with police. Late at night Dan kicks open the back door of the store so Norm can run in to steal merchandise. Dan stays in the get-away car. Dan cannot be convicted of burglary because he **did not enter the store**. Norm entered the store, but Dan is not

vicariously liable for his act because he is a police agent. Moreover, the entry was **not trespassory** because Norm had the store owner's consent. And since the store owner agreed to cooperate with the police, Dan may not even be liable for kicking in the door. Further, larceny or attempted larceny may be **legally impossible** because property cannot be stolen from a "victim" who agrees to let it be taken.

7. Defense of Authority / Crime Prevention

Prevention of crime and **authority of law** are closely related defense claims.

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A. Prevention of Crime

Prevention of crime is the defense that the defendant was privileged to use reasonable force to halt or prevent a **violent felony.** A violent felony would generally be a **rape, robbery, burglary, kidnapping, arson** or a **deadly assault**. Prevention of crime is an **affirmative defense** so the defendant has the burden of proof.

> **For example:** Dan is robbing the bank and Gary the guard shoots and kills him. If Gary is tried for murder he can raise the **defense of prevention of crime** and would be acquitted if he can prove he used reasonable force.

Prevention of crime is NOT a valid defense if the crime to be "prevented" has already been completed.

> **For example:** Dan robs the bank and Gary the guard shoots and kills him as he drives out of the parking lot. Gary cannot claim prevention of crime as a defense because the robbery was over before he shot, so he was not "preventing" any crime from happening.

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B. Authority of Law

Authority of law is the defense that the defendant was privileged to use reasonable force to **catch and arrest** a criminal suspect. It is an **affirmative defense** so the defendant has the burden of proof.

Police are privileged to use **deadly force if necessary** to **catch** an **escaping felony suspect** regardless of the type of felony. And the officer can **arrest without a warrant** if the officer has a **reasonable belief** a felony has been committed and a reasonable belief that the suspect did it.

Private citizens can use **deadly force if necessary** to **catch** an **escaping felony suspect** only if a **violent felony** has **actually been committed by the suspect.** And a private citizen can arrest only if a felony has **actually been** committed and a reasonable belief that the suspect did it.

Both police and private citizens can arrest for **misdemeanors committed in their presence** and they were in **fresh pursuit**. **Reasonable force** is allowed, but **never deadly force** in the case of a misdemeanor.

8. Defense of Necessity / Duress

Necessity is the defense that the defendant acted under **duress** to save **himself**, **others**, or **property** from injury. A "defense of necessity" claim may also be called a "defense of duress" claim. This defense incorporates the defenses of "**defense of others**", "**defense of property**" and "**self defense**" explained below. These are all **affirmative** defenses.

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A. Self Defense

Self defense is the defense that defendants are privileged to act as reasonably necessary to protect them selves from suffering a battery. When defendants are not the aggressors in conflicts and reasonable force is used, this is a complete defense. It is an **affirmative defense**.

Whether the actions taken by a defendant are reasonable or not depends, obviously, on the circumstances and the threats they face.

Usually "self defense" claims concern the use of force in self defense, and other actions taken in self defense are often called "defense of necessity" or "defense of duress".

> **For example:** Hansel is lost in the forest blizzard. He breaks into a cottage made of candy and eats some furniture to save himself. If tried for burglary he might claim he acted out of "necessity" or "under duress" to save himself. But he could also say he acted "in self defense". The terms are fairly synonymous.

If defendants use force against innocent parties because of a **mistake of fact**, the claim of self defense is still effective if the mistake was a **reasonable mistake.** If the mistake was NOT reasonable a claim of self defense will not be effective, but an honest but unreasonable mistake of fact may be a mitigating factor that might reduce the severity of criminal convictions. For example a charge of murder might be reduced to a conviction for manslaughter if the defendant acted honestly but unreasonably.

A claim of self defense can NOT be raised by the **aggressor** in an altercation. The **initial aggressor** is the person that initiates the fight. But the role of aggressor is assumed by the other party if they **unreasonably escalate the violence** by responding with unreasonable force in return. And the role of aggressor is assumed by a party that **prevents withdrawal** from the fight by the other party after **intent to withdraw has been communicated**.

Most Courts hold that an innocent victim of a deadly attack may use deadly force in self defense and has **no duty to attempt to retreat**. But where the defendant is a **willing participant** in a fist fight or other non-deadly encounter, the defendant does have a duty to attempt retreat before resorting to deadly force.

Self defense does not justify committing murder under any circumstances.

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B. Defense of Others

Defense of others is the defense that the defendant was privileged to act as reasonably necessary to protect another person from injury. Where the person defended was not the aggressor in the conflict and reasonable force was used, this is a complete defense. This is an **affirmative defense**.

Under early common law a person was only privileged to defend members of the family or household. This is just legal trivia now because the privilege has been extended to the protection of almost any person in danger for a very long time.

If a defendant uses force against an innocent person because of a **mistake of fact**, the claim of defense of others is still effective if the mistake was a **reasonable mistake** and the force used was **reasonable force**, given the mistake, unless the defendant helps the aggressor in an altercation. If the mistake was NOT reasonable, or the force used was not reasonable, given the mistake, a claim of self defense will not be effective.

> **For example:** Hansel and Gretel are lost in the forest. Hansel breaks into a cottage made of candy and takes some furniture for Gretel to eat. If tried for burglary he might claim he acted "in defense of others" because he acted to feed Gretel.

However, where the use of force in an honest but unreasonable mistake results in a homicide it may be a mitigating factor that would reduce a charge of murder to manslaughter.

If a defendant attacks an innocent person to **help the aggressor** in an altercation there is a SPLIT of law as to whether "**defense of others**" can be raised as a defense at all, and this is a major issue for discussion every time a defendant enters into a fracas to help one of the participants.

- Under the STEP INTO THE SHOES VIEW the defendant **steps into the shoes of the aggressor** and cannot claim **defense of others** because the aggressor could not claim self defense.
- Under the REASONABLE APPEARANCES VIEW the defendant is privileged to claim defense of others **if the mistake was reasonable** given the facts as they appeared at the time.

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C. Defense of Property

Defense of property is the defense that the defendant was privileged to act as reasonably necessary to protect property from loss. This is an **affirmative defense**.

It is generally "reasonable" to use force, even violent force, when acting in "hot pursuit" to **recover property** immediately after it has been **lost or stolen**. But it is not "reasonable" and there is no privilege to use violent force to recover property a long time after it has been lost or stolen.

Deadly force is never "reasonably necessary" to protect property from loss and this is heavily tested on exams.

Defense of property can be a defense to a wide variety of criminal prosecutions. If the defendant uses force against another person to prevent theft or destruction of property it is a potential defense to a charge of **assault** or **battery**. But any force used must be **reasonably necessary**.

If the defendant acts because of a **mistake** the act is still privileged if the mistake was a **reasonable** mistake and the acts done or force used was **reasonable**, given the mistake.

9. Defense of Intoxication

Intoxication is a defense claim that defendants did not act with criminal intent because they were too intoxicated to form intent. Since this is a claim the defendant did not have criminal intent, an element the prosecution must prove, this is a **passive defense**.

Involuntary intoxication is a defense to any crime if it meets the same rules as an insanity plea that the defendants **did not know what they were doing** or **did not know what they were doing was morally wrong**.

Voluntary intoxication only an effective defense to a **specific intent crime** if it proves the defendant was too intoxicated to form the **specific criminal intent** necessary to commit the crime charged.

> **For example:** Dan decides to burglarize Owen's house to steal his TV. Burglary is a specific intent crime because the prosecution must prove the defendant trespassorily entered a protected structure with the specific intention of committing some felony or larceny. While waiting in a bar for darkness to fall, Dan becomes very drunk. Later Dan is arrested while stumbling around inside Owen's house. He can NOT claim intoxication as a defense because he formed the intent to commit burglary while he was still sober.

Voluntary intoxication is generally no defense to a **general intent** crime because the defendant must prove a reasonable and sober person in the same circumstance would have made the same mistake of fact.

> **For example:** Dan gets very drunk and forces his girlfriend Buffy to have sex with him. Dan is charged with **rape**. Dan claims he was so drunk he thought Buffy was willing to have sex with him. That claim is no defense at all because rape is a **general intent** crime. Dan cannot claim any "mistake of fact" as a defense unless a reasonable, sober person would have made the same mistake he did.

While a claim of voluntary intoxication may be an imperfect defense to a murder charge, it may still be recognized as a **mitigating factor** that can reduce a first-degree murder to second degree if the defendant was too intoxicated to act in a **willful, deliberate and premeditated** manner. And it may reduce a "depraved heart murder" to involuntary manslaughter if the defendants were too intoxicated to be **aware** they created unreasonable risks to others.

Chapter 18: Conclusion

This outline provides a simple and summarized explanation of the black letter law and bright line rules of **CRIMINAL LAW**.

Black letter law means statutes and basic rules of broad theoretical application. And **bright line rules** are those decisional rules or logical guidelines created by the Courts for the determination of close cases.

To make the explanation here simple and avoid unnecessary confusion some of the details and minor views have been ignored and avoided in this outline. That law necessarily varies from one jurisdiction to another, so in citing rules of law one must often say “generally” or “usually”. But the foregoing reflects about ninety percent of everything you should know to succeed in law school, and more than enough explanation of the rules of law for you to pass any bar examination.

Among the materials that have been excluded from this outline are legal theories that have been widely abandoned, extreme minority views, rare exceptions, fact-bound cases, history of the law's development, most cases, highly unusual situations and dwelling on subtle distinctions. These issues and concepts are either unnecessary for your legal education, OR your professor will direct them to your attention.

Each professor of law, in every subject, holds a keen interest in narrow areas of the law of personal interest. Frequently this interest is based on their own legal education or their experiences in the Courts. When your professor expounds on an area of law given summary treatment in this outline it will be necessary for you to consult authoritative reference materials such as hornbooks to gain a greater understanding.

If your professor is adamant about some theoretical concept note that proclivity and modify your explanation of the law as necessary to humor those proclivities. But, you will find the bar examiners far less interested in such marginal issues and much more concerned with the breadth of your knowledge of the rules of law set forth herein.

Other than those cases where a professor demands further knowledge in a narrow area, the foregoing should be entirely sufficient to impart an adequate **understanding** of **criminal law**. However, mere **understanding is NOT ENOUGH** for you to succeed. Law school and the bar examinations require **both understanding** and ability to **explain the application** of the **law to the facts and facts to the law**.

This outline is NOT written for the purpose of explaining to you how you should explain the law on your examinations. You are urged to consult Nailing the Bar’s **"How to Write Essays for Crimes Law School and Bar Exams"**. Information about that publication is available at the end of this outline.

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