

3.7: Substantive Law - Defining Crimes, Inchoate Liability, Accomplice Liability, and Defenses

Substantive Law

Substantive law includes laws that define crime, meaning laws that tell us what elements the government needs to prove in order to establish that this crime has been committed. Substantive law also includes the definitions of **inchoate crimes** (incomplete crimes) of conspiracies, solicitations, and attempts. Substantive law also sets forth **accomplice liability** (when a person will be held responsible when they work in concert with others to complete a crime). Substantive law also identifies the **defenses** that a person may raise when they are charged with a crime. Finally, substantive law indicates the appropriate penalties and sentences for crimes. Today, the great majority of substantive law has been codified and is found in the state's particular criminal code or in the federal code. Generally, criminal codes are separated into two parts: a general part and a special part. The general part typically defines words and phrases that will be used throughout the code (for example, the word intentionally), indicates all possible defenses and provides the general scheme of punishments. The special part of the code typically defines each specific crime setting forth the **elements of the crime** (components of the crime) the government must prove beyond a reasonable doubt in order to convict a defendant of a crime.

Elements of the crime

With the exception of strict liability crimes and vicarious liability crime (discussed below), the government will always have to prove that the defendant committed some criminal act, the **actus reus** element and that he or she acted with criminal intent, the **mens rea** element. When proving a **crime of conduct**, the state must prove that the defendant's conduct met the specific actus reus requirement. The government must prove that the defendant's behavior was either a voluntary act (meaning not the product of a reflex or done while asleep, or under hypnosis), a voluntary omission to act (meaning that he or she failed to act) when there was a legal duty to do so, or that he or she possessed some item that should not have been possessed. To meet the mens rea element, the state must prove that the defendant's act was triggered by criminal intent. The elements of a specific crimes may also include what is referred to as **attendant circumstances**. Attendant circumstances are additional facts set out in the substantive law's definition that the state must prove to establish a crime, for example, that the place burglarized be a dwelling, or that the property value is at least a certain amount.

When proving a **crime of causation**, the state must also prove that the defendant caused specific, listed harm. Although generally not included in the listed elements, to prove a crime of causation, the government must also prove that the defendant is the actual cause of the harm (**actual or but/for cause**) and that it is fair to hold him or her responsible (that the defendant is the **legal or proximate cause** of the harm).

Statutes are generally silent on the other elements of crimes of conduct or crimes of causation: **legality** and **concurrence**. The legality element is met when a law is validly enacted and puts people on notice that certain behavior is illegal. Laws are presumed to be valid, and the state generally does not have to begin each case by proving that proper procedure was followed when the law was enacted. The **concurrence element** requires the state must also prove that the criminal intent triggered the criminal act—that the mens rea and actus reus occurred at the same time.

Occasionally, a statute will be silent as to the **mens rea** element. When this occurs, courts need to decide whether the legislature has intended to create a **strict liability crime** or has just been sloppy in drafting the law. Strict liability crimes are ones where the government does not have to prove criminal intent. Courts are disinclined to find in favor of strict liability statutes unless there is a clear indication that the legislature intended to create strict liability. The courts will examine legislative history, the seriousness of harm caused by the crime, whether the crime is *male in se* or *mala prohibita*, and the seriousness of the punishment in deciding whether the state should be relieved of its obligation to prove criminal intent of the defendant. As a general rule, the courts are more likely to find that a crime is a strict liability one when there is a small punishment and when the crime is more of a recent, regulatory offense (*mala prohibita* crime).

Inchoate Offenses: Attempt, Conspiracy, and Solicitation

In order to prevent future harm, state and federal governments have enacted statutes that criminalize attempts to commit crimes, solicitations to commit crimes, and conspiracies to commit crimes. The common law also recognized these **inchoate offenses** or incomplete offenses. With each of the inchoate crimes, the state must prove that the defendant intended to commit some other crime, the highest level of criminal intent. For example, there is no crime of **attempt**, but there is a crime of attempted theft. State

laws vary in the approaches and tests of whether the defendant has taken enough steps to be charged with attempt, but all agree that mere preparation does not constitute an attempt. **Conspiracies** involve an agreement between at least two parties to commit some target crime. Some jurisdictions also require that there be an **overt act** in furtherance of the crime (some outward movement towards the commission of the target crime) which reaffirms there is a meeting of the minds between the co-conspirators. **Solicitations** involve a person asking another to commit a crime on his or her behalf, and they do not even require an agreement by the person requested to do so.

Accomplice Liability: Aiders and Abettors

People who commit crimes frequently do so with assistance. Substantive criminal law describes when a person can be found guilty for the acts of another. For example, the common law recognized four parties to a crime: principal in the first degree, principal in the second degree, accessory before the fact, and accessory after the fact. Many complicated legal rules developed to offset the harsh common law treatment of most crimes as **capital offenses** (death penalty eligible). The modern statutory trend has been to recognize **accomplices**, people who render assistance before and during the crime, on one hand, and accessories after the fact, people who help the offender escape responsibility after the crime has been committed, on the other. Accomplices, as treated as equally liable as the main perpetrator as “the hand of one, is the hand of them all.” Accessories after the fact, under the modern trend, are charged with hindering prosecution or obstructing justice after the crime are punished to a lesser extent than the main perpetrators.

Vicarious Liability

A few states have enacted **vicarious liability statutes** seeking to hold one person responsible for the acts of another, even when they did not provide any assistance and may have not even known about the other’s behavior. These statutes, generally violate our belief in individual responsibility that only people who do something wrong should be blamed for the crime. Vicarious liability imputes (transfers) both the criminal intent and the criminal act of one person to another. Courts generally invalidate these purported vicarious liability statutes but have at times upheld liability based upon an employer/employee relationship or a parent/child relationship.

Defenses

Assuming the government has proven all the elements of a crime, defendants may nevertheless raise defenses that may result in their acquittal. **Defense** is a general term that includes perfect and imperfect defenses, justifications and excuses, and procedural defenses.

Perfect and Imperfect Defenses

A **perfect defense** is one that completely exonerates the defendant. If the defendant is successful in raising this defense, meaning the jury believes him or her, the jury should find the defendant not guilty. An **imperfect defense** is one that reduces the defendant’s liability to that of a lesser crime. If the jury believes the defendant, it should find the defendant guilty of a lesser charge.

Negative Defenses and Affirmative Defenses

Sometimes the government is unable to prove all the elements of the crime charged. When this happens, the defendant may raise a **negative defense** claim. The defendant doesn’t have to prove anything, instead, he or she just argues that something is missing in the state’s case, that the state did not prove everything the statute said it had to prove, and therefore the jury should find him or her not guilty. For example, when charging a defendant with theft, the state must prove that the defendant intentionally took the property of another. If the jury finds that the defendant did not intend to take the property, or took property that that was rightfully his or hers, then it should find the defendant not guilty. Negative defenses at their essence are claims that there are “proof problems” with the state’s case. The defendant’s claim that the state failed to prove its case does not depend on whether the defendant has put on any evidence or not.

An **affirmative defense** requires the defendant to put on evidence that will persuade the jury that he or she should either be completely exonerated (for a perfect defense) or be convicted only of a lesser crime (for an imperfect defense). The defendant can meet this requirement by calling witnesses to testify or by introducing physical evidence. Because of the presumption of innocence, the **burden of proof** (the requirement that the party put on evidence and persuade the fact-finder) cannot switch completely to the defendant. The state must ultimately bear the burden of proving defendant’s guilt by putting on enough evidence that defendant has committed the crime by proving each and every material element of the crime, and it must convince the jury of this guilt beyond a reasonable doubt. However, when the defendant raises an affirmative defense, the burden of production or persuasion switches, at

least in part and temporarily, to the defendant. The defendant's burden is limited, however, to prove the elements of the defense he or she asserts.

Note the interplay of negative defenses and affirmative defenses. Even if a defendant is unsuccessful in raising an affirmative defense, the jury could nevertheless find him or her not guilty based upon the state's failure to prove some other material element of the crime.

Justifications

Sometimes doing the right thing results in harm. Society recognizes the utility of doing some acts in certain circumstances that unfortunately result in harm. In those situations, the defendant can raise a justification defense. Justification defenses allow criminal acts to go unpunished because they preserve an important social value or because the resulting harm is outweighed by the benefit to society. For example, if a surgeon cuts someone with a knife to remove a cancerous growth, the act is a beneficial one even though it results in pain and a scar. In raising a justification defense, the defendant admits he did a wrongful act, such as taking someone's life, but argues that the act was the right thing to do under the circumstances. At times, the state's view differs from the defendant's view of whether the act was, in fact, the right thing to do. In those cases, the state files charges to which the defendant raises a justification defense.

Justification defenses include self-defense, defense of others, defense of property, defense of habitation, consent, and necessity, also called, choice of evils. Justifications are affirmative defenses. The defendant must produce some evidence in support of these defenses. In most cases, the defendant must also convince the jury that it was more likely than not (a preponderance of the evidence) that his or her conduct was justified. For example, the defendant may claim that he or she acted in self-defense and at trial would need to call witnesses or introduce physical evidence that supports the claim of self-defense, that it was more likely than not that his or her actions were ones done in self-defense. State law may vary about how convinced the jury must be (called the standard of proof) or when the burden switches to the defendant to put on evidence, but all states generally require the defendant to carry at least some of the burden of proof in raising justification defenses.

Excuses

Excuses are defenses to criminal behavior that focus on some characteristic of the defendant. With excuses, the defendant is essentially saying, "I did the crime, but I am not responsible because I was . . . insane (or too young, intoxicated, mistaken, or under duress)." Excuses include insanity, diminished capacity, automatism, age, involuntary intoxication, duress, mistake of fact, and then a variety of non-traditional syndrome excuses. Like justifications, excuses are affirmative defenses in which the defendant bears the burden of putting on some evidence to convince the jury that he or she should not be held responsible for his or her conduct.

Procedural Defenses

Procedural defenses are challenges to the state's ability to bring the case against the defendant for some reason. These defenses point to some problem in the process or the state's lack of authority to bring the case rather than facts surrounding the crime or the criminal. Procedural defenses include: **double jeopardy** (a defense in which the defendant claims that the government is repeatedly and impermissibly prosecuting him or her for the same crime), **speedy trial** (a defense in which the defendant claims the government took too long to get his or her case to trial), **entrapment** (a defense in which the defendant claims the government in some way enticed him or her into committing the crime), the **statute of limitations** (a defense in which the defendant claims the government did not charge him or her within the required statutory period), and several types of **immunity** (a defense in which the defendant claims he or she is immune from being prosecuted). Although procedural defenses are considered procedural criminal law, many states include the availability of these defenses in their substantive criminal codes.

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