

4.1: Criminal Law

Chapter 4 – Aspects of Law and Criminal Defenses

Criminal Law ^[62]

Criminal law generally defines the rights and obligations of individuals in society. Some common issues in criminal law are the elements of specific crimes and the elements of various criminal defenses. Criminal procedure generally concerns the enforcement of individuals' rights during the criminal process. Examples of procedural issues are individuals' rights during law enforcement investigation, arrest, filing of charges, trial, and appeal.



Figure 4.1 Criminal Law ^[63]

Classifications of Law ^[64]

Learning Objectives

- Ascertain the basis for grading.
- Compare malum in se and malum prohibitum crimes.
- Compare the punishment options for felonies, misdemeanors, felony-misdemeanors, and infractions.
- Compare jail and prison.

Crimes can be classified in many ways. Crimes also can be grouped by subject matter. For example, a crime like assault, battery, or rape tends to injure another person's body, so it can be classified as a "crime against the person." If a crime tends to injure a person by depriving him or her of property or by damaging property, it can be classified as a "crime against property." These classifications are basically for convenience and are not imperative to the study of criminal law.

More important and substantive is the classification of crimes according to the severity of punishment. This is called grading. Crimes are generally graded into four categories: felonies, misdemeanors, felony-misdemeanors, and infractions. Often the criminal intent element affects a crime's grading. Malum in se crimes, murder, for example, are evil in their nature and are generally graded higher than malum prohibitum crimes, which are regulatory, like a failure to pay income taxes.

Felonies

Felonies are the most serious crimes. They are either supported by a heinous intent, like the intent to kill, or accompanied by an extremely serious result, such as loss of life, grievous injury, or destruction of property. Felonies are serious, so they are graded the highest, and all sentencing options are available. Depending on the jurisdiction and the crime, the sentence could be execution, prison time, a fine, or alternative sentencing such as probation, rehabilitation, and home confinement. Potential consequences of a felony conviction also include the inability to vote, own a weapon, or even participate in certain careers.

Misdemeanors

Misdemeanors are less serious than felonies, either because the intent requirement is of a lower level or because the result is less extreme. Misdemeanors are usually punishable by jail time of one year or less per misdemeanor, a fine, or alternative sentencing like probation, rehabilitation, or community service. Note that incarceration for a misdemeanor is in jail rather than prison. The difference between jail and prison is that cities and counties operate jails, and the state or federal government operates prisons, depending on the crime. The restrictive nature of the confinement also differs between jail and prison. Jails are for defendants who have committed less serious offenses, so they are generally less restrictive than prisons.

Felony-Misdemeanors

Felony-misdemeanors are crimes that the government can prosecute and punish as either a felony or a misdemeanor, depending on the particular circumstances accompanying the offense. The discretion whether to prosecute the crime as a felony or misdemeanor usually belongs to the judge, but in some instances the prosecutor can make the decision.

Infractions

Infractions, which can also be called violations, are the least serious crimes and include minor offenses such as jaywalking and motor vehicle offenses that result in a simple traffic ticket. Infractions are generally punishable by a fine or alternative sentencing such as traffic school.

Wobblers ^[65]

Although the above classification schemes may seem straightforward, sometimes states allow felonies to be treated as misdemeanors and misdemeanors to be treated as either felonies or violations. For example, California has certain crimes, known as wobblers, that can be charged as either felonies or misdemeanors at the discretion of the prosecutor upon consideration of the offender's criminal history or the specific facts of the case.

The distinction between felonies and misdemeanors developed at common law and has been incorporated in state criminal codes. At one time, all felonies were punishable by death and forfeiture of goods, while misdemeanors were punishable by fines alone. Laws change over time, and as capital punishment became limited to only certain felonies (like murder and rape), new forms of punishment developed. Now, felonies and misdemeanors alike are punished with fines and/or incarceration. Generally, felonies are treated as serious crimes for which at least a year in prison is a possible punishment. In states allowing capital punishment, some types of murder are punishable by death. Any crime subject to capital punishment is considered a felony. Misdemeanors are regarded as less serious offenses and are generally punishable by less than a year of incarceration in the local jail. Infractions and violations, when those classifications exist, include minor behavior for which the offender can be cited, but not arrested, and fined, but not incarcerated.

The difference between being charged with a felony or misdemeanor may have legal implications beyond the length of the offender's sentence and in what type of facility an offender will be punished. For example, in some jurisdictions, the authority of a police officer to arrest may be linked to whether the crime is considered a felony or a misdemeanor. In many states the classification impacts which court will have the authority to hear the case. In some states, the felony-misdemeanor classification determines the size of the jury.

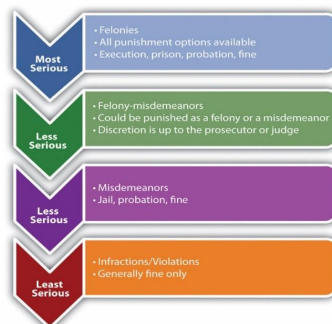


Figure 4.2 Diagram of Grading ^[66]

Key Takeaways

- Grading is based on the severity of punishment.
- Malum in se crimes are evil in their nature, like murder. Malum prohibitum crimes are regulatory, like a failure to pay income taxes.
- Felonies are graded the highest. Punishment options for felonies include the following:
 - Execution
 - Prison time
 - Fines
 - Alternative sentencing such as probation, rehabilitation, and home confinement
- Misdemeanors are graded lower than felonies. Punishment options for misdemeanors include the following:
 - Jail time of one year or less per misdemeanor
 - Fines
 - Alternative sentencing such as probation, rehabilitation, and community service
- Felony-misdemeanors are punished as either a felony or a misdemeanor.
- Infractions, also called violations, are graded lower than misdemeanors and have less severe punishment options:
 - Fines
 - Alternative sentencing, such as traffic school
- One difference between jail and prison is that cities and counties operate jails, and the state or federal government operates prisons, depending on the crime. The restrictive nature of the confinement is another difference. Jails are for defendants who have committed less serious offenses, so they are generally less restrictive than prisons.

Sources of Law

Criminal Statute ^[67]

Crimes can be broken down into elements, which the prosecution must prove beyond a reasonable doubt. Criminal elements are set forth in criminal statutes, or cases in jurisdictions that allow for common-law crimes. With exceptions, every crime has at least three elements: a criminal act, also called *actus reus*; a criminal intent, also called *mens rea*; and concurrence of the two. The term conduct is often used to reflect the criminal act and intent elements. As the Model Penal Code explains, “‘conduct’ means an action or omission and its accompanying state of mind” (Model Penal Code § 1.13(5)).

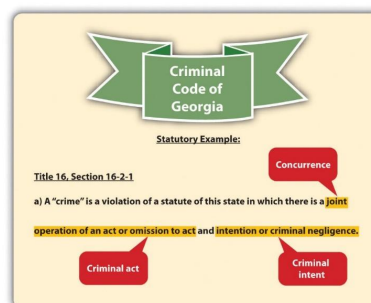


Figure 4.3 Criminal Code of Georgia ^[68]

Note, not all crimes require a bad result. If a crime does require a bad result, the prosecution must also prove the additional elements of causation and harm.

Another requirement of some crimes is attendant circumstances. Attendant circumstances are specified factors that must be present when the crime is committed. These could include the crime's methodology, location or setting, and victim characteristics, among others.

Case Law ^[69]

Another source of law is case law. When judges rule on the facts of a particular case, they create case law. Federal case law comes from federal courts, and state case law comes from state courts. Case law has its origins in English common law.

English Common Law

In Old England, before the settlement of the United States, case law was the most prevalent source of law. This was in contrast to countries that followed the Roman Law system, which primarily relied on written codes of conduct enacted by legislature. Case law in England was mired in tradition and local customs. Societal principles of law and equity were the guidelines when courts issued their rulings. In an effort to be consistent, English judges made it a policy to follow previous judicial decisions, thereby

creating a uniform system of laws throughout the country for the first time. Case law was named common law because it was common to the entire nation (Duhaime, L., 2010).

The English system of jurisprudence made its way to the United States with the original colonists. Initially, the thirteen colonies unanimously adopted common law as the law of the land. All crimes were common-law crimes, and cases determined criminal elements, defenses, and punishment schemes. Gradually, after the Revolutionary War, hostility toward England and modern reform led to the erosion of common-law crimes and a movement toward codification. States began replacing common-law crimes with statutes enacted by state legislatures. Oxford professor Sir William Blackstone's Commentaries on the Law of England, which interpreted and summarized English common law, became an essential reference as the nation began the process of converting common-law principles into written statutes, ordinances, and penal codes (Duhaime, L., 2010).

Limitations on Common-Law Crimes

In modern society, in many states and the federal government (United States v. Hudson & Goodwin, 2010), judges cannot create crimes. This violates notions of fairness. Making up a new crime and punishing the defendant for it does not provide consistency or predictability to our legal system. It also violates the principle of legality, a core concept of American criminal justice embodied in this phrase: "Nullum crimen sine lege, nulla poena sine crimen" (No crime without law, no punishment without crime).

In states that do not allow common-law crimes, statutes must define criminal conduct. If no statute exists to criminalize the defendant's behavior, the defendant cannot be criminally prosecuted, even if the behavior is abhorrent. As the Model Penal Code states, "[n]o conduct constitutes an offense unless it is a crime or violation under this Code or another statute of this State" (Model Penal Code § 1.05(1)).

The common law still plays an important role in criminal lawmaking, even though most crimes are now embodied in statutes. Classification of crimes as felonies and misdemeanors is a reflection of English common law. Legislatures often create statutes out of former common-law crimes. Judges look to the common law when defining statutory terms, establishing criminal procedure, and creating defenses to crimes. The United States is considered a common-law country. Every state except Louisiana, which is based on the French Civil Code, adopts the common law as the law of the state except where a statute provides otherwise (Legal Definition, 2010).

Example of a Court's Refusal to Create a Common-Law Crime

Read [Keeler v. Superior Court](#), 470 P.2d 617 (1970). In Keeler, the defendant attacked his pregnant ex-wife, and her baby was thereafter stillborn. The California Supreme Court disallowed a murder charge against Keeler under California Penal Code § 187 because the statute criminalized only the malicious killing of a "human being." The court reached its decision after examining the common-law definition of human being and determining that the definition did not include a fetus. The court reasoned that it could not create a new crime without violating the due process clause, separation of powers, and California Penal Code § 6, which prohibits the creation of common-law crimes. After the Keeler decision, the California Legislature changed Penal Code § 187 to include a fetus, excepting abortion (Cal. Penal Code, 2010).

Powerful Nature of Case Law

Generally, if there is a statute on an issue, the statute is superior to case law, just as the Constitution is superior to statutory law. However, judges interpret constitutional and statutory law, making case law a powerful source of law. A judge can interpret a constitution in a way that adds or creates exceptions to its protections. A judge can also interpret a statute in a way that makes it unconstitutional and unenforceable. This is called the power of judicial review (Marbury v. Madison, 2010).

Example of Judicial Review

An example of judicial review is set forth in [Texas v. Johnson](#), 491 U.S. 397 (1989). In Johnson, the US Supreme Court ruled that burning a flag is protected self-expression under the First Amendment to the US Constitution. Thus, the Court reversed the defendant's conviction under a Texas statute that criminalized the desecration of a venerated object. Note how Johnson not only invalidates a state statute as being inferior to the US Constitution but also changes the US Constitution by adding flag burning to the First Amendment's protection of speech.

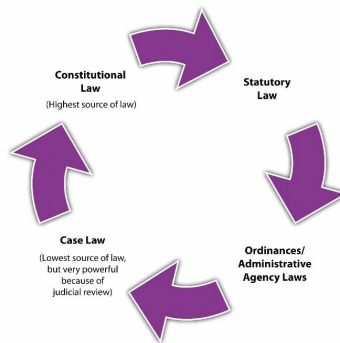


Figure 4.4 Diagram and Hierarchy of the Sources of Law ^[70]

Stare Decisis and Precedent

Cases are diverse, and case law is not really law until the judge rules on the case, so there must be a way to ensure case law's predictability. It would not be fair to punish someone for conduct that is not yet illegal. Thus, judges adhere to a policy called stare decisis. Stare decisis is derived from English common law and compels judges to follow rulings in previous cases. A previous case is called precedent. Once judges have issued a ruling on a particular case, the public can be assured that the resulting precedent will continue to be followed by other judges. Stare decisis is not absolute; judges can deviate from it to update the law to conform to society's modern expectations.

Rules of Stare Decisis and Use of Precedent

Case precedent is generally an appeal rather than a trial. There is often more than one level of appeal, so some appeals come from higher courts than others. This book discusses the court system, including the appellate courts, in [Chapter 2 "The Legal System in the United States"](#).

Many complex rules govern the use of precedent. Lawyers primarily use precedent in their arguments, rather than statutes or the Constitution, because it is so specific. With proper research, lawyers can usually find precedent that matches or comes very close to matching the facts of any particular case. In the most general sense, judges tend to follow precedent that is newer, from a high court, and from the same court system, either federal or state.

Example of Stare Decisis and Use of Precedent

Geoffrey is a defense attorney for Conrad, who is on trial for first-degree murder. The murder prosecution is taking place in New Mexico. Geoffrey finds case precedent from a New York Court of Appeals, dated 1999, indicating that Conrad should have been prosecuted for voluntary manslaughter, not first-degree murder. Brandon, the prosecuting attorney, finds case precedent from the New Mexico Supreme Court, dated 2008, indicating that a first-degree murder prosecution is appropriate. The trial court will probably follow the precedent submitted by Brandon because it is newer, from a higher court, and from the same court system as the trial.

Case Citation

Cases must be published to become case law. A published case is also called a judicial opinion. This book exposes you to many judicial opinions that you have the option of reading on the Internet. It is essential to understand the meaning of the case citation. The case citation is the series of numbers and letters after the title of the case and it denotes the case's published location. For example, let's analyze the case citation for [Keeler v. Superior Court](#), 470 P.2d 617 (1970).

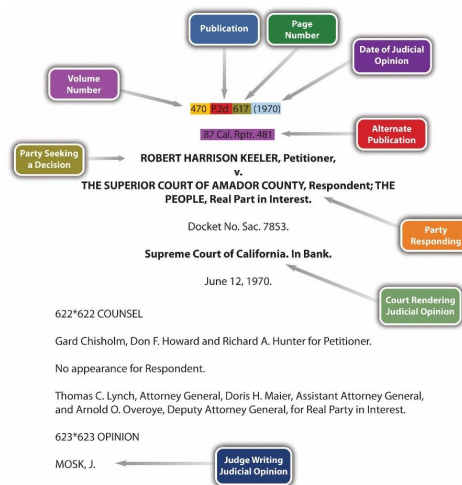


Figure 4.5 Keeler Case Citation ^[71]

As you can see from the diagram, the number 470 is the volume number of the book that published the Keeler case. The name of that book is “P.2d” (this is an abbreviation for Pacific Reports, 2d Series). The number 617 is the page number of the Keeler case. The date (1970) is the date the California Supreme Court ruled on the case.

Case Briefing

It is useful to condense judicial opinions into case brief format. The Keeler case brief is shown in the image below.

1. *Keeler v. Superior Court*, 470 P.2d 617 (1970).
2. A. (Procedural Facts) The defendant seeks a writ of prohibition, CA Supreme Court.
- B. (Substantive Facts) The defendant became upset when he saw that his ex-wife was pregnant. After stating "I'm going to stomp it out of you," he kneed his ex-wife in the abdomen. She survived, but the baby was stillborn, the cause of death a fractured skull. The defendant was charged with murder under Cal. Penal Code § 187, which defined murder as the malicious and unlawful killing of a human being. The defendant sought a writ of prohibition to disallow the murder charge, because he killed a fetus.
3. (Issue) Can a defendant be charged with murder for killing a fetus in a state that statutorily defines murder as the malicious and unlawful killing of a human being?
4. A. (Substantive Holding) A defendant cannot be charged with murder for killing a fetus in a state that statutorily defines murder as the malicious and unlawful killing of a human being.
- B. (Procedural Holding) Writ of prohibition granted, murder charge disallowed.
6. (Rationale) The Court examined the common-law definition of human being, and held that it did not include a fetus. Charging the defendant with murder of a fetus, when the murder statute criminalizes only murder of a human being born alive, would violate: due process by not giving the defendant notice of what is criminal, separation of powers by allowing a court to create crimes, which is the legislature's responsibility, and California Penal Code §6, which specifically prohibits common-law crimes.

Figure 4.6 Keeler Case Brief ^[72]



Pin It! Keeler Case

Follow this link for the full text of the [Keeler case](#)

Published judicial opinions are written by judges and can be lengthy. They can also contain more than one case law, depending on the number of issues addressed. Case briefs reduce a judicial opinion to its essentials and can be instrumental in understanding the most important aspects of the case. Standard case brief formats can differ, but one format that attorneys and paralegals commonly use is explained in the following paragraph.

Review the Keeler case brief. The case brief should begin with the title of the case , including the citation . The next component of the case brief should be the procedural facts . The procedural facts should include two pieces of information: who is appealing, and which court the case is in. As you can see from the Keeler case brief, Keeler brought an application for a writ of prohibition, and the court is the California Supreme Court. Following the procedural facts are the substantive facts , which should be a short

description of the facts that instigated the court trial and appeal. The procedural and substantive facts are followed by the issue . The issue is the question the court is examining, which is usually the grounds for appeal. The case brief should phrase the issue as a question. Cases usually have more than one issue. The case brief can state all the issues or only the issue that is most important. The substantive holding comes after the issue, is actually the case law , and answers the issue question. If more than one issue is presented in the case brief, a substantive holding should address each issue.

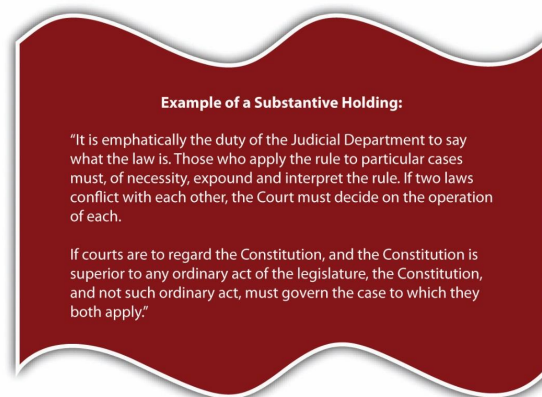



Figure 4.7 Example of a Substantive Holding ^[73]

	<p>Pin It! Marbury v Madison</p> <p>Follow this link to read the full text of the Marbury v Madison case .</p>
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A procedural holding should follow the substantive holding. The procedural holding discusses what the court did procedurally with the case. This could include reversing the lower court's ruling, affirming the lower court's ruling, or adjusting a sentence issued by the lower court. Last, but still vital to the case brief, is the rationale . The rationale discusses the reasoning of the judges when ruling on the case. Rationales can set policy , which is not technically case law but can still be used as precedent in certain instances.

One judge writes the judicial opinion. Judges vote how to rule, and not all cases are supported by a unanimous ruling. Occasionally, other judges will want to add to the judicial opinion. If a judge agrees with the judicial opinion, the judge could write a concurring opinion , which explains why the judge agrees. If a judge disagrees with the judicial opinion, the judge could write a dissenting opinion explaining why the judge disagrees. The dissenting opinion will not change the judicial opinion, but it may also be used as precedent in a future case if there are grounds for changing the law.

Legal definition ^[74]

Actus Reus

Nobody can read minds, and the First Amendment means that people can say pretty much whatever they want. What you think and say (within limits) is protected. It is what you do-your behaviors-that the criminal law seeks to regulate. Lawyers use the legal Latin phrase actus reus to describe this element of a crime. It is commonly translated into English as the guilty act . The term act can be a bit confusing. Most people tend to think of the term act as an action verb-it is something that people do. The criminal law often seeks to punish people for things that they did not do. When the law commands people to take a particular action and they do not take the commanded action, it is known as an omission . The law commands that people feed and shelter their children. Those who do not are guilty of an offense based on the omission. The law commands that people pay their income taxes; if they do not pay their taxes, the omission can be criminal. Threatening to act or attempting an act can also be the actus reus element of an offense.

In addition to acts and omissions, possession of something can be a criminal offense. The possession of certain weapons, illicit drugs, burglary tools, and so forth are all guilty acts as far as the criminal law is concerned. Actual possession is the legal idea that most closely coincides with the everyday use of the term. Actual possession refers to a person having physical control or custody of

an object. In addition to actual possession, there is the idea of constructive possession . Constructive possession is the legal idea that the person had knowledge of the object, as well as the ability to exercise control over it.

Criminal Intent

A fundamental principle of law is that to be convicted of a crime, there must be a guilty act (the *actus reus*) and a culpable mental state. Recall that culpability means blameworthiness. In other words, there are literally hundreds of legal terms that describe mental states that are worthy of blame. The most common is intent . The Model Penal Code boils all of these different terms into four basic culpable mental states: purposely, knowingly, recklessly, and negligently.

Purposely : According to the Model Penal Code, a person acts purposely when “it is his conscious object to engage in conduct of that nature....”

Knowingly : A person acts knowingly if “he is aware that it is practically certain that his conduct will cause such a result.” In other words, the prohibited result was not the actor’s purpose, but he knew it would happen.

Recklessly : A person acts recklessly if “he consciously disregards a substantial and unjustifiable risk.” Further, “The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.”

Negligently : A person acts negligently when “he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct.” The idea is that a reasonably carefully person would have seen the danger, but the actor did not.

At times, the legislature will purposely exclude the *mens rea* element from a criminal offense. This leaves only the guilty act to define the crime. Crimes with no culpable mental state are known as strict liability offenses. Most of the time, such crimes are mere violations such as speeding. An officer does not have to give evidence that you were speeding purposely, just that you were speeding. If violations such as this had a mental element, it would put an undue burden on law enforcement and the lower courts. There are a few instances where serious felony crimes are strict liability, such as the statutory rape laws of many states.

Mens Rea

As mentioned earlier in this chapter, criminal intent or *mens rea* is an essential element of most crimes. Under the common law, all crimes consisted of an act carried out with a guilty mind. In modern society, criminal intent can be the basis for fault , and punishment according to intent is a core premise of criminal justice. Grading is often related to the criminal intent element. Crimes that have an “evil” intent are *malum in se* and subject the defendant to the most severe punishment. Crimes that lack the intent element are less common and are usually graded lower, as either misdemeanors or infractions.

Concurrence

For an act to be a crime, the act must be brought on by the criminal intent. In most cases, concurrence is obvious and does not enter into the legal arguments. A classic example is an individual who breaks into a cabin in the woods to escape the deadly cold outside. After entering, the person decides to steal the owner’s property. This would not be a burglary (at common law) since burglary requires a breaking and entering with the intent to commit a felony therein. Upon entry, the intent was to escape the cold, not to steal. Thus, there was no concurrence between the guilty mind and the guilty act.

Stare Decisis ^[75]

The principle of *stare decisis* (to “stand by things decided”) refers to the requirement that when a legal issue has been determined and decided, other courts should follow the decision.

The principle is the “glue that holds together the various levels of courts and it is the principle that elevates the rule of law above the rule of individual judges.” It is considered “essential to law” and a “central pillar” to our system of law. It ensures predictability without which differing results would be unjust.

The requirement ensures “consistency, certainty, predictability and sound judicial administration” and the adherence to precedent “enhances the legitimacy and acceptability of judge-made law, and by so doing enhances the appearance of justice”.

The principle does not apply where a decision does not lay out a “substantive rule of law”, but simply applies an existing rule to a set of facts.

A statement of a legal principle will amount to an “opinion of the Court” where the principle is accepted by a majority of the Court regardless of the number of dissenters on the result.

Components of Stare Decisis

The principle can be divided into two components. Stare decisis as among the same level of court ("horizontal" stare decisis) and as between different levels of court ("vertical" stare decisis).

Irrelevant Factors to Application

The application of stare decisis does not depend on factors such as the length of the judgement, the extent of the judgement's analysis, or whether the decision is wrong in law. [8]

Previous Dissenter

A judge who previously dissented on the same issue before the court, should generally apply to law as it was decided by the majority on the prior case.

Strict Liability ^[76]

An exception to the requirement of a criminal intent element is strict liability. Strict liability offenses have no intent element (Ala. Code, 2011). This is a modern statutory trend, which abrogates the common-law approach that behavior is only criminal when the defendant commits acts with a guilty mind. Sometimes the rationale for strict liability crimes is the protection of the public's health, safety, and welfare. Thus, strict liability offenses are often vehicle code or tax code violations, mandating a less severe punishment (Tex. Penal Code, 2011). With a strict liability crime, the prosecution has to prove only the criminal act and possibly causation and harm or attendant circumstances, depending on the elements of the offense.

Example of a Strict Liability Offense

A vehicle code provision makes it a crime to "travel in a vehicle over the posted speed limit." This is a strict liability offense. So, if a law enforcement officer captures radar information that indicates Susie was traveling in a vehicle five miles per hour over the posted speed limit, Susie can probably be convicted of speeding under the statute. Susie's protests that she "didn't know she was traveling at that speed," are not a valid defense. Susie's knowledge of the nature of the act is irrelevant. The prosecution only needs to prove the criminal act to convict Susie because this statute is strict liability and does not require proof of criminal intent.

Criminal Defenses ^[77]

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Quotable

A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence...

— Fla. Stat. Ann. §776.013(4) , cited in Section 5.3.3 "Defense of Habitation"

Learning Objectives

- Distinguish between a denial or failure of proof defense and an affirmative defense.
- Distinguish between imperfect and perfect defenses.
- Distinguish between factual and legal defenses.
- Give examples of factual and legal defenses.
- Distinguish between defenses based on justification and excuse.

A plethora of criminal defenses exist. Defenses may completely exonerate the criminal defendant, resulting in an acquittal, or reduce the severity of the offense.

Categorization of Defenses

Defenses can be categorized as denial or failure of proof, affirmative, imperfect, or perfect. Defenses can also be categorized as factual, legal, based on justification, or excuse. Lastly, defenses can be created by a court (common law) or created by a state or federal legislature (statutory).

Definition of Denial or Failure of Proof and Affirmative Defenses

A criminal defendant will be acquitted if the prosecution cannot prove every element of the offense beyond a reasonable doubt. In certain cases, the defendant can either deny that a criminal element(s) exists or simply sit back and wait for the prosecution to fail in meeting its burden of proof. This legal strategy is sometimes referred to as either a denial or failure of proof defense.

An affirmative defense is not connected to the prosecution's burden of proof. When the defendant asserts an affirmative defense, the defendant raises a new issue that must be proven to a certain evidentiary standard. State statutes often specify whether a defense is affirmative. The Model Penal Code defines an affirmative defense as a defense that is deemed affirmative in the Code or a separate statute, or that "involves a matter of excuse or justification peculiarly within the knowledge of the defendant" (Model Penal Code § 1.12 (3) (c)). Procedurally, the defendant must assert any affirmative defense before or during the trial, or the defense cannot be used as grounds for an appeal.

Example of an Affirmative Defense

A fight breaks out at a party, and Juan is severely injured. Jasmine and Jerome are arrested and charged for battering Juan. Jerome claims that he did not touch Juan; someone else battered him. Jasmine claims that she did not batter Juan because she was legally defending herself against Juan's attack. Jerome's claim focuses on the elements of battery and asserts that these elements cannot be proven beyond a reasonable doubt. Technically, Jerome can do nothing and be acquitted if the prosecution fails to prove that he was the criminal actor. Jasmine's self-defense claim is an affirmative defense. Jasmine must do something to be acquitted: she must prove that Juan attacked her to a certain evidentiary standard.



Figure 4.8 Denial and Affirmative Defenses^[78]

Burden of Proof for Affirmative Defenses

States vary as to their requirements for the defendant's burden of proof when asserting an affirmative defense (Findlaw.com, 2010). Different defenses also have different burdens of proof. Some states require the defendant to meet the burden of production but require the prosecution to thereafter meet the burden of persuasion, disproving the defense to a preponderance of evidence, or in some states, beyond a reasonable doubt. Other states require the defendant to meet the burden of production and the burden of persuasion. In such states, the defendant's evidentiary standard is preponderance of evidence, not beyond a reasonable doubt.

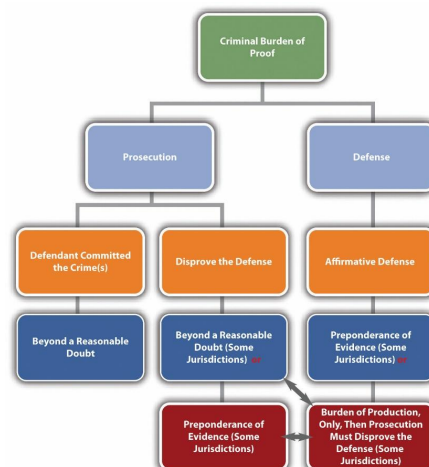


Figure 4.9 Diagram of the Criminal Burden of Proof^[79]

Definition of Imperfect and Perfect Defenses

As stated previously, a defense can reduce the severity of the offense, or completely exonerate the defendant from criminal responsibility. If a defense reduces the severity of the offense, it is called an imperfect defense. If a defense results in an acquittal, it

is called a perfect defense. The difference between the two is significant. A defendant who is successful with an imperfect defense is still guilty of a crime; a defendant who is successful with a perfect defense is innocent .

Example of Imperfect and Perfect Defenses

LuLu flies into a rage and kills her sister Lola after she catches Lola sleeping with her fiancé. LuLu is thereafter charged with first-degree murder. LuLu decides to pursue two defenses. First, LuLu claims that the killing should be manslaughter rather than first-degree murder because she honestly but unreasonably believed Lola was going to attack her , so she thought she was acting in self-defense. Second, LuLu claims she was insane at the time the killing occurred. The claim of manslaughter is an imperfect defense that will reduce LuLu's sentence but will not acquit her of criminal homicide. The claim of insanity is a perfect defense that will result in an acquittal.

Definition of Factual and Legal Defenses

A defense must be based on specific grounds . If a defense is based on an issue of fact , it is a factual defense. If a defense is based on an issue of law , it is a legal defense.

Example of Factual and Legal Defenses

Armando is charged with the burglary of Roman's residence. Armando decides to pursue two defenses. First, Armando claims that he was with Phil on the date and time of the burglary. This is called an alibi defense. Second, Armando claims that it is too late to prosecute him for burglary because of the expiration of the statute of limitations. Armando's alibi defense is a factual defense; it is based on the fact that Armando could not have committed the burglary because he was somewhere else at the time it occurred. Armando's statute of limitations defense is a legal defense because it is based on a statute that limits the amount of time the government has to prosecute Armando for burglary.

Definition of Justification and Excuse

With the exception of alibi, most affirmative defenses are based on either justification or excuse. Typically, justification and excuse defenses admit that the defendant committed the criminal act with the requisite intent but insist that the conduct should not be criminal.

A defense based on justification focuses on the offense . A justification defense claims that the defendant's conduct should be legal rather than criminal because it supports a principle valued by society. A defense based on excuse focuses on the defendant . An excuse defense claims that even though the defendant committed the criminal act with criminal intent, the defendant should not be responsible for his or her behavior.

Example of Justification and Excuse

A fight breaks out at a party, and Juan is severely injured. Jasmine and Jerome are arrested and charged for battering Juan. Jerome claims that he did not touch Juan; someone else battered him. Jasmine claims that she did not batter Juan because she was legally defending herself against Juan's attack. Jerome's claim focuses on the elements of battery and asserts that these elements cannot be proven beyond a reasonable doubt. Technically, Jerome can do nothing and be acquitted if the prosecution fails to prove that he was the criminal actor. Jasmine's self-defense claim is an affirmative defense. Jasmine must do something to be acquitted: she must prove that Juan attacked her to a certain evidentiary standard. Jasmine's self-defense claim is based on justification . Society believes that individuals should be able to protect themselves from harm, so actions taken in self-defense are justified and noncriminal. Note that a self-defense claim focuses on the offense (battery) in light of the circumstances (to prevent imminent harm).

Table 4.1 Categorization of Defenses

Defense Type	Characteristics
Common-law	Created by a court
Statutory	Created by a state or federal legislature
Denial or failure of proof	Creates doubt in one or more elements of the offense and prevents the prosecution from meeting its burden of proof
Affirmative	Raises an issue separate from the elements of the offense
Imperfect	Reduces the severity of the offense

Perfect	Results in an acquittal
Factual	Based on an issue of fact
Legal	Based on an issue of law
Alibi	Asserts that the defendant was somewhere else when the crime was committed
Expiration of the statute of limitations	Asserts that it is too late for the government to prosecute the defendant for the crime
Justification	Claims that the criminal conduct is justified under the circumstances
Excuse	Claims that the defendant should be excused for his or her conduct

Key Takeaways

- A denial or failure of proof defense focuses on the elements of the crime and prevents the prosecution from meeting its burden of proof. An affirmative defense is a defense that raises an issue separate from the elements of the crime. Most affirmative defenses are based on justification or excuse and must be raised before or during the trial to preserve the issue for appeal.
- An imperfect defense reduces the severity of the offense; a perfect defense results in an acquittal.
- If the basis for a defense is an issue of fact, it is called a factual defense. If the basis for a defense is an issue of law, it is called a legal defense.
- An example of a factual defense is an alibi defense, which asserts that the defendant could not have committed the crime because he or she was somewhere else when the crime occurred. An example of a legal defense is a claim that the statute of limitations has expired, which asserts that it is too late for the government to prosecute the defendant for the crime.
- An affirmative defense is based on justification when it claims that criminal conduct is justified under the circumstances. An affirmative defense is based on excuse when it claims that the criminal defendant should be excused for his or her conduct.

Excuses Defenses ^[80]

To successfully obtain a conviction, the prosecutor must show all of the elements of the crime beyond a reasonable doubt in criminal court. This is not the end of it in some cases. It must also be shown (if the issue is raised) that the actus reus and the mens rea was present, but also that the defendant committed the act without justification or excuse . Both justifications and excuses are species of legal defenses . If a legal defense is successful, it will either mitigate or eliminate guilt.

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.

Ignorance or Mistake

It is often said, “Everybody makes mistakes.” The law recognizes this, and mistake can sometimes be a defense to a criminal charge. Mistakes made because the situation was not really the way the person thought it was are known as mistakes of fact . These can be a criminal defense. Mistakes as to matters of law (mistakes of law) can never be used as a criminal defense. There is a presumption in American law that everyone knows the criminal law. This may seem like a preposterous assumption but consider the alternative. If a defendant could mount a defense by claiming that he or she did not know the act was criminal, then everyone could commit every crime at least once and get away with it by claiming that they did not know. For this reason, the law has to presume that everybody knows the law.

Insanity

The term insanity comes from the law; psychology and medicine do not use it. The everyday use of the term can be misleading. If a person acts abnormally, they tend to be considered by many as “crazy” or “insane.” At law, merely having a mental disease or mental defect is not adequate to mitigate guilt. It must be remembered that Jeffery Dahmer was determined to be legally sane, even though everyone who knows the details of his horrible acts knows that he was seriously mentally ill. To use insanity as a legal

excuse, the defendant has to show that he or she lacked the capacity to understand that the act was wrong, or the capacity to understand the nature of the act. Some jurisdictions have a not guilty by reason of insanity plea.

The logic of the insanity defense goes back to the idea of mens rea and culpability. We as a society usually only want to punish those people who knew what they were doing was wrong. Most people believe that it is morally wrong to punish someone for an unavoidable accident. Likewise, society does not punish very young children for acts that would be crimes if an adult did them. The logic is that they do not have the maturity and wisdom to foresee and understand the nature of the consequences of the act. Put in oversimplified terms, if a person is so crazy that they do not understand that what they are doing is wrong, it is morally wrong to punish them for it.

Over the years, different courts in different jurisdictions have devised different tests to determine systematically if a criminal defendant is legally insane. One of the oldest and most enduring tests is the M’Naghten rule, handed down by the English court in 1843. The basis of the M’Naghten test is the inability to distinguish right from wrong. The Alabama Supreme Court, in the case of *Parsons v. State* (1887), first adopted the Irresistible Impulse Test. The basic idea is that some people, under the duress of a mental illness, cannot control their actions despite understanding that the action is wrong.

Today, all of the federal courts and the majority of state courts use the substantial capacity test developed within the Model Penal Code. According to this test, a person is not culpable for a criminal act “if at the time of the crime as a result of mental disease or defect the defendant lacked the capacity to appreciate the wrongfulness of his or her conduct or to conform the conduct to the requirements of the law.” In other words, this test contains the awareness of wrongdoing standard of M’Naghten as well as the involuntary compulsion standard of the irresistible impulse test.

It is a Hollywood myth that many violent criminals escape justice with the insanity defense. In fact, the insanity defense is seldom attempted by criminal defendants and is very seldom successful when it is used. Of those who do successfully use it, most of them spend more time in mental institutions than they would have spent in prison had they been convicted. The insanity defense is certainly no “get out of jail free card.”

Intoxication

While there is some logic to the idea that being intoxicated diminishes a person’s capacity to develop mens rea, it usually serves to enhance rather than mitigate criminal culpability. There are some jurisdictions that allow voluntary intoxication as a factor that mitigates culpability, such as when murder in the first degree is reduced to murder in the second degree. Involuntary intoxication is another matter. If a defendant has been given a drug without their knowledge, then a defense of involuntary intoxication may be available.

Justification Defenses ^[81]

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.

Consent

Consent by the victim can also form the basis of a justification defense to criminal conduct. Consent is most commonly used as a defense to sex crimes such as rape, and lack of consent is a criminal element of most sexual offenses that must be proven beyond a

reasonable doubt. Consent is a defense that can be statutory or common law, perfect or imperfect, depending on the jurisdiction.

Elements of the Consent Defense

Consent can be a valid defense to a crime only if the victim chooses to render it. Thus, it must be proffered knowingly and voluntarily, or it is ineffective. Under the Model Penal Code, consent is ineffective if “it is given by a person who is legally incompetent to authorize the conduct...it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable to make a reasonable judgment...it is induced by force, duress or deception” (Model Penal Code § 2.11(3)). In general, consent is not knowing if it is given by an individual who is too young, mentally incompetent (Colo> Rev. Stat. Ann., 2010), or intoxicated. In general, consent is not voluntary if it is induced by force, threat of force, or trickery (Del. Code Ann. tit. 11, 2010).

Example of Unknowing Consent

Gina drinks six glasses of wine at a party and offers to be the “donkey” in a game of pin the tail on the donkey. Other party members watch as Gina staggers her way to the front of the room and poses in front of the pin the tail on the donkey poster. Geoff walks up to Gina and stabs her several times in the buttocks with a pin. Geoff probably cannot claim consent as a defense to battery in this case. Gina consented to battery while she was intoxicated, and clearly, she was unable to make a reasonable judgment. Thus, her consent was not given knowingly and was ineffective in this situation.

Example of Involuntary Consent

Change the example with Gina and Geoff. Imagine that Gina just arrived at the party and has not consumed any alcohol. Geoff tells Gina he will poke out her eye with a pin if she does not volunteer to be the donkey in the pin the tail on the donkey game. He exemplifies his threat by making stabbing gestures at Gina’s eye with the pin. Frightened, Gina goes to the front of the room and poses in front of the donkey poster until Geoff stabs her in the buttocks with the pin. Geoff probably cannot claim consent as a defense to battery in this case. Gina consented in response to Geoff’s threat of physical harm. Thus, her consent was not given voluntarily and was ineffective in this situation.

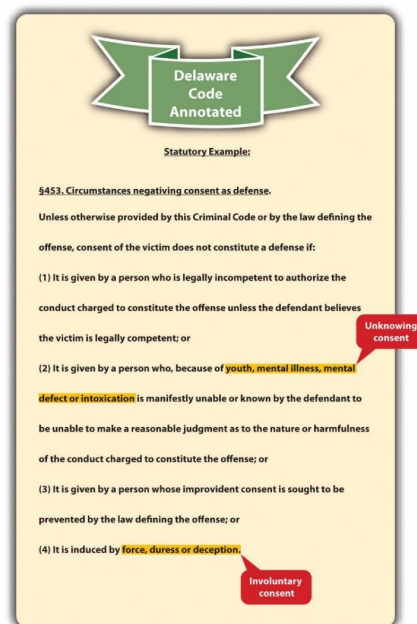


Figure 4.10 Delaware Code Annotated ^[82]

Situations Where Consent Can Operate as a Defense

Consent is a defense to only a few crimes. In most jurisdictions, consent can operate only as a defense to sexual conduct, injury that occurs during a sporting event, and crimes that do not result in serious bodily injury or death (Me. Rev. Stat. Ann., 2010). As the Model Penal Code states, “[w]hen conduct is charged to constitute an offense because it causes or threatens bodily harm, consent to such conduct or to the infliction of such harm is a defense if: (a) the bodily harm consented to or threatened by the conduct consented to is not serious; or (b) the conduct and the harm are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport” (Model Penal Code § 2.11(2)).

Stand your Ground

Sandy and Sue have an argument in the park. Sue pulls a knife out of a sheath that is strapped to her leg and begins to advance toward Sandy. Sandy also has a knife in her pocket. In a state that follows the retreat doctrine, Sandy must attempt to escape, if she can do so safely. In a state that follows the stand-your-ground doctrine, Sandy can defend herself using her own knife and claim lawful self-defense. Note that Sandy was not the initial aggressor in this situation. If Sandy pulled a knife first, she could not use the knife and claim self-defense, whether the state follows the stand-your-ground doctrine or the duty to retreat doctrine.

Entrapment

Historically, no legal limit was placed on the government's ability to induce individuals to commit crimes. The Constitution does not expressly prohibit this governmental action. Currently, however, all states and the federal government provide the defense of entrapment. The entrapment defense is based on the government's use of inappropriately persuasive tactics when apprehending criminals. Entrapment is generally a perfect affirmative statutory or common-law defense.

Entrapment focuses on the origin of criminal intent. If the criminal intent originates with the government or law enforcement, the defendant is entrapped and can assert the defense. If the criminal intent originates with the defendant, then the defendant is acting independently and can be convicted of the offense. The two tests of entrapment are subjective entrapment and objective entrapment. The federal government and the majority of the states recognize the subjective entrapment defense (Connecticut Jury Instruction on Entrapment, 2010). Other states and the Model Penal Code have adopted the objective entrapment defense (People v. Barraza, 2010).

Subjective Entrapment

It is entrapment pursuant to the subjective entrapment defense when law enforcement pressures the defendant to commit the crime against his or her will. The subjective entrapment test focuses on the defendant's individual characteristics more than on law enforcement's behavior. If the facts indicate that the defendant is predisposed to commit the crime without law enforcement pressure, the defendant will not prevail on the defense.

The defendant's criminal record is admissible if relevant to prove the defendant's criminal nature and predisposition. Generally, law enforcement can furnish criminal opportunities and use decoys and feigned accomplices without crossing the line into subjective entrapment. However, if it is clear that the requisite intent for the offense originated with law enforcement, not the defendant, the defendant can assert subjective entrapment as a defense.

Example of Subjective Entrapment

Winifred regularly attends Narcotics Anonymous (NA) for her heroin addiction. All the NA attendees know that Winifred is a dedicated member who has been clean for ten years. Marcus, a law enforcement decoy, meets Winifred at one of the meetings and begs her to "hook him up" with some heroin. Winifred refuses. Marcus attends the next meeting, and follows Winifred out to her car pleading with her to get him some heroin. After listening to Marcus explain his physical symptoms of withdrawal in detail, Winifred feels pity and promises to help Marcus out. She agrees to meet Marcus in two hours with the heroin. When Winifred and Marcus meet at the designated location, Marcus arrests Winifred for sale of narcotics. Winifred may be able to assert entrapment as a defense if her state recognizes the subjective entrapment defense. Winifred has not used drugs for ten years and did not initiate contact with law enforcement. It is unlikely that the intent to sell heroin originated with Winifred because she has been a dedicated member of NA, and she actually met Marcus at an NA meeting while trying to maintain her sobriety. Thus it appears that Marcus pressured Winifred to sell heroin against a natural predisposition, and the entrapment defense may excuse her conduct.

Objective Entrapment

The objective entrapment defense focuses on the behavior of law enforcement, rather than the individual defendant. If law enforcement uses tactics that would induce a reasonable, law-abiding person to commit the crime, the defendant can successfully assert the entrapment defense in an objective entrapment jurisdiction. The objective entrapment defense focuses on a reasonable person, not the actual defendant, so the defendant's predisposition to commit the crime is not relevant. Thus, in states that recognize the objective entrapment defense, the defendant's criminal record is not admissible to disprove the defense.

Example of Objective Entrapment

Winifred has a criminal record for prostitution. A law enforcement decoy offers Winifred \$10,000 to engage in sexual intercourse. Winifred promptly accepts. If Winifred's jurisdiction recognizes the objective entrapment defense, Winifred may be able to successfully claim entrapment as a defense to prostitution. A reasonable, law-abiding person could be tempted into committing prostitution for a substantial sum of money like \$10,000. The objective entrapment defense focuses on law enforcement tactics,

rather than the predisposition of the defendant, so Winifred's criminal record is irrelevant and is not admissible as evidence. It appears that law enforcement used an excessive inducement, and entrapment may excuse Winifred's conduct in this case.

Duress

Duress, sometimes known as coercion, means that the actor did the criminal act because they were forced to do so by another person by means of a threat. The idea is that while the actor commits the actus reus of the offense, the mens rea element, the criminal intent, was that of the person that coerced the actor to commit the crime. The effect of a successful duress defense is a matter of state law, so may be different in different jurisdictions. Most jurisdictions require that the actor have no part in becoming involved in the situation.

Necessity

The defense of necessity is based on the idea that it is sometimes necessary to choose one evil to prevent another, such as when property is destroyed to save lives. The necessity defense is sometimes referred to as the lesser of two evils defense because the evil that the actor seeks to prevent must be a greater harm than the evil that he or she does to prevent it. In most jurisdictions, the defense will not be available if the person created the danger they were avoiding.

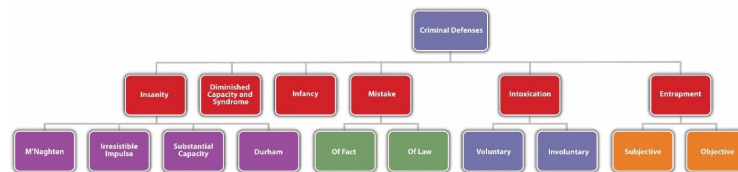


Figure 4.11 Diagram of Defenses^[83]

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