Criminal Law & Procedure

Conley Bar Review

Conley Bar Review: Criminal Law & Procedure

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Contents

Note: On the Multistate Bar Exam, about half of the Criminal Law & Procedure questions will be based on criminal law, and half on criminal procedure.

I. Fundamentals

In criminal law examinations, use common law definitions unless otherwise indicated.

Criminal law may derive from common law, the Constitution (treason), modern statutes, or the Model Penal Code, on which many modern statutes are based.

Theories of punishment include:

1. Incapacitation
2. Special deterrence
3. General deterrence
4. Retribution
5. Rehabilitation
6. Education

Generally, a felony is a crime punishable by death or imprisonment exceeding one year. A misdemeanor is a crime punishable by imprisonment for less than one year or by a fine only.

A crime is malum in se (wrong in itself) when it is one that is inherently evil. A crime is malum prohibitum if it is wrong only because it is prohibited by legislation.

Legality: No criminal penalty may be imposed without fair notice that the conduct is forbidden. In addition, there can be no ex post facto laws.

Each crime has two parts: the actus reus (physical part) and the mens rea (mental part). Each must be present at the same time to make the required concurrence of the elements.

In addition, other crimes require a harmful result caused (factually and proximately) by the defendant's act.

A. Actus reus

Actus reus describes the action the defendant performed or the results brought about.

Generally, the actus reus must be a voluntary, physical act, i.e. a bodily movement. Thoughts do not suffice.

These acts are not voluntary, so no actus reus:

1. Movement caused by another,
2. Reflexive or convulsive acts,
3. Acts performed while defendant was unconscious or asleep.

Intoxication, voluntary or not, may be used as a defense when the defendant was so drunk that they were unconscious or unaware of what actions they were performing. Though intoxication usually is understood to negate the mens rea, in this case it actually negates the voluntariness aspect of the actus reus. This use of the intoxication defense is rare and may meet resistance by a court.

Omissions are generally not acts, but the exception is if the defendant had all three of these elements:

1. Legal duty to act, created by:
    a. Statute (e.g. duty to file income tax return), or
    b. Contract (e.g. lifeguard or nurse), or
    c. Defendant's relationship to victim (e.g. parent or spouse, duty to prevent harm, but no duty for other relatives)
    d. Voluntary assumption of care, creates duty of reasonable care
    e. Creation of peril by defendant (some jurisdictions)
    f. Landowner liability (some jurisdictions)
    g. Duty to control (some jurisdictions)
2. Knowledge of facts giving rise to duty (may be known or should have known as with lifeguard asleep at post and unaware someone is drowning)
3. Reasonably possible to perform (e.g. parent unable to swim is under no duty to rescue drowning child).

B. Mens rea

The mens rea is the mental part of a crime, the "guilty mind." The defendant must have had the requisite mental state and no exculpating factors (i.e. defenses that negate intent).

At common law, the level of intent may be of four types: general intent, specific intent, malice, and strict liability.

For **general intent** crimes, the defendant need only have had an awareness that they were committing a crime. Intent may be inferred from the doing of the act.

For general intent crimes, actual intent to commit the act is not required, merely creating a high risk that the act would occur is sufficient. E.g., with rape, the act is intercourse without the woman's consent. Defendant need not have known the woman did not consent, they may merely have taken an unjustifiably high risk that they had not given their consent.

Intent may be transferred from one victim to another. Transferred intent is most commonly used with homicide, battery, and arson. It may not be used for attempt. Defenses follow transferred intent: a defense to murder one person will apply if another person is accidentally killed.

Motive is irrelevant to mens rea. If one intends to steal, one has the mens rea, though one intended to steal bread for a starving child.

For specific intent crimes, the definition of the crime requires a specific intent or objective. Intent may not be inferred from the doing of the act; the prosecution must provide evidence tending to prove the existence of the specific intent.

Two defenses, voluntary intoxication and unreasonable mistake of fact, apply only to specific intent crimes.

Specific intent crimes:

1. Solicitation: Intent to have the person solicited commit the crime;
2. Attempt: Intent to complete the crime;
3. Conspiracy: Intent to have the crime completed;
4. First degree premeditated murder (by statute): Premeditated, deliberate intent to kill
5. Assault: Intent to commit a battery;
6. Larceny and robbery: Intent to permanently deprive another of their interest in the property taken;
7. Burglary: Intent at the time of entry to commit a felony in the dwelling of another;
8. Forgery: Intent to defraud;
9. False pretenses: Intent to defraud;
10. Embezzlement: Intent to defraud.

Malice is the intent required for common law murder and arson. It is not a specific intent. The defenses of voluntary intoxication and unreasonable mistake are not available for these crimes. To show malice, the prosecution need only show that

defendant recklessly disregarded an obvious or high risk that the harmful result would occur.

Strict liability offenses remove the requirement that defendant be aware of all factors constituting the crime. Certain defenses, such as mistake of fact, are not available for strict liability offenses.

With strict liability offenses, if the defendant performed the actus reus, they are guilty. The only defense is that when defendant performed the action, they were unaware or unconscious, thus there is no actus reus.

The Model Penal Code (MPC) levels of culpability eliminate malice and eliminate the difference between general and specific intent, in favor of four levels of culpability, used consistently for all crimes:

1. **Purposely:** when defendant's conscious object was to cause the result;
2. **Knowingly:** when defendant knows their conduct is likely to cause the result (also covers "willful");
3. **Recklessly:** when defendant consciously disregards a substantial or unjustifiable risk, and this constitutes a gross deviation from the standard of reasonable care. (Also covers "wanton." Defendant must take an unjustifiable risk, and know of and consciously disregard that risk.
4. **Negligently:** when defendant fails to be aware of a substantial and unjustifiable risk that the result will follow, and this constitutes a substantial deviation from reasonable care. Violation of an ordinance, e.g. a speed limit, may be evidence of negligence.

Wanton: Must be a very high probability of death or serious bodily harm. With only a small risk, the state of mind is negligence.

Under the MPC, if a state of mind is part of the offense, then the state of mind applies to all elements of the offense.

Under the MPC, if no state of mind is given, then recklessness at the least is required for each material element of the offense.

Vicarious liability: An employer may be criminally liable for the acts of their employee, if the employee committed the crime (actus reus and mens rea), and the employer committed no actus reus but had a guilty mind. Punishment may be limited to a fine rather than imprisonment.

Enterprise liability: At common law, corporations could not commit crimes because they could not form intent; modernly vicarious liability may apply by statute.

C. Concurrence of the elements

The defendant must have had the intent necessary for the crime at the time they committed the act constituting the crime, and the intent must have prompted the act. In addition, for some crimes, the defendant's action must have actually and proximately caused the prohibited result.

The continuous trespass doctrine is a legal fiction circumventing concurrence of the elements for the crime of larceny.

Courts will sometimes forego the proximate causation requirement of concurrence of the elements when justice requires it. Thus, if a defendant intends to kill and performs the actus reus, and an intervening cause cuts off the chain of causation, but then the prohibited result occurs anyway in the way that defendant intended, courts may find guilt though causation is absent.

In addition, the court must have jurisdiction.

II. Inchoate crimes and accomplice liability

A. Accomplice liability

Common law distinguished four types of parties:

1. principals in the first degree (people who actually do the act);
2. principals in the second degree (people who aid, command, or encourage the principal and are present at the crime);
3. accessories before the fact (persons who aid, abet, or encourage but are not present at the crime);
4. accessories after the fact (persons who assist the principal after the crime).

The common law distinctions were significant in that, e.g., an accessory could not be convicted unless the principal had already been convicted. Modernly most jurisdictions have abolished these procedural requirements, so the distinctions are less important.

Modernly, all parties to the crime may be found guilty of the offense. Accomplice liability results from aiding, counseling, or encouraging the principal before or during

the commission of the crime (actus reus) with the intent that the crime be committed (mens rea). Mere knowledge that a crime will result does not suffice.

Actual aid is not required; standing by ready to give aid is sufficient.

Accomplice liability is more likely to attach if the defendant derived a direct benefit from the crime. This is not a requirement, but it may make the difference in cases in which, e.g. a landlord rents to a prostitute. If the landlord charges the normal rate and does not encourage the prostitution, they are not liable. But if they charge a higher rate or a percentage of the take, they derive a benefit from the crime and are liable.

Modernly, an accessory after the fact is one who assists another, knowing they have committed a felony, in order to help them escape. The crime must be a felony and it must be completed at the time assistance is given. The crime may be called harboring a fugitive, aiding escape, or obstructing justice. The penalty is not related to the particular crime (usually maximum five years).

Note that if one agrees before the crime to help another evade escape after the crime, then they are an accessory before the fact, not an accessory after the fact.

An accomplice is responsible for the crimes they aided, counseled, or assisted in and any other crimes committed in the course of the crime, if they were foreseeable. Note: this prevents the application of the felony murder rule to accomplices when the killing is unforeseeable, though the principals would be liable.

Protected class: One may not be liable as an accomplice if one is in the class of people protected by the criminal statute (e.g. a woman cannot be an accomplice in the crime of transporting herself across state lines for prostitution).

However, one is not protected from accomplice liability merely because it would be impossible for one to be a principal, e.g. a woman may be an accomplice in the rape of another woman, though she could not be the principal.

Necessary parties not provided for: One may not be liable as an accomplice if the statute requires the presence of another to complete the crime (e.g. a buyer of heroin cannot be an accomplice in the sale of heroin, since a sale cannot take place without a buyer and the definition of the crime does not provide for liability of the buyer).

An accomplice may assert the defense of withdrawal if they neutralize their assistance. E.g.:

1. If they encouraged, they must repudiate this encouragement;
2. If they provided material assistance, they must attempt to neutralize this assistance, e.g. by attempting to retrieve the material;

3. If withdrawal is otherwise impossible, one may notify authorities or take some other action to prevent the crime from being committed.

B. Inchoate offenses

Inchoate offenses are complete offenses in themselves, committed prior to and in preparation for the target offense. Attempt and solicitation generally merge with the target offense, thus one may not be convicted of either attempt or solicitation and the target offense. However, conspiracy does not merge, so one may be convicted of conspiracy and the target offense.

Solicitation

Solicitation: Inciting, counseling, advising, inducing, urging, or commanding another to commit a felony with the specific intent that the person solicited commit the crime. The offense is complete once the request is made. The person solicited need not agree or do anything in response. (Note: if the person solicited completed the crime, the solicitor would be liable for the crime as an accomplice. If the person solicited attempted the crime, the solicitor would be liable for the attempt as an accomplice.)

Modernly, solicitation may include solicitation to commit a misdemeanor.

Solicitation merges with the target offense.

Impossibility is no defense, as where the person solicited was an undercover agent. The culpability of the defendant is measured by the facts as they believed them to be.

Withdrawal or renunciation is no defense.

Exemption is a defense: E.g., a victim cannot be guilty of solicitation of statutory rape, since they could not be guilty as an accomplice of the completed crime.

Conspiracy

Common law conspiracy is an agreement between two or more persons to accomplish some criminal or unlawful purpose, or to accomplish a lawful purpose by unlawful means.

No merger for conspiracy: Common law merger has been abolished for conspiracy: one may be convicted of the crime and conspiracy to commit the crime.

A conspirator is liable for the crimes of their co-conspirators if:

1. The crimes were committed in furtherance of the conspiracy; and
2. The crimes were foreseeable.

Elements of conspiracy:

1. Agreement between two or more persons;
2. Intent to enter into an agreement;
3. Intent to achieve the criminal objective of the agreement.

At common law, the agreement itself constituted the crime. Most jurisdictions now require an overt act in furtherance of the conspiracy, but mere preparation will usually suffice.

Multiple crimes do not create multiple conspiracies, e.g. when two people agree to go on a bank robbing spree.

Two models of conspiracies: chain and wheel. In a chain model, there is one large conspiracy involving a series of agreements. In a wheel model, the "hub" of the wheel creates several conspiracies with different people who may not know of the other agreements. The hub is liable for all the conspiracies, but the spokes are only liable for the ones they are interested in.

At common law, two or more people had to agree. Thus, a person agreeing with an undercover cop could not be liable, because the cop did not actually agree. The MPC approach dispenses with this requirement.

At common law, husband and wife were the same person, so they only counted as one person for the conspiracy numbers requirements (abandoned modernly). Some jurisdictions hold that a corporation and its agent are not separate entities for conspiracy purposes.

Wharton rule: There is no crime of conspiracy unless there are more conspirators than people necessary for completion of the crime. E.g., if two people agree to a duel, they may not be convicted of conspiracy, since two people are necessary for a duel. But note: in the case of "necessary parties not provided for," e.g. when sale of heroin is illegal but no provision is made for liability of the buyer. The buyer may not be an accomplice, but this removes the application of the Wharton rule: The buyer and seller may be found guilty of conspiracy to sell heroin.

Protected class: If, e.g., a woman could not be an accomplice in transporting herself across state lines for prostitution, then anyone agreeing with her to do that, could not be liable for conspiracy.

Conspiracy requires agreement with other guilty parties. If all other co-conspirators are acquitted of the conspiracy charges, then defendant may not be found guilty of conspiracy. (Does not apply if any other co-conspirators evade justice.)

Conspiracy requires intent to agree (may be inferred) and intent to achieve the same criminal objective. Each defendant, to be convicted, must have their intent proven separately.

Conspiracy to commit a strict liability crime still requires intent. E.g., two adults agree to a plan to persuade an underage person to have sex with them. They believe the underage person is an adult. Their mistake of fact would be no defense to statutory rape, but it is a defense to conspiracy.

In determining when a conspiracy ends, acts of concealment after the fact are not part of the conspiracy unless there was agreement on that specific method of concealment.

One may be convicted of conspiracy to do only what they agreed to do. Thus, if defendant agreed to rob a bank, but not to kill anyone, they may be convicted of conspiracy to commit robbery, but not of conspiracy to commit murder. However, they may be convicted of murder itself, if the killing was a foreseeable result of the bank robbery, because they are liable for the subsequent foreseeable crimes of their co-conspirators.

Impossibility is no defense.

Withdrawal is generally no defense because the crime is complete when agreement is made. MPC recognizes voluntary withdrawal if defendant thwarts the success of the conspiracy, e.g. by calling the police.

Withdrawal may be a defense to subsequent crimes of co-conspirators, including the target crime, if defendant performs an affirmative act that notifies all members of the conspiracy, and notice is given in time to allow them to abandon their plans.

Conspiracy is punished differently by jurisdiction, separately from the crimes themselves.

Mistake of law is allowed in a minority of jurisdictions for the conspiracy charge, but not the crime itself.

Attempt

Attempt is an act that is performed with the intention of completing a crime, but falls short. It consists of two elements:

1. Specific intent to complete the crime, and
2. An overt act in furtherance of that intent.

Attempt always requires specific intent. For instance, attempted murder requires intent to kill, although murder itself allows several other intents.

Attempt is always a lesser included offense of the target offense. Thus, if one may be convicted of committing the target offense, then, ipso facto, one may be convicted of attempting to commit the target offense. Note, however, that attempt merges with the target offense. So if one actually is convicted of the target offense, then one may not be convicted of attempt.

There can be no attempt to commit a negligent crime, because negligence is by definition unintentional, and attempt requires specific intent.

Attempt to commit strict liability crimes requires intent, though the crime itself does not.

The act in furtherance of the crime must be beyond mere preparation. Tests:

1. Proximity test: was defendant dangerously close to success?
2. Unequivocality test: was defendant's action unequivocal?
3. MPC test: was the act a :substantial step in the course of conduct planned to culminate in the commission of the crime." It must be strong corroboration of actor's criminal purpose.

Factual impossibility is no defense, e.g. attempting to rob someone with no money is still attempt. With regard to attendant circumstances, the idea is that defendant is liable for attempt when, if the circumstances were as they believed them to be, their act would be a substantial step toward a crime.

Legal impossibility is always a defense. This occurs when defendant thought they were breaking the law but weren't.

The general rule is that abandonment is never a defense. The MPC allows withdrawal as a defense but only if:

1. It is fully voluntary and not made because of difficulty or risk of completion; and
2. It is a complete abandonment of the plan, not just a postponement or change.

A defendant charged with the completed crime may be found guilty of either the crime or attempt, but not both. A defendant charged with attempt may only be found guilty of attempt.

III. Homicide

At common law, there were three types of homicides:

1. Justifiable (authorized by law);
2. Excusable (with a defense to criminal liability); and
3. Criminal

Criminal homicide included murder, voluntary manslaughter, and involuntary manslaughter.

A. Murder

Murder is the unlawful killing of a human being with malice aforethought. Malice may be express or implied.

Malice may be shown by:

1. Intent to kill (express malice);
2. Intent to inflict great bodily injury;
3. Reckless or wanton disregard for an unjustifiably high risk to human life ("abandoned and malignant heart"); or
4. Intent to commit a felony (felony murder rule).

The last three types of malice are implied malice.

Intent to kill may be inferred from the use of a deadly weapon in a manner likely to produce death or serious bodily injury.

Felony murder: a killing, even an accidental one, committed during the course of a felony is murder. Malice is implied from the intent to commit the underlying felony. It is subject to many limitations by jurisdiction:

1. The felony must be inherently dangerous
2. The defendant must guilty of the underlying felony (a defense to the felony is a defense to the murder)
3. Felony must be independent of killing (e.g. manslaughter or aggravated battery don't work as underlying felonies)
4. Death must be foreseeable, thought most courts are willing to find most deaths foreseeable. A minority of courts do not require foreseeability, only that the felony be inherently wrongful (malum in se).

5. Death must have been caused during the commission or attempted commission of the felony. Escape is part of the felony, but once a place of temporary safety is reached, further deaths are not felony murder.
6. No liability for death of co-felon caused by cops or justifiably resisting victims. Note: deaths of innocent bystanders, even if killed by cops, are still felony murder.

Degree murder: In jurisdictions that divide murder into degrees, all murders are second degree murders unless the prosecution proves any of the following, which would make the murder first degree murder:

1. Deliberate (cool and dispassionate) and premeditated (actual reflection) killing
2. First degree felony murder: Some statutes provide that if a killing took place during certain enumerated felonies (e.g. arson, robbery, burglary, rape, mayhem, kidnapping) then it is first degree murder. Other felony murders are second degree murders.
3. Some statutes make killings performed in certain ways first degree murder, e.g. lying in wait, poison, or torture.

Causation for murder: When a crime is defined as requiring not merely conduct but a prohibited result, the conduct must be the actual and proximate cause of the result. Murder has a few special rules for causation:

1. Common law "year and a day" rule: The death of the victim must occur within one year and one day from the infliction of the injury or wound to find guilt for murder. Abolished in many states, and changed to, e.g., one year or three years in other states.
2. An act that hastens an inevitable result is nevertheless a proximate cause of that result.
3. Simultaneous acts by two or more persons may be considered independently sufficient causes of a single result.
4. Defendant takes the victim as they find them; a preexisting condition does not cut off causation.
5. Negligent medical care is almost always held to be a foreseeable risk. Gross negligence or recklessness by medical professionals may be held to be unforeseeable.
6. Acts of nature are almost always held to cut off the chain of liability.

B. Voluntary manslaughter

Voluntary manslaughter is an intentional killing distinguished from murder by the presence of adequate provocation.

Voluntary manslaughter requires intent to kill or intent to cause great bodily harm.

Adequate provocation can mitigate murder to voluntary manslaughter only if all four elements are present:

1. The provocation must have been one that would arouse sudden and intense passion in the mind of an ordinary person such as to cause them to lose their self-control;
2. The defendant must have in fact been provoked;
3. There must not have been sufficient time between the provocation and the killing for the passions of a reasonable person to cool (addressed through the facts); and
4. The defendant in fact did not cool off between the provocation and the killing.

Reasonableness of the provocation and the cooling off period are matters of fact to be determined by the court and each court may respond differently.

Two types of provocation often found to be adequate:

1. Being subjected to a serious battery or a threat of deadly force; or
2. Discovering one's spouse in bed with another person.

As a matter of law, "mere words" were not adequate provocation at common law.

Some jurisdictions recognize "imperfect self-defense" as a way to reduce murder to manslaughter, when the defendant was at fault in starting the altercation or unreasonably but honestly believed in the necessity of responding with force.

C. Involuntary manslaughter

Involuntary manslaughter is of two types:

1. When death is caused by criminal negligence (not mere negligence, but a very high or unreasonable risk of death or serious bodily injury); or
2. "Unlawful act manslaughter"
    a. When the killing is in the course of the commission of a misdemeanor (misdemeanor manslaughter rule). Some courts require the misdemeanor be an inherently wrongful act (malum in se) or that the death be foreseeable.

b. When the killing is caused during the commission of a felony but does not qualify for the felony murder rule, the killing will be involuntary manslaughter.

IV. Other crimes

A. Battery

Battery is an unlawful application of force to the person of another resulting in either bodily injury or an offensive touching. Simple battery is a misdemeanor.

Intent not required: it is sufficient that the defendant caused the application of force with criminal negligence.

Indirect application of force is sufficient, e.g. causing a dog to attack the victim, or threatening the victim at gunpoint.

Most states define certain acts as aggravated batteries and punish them as felonies, e.g.:

1. Use of a deadly weapon;
2. Serious bodily injury is caused;
3. The victim is a child, woman, or police officer.

The general rule is that consent is not a defense, but some jurisdictions recognize consent in certain situations, e.g. a medical operation or athletic contests.

B. Assault

In a majority of jurisdictions, an assault may be either:

1. An attempt to commit a battery; or
2. The intentional creation, other than by mere words, of a reasonable apprehension in the mind of the victim of imminent bodily harm.

A minority of jurisdictions limit assault to attempted battery. Simple assault is a misdemeanor.

Some states define assault as an unlawful attempt to commit a battery coupled with a present ability to succeed. Impossibility of succeeding in battery precludes liability for assault.

All states have aggravated assault statutes, for instance:

1. With a dangerous or deadly weapon;
2. With intent to rape, maim, or murder.

C. Mayhem

At common law, the felony of mayhem required either the dismemberment or disablement of a bodily part. Most states retain the crime in some form, though the modern trend is to make is a type of aggravated assault, when the intent is to disfigure, dismember, or disable.

D. False imprisonment

Common law misdemeanor had three elements:

1. Unlawful
2. Confinement of a person
3. Without their valid consent.

Confinement requires that the victim either be compelled to go where they do not wish to go or remain where they do not wish to remain. It is not confinement merely to prevent someone from going where they wish to go, so long as alternative routes are available. The confinement may be accomplished by actual force, threats, or a show of force.

Confinement is unlawful unless specifically authorized by law or consented to by the person.

Consent must be freely given by one with the capacity to give consent. Thus, consent is invalidated by coercion, threats, deception, or incapacity due to mental illness or youth.

E. Kidnapping

At common law, the misdemeanor of kidnapping was the forcible abduction or stealing away of a person from their own country and sending them into another.

Modern statutes expand the definition, though it usually remains a form of aggravated false imprisonment.

Most jurisdictions define kidnapping as confinement of a person that involves either:

1. Some movement (asportation) of the victim; or
2. Concealment of the victim in a secret place.

Some statutes define aggravated kidnapping as:

1. Kidnapping for ransom
2. Kidnapping for the purpose of committing other crimes (e.g. robbery)
3. Kidnapping for offensive purpose, such as to harm or sexually violate person
4. Child stealing

For many statutes requiring some movement of the person, a small movement is sufficient (in contrast to common law). Some statutes require only confinement. Some require some asportation, however slight. Some require asportation that is not incidental and necessary to some other substantive crime.

Some statutes require secrecy when the kidnapping is based on confinement not movement.

Consent precludes confinement, as in false imprisonment. Must be valid consent.

F. Rape

Rape, a felony, is the unlawful carnal knowledge of a woman by a man, not her husband, without her effective consent.

Penetration of the vulva by the penis is sufficient. Ejaculation is neither necessary nor sufficient. Many modern jurisdictions have abolished the requirement that the victim and perpetrator not be married.

Consent may be ineffective in several situations:

1. Intercourse accomplished by force means no consent
2. By threats: any consent obtained by threats is ineffective. Failure of victim to resist to the utmost does not prevent the intercourse from being rape. Threat to turn a prostitute in to the police doesn't count.
3. Woman unable to consent: due to unconsciousness, intoxication, or mental condition.
4. Consent obtained by fraud:

a. Fraud in the factum: no consent, no understanding of what was happening

b. Fraud in the inducement: effective consent, therefore not rape, since consent was given.

Statutory rape: carnal knowledge of a female below the age of consent (varies by state). Consent is irrelevant; strict liability. Reasonable mistake as to age is no defense.

G. Other sex crimes

Sodomy included "unnatural" sex acts such as oral and anal sex.

Adultery: Some modern statutes provide that any person who cohabits or has sexual intercourse with another not their spouse commits the misdemeanor offense if:

1. Behavior is open and notorious; and
2. The person is married and the other person is not their spouse; or
3. The person is not married and knows the other person is married.

Fornication is open and notorious sexual intercourse between or cohabitation by unmarried persons.

Incest is a statutory offense, usually a felony, that consists of marriage or a sexual act between persons who are too closely related. There is no uniformity on the degree of relationship prohibited or criminal responsibility levied.

Seduction or carnal knowledge: A statutory felony in many states, seduction is committed when a male person induces an unmarried female of previously chaste character to engage in an act of intercourse on promise of marriage. Subsequent marriage may be a defense.

Bigamy is a traditional strict liability offense that consists of marrying someone while having another living spouse.

H. Larceny

Larceny is the:

1. Taking (caption) and
2. Carrying away (asportation)
3. Of tangible personal property
4. Of another

5. By trespass
6. With intent to permanently (or for an unreasonable time) deprive the person of their interest in the property.

Larceny may only be of personal property, not realty and fixtures, not services, and not intangibles. Documents and instruments merge with the property they represent; thus, stealing a deed is not larceny. Some modern statutes have expanded larceny to include written instruments embodying intangible rights.

The property must be "of another." If defendant took money that was owed her, or fungible goods of equal or lesser value than the amount owed her, then they have not taken the property of another, and are not liable for larceny. However, if they take non-fungible goods, they are liable for larceny.

Larceny occurs only when defendant takes from someone with possession other than defendant. There is no requirement that the person originally in possession be in lawful possession. The property in question may have been previously stolen from someone else, or it may be contraband. If defendant had possession at the time of taking, the crime is not larceny, though it may be embezzlement. If defendant has mere custody at the time of the taking, then the crime is larceny.

Possession is much broader power over property than custody.

Generally, low level employees have mere custody over their employer's property, while managers have possession. Low level employees may have possession, however, if they are given broad powers over property or if a third party directly gives them property intended for their employer.

Generally, a bailee has possession. If they misappropriate the property, they commit embezzlement. If, however, they break bulk by opening the packages before they misappropriate the property, then possession returns to the bailor, and the crime is larceny.

Lost or mislaid property is regarded as constructively in the possession of the owner, and thus if it is found and taken, it is taken from their possession and larceny might be committed. The requirements are that the defendant knew or had reason to believe they could find out the identity of the owner of the property, and the intent to commit larceny existed when they took possession of the property. If they took the property intending to find the rightful owner, but later decided to keep it, there is no larceny.

Misdelivered property may be the subject of larceny if the person receiving it, at the time of the misdelivery, realizes the mistake and has the intent to commit larceny.

Abandoned property has no owner and no larceny can be committed by taking it.

Taking: Defendant must obtain control, not merely destroy or move the property. Taking may be accomplished through the use of an innocent agent.

Asportation: Physical movement, however slight, that is part of the carrying away process.

Trespass: The taking must be trespassory, i.e. without consent. (If consent is obtained by fraud, it is ineffective; this may be called larceny by trick.)

Intent to permanently deprive: Defendant, at the time of the taking, must have the intent to permanently deprive the person from whom the property is taken of their interest in the property. This may be intent to create substantial risk of loss. Intent to borrow or intent to obtain repayment of debt are insufficient.

Intent to permanently deprive is met by contingent intent: e.g. if defendant plans to return the money they stole if they win in Vegas. Defendant thus intends to create a substantial risk of loss. Intent to permanently deprive is met by intent to sell goods back to the owner.

Continuing trespass: Larceny requires the defendant have the intent to permanently deprive at the time of the trespassory taking. However, if the intent to permanently deprive did not exist at the time of taking, but some wrongful state of mind did exist, then the trespass involved in the original taking is regarded as continuing and existing at the moment intent to steal is formed. Note: if the original taking was innocent, the doctrine does not apply.

I. Embezzlement

Embezzlement generally requires:

1. The fraudulent
2. Conversion
3. Of property
4. Of another
5. By a person in lawful possession of that property.

The conversion required by embezzlement requires only that the defendant deal with the property in a manner inconsistent with the trust arrangement pursuant to which they hold it. (Conversion need not be for defendant's benefit.)

Some statutes apply embezzlement only to property that may be the subject of larceny. Others apply it to, e.g., real estate.

Defendant must have intent to defraud. The intent is negated if defendant intended to restore the exact same property (but not equivalent property, even money of equal value), or if they believed they were entitled to the property, e.g. to pay a debt.

J. False pretenses

The offense may be grand (felony) or petit (misdemeanor). It consists of:

1. Obtaining title
2. To the property of another
3. By an intentional (or knowing) false statement of past or existing fact
4. With intent to defraud the other.

Note that if only possession of property is obtained through fraud, the crime is larceny by trick. If title is obtained, the crime is false pretenses. What is obtained depends upon what the victim intended to convey to defendant.

Courts have held that when a defendant knowingly writes a bad check in exchange for an item of personal property, the seller intends only to transfer possession of the property and their transfer of title is dependent on the check being good. Therefore, the crime is larceny, not false pretenses.

When defendant obtained money through fraud, courts have held that defendant obtained title to the money if the person giving the money intended for the sale to be final or for the money to be a non-refundable deposit or down payment to be followed by installments. In these cases, the crime would be false pretenses. However, if the money was a temporary payment or refundable deposit, then the defendant may be found to have obtained mere possession of the money, and the crime would be larceny.

The defendant must have knowingly made a false statement of past or existing fact, and such fraud must be the cause of the transfer of property.

Many jurisdictions have created crimes similar to false pretenses:

1. Bad check: writing a bad check with intent to defraud
2. Abuse of credit card: knowingly obtaining property with unauthorized credit card.

K. Robbery

Robbery, a felony in all jurisdictions, consists of:

1. A taking
2. Of personal property of another
3. From the other's person or presence
4. By force, threat of force, or intimidation
5. With the intent to permanently deprive them of it.

Thus, robbery is basically a form of aggravated larceny where the taking is accomplished by force or threat of force.

If threats are used, they must be of death or serious physical injury to the person or their family or persons there at the time. Threats to property and threats to harm the person or the person's family in the future will not suffice.

The threat must be one intentionally or knowingly made by the defendant. If the victim perceives a threat where one was not made, this is insufficient.

There is no requirement that defendant actually be able to carry out the threat of force. Thus, use of toy guns or fingers in a jacket pocket when they are represented to be real guns, and a threat to shoot the person is made, still constitute robbery.

Many jurisdictions have created a form of aggravated robbery, when a deadly weapon is used.

L. Extortion

The common law definition of extortion consisted of the corrupt collection of an unlawful fee by an officer under color of their office. The modern definition has expanded far beyond this original meaning.

The modern definition of extortion or blackmail is obtaining property from another by means of certain oral or written threats: threats to do physical harm to others or threats to damage the victim's property are included. Under some statutes, the crime is completed when the threats are issued with the intent of collecting money or property, under others the money must actually be obtained by means of the threats.

Threats to accuse someone of a crime, even if that person is guilty, are still sufficient for extortion.

M. Receipt of stolen property

Common law and modern definitions are identical:

1. Receiving possession and control
2. Of stolen personal property
3. Known to have been obtained in a manner constituting a criminal offense
4. By another person
5. With the intent to permanently deprive the owner of their interest in the property.

Knowledge is required. Evidence that defendant "should have known" property was stolen indicates negligence, not knowledge, but it may be circumstantial evidence that defendant has actual knowledge.

The property must actually be "stolen" at the time it was received. Once stolen property has been recovered by the police, it may be argued that it is no longer stolen.

One receives property when they take possession or direct possession be delivered to someone else.

Modernly, the trend is to combine the property offenses into the modern statutory heading of theft. Or if larceny remains, the technical requirements of trespass and asportation are being rejected.

N. Forgery

Forgery is:

1. Making or altering
2. Of a false writing
3. With intent to defraud.

Writing must be a document, not e.g. a "Picasso" signature on a painting is not forgery.

O. Uttering a forged instrument

Uttering a forged instrument is:

1. Offering as genuine
2. An instrument that may be the subject of forgery and is false

3. With intent to defraud.

P. Malicious mischief

Malicious mischief is:

1. Malicious
2. Destruction of or damage to
3. Property of another.

Q. Burglary

Common law:

1. A breaking
2. and entry
3. Of the dwelling
4. Of another
5. At nighttime
6. With the intent of committing a felony therein.

Breaking requires some force to gain entry, but minimal force is sufficient. For instance, opening a closed but unlocked door is usually held to be a breaking. One theory is that a breaking has occurred if defendant, through some movement of the structure, created the space through which they entered.

A constructive breaking occurs when entry is gained by means of fraud, threat, or intimidation, or by use of the chimney.

Constructive breaking is breaking with consent that is gained by force, threat, or intimidation.

A person may have consent to enter during certain times, so entry during those times is not a breaking, but entry at unauthorized times may be a breaking. Entry for an unauthorized purpose, but at an authorized time, is not a breaking.

Entry is made by placing any portion of the body inside the structure, even momentarily. Insertion of a tool is sufficient if it is used to accomplish the felony, not if it is used merely to gain entry. Example: shooting a bullet through a window at night with the intent to kill a resident is burglary.

The defendant must have intended to commit a felony at time of entry.

Petit theft counts as a felony for burglary.

Modern statutory changes by jurisdiction:

1. No breaking requirement
2. Remaining concealed inside a structure included
3. Broadening structures beyond dwellings
4. Elimination of nighttime requirement
5. Intent to commit even misdemeanor theft sufficient

R. Arson

At common law:

1. The malicious
2. Burning
3. Of the dwelling
4. Of another.

Apartment houses are the dwellings of all.

There must be burning. Explosions are insufficient, and some damage must actually occur.

Malice in this context requires that the defendant have acted with the intent or knowledge that the structure would burn, or with reckless disregard of an obvious risk that it would burn. No specific intent, no ill will required.

The offense of burning one's own house, when it creates a danger to others, is known as houseburning.

S. Perjury

A misdemeanor at common law, perjury consisted of the willful and corrupt taking of a false oath in regard to a material matter in a judicial proceeding.

T. Subornation of perjury

Procuring or inducing another to commit perjury.

U. Bribery

The common law misdemeanor consisted of the corrupt payment or receipt of anything of value in return for official action.

V. Compounding a crime

Entering into an agreement for valuable consideration to not prosecute another for a felony, or to conceal the commission of a felony or whereabouts of a felon.

W. Misprision of a felony

The failure by someone other than a principal or accessory after the fact to disclose or report knowledge of the commission of a felony. If a modern jurisdiction does not recognize misprision, then a person is under no obligation to report a crime.

V. Defenses

Defenses are generally of two types: justifications and excuses. With a justification, the argument is that the actor did nothing wrong, because some circumstance justified their behavior. With an excuse, the argument is that the actor did something wrong, but some circumstance should excuse them from punishment.

In addition, the "state of mind" defenses may be distinguished from justifications and excuses. With these defenses, circumstances that negate the mens rea element of the crime or the voluntariness aspect of the crime.

Defendants have the burden of proving an affirmative defense, but the government has the burden of proving every element of the crime charged. Thus, a legal defense may be that the prosecution did not prove every element of the crime, but the burden of proving that cannot be shifted to the defendant.

A. Self defense

At common law, a non-aggressor is justified in using force upon another if they reasonably believe that such force is necessary to protect themselves from imminent use of unlawful force by the other person. Deadly force is only justified if deadly force is threatened.

Self defense includes a necessity component, a proportionality requirement, and a reasonable-belief rule.

One may lose the status of aggressor if one withdraws from the conflict and successfully communicates their withdrawal to the other.

Some jurisdictions impose a duty to retreat in order to avoid using force in self-defense. In these so-called "retreat jurisdictions," an exception is that one is not required to retreat from one's home (except, in some jurisdictions, if the aggressor also lives there).

Under the MPC, one may use force to defend oneself from death, serious bodily harm, kidnapping, or rape. Different from common law in that the actor's belief is subjective (i.e. no reasonableness requirement). MPC follows rule of retreat.

B. Defense of others

A person is justified in using force to protect a third party from unlawful use of force by an aggressor. The intervenor's right to use force in such circumstances parallels the third party's right of self-defense; that is, they may use force when, and to the extent that, the third party would apparently be justified in using force to protect themselves.

A historical limitation was that one could defend only persons related to one by consanguinity, marriage, or employment relations.

A minority of jurisdictions follow the rule that the person being protected must in fact be justified in protecting himself, instead of apparently justified. This was to protect plain-clothes police officers making lawful arrests who might be attacked by well-meaning passers-by ignorant of the facts.

MPC: Three conditions:

1. D uses no more force to protect X than D would be entitled to in self-protection.
2. X would be justified in using such force in the situation as D believes it to be.
3. D believes their intervention is necessary to protect X.

C. Defense of property

A person in possession of real or personal property is justified in using non-deadly force against a would-be dispossessor if they reasonably believe that such force is

necessary to prevent imminent and unlawful dispossession of the property. Deadly force is never permitted. Generally, force is not permitted to recapture property once dispossession is complete; the exception is if the dispossessed acts promptly.

Defense of habitation: A subset of defense of property. Deadly force is sometimes permitted. Broadly, deadly force may be used if the home-dweller reasonably believes that such force is necessary to prevent an imminent and unlawful entry of their dwelling. Jurisdictions may impose requirements that the intruder intend injury or a forcible felony, or the force be necessary to repel the invasion.

D. Law enforcement

Generally, actions that would normally be crimes, such as imprisoning someone or depriving them of life or liberty, are justified when they are taken for legitimate law enforcement purposes. Issues of the law enforcement defense are addressed in Criminal Procedure.

E. Necessity

The necessity defense is most often invoked when an actor, as a result of some force or condition, must choose between committing a relatively minor offense, and suffering (or allowing others to suffer) substantial harm to person or property. For example, under the necessity defense, these actions are justified: property may be destroyed to prevent the spread of a fire, mountain climbers lost in a storm may take refuge in a house or appropriate provisions, or cargo may be jettisoned or an embargo violated to save a vessel.

Elements:

1. Balance of harms: defendant must be faced with a choice of evils and choose the lesser evil
2. Imminence: the harm must be imminent
3. Causation: defendant must reasonably believe that their actions will abate the harm
4. No legal alternative: there must be no legal means of accomplishing the defendant's ends
5. Not statutorily prohibited: the defense must not be prohibited by law in cases such as the defendant's case

Under common law, necessity is never a defense to homicide. The MPC leaves this question open.

F. Duress

An actor's conduct may be excused when they acted under duress. Elements:

1. Imminent threat of death or grievous bodily injury
2. Defendant did not recklessly or negligently place himself in the situation
3. No reasonable legal alternative
4. Direct causal relationship between criminal action and avoidance of threatened harm.

Duress is caused by a human whereas necessity is natural forces.

Duress may not a defense for homicide.

G. Intoxication

A defendant will encounter resistance to intoxication defenses in general.

Intoxication may be caused by any substance. Evidence of intoxication may be raised whenever the intoxication negates the existence of an element of the crime.

In general, voluntary intoxication is only used for specific intent crimes, where the intoxication negates the specific mens rea required.

Voluntary intoxication may not be used for crimes requiring malice, recklessness, or negligence, or for strict liability crimes. The only possible, but very rare use of the voluntary intoxication defense, outside of specific intent crimes, is when the defendant was so intoxicated that their actions were unconscious. This negates the voluntariness aspect of the actus reus.

Involuntary intoxication exists if defendant took an intoxicating substance without knowledge of its nature, under duress, or pursuant to medical advice while unaware of the intoxicating effect.

A person may be said to be involuntarily intoxicated when their intoxication is the result of an unpredictable and grossly excessive reaction to an intoxicating substance.

Involuntary intoxication is treated as a mental illness, and the jurisdiction will apply whichever test it uses for insanity.

Long-term drug use may create "fixed" brain damage, in which case the insanity defense may be used.

H. Insanity

The insanity defense always requires that the defendant have been suffering from the mental disease or defect at the time they committed the crime. A previous finding of insanity for another crime has no effect.

Various tests are used to determine if the actor's conduct can be excused.

M'Naghten test: Focuses on defendant's cognitive capability. Defendant must show they did not know the nature and quality of the act OR did not know the difference between right and wrong. For these purposes, if defendant knew their actions were unlawful or would result in punishment, then they knew that their actions were wrong.

Control test: Focuses on defendant's volitional capability. Defendant must show they acted from an irresistible impulse and lost control of their actions.

Product test: Only in New Hampshire. The defect must cause the conduct.

MPC approach: Once favored, now less so. Defendant must show that they lacked substantial capacity either to appreciate the wrongfulness of their act or to conform their conduct to the requirements of the law.

Modernly, about 20 states use the MPC approach, and the majority of the remaining states use the M'Naghten test or some combination of the different tests. A few states have abolished the insanity defense.

There is an assumption of sanity, and the defendant has the burden of producing evidence of insanity.

Diminished capacity: Recognized by some states, the defendant asserts that as the result of a mental defect short of insanity, they did not have the particular mental state required for the crime charged.

I. Infancy

At common law, there were three presumptions regarding defendant's age at the time of commission of the crime:

1. Under seven: no criminal liability
2. Under fourteen: rebuttable presumption of no criminal liability
3. Over fourteen: adult

Some states have abolished the presumptions and mandated liability by statute.

J. Consent

Consent of the victim is no defense generally. However, it is a complete defense if it negates an element of the crime, e.g. showing the victim consented is a complete defense to rape.

The consent must be voluntarily and freely given, the party must be capable of consenting, and there must have been no fraud in obtaining the consent.

K. Entrapment

Entrapment occurs if the intent to commit the crime originated not with the defendant, but rather with the creative activities of law enforcement officers. If that is the case, it is presumed that the conduct is not covered by the offense. Elements:

1. The criminal design must have originated with law enforcement officers; and
2. The defendant must not have been predisposed to commit the crime.

Merely providing the opportunity to commit the crime is not entrapment.

If defendant denies involvement in the crime, they may not pursue entrapment as a defense.

An alternative conception of entrapment is the objective test, which is based entirely on the nature of the police activity: if it was reasonably likely to cause an innocent person to commit the crime, then the defense may be used regardless of defendant's particular circumstances.

L. Mistake of fact

A mistake of fact may exculpate an actor for the social harm they causes A mistake of fact occurs when the defendant would not have committed a crime if the facts were as the defendant believed them to be.

Common law: A mistake may exculpate if it negates the intent.

General intent: A reasonable mistake may exculpate if it negates the intent.

Specific intent: A reasonable or unreasonable mistake may exculpate if it negates the specific intent.

Strict liability: No defense, since no intent required.

MPC:

Knowledge or purpose: A reckless, negligent, or reasonable mistake may exculpate.
Recklessness: A negligent or reasonable mistake may exculpate.
Negligence: Only a reasonable mistake may exculpate.

M. Mistake of law

Ignorance of the law is no excuse. Exceptions:

1. Reasonable reliance:
    a. It is no defense to rely upon your own interpretation of the law.
    b. It is no defense to rely upon your lawyer's interpretation of the law.
    c. It is a defense to rely upon on official interpretation of the law even if it is erroneous.
2. Fair notice: If there is no reason a reasonable person would be aware of the law, defendant may raise the reasonable notice defense.
3. Mistakes of law that negate mens rea:
    a. Specific intent: Defense if mistake negates specific intent regarding knowledge of attendant circumstances.
    b. General intent: No defense whether mistake is reasonable or not.
    c. Strict liability: No defense (no mens rea to negate).

VI. Criminal procedure

A. Excluding evidence

The exclusionary rule: Evidence obtained in violation of the defendant's constitutional rights may not be used at trial as direct evidence of the defendant's guilt. The government has the burden of establishing admissibility by a preponderance of the evidence.

Fruit of the poisonous tree: When unconstitutionally obtained evidence leads authorities to more evidence, all the evidence is excluded. This does not apply to Miranda violations or violations of the knock and announce rule in executing a search

warrant. The defendant's intervening act of free will may allow evidence to be admitted. If the connection between the original illegality and the final evidence is too tenuous due to other intervening factors, then the taint of illegality is purged and the evidence may be admitted. Illegally obtained evidence may still be used to impeach the defendant's credibility if they take the stand.

Inevitable discovery exception: If the evidence would inevitably have been discovered apart from the illegal means, it can still be admitted.

Independent source exception: If there is an independent source of discovery of the evidence apart from the illegal means, it can still be admitted.

B. Arrest, search and seizure

Fourth Amendment: The Fourth Amendment protects against unreasonable search and seizure.

Seizure: A seizure of the person occurs when a reasonable person would believe they are not free to leave.

Arrest: An arrest occurs when the government takes a person into custody against their will for interrogation or criminal prosecution. An arrest generally requires probable cause, which is a reasonable belief, based on specific facts, that the individual is committing or has committed a crime. Arresting someone in a public place does not generally require a warrant, but arresting them in a home does, except when there are exigent circumstances, such as preventing harm to others, hot pursuit of a suspect, or to prevent destruction of evidence.

State actor requirement: The Fourth Amendment only applies to government action. In the case of private individuals conducting a search, analyze whether they were acting at the direction of the police. In the case of private security guards, analyze whether they were deputized with the power to make arrests. School officials may search a student or their possessions without a warrant when there are reasonable grounds to believe the law or school rules have been violated. However, they must not be acting at the direction of law enforcement.

Standing: There must be an expectation of privacy, subjectively held and objectively reasonable. There is automatic standing if the person owned or lived in the premises, or was an overnight guest (standing as to their sleeping quarters). A person may have standing where they were legitimately present during a search or where they owned the property seized. There is no standing when items are exposed to public view.

Search warrants: A search warrant is generally required to conduct a search. A search warrant must be based on probable cause and there must be particularity in the description of the place to be searched and the things to be seized. The description should be specific enough that someone with no previous knowledge of the case would understand what to search for. Officers must knock and announce themselves before entering to execute a search warrant; if they receive no response they may break in. Officers may only search in places where the items covered by the warrant could be located.

Probable cause: Probable cause for search or arrest can be established by any trustworthy information, even if it would not be admissible at trial.

Issuance of warrants: Hearsay can be relied on for probable cause, even from an anonymous informant, if it is likely to be reliable under the totality of the circumstances, including whether the informant is a generally reliable witness and whether the facts show the informant's basis of knowledge. "Stale" information (older than a few weeks) should not be relied upon in issuing a warrant.

Good faith exception: When officers obtained evidence acting in reasonable reliance on a properly executed warrant, but it is later found that there was no probable cause for the warrant, the evidence can still be admitted. Lying or reckless disregard for the truth is not good faith.

Wiretapping: Wiretapping and eavesdropping are searches and require a warrant. However, one party to a conversation may consent if working with police. A pen register recording phone numbers dialed may require judicial approval but may not require a warrant.

Body intrusions: Due process requires searches in a person's body to be reasonable. The magnitude of the intrusion is balanced against society's need.

Secret agents: A person secretly working with the police, whether wearing a wire or not, is not deemed to be conducting a search or seizure, as long as the target is aware that the person is present.

When a search warrant is not required

Mnemonic: "Scrapes" (Think of when an officer scrapes by without a warrant.)

Search Incident to Arrest
Consent
Regulatory or inspection searches
Automobile exception

Plain view
Exigent Circumstances
Stop and frisk partial search

Search incident to arrest: Arrest must be lawful and search must be contemporaneous with arrest. Police can search the person and the area they can reach to obtain a weapon or destroy evidence. Police can also conduct a protective sweep of any areas where accomplices could be hiding. At the police station, an inventory search of personal belongings and impounded vehicles may be conducted. If the arrest takes place in an automobile, the passenger compartment and any containers may be searched, but not the trunk.

Consent: No warrant is needed if a person voluntarily and intelligently consents to the search.

Regulatory or inspection searches: Regulatory and inspection searches, including sobriety checkpoints, may not require a warrant if they are part of a neutral plan. No warrant is necessary for searches at the border.

Automobile exception: Police must have probable cause, but do not need a warrant. The vehicle can only be stopped for a justifiable reason, but it need not relate to the probable cause.

Plain view: No warrant is necessary if an officer has the right to be where they are and they observe an item in plain view. They may seize the item if they can do so from a position they have the right to be in.

Exigent circumstances: No warrant is needed when an officer is in hot pursuit of a fleeing felon. A warrantless search may be made when a delay in obtaining a warrant poses an unusually serious risk that the evidence would be destroyed.

Stop and frisk: When an officer has a reasonable suspicion of criminal activity based on articulable facts, they may detain an individual for a limited investigation, and frisk them for weapons if they have a reasonable suspicion that they are armed.

C. Confrontation and self-incrimination

Fifth Amendment: The Fifth Amendment protects against compulsory self-incrimination.

Sixth Amendment: The Sixth Amendment provides the right to confront witnesses, the right to a compulsory process for obtaining witnesses, and the right to counsel.

Miranda warning: Miranda warnings are required when a suspect is in custody and is subject to police questioning. The Miranda warning must include four parts:

1. The suspect has the right to remain silent.
2. Anything they say can and will be used against them in court.
3. They have the right to a lawyer.
4. If they cannot afford a lawyer, one will be appointed for them.

Once a suspect is in custody and being questioned by police, if they have not been properly Mirandized, then any statement they make, even a voluntary statement, is inadmissible as evidence against them as to their guilt.

A waiver of Miranda rights is proper only if it is done knowingly and intelligently. A defendant's silence may never constitute a waiver of their Miranda rights.

When a suspect makes incriminating statements to another person and is heard by the police, whether or not it is a Miranda violation depends on whether the police intentionally set up the conversation or allowed it to happen naturally.

Public safety exception: When police questioning is reasonably prompted by public safety concerns, Miranda warnings do not need to be given.

Silence: Even though the Miranda warning includes the right to remain silent, and a defendant's choice to exercise that right after the warning may not be used against them, a defendant's silence before being arrested and Mirandized may be used against them.

Invoking Fifth Amendment rights: A criminal defendant has the right to not take the stand and not be asked to. Other witnesses must take the stand but may invoke the Fifth Amendment in response to questions.

D. Lineups and identification

A suspect has the right to counsel at a lineup or showup after they have been charged, but not at a photo identification or when physical evidence such as fingerprints or handwriting is taken.

An identification violates due process if it is unnecessarily suggestive or there is a substantial likelihood of misidentification.

An in-court identification can be admitted even though the original lineup was unconstitutional.

E. Right to counsel

Sixth Amendment: The Sixth Amendment provides the right to counsel in felony cases and in misdemeanor cases where imprisonment can be imposed.

Criminal defendants have the right to counsel at critical stages of a trial, when the defendant must make a decision that can later be formally used against them. This includes initial appearance, preliminary hearings, and arraignment.

On appeal, a violation of the right to counsel at trial cannot be harmless error.

Witnesses in grand jury proceedings do not have a right to have counsel present.

F. Confessions

A confession that results from police coercion is involuntary and inadmissible. Neither coercion by non-government actors nor the suspect's mental illness will make the confession involuntary.

Only the person who made a confession has standing to challenge the voluntariness of the confession. Another party implicated by the confession does not have standing to challenge it.

G. Fair trial and guilty pleas

Sixth Amendment: The Sixth Amendment provides the right to a speedy trial, public trial, trial by jury, and right to counsel.

Eighth Amendment: The Eighth Amendment provides that excessive bail shall not be required, and this applies to federal and state courts.

A defendant is incompetent to stand trial if they are not capable of understanding the charges against them or assisting in their own defense.

Jury trial: A defendant has the right to a trial by jury only for serious offenses, including felonies and misdemeanors with a possible sentence of more than six months. There is no right to a jury trial for juvenile delinquency proceedings.

A guilty plea can only be accepted if the defendant is competent, understands the charges against them, and understands the consequences of the plea. A judge does not have to accept a guilty plea if there is no factual basis for it.

H. Double jeopardy

Fifth Amendment: The Fifth Amendment protects against double jeopardy.

One cannot be tried again for the same offense once jeopardy attaches, which occurs in a jury trial when the jury is sworn in and in a bench trial when the first witness is sworn in.

If a trial ends in mistrial or hung jury, the prosecution can retry the case in most circumstances.

Separate sovereigns: A defendant may be tried by the federal government and the state government for the same conduct, and this is not double jeopardy because they are separate sovereigns.

I. Cruel and unusual punishment

Eighth Amendment: The Eighth Amendment protects against cruel and unusual punishment, and provides that excessive bail and excessive fines cannot be imposed.

J. Burdens of proof and persuasion

The defendant has the burden of proving any affirmative defense, but the prosecution has the burden of proving every element of the crime charged beyond a reasonable doubt.

K. Appeal and error

A conviction resulting from unconstitutionally obtained evidence will be reversed on appeal, unless the government can show that the error was harmless. Harmless error must be shown beyond a reasonable doubt, and the right to counsel at trial cannot be harmless error.

Indigent appellants have the right to counsel on a first appeal as a matter of right.