

Law School Survival Guide

Criminal Law

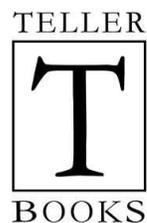
Outlines and Case Summaries

2010
Edition

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CRIMINAL LAW
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2010 Edition (v.1.3)

Published by Teller Books
Manufactured in the U.S.A.
First printing August, 2008.

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Some judicial decisions discussed in this book, due to their ambiguity, are subject to different interpretations. Other authors may come to conclusions different from those presented herein. No representation is therefore made that these materials reflect a definitive statement of the state of the law or of the views that will be applied by any court in any particular case or jurisdiction.

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ABBREVIATIONS

A	Grantee (for present estate/ future interest hypotheticals)	JT	Joint tenant/tenancy
AGI	Adjusted gross income	K	Knowledge (criminal law) or Contract (all other law)
AP	Adverse possession	K.B.	King's Bench (UK)
A/R	Assumption of the risk	KSC	Knowledge to a substantial certainty
B	Buyer	L	Loss in value
BFP	Bona fide purchaser or bona fide purchase	L1	First landlord
C	Constitution	Lat.	Latin
CIF	Cause-in-fact	LE	Life estate
Cl.	Clause	LED	Life estate determinable
CLEO	State Chief Law Enforcement Officer	LLC	Limited liability company
Court (cap.)	United States Supreme Court	LLP	Limited liability partnership
CP	Court of Pleas (UK)	LRM	Least restrictive means
CR	Contingent remainder	MPC	Model Penal Code
CSD	Common Scheme of Development	MSAJ	Motion to set aside the judgment
CSI	Compelling state interest	N	Negligence
Ct.	Court	N.B.	Nota bene
Ct. App.	Court of Appeals	NIED	Negligent infliction of emotional distress
Ct. Chan.	Court of Chancery (England)	O	Original owner, or grantor (in present estates and future interests)
ED	Emotional distress	OLQ	Owner of the <i>locus in quo</i>
EI	Executory interest	OO	Original owner
Eng.	England	P	Purpose or purchaser
ES	Equitable Servitude	PE	Privity of Estate
FI	false imprisonment	PJ	Personal jurisdiction
FLSA	Fair Labor Standards Act	PJI	Pattern Criminal Jury Instruction
FMLA	Family and Medical Leave Act	PK	Privity of Contract
FQJ	Federal question jurisdiction	Q.B.	Queen's Bench (UK)
FRAP	Federal Rules of Appellate Procedure	R	Recklessness
FRCP	Federal Rules of Civil Procedure	RAP	Rule against perpetuities
FRCrP	Federal Rules of Criminal Procedure	RC	Real Covenant
FRE	Federal Rules of Evidence	Restatement	Restatement (of Contracts, Torts, Judgments, etc.)
FS	Fee simple absolute (fee simple)	RFRA	Religious Freedom Restoration Act of 1993
FSCS	Fee simple on condition subsequent	RIL	Res ipsa loquitur
FSD	Fee simple determinable	RPP	Reasonable prudent person
FS EL	Fee simple on executory limitation	Rule	Federal Rule of Evidence or Federal Rule of Civil Procedure
FT	Fee tail	§	Section
H.L.	House of Lords (England)	S	Sublessee or seller
IIED	Intentional infliction of emotional distress	S.Ct.	Supreme Court or US Supreme Court Reporter
IT	Intentional tort	SF	Statute of Frauds
JMOL	Judgment as a matter of law	SJ	Summary judgment
JNOV	Judgment non obstante veredicto	SL	Strict liability, or statute of limitations
J/SL	Joint and several liability, or jointly and severally liable		

CRIMINAL LAW

SMJ	Subject matter jurisdiction		(compilation of US Supreme Court opinions)
SP	Specific performance		
T1	First tenant	USC	United States Code
TE	Tenant/tenancy by the entireties	VR	Vested remainder
TO	True owner	VR SD	Vested remainder subject to divestment
UCC	Uniform Commercial Code		
US	United States of America or United States Reports		

I. THE ELEMENTS OF A CRIME

A. ELEMENTS THAT THE PROSECUTION MUST PROVE

1. A voluntary act.
 - a. *See Martin v. State* (Ala. App. 1944), where the defendant was found by police intoxicated in his home, was brought out to a public highway, and then charged and convicted of violating a statute prohibiting the appearance of intoxicated persons in public places. Held: the statute presupposes voluntary conduct, which here is not the case. Conviction reversed.
2. *Actus reus* – a criminal act (*see infra.*);
3. *Mens rea* – a guilty mind (*see infra.*);
4. The concurrence in time between the *actus reus* and the guilty mind.
 - a. Example: an actor can only be guilty of larceny **if at the time** of the unlawful taking of the property of another (*actus reus*), he intended to permanently deprive him thereof.
5. Actual and proximate causation of the injury or harm suffered; and
6. An injury or harm suffered by the victim.

B. ACTUS REUS: A CRIMINAL ACT

1. The criminal law requires **conduct** before punishment can be made. *Mere thoughts* or *criminal propensity* is insufficient.
 - a. *See Doe v. City of Lafayette* (7th Cir. 2003), where the plaintiff, who confessed to having entered into a public park to see small children at play and to contemplate having sexual contact with them, was banned by the City of Lafayette from entering private parks. The plaintiff sued to lift the ban. Held: the ban is unconstitutional because it punishes the plaintiff for mere thoughts and propensities, not actual conduct.
2. The Requirement that Offenses be Previously Defined
 - a. An *ex post facto* law is a law that does any of the following retroactively: (i) makes conduct criminal; (ii) establishes a stricter punishment for a crime; or (iii) alters the procedural or evidentiary rules in favor of the prosecution.
 - b. Such laws are unconstitutional; in order to hold a defendant criminally liable, the offense must be previously defined.
 - i. *See Rex v. Manley* (K.B. 1933) (Ct. Crim. App. 1933), where a defendant could be held guilty for making false statements to police if the offense was previously defined under the *common law of crimes*.
3. Omissions

- a. As a general rule, there is ***no legal duty to act at common law***.
- b. However, the common law recognizes a duty to act and imposes criminal liability for an omission under the following circumstances:¹
 - i. There is a duty based on ***statutes***.
 - ii. There is a duty based on ***contract*** (e.g., a lifeguard's employment contract);
 - iii. The defendant ***undertook a rescue*** by: (i) promising to act; or (ii) voluntarily undertaking a rescue by giving assistance such that others are prevented from rendering assistance.
 - iv. The defendant ***created the victim's peril*** or left him in greater peril than he found him, whether or not he acted with intent or negligence.
 - v. The ***instrumentality*** is within the defendant's control (especially when the plaintiff is an invitee).
 - vi. There is a ***special relationship*** with the victim (e.g., relationships between spouses; employers and employees; parents and children; inviters and invitees; innkeepers and guests; common carriers and passengers; captain and crew).
 - vii. ***Other circumstances*** based on: (i) the *foreseeability* of the harm; (ii) the *societal interest* in recognizing the duty; and (iii) the *opportunity to avoid risk*.
- c. A statute ***may not criminalize an omission*** unless another statute or source of law creates a duty to act.
- d. In some states, such as Texas, legal duties are based only on statute. Thus, a statute may not make it a crime not to render assistance in the absence of another statute creating an affirmative duty to act.
 - i. *See Billingslea v. State* (Tex. 1989), where social services eventually found the defendant's mother who he left in a bed with rotting flesh and bed soars with live maggots in a pool of her own urine that caused her second degree burns. The defendant was charged with violating a Texas statute making it a crime to cause injury to an elderly person *by any reckless act or omission*, since he failed to obtain medical care for his mother. Held: in Texas, ***common law, factual, or familial duties are insufficient bases*** on which to predicate a legal duty to act. Such duties must be based on statutes. Here, there is no statute creating an affirmative duty to act; a statute criminalizing an omission without making the statutory duty to act known is unconstitutionally vague. The defendant had no notice of his duty.

¹ The civil tort law recognizes a duty to act imposes civil liability for omissions under these same circumstances.

- 1) *N.B.*: if Texas had a more typical approach, the defendant would have been convicted under common law social and familial duties.
- e. In the majority of states, however, legal duties to act may be based on common law and social duties.
 - i. *See Regina v. Instan* (Q.B. 1893), where the defendant was convicted of manslaughter for failure to provide sustenance to her aunt, who supported her. The legal duty was based on the defendant's having taken on the care of her aunt and her duty to share the food brought into the home, based on the aunt's support.
 - ii. *See also Jones v. United States* (U.S. 1960), where a defendant took on the care of a boy, who, left in her basement, died of malnutrition. The appeals court required the trial court to determine whether the defendant had a legal duty to care based on contract or based on her taking on the care of a boy to the exclusion of others before holding her guilty of involuntary manslaughter.
 - f. Similarly, there is no duty to summon medical assistance for drug overdoses for those with whom one has no statutory, familial, or contractual relationship.
 - i. *See People v. Beardsley* (Mich. 1907), where the defendant failed to provide reasonable care for a woman with whom he was drinking when she later took morphine and died. On appeal, the conviction was reversed: the fact that she was in his house did not create a legal duty to act.
 - g. However, the contribution of one's actions to another person's state of peril gives rise to the legal duty to summon medical assistance.
 - i. *See People v. Oliver* (Cal. Ct. App. 1989), where the defendant took the victim from a public place where he was drunk and where others could have provided assistance and brought him to her private home, where only she could provide assistance when he used narcotics and later collapsed. Her indictment was upheld for her failing to summon medical assistance.
 - h. With respect to the omission of life-sustaining treatment, doctors generally have no affirmative duty to continue to keep patients on life support when it has been determined that it will be ineffective.
 - i. In *Barber v. Superior Court* (Ca. Ct. App. 1983), upon consultation with a patient's family, medical personnel removed life support equipment from a patient who they concluded would be in a permanent vegetative state. When the doctors were charged with murder and conspiracy to commit murder, the court of appeals dismissed the complaint, since the doctors had no legal duty to act.
4. Interpretation of Conduct Elements

- a. In order to hold a criminal defendant guilty of committing a crime, the prohibited conduct must be clearly defined.
 - i. *See Keeler v. Superior Court of Amador County* (Cal. 1970), where the defendant, after kicking his former wife in the stomach and causing the birth of a still-born, was charged with murder. Held: the statute applies only when the victims of murder are born alive. Because the fetus died in uterus, the statute does not apply. Due process prevents us from reading the 1850 statute to have included unborn fetuses in the category of human beings, since the defendant would not have had notice. Judgment for the defendant.
 - ii. Dissent: the specific classes of persons defined as “human beings” in the common law should change as science informs our understanding. Today, we know fetuses to be living, breathing human beings. They should therefore be covered under the statute. The defendant had adequate notice that his acts constituted homicide.
- b. However, some courts may modify preexisting laws based on common social duties.
 - i. *See People v. Sobiek* (Cal. Ct. App. 1973), where the defendant was indicted for grand theft for allegedly embezzling partnership funds. The defendant moved to quash the indictment: since the laws define partnership assets as being all in common, one may not steal that which is his. Held: this theory is rejected based on a *common social duty informing the defendant of the offense*. Unlike in *Keeler*, here, the defendant had notice that nothing in the grand-theft statute excluded partnership property from the “property of another” being protected. Judgment for the defendant reversed.

C. MENS REA: A CRIMINAL MIND

1. Historical Origins of *Mens Rea*
 - a. The criminal law underwent the following stages of evolution:
 - i. In the early common law, **conduct** on its own could be the object of criminal punishment (in a sense, tort and criminal law were treated as the same) (strict liability).
 - ii. The canon law added to the development of the second stage, where **general intent** was required. General moral blameworthy was required in addition to the act.
 - iii. The modern approach requires **specific intent** as to the offense: there must be *mens rea* with respect to the act charged.
 - b. As judges’ treatment of *mens rea* evolved, “intermediate categories” arose as the law moved from one stage to another.
 - i. In *Regina v. Faulkner* (Ire. Cox C.C. 1877), the defendant sailor tried to steal rum from a ship and in so doing, negligently dropped a match burning the whole ship down. He was charged and convicted of larceny and arson. The prosecutor argued that the

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engaging in sexually explicit conduct; and ... such visual depiction is of such conduct.”

- 1) In *United States v. X-Citement Video* (U.S. 1994) (Rehnquist, C.J.), the defendant was convicted under the PCASEA. The Court of Appeals interpreted “knowingly” in the statute to apply only to the transporting, shipping, receiving, or distribution of the pornography. Since knowledge that the pornography involved child performers was not necessary, the Court of Appeals held that the statute was unconstitutional and reversed the defendant’s convictions. On appeal, the Supreme Court saved the statute by interpreting “knowingly” *mens rea* to carry all of the way through to the knowledge that the pornography involved child performers and reversed the Court of Appeals by holding that the statute was constitutional.
- 2) Dissent (Scalia, J.): the majority’s interpretation goes against the text of the statute. The statute is unconstitutionally broad.

II. JUSTIFICATION AND EXCUSE

A. INTRODUCTION TO THE THREE FORMS OF DEFENSES

1. Derivative Defenses
 - a. Derivative defenses are based the plaintiff’s failure *to prove all of the requisite elements*.
 - b. Example: a crime requires the *mens rea* of recklessness, yet the plaintiff can only prove that the defendant acted with negligence.
2. Justification
 - a. Justification is based on the notion that, although all of the requisite elements were met, there was “some good reason” that justified the act.
 - b. Although normally the act is criminal, under the circumstances, it is not wrongful and *possibly desirable*.
 - c. Examples of justification (different texts vary as to where they categorize these defenses):
 - i. Necessity;
 - ii. Self-defense; and
 - iii. Public authority (law enforcement).
3. Excuse
 - a. Excuse applies when the defendant commits a crime for which that he *should not be held accountable*.

- b. Although the actor's conduct has been *harmful and undesirable*, he should be *neither blamed nor punished*.
- c. Rationale: society does not wish to encourage the behavior or condition, but it does not wish to punish it either.
- d. There are two kinds of excuse: (i) situational excuse (duress, entrapment); and (ii) excuse at the individual level (mental abnormality, intoxication, infancy).

B. JUSTIFICATION

1. Self-Defense

a. General Rule

- i. A party may use force to defend himself against harm threatened by *unlawful acts* when the defendant *reasonably believes*:
 - 1) The harm threatened is imminent;
 - 2) The use of force is reasonably necessary (not excessive) to avoid the harm.
- ii. Self-defense only applies when there is a physical threat, not when there are only insults.
- iii. Similarly, it does not apply when the threat has disappeared and the subject is merely retaliating.

b. Reasonable Person Standard

- i. Several formulations are possible under the common law:
 - 1) *State v. Leidholm* (N.D. 1983) *purely objective standard*: stated but not used in *Leidholm*) that looks to an objective person without considering the defendant's personal history and characteristics;
 - 2) *State v. Leidholm* *subjective test*, looking to the reasonable battered woman; the reasonable courageous person, etc.
 - 3) *People v. Goetz* (N.Y. 1986) *intermediate reasonable person standard* that also takes into account in the personal history and physical characteristics of the defendant;
 - a) This third position is applied to a defendant who invokes defense as a justification for his acts: although the defendant's belief must be objectively reasonable, his *personal characteristics* are *not ignored*.
 - b) *See People v. Goetz* (NY 1986), where the court held that the standard for determining whether the defendant was justified in shooting four youths who solicited money from him on the subway was that of the reasonable person while *taking into account the*

defendant's knowledge and experiences (such as his having previously been robbed).

- ii. The MPC Formulation
 - 1) Under the MPC, “the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.” MPC § 3.04(1).
 - 2) Unlike the common law formulation, the MPC standard is purely subjective.
- c. Deadly Force in Defense of Self
 - i. Deadly force is force likely to cause death or serious bodily harm.
 - ii. Common Law Formulation
 - 1) **Majority View**: in defending oneself against a deadly threat, one may use *deadly force* and stand his ground *in any situation*.
 - 2) **Minority View**²: in defending oneself against a deadly threat, one may only use *deadly force* if he has first “fled to the wall,” unless:
 - a) There is the slightest reason to believe that he cannot make a safe retreat (*e.g.*, he is threatened with a firearm at close range); or
 - b) He is in his own home (the “castle” exception).
 - 3) Because guns have made retreat impractical, the distinction between the majority and minority views has decreased, since defendants will not be required to retreat when threatened with a gun under either approach.
 - iii. MPC Formulation
 - 1) Under MPC, a party may use deadly force to defend himself against the use of unlawful force when he **believes** the use of force is necessary to avoid death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat. MPC § 3.04(2)(b).
 - 2) The standard, like the MPC necessity standard, is purely subjective.
- d. Effect of Mistake in Claims of Self-Defense
 - i. The Common Law
 - 1) Reasonable Mistake

² This view is embraced by the MPC and Restatement (Second) of Torts.

a) The common law and modern law agree that the defendant is justified in using deadly force, even if he is mistaken as to the need of deadly force, when the mistake is reasonable.

2) Unreasonable Mistake

a) The justification of defense does not arise when the defendant makes an unreasonable mistake as to the need to employ deadly force.

b) However, the common law developed the doctrine of *imperfect justification*, which can reduce the degrees of a crime.

c) Thus, under imperfect justification, an honest but unreasonable mistake can, for example, reduce murder to manslaughter.

ii. Mistake and the MPC

1) The MPC supports the *imperfect justification doctrine* by generalizing it.

2) Under the MPC, an honest but unreasonable mistake can remove the *mens rea* for crimes that require *purpose or knowledge*.

3) However, for crimes requiring only recklessness or negligence, an unreasonable mistake, whether it is reckless or negligent, will not serve as a defense.

a) For a crime requiring recklessness, however, a negligent mistake will serve as a defense.

b) For a crime requiring negligence, only a reasonable mistake will serve as a defense.

iii. Mistake within Battered Woman's Syndrome

1) Battered woman's syndrome is relevant to a self-defense justification in cases of murder when evidence of the syndrome helps determine the credibility of the defendant's testimony as to the need to act immediately in self-defense.

2) *See State v. Kelly* (NJ 1984), where evidence was admitted showing that a woman who murdered her husband acted with a reasonable belief that she was defending herself from him. Evidence of battered wife's syndrome was relevant in showing: (i) the reasonableness of her not having left her husband and her reasons for not having done so (an addiction is caused by the syndrome); and (ii) her honesty in believing that her husband was about to kill her (it would establish her perception at the time of the stabbing).

2. Defense of Others

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- i. The states are divided as to whether a solicitation that never reaches its intended recipient constitutes a completed or an attempted solicitation.
 - ii. Some courts have held that the defendant is guilty if the communication is communicated, but never reaches the recipient, as long as the defendant *intended* to communicate it.
 - 1) The MPC takes this even further in holding the defendant criminally liable, even if he “fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication.” MPC § 5.02(2).
 - iii. Other courts, however, hold the defendant guilty only of *attempted solicitation* when the communication does not reach the intended recipient.
3. Defenses
 - a. Impossibility
 - i. Impossibility of the underlying offense is no defense to solicitation when the soliciting party believed that completion of the underlying offense was possible.
 - ii. However, “true” legal impossibility is a defense, since the underlying offense must be a real crime.
 - 1) Example: a defendant cannot be held guilty of “the solicitation of purchasing aspirin with no prescription,” even if he honestly believes that such conduct constitutes a crime.
 - b. Withdrawal
 - i. At common law, *withdrawal* (“abandonment”) is not a defense to solicitation once the solicitation is complete (it may, however, be a defense to the underlying crime).
 - ii. In contrast, under the MPC, withdrawal (“renunciation”) is an affirmative defense when the following elements are met:
 - 1) The actor persuades the solicited party not commit the solicited crime or otherwise prevents the commission of the crime; and
 - 2) The withdrawal is done under circumstances manifesting a *complete* and *voluntary renunciation* of the criminal purpose. MPC § 5.02(3).

V. CRIMES AGAINST THE PERSON

A. INTRODUCTION TO HOMICIDE

1. The Common Law
 - a. Murder

- i. Murder under the common law is defined as an unlawful killing having the following elements:
 - 1) *Conduct*: an act or an omission under a duty;
 - 2) *Mens rea*: “malice aforethought” (not intent) which may be: (i) intent to kill; (ii) intent to cause serious bodily harm; (iii) depraved heart/indifference; or (iv) intent to commit a serious or dangerous felony.
 - 3) *Causation* in-fact and proximate cause of the death of another;
 - 4) Within *one year and one day* of the act (the trend of the modern law is to abandon this common law rule).
 - b. Voluntary Manslaughter
 - i. Voluntary manslaughter is homicide that lacks malice aforethought.
 - ii. It is an *intentional killing* mitigated by extenuating circumstances, such as *adequate provocation*, which tends to negate malice aforethought;
 - iii. Adequate provocation thus reduces murder to voluntary manslaughter.
 - c. Involuntary Manslaughter
 - i. Involuntary manslaughter is also a form of homicide that lacks malice aforethought.
 - ii. At common law, it has been typically defined as criminal negligence manslaughter or unlawful act/misdemeanor manslaughter.
 - iii. The *mens rea* required was either recklessness or negligence.
2. Modern State Statutes
- a. First Degree Murder
 - i. Under modern state statutes, all classes of murder (both first and second degree murder), *require malice aforethought*. In this way, murder is distinguished from manslaughter.
 - ii. First degree murder, in addition to malice aforethought, requires *premeditation and deliberation*.
 - b. Second Degree Murder
 - i. Second degree murder includes all other forms of homicide having *malice aforethought* but lacking premeditation and deliberation.
 - ii. Example: depraved heart murder (which does not require premeditation) or felony murder committed in tandem with one of the dangerous felonies not enumerated in first degree murder statutes.
 - c. Manslaughter

- i. Manslaughter is homicide that lacks malice aforethought.
 - ii. It is thus the equivalent of both common law voluntary and common law involuntary manslaughter.
 - iii. Adequate provocation reduces murder to manslaughter.
 3. The MPC
 - a. Murder
 - i. Murder in the MPC is defined as criminal homicide committed with P or K or with R showing indifference to the value of life.
 - ii. R showing indifference to the value of life is presumed when the actor was engaged in robbery, rape, deviate sexual intercourse, arson, burglary, kidnapping, or felonious escape. MPC § 210.2(1)(b).
 - b. Manslaughter
 - i. Manslaughter is criminal homicide committed through recklessness or some *extreme mental* or *emotional disturbance* having a reasonable explanation or excuse.
 - ii. This is to be analyzed subjectively.
 - c. Negligent Homicide
 - i. Negligent homicide is criminal homicide committed with N.

B. MURDER⁶

1. Common Law Murder: an Introduction
 - a. Common Law Murder is defined as an unlawful killing having the following elements:
 - i. *Conduct*: an act or omission under a duty;
 - ii. *Mens rea*: “malice aforethought” (not necessarily intent), which can take on any of the following forms:
 - 1) *Intent to kill* – the actor intends to kill or knows that a death will result from his conduct;
 - 2) *Intent to cause serious bodily harm* – the actor intends to cause serious bodily harm or knows that it will result from his conduct.
 - 3) *Depraved heart* – the actor lacks the intent to murder, but acts with wanton or *reckless indifference* to human life that creates a very high risk of and results in death;
 - 4) *Intent to commit a felony* – the actor lacks the intent to murder, but *proximately causes* the death of another while *intending to commit a serious or dangerous felony*.

⁶ Under both the common law as well as the modern statutory approach, murder requires malice aforethought. Provocation can negate malice aforethought such that murder is reduced to manslaughter.

- iii. *Causation*: the cause in-fact and proximate cause of the victim's death;
- iv. *Within one year and one day* of the act (in modern jurisdictions, the overwhelming trend is to abandon this common law rule).

2. Depraved Heart Murder

- a. Depraved heart murder is an unintentional killing resulting from conduct manifesting a wanton indifference to human life.
- b. It appears that a majority of the jurisdictions require, in addition to the *objective* unreasonableness of the risk, a *subjective* conscious disregard of a high risk of death or serious bodily injury.
- c. In other jurisdictions, the *mens rea* required for depraved heart murder is a purely objective standard based on gross negligence that, unlike recklessness, *does not require a subjective prong* that looks to the defendant's disregard of a risk.
 - i. In *People v. Roe* (N.Y. 1989), the defendant was showing his friends his father's shotgun. He randomly loaded some live and dummy shells into the gun and, not knowing whether there was a live shell in the gun, pointed it at his friend Darrin, and stated, "Let's play Polish roulette. Who is first?" He then shot and killed Darrin. The defendant was convicted of depraved indifference murder and appealed, claiming that the gun slipped, went airborne, and discharged. Held: depraved indifference murder requires **conduct that poses a substantial risk of death**. The standard is objective. Neither the defendant's remorse after the act nor his ignorance as to whether the shell in the gun was live are irrelevant. The only question is, looking at the facts, whether this an outrageous threat to human life. Regardless of the defendant's thinking and motives, it was. The defendant is guilty of **depraved indifference murder**, not involuntary manslaughter.
 - 1) Dissent (Bellacosa, J.): this case's holding obliterates the distinction between depraved indifference murder and manslaughter. Acts that have constituted depraved indifference murder include firing a gun three times into a packed ballroom having boasted in advance of an intention to kill someone, driving a car at high speed on a crowded urban street and failing to apply the brakes after striking someone, or continuously beating a child over a five day period. We should look to the defendant's age and the remorse he showed after the act. The defendant **would have to disregard a grave, enormous risk** in a way that is irresponsible.
 - 2) *N.B.*: this approach is available in jurisdictions based largely on the common law approach.
- d. Voluntary Intoxication and Depraved Heart Murder

- i. Voluntary intoxication is no defense to depraved heart murder, a general intent crime.
 - ii. Under the MPC, depraved heart murder is murder when “committed recklessly under circumstances manifesting extreme indifference to the value of human life.” MPC § 210.2(1)(b). Voluntary intoxication is not allowed in to negate the indifference.
3. Felony Murder
 - a. Traditionally, a person and *any of his accomplices* are guilty of felony murder if they:
 - i. Commit or attempt to commit an ***inherently dangerous felony***; and
 - ii. A death occurs (even if there was no intent to kill or to cause serious bodily harm) ***during the commission*** of the felony or while the defendant is fleeing.
 - b. The following limitations apply:
 - i. The defendant’s conduct must be the cause in fact and ***proximate cause*** of the homicide.
 - 1) In the minority view, the felon starts a motion of events and is responsible for any deaths that follow.
 - 2) In the majority view, the death must be the *natural and probable result* of (proximately caused by) the felony.
 - a) *N.B.*: even in states that embrace this majority view, the courts interpret most deaths that occur during a felony to be foreseeable and thus proximately caused.
 - ii. When states presume malice from the intent to commit a felony, the felony must be *serious* or ***inherently dangerous***.
 - 1) Examples of serious or inherently dangerous felonies include arson, burglary, rape, robbery, felonious escape, kidnapping, or deviate sexual intercourse.
 - 2) Examples of non-inherently dangerous felonies include securities fraud and conflict of interest.
 - iii. Under the ***merger doctrine***, the felony must be *independent* from the homicide.
 - 1) Under the merger doctrine, certain crimes are said to “merge” into murder and are *not considered to be a sufficiently independent* basis on which to prosecute a defendant for felony murder.
 - 2) For example, because voluntary manslaughter is *not considered to be sufficiently independent of murder*, it cannot provide the basis for prosecuting a defendant for felony murder. Otherwise, every defendant guilty of

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- ii. However, determining what the exact test for determining incompetence is still an unresolved issue, as is the question of whether strict liability should be imposed upon perpetrators when they have intercourse with incompetent victims.
 - iii. The traditional approach to competence holds that when the victim is unconscious, intoxicated by drugs or alcohol, or, in some cases, mentally retarded or insane, she is unable to give effective consent. In these cases, sexual intercourse with her constitutes rape.
 - iv. Consent is similarly lacking, and sexual intercourse constitutes rape, when the victim is threatened into having intercourse or her consent is obtained through fraud.
3. Statutory Rape
- a. When a jurisdiction has passed a statutory rape statute, the defendant is guilty of rape when he has sexual intercourse with a female under the age of consent (generally, between sixteen to eighteen years old).
 - b. Whether the female actually consented is irrelevant; she is held not to have consented as a matter of law.
 - c. The defendant's mistake as to the victim's age is generally no defense. However, some jurisdictions allow for the defense if the victim deliberately misled the defendant into believing that she was of the age of consent.

VI. CRIMES AGAINST PROPERTY

A. LARCENY

- 1. Introduction
 - a. Larceny is a specific intent crime consisting of the unlawful taking and carrying away of the property of another with the intent to permanently deprive him thereof.
 - b. Only personalty, not real property or services, may be the object of larceny.
- 2. Custody and Possession Distinguished
 - a. Larceny may occur when the defendant unlawfully and forcefully takes and carries away the property of another.
 - b. This includes cases where the owner of the property gives the defendant *custody* of some particular item, without granting him *ownership* or *possession* (in which case there may be liability for embezzlement or false pretenses).
 - i. If the owner grants him *ownership*, there would be no criminal liability if the defendant, with the intent to permanently deprive the owner of the property, fails to return it.

- ii. If the owner grants him **possession**, there may be liability for embezzlement or false pretenses if the defendant, with the intent to permanently deprive the owner of the property, fails to return it.
- c. Possession involves a much larger scope of authority to deal with the property than does mere custody and implies a certain relationship between the owner and the possessor that usually involves the possessor's fiduciary duties.
 - i. Example: if an employer grants his employee a clock to take to a repair shop and return, the employee, given the limited scope of his authority over the clock, has mere custody, not possession. Thus, if he fails to return it with the intent of permanently depriving the employer of the clock, he will be guilty of larceny.
- d. Under some modern statutes, the scope of larceny has been broadened to include embezzlement and false pretenses.

B. EMBEZZLEMENT

1. Embezzlement is a specific intent crime consisting of the **fraudulent taking** for one's own use the property of another by one who originally acquired it lawfully.
2. Embezzlement was statutorily developed in order to make provisions for a gap in the common law, which did not punish unlawful takings when the defendant originally acquired possession of the stolen property lawfully.
3. Embezzlement punishes the defendant when he comes to **possess** the money or property *through a fiduciary relationship* with the owner.
4. Criminal intent for embezzlement arises *after* the taking (not during or before the taking, as with larceny).

C. FALSE PRETENSES

1. False pretenses is a specific intent crime consisting of the: (i) acquiring of title; (ii) to the property of another; (iii) through making false statements or misrepresentations; (iv) with the intent of defrauding the owner.
2. Unlike the crime of **larceny by trick**, in the case of false pretenses, the defendant obtains full title of the owner's property, not mere possession.

D. ROBBERY

1. Robbery is the specific intent crime that consists of the unlawful taking of property from another person or in the person's presence by the use of force or by threatening the imminent use of force.
2. Robbery is essentially larceny with force or intimidation. The force or intimidation may be directed towards the victim of the crime or towards his relative or any person in the victim's company.
3. The defendant need not have the present ability to carry out the threatened harm, as long as he has the *apparent ability* to do so.

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REVIEW CHARTS

CLASSIFICATION OF CRIMES BASED ON COMMON LAW INTENT

General Intent Crimes	Specific Intent Crimes
Arson Battery Depraved heart murder False imprisonment Involuntary manslaughter Kidnapping Rape	Assault Attempt Burglary Conspiracy Embezzlement False pretenses Intent to kill murder Larceny Robbery Solicitation

SUMMARY CHARTS OF ATTEMPT, COMPLICITY, AND CONSPIRACY

Elements

	<i>Mens Rea</i>	<i>Actus Reus</i>
<i>Complicity</i>	Intent to facilitate the commission of a crime.	Aiding or failing to act on a legal duty.
<i>Attempt</i>	Specific intent to commit the ultimate offense.	A significant, overt act (under the proximity test, <i>res ipsa loquitur</i> test or “strongly corroborates” test).
<i>Conspiracy</i>	Specific intent to commit an illegal act or a legal act by illegal means.	An agreement; and An overt act (under the modern law and for less grave offenses in the MPC), however small. ⁷
<i>Solicitation</i>	The specific intent that the solicited party commit the underlying offense.	Entreating, imploring, inducing, encouraging, or promoting another person to engage in behavior that would constitute a crime.

⁷ Mere preparation suffices.

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Renunciation

	<i>Common Law</i>	<i>Model Penal Code</i>
<i>Complicity</i>	An accomplice is not liable if he communicates his repudiation and takes steps to neutralize any assistance he has provided.	An accomplice is not liable when he terminates his complicity prior to the commission of the act and either (i) deprives the act of its effectiveness or (ii) gives timely warning to law enforcement officials or otherwise prevents its commission. MPC § 2.06(6).
<i>Attempt</i>	Abandonment (the common law term for renunciation) is no defense.	Renunciation is a defense when the defendant abandons the effort or prevents its commission and there is complete and voluntary renunciation. MPC § 5.01(4).
<i>Conspiracy</i>	Abandonment is no defense. However, renunciation limits liability for acts committed after the withdrawal.	<i>Renunciation</i> is a defense when it is complete and voluntary and the actor thwarts the conspiracy. MPC § 5.03(6).
<i>Solicitation</i>	Abandonment is no defense to solicitation once the solicitation is complete.	Renunciation is an affirmative defense when: (i) the actor persuades the solicited party not commit the solicited crime or prevents the crime; and (ii) the withdrawal is <i>complete</i> and <i>voluntary</i> . MPC § 5.02(3).

SUMMARY OF HOMICIDE CATEGORIES

	<i>Common law</i>	<i>Modern Statutes</i>	<i>MPC</i>
<i>Homicide having malice aforethought</i>	Murder (having malice aforethought)	First and second degree murder (having malice aforethought)	Murder (having P, K, or R showing indifference to the value of life). § 210.2.
<i>Malice aforethought negated by circumstances</i>	Voluntary manslaughter	Manslaughter	Manslaughter (“extreme mental or emotional disturbance”). § 210.3(b)
<i>Homicide lacking malice aforethought</i>	Involuntary manslaughter: - criminal negligence manslaughter; - misdemeanor manslaughter		- Manslaughter (recklessly committed). § 210.3(a); or - Negligent homicide. § 210.4.

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GLOSSARY

Ad coelum doctrine Under this doctrine, for the purpose of immovable minerals, “to whomever the soil belongs, he also owns to the sky and to the depths.” It refers to the right of the owner of property to the space that extends vertically upward and downward from his property.

Arson The malicious, willful, and unlawful burning of a structure which, at common law, had to be the dwelling place of another.

Assignment A transfer of property that grants the possession of land for the *entire period of a lease*. By default, an assignment grants *all of the property* for the lease period. A *partial assignment* may however, be granted for only *part of the property* during the lease period. Compare SUBLEASE.

Bailment A legally recognized property relationship between a bailor, who gives personalty to another to be held for a particular purpose, and a bailee, party that receives the property.

Bill of attainder An unconstitutional legislative action that singles out an individual or group for punishment without the benefit of a trial.

Burglary At common law, the specific intent crime that consisted of the breaking and entering of the dwelling of another at night with the intent to commit a felony therein.

Causation in fact Actual causation that links an act with a result through implementing the “but-for” test (*i.e.*, “but for A, B would not have occurred”). Compare PROXIMATE CAUSE.

Circumstantial evidence Secondary facts and other evidence that lead to primary fact inferences.

Chattel An item of personal, as opposed to real property; any moveable object.

Claim preclusion See *RES JUDICATA*.

Closing (real property) The final meeting between the seller and the purchaser in a land sale contract, whereby the executory period is concluded and the payment and property are exchanged.

Closing of escrow See CLOSING.

Collateral estoppel Under the doctrine of collateral estoppel, a factual issue *may not be litigated* in any lawsuit if it was litigated and decided in a previous proceeding. Also referred to as ISSUE PRECLUSION.

Constructive notice Legal notice derived from the circumstances.

Construction The act of interpreting the sense or intention of a constitution, statute, contract, or some other text; the process of construing the meaning of a writing.

Constructive possession doctrine Doctrine by which control or dominion of property is granted to the owner of the *locus in quo*, in situations in which it would otherwise go to the finder (*e.g.*, in cases of treasure trove and findings generally). The doctrine is applied, for example, when an object is found in a private place of a store. The owner of the *locus in quo*, rather than the finder, obtains possession.

Conversion A tortious act of willful interference with the property of another without lawful justification, in a way that *deprives the owner of the use of his property*. Examples of conversion include illegal takings, the assumption of ownership, and the destruction of the property of another.

Counterclaim An independent cause of action made by the defendant against the plaintiff in order to defeat the plaintiff’s claim.

Criminal negligence Extremely negligent conduct that creates a risk of death or serious bodily injury beyond that of mere civil negligence.

Cross-claim A claim under FRCP 13(g) by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action.

Dead Man's Act A statute that disqualifies a party from testifying *against the estate* of the deceased because of the party's incentive to lie based on: (i) his interest in the case; and (ii) the unavailability of the deceased to contradict him.

Detinue An action at common law to recover PERSONALTY or its value when it is unlawfully held by another.

Devise To make a gift of real property by will. Property that can be given in such a gift is referred to as "devisable."

Duress A defense that applies when the defendant acts illegally and against his own will as a result of another's *unlawful threat* of bodily harm. Duress excuses an actor from the legal effects of his actions (*e.g.*, a defendant is not guilty for a theft committed under duress).

Easement The right to use part of land owned by another for a special purpose. *See* EASEMENT APPURTENANT and EASEMENT IN GROSS.

Easement appurtenant An easement that benefits the grantee's (dominant tenant) land. When there is an easement appurtenant, there are *both dominant* and *servient tenements*. Compare EASEMENT IN GROSS.

Easement in gross An easement that does not benefit the grantee's land. Although there is a servient estate, but there is no *dominant estate*. Compare EASEMENT APPURTENANT.

Equitable servitude Covenants restricting the use of land that run with the land at equity and thus offer remedies at equity (*e.g.*, injunctions). Compare REAL COVENANTS.

Executory period In a land sale contract, the period between the formation of the sale contract and the closing.

Ex post facto law (Lat., a law "after the fact"). A law that does any of the following retroactively: (i) makes conduct criminal; (ii) establishes a stricter punishment for a crime; or (iii) alters the procedural or evidentiary rules in favor of the prosecution.

False pretenses A specific intent crime consisting of the acquiring of title to the property of another through making false statements or misrepresentations with the intent of defrauding the owner.

First degree murder Under the modern statutory approach to murder, first degree murder is generally defined as all forms of murder having malice aforethought *and* premeditation and deliberation. Compare SECOND DEGREE MURDER.

Freehold estate An estate where the possessor is the owner of the property (at least for a temporary period of time).

Grand theft The commission of LARCENY when the value of the property unlawfully taken exceeds some predetermined amount.

Habeas corpus Legal proceeding where a writ is brought to determine whether a person is being lawfully detained.

Holdover tenant A tenant who keeps possession of the property beyond the expiration of the lease.

Implied easement by prior use An easement that comes into being when an owner of two parcels of land uses one of them, the servient estate, to benefit the other in such a way that when he sells one of them, the purchaser can *reasonably expect* that the servient estate will continue to be used in a way that is consistent with its prior use.

In-court identification Modality of identification where an attorney asks a witness

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