

that *did* cause death but without the requisite intent to kill. Because the defendant thought that the deed had already been completed. Nonetheless, the murder convictions in both cases were affirmed, presumably because the defendant's culpability was that of a murderer, and "ordinary ideas of justice and common sense require that such [cases] be treated as murder,"<sup>10</sup> rather than attempted murder.

<sup>10</sup> Glanville Williams, *Criminal Law: The General Part* 174 (2d ed. 1961).

*Dressler*

## Chapter 16

### DEFENSES: AN OVERVIEW

#### § 16.01 DEFENSES: IN CONTEXT<sup>1</sup>

In criminal trials in the United States, the prosecution has the burden of producing evidence, and of persuading the factfinder beyond a reasonable doubt, of the concurrence of four ingredients of criminal responsibility: (1) a voluntary act (or an omission when there is a duty to act) by the defendant; (2) the social harm specified in the definition of the offense; (3) the defendant's *mens rea* (strict-liability crimes aside); and (4) an actual and proximate causal connection between elements (1) and (2).

Even if the prosecution proves the concurrence of these four elements, the defendant may seek to raise one or more defenses, which, if proven, will result in his acquittal of the offense charged.<sup>2</sup> This chapter sets out the various categories of defenses recognized in the criminal law.

Generally speaking, a legislature may allocate to the defendant the burden of persuasion regarding criminal law defenses.<sup>3</sup> When the defendant shoulders the burden, he is usually required to convince the factfinder of his claim by a preponderance of the evidence. But, there is one category of defenses—failure-of-proof defenses—that is a “defense” in only a loose sense of the term.<sup>4</sup> As to defenses that fall in *this* category, as will be explained, the legislature may *not* properly place the burden of persuasion on the defendant.

Two categories of defenses described briefly below—“justification” and “excuse” defenses—are of such fundamental significance that they are considered in greater detail in Chapter 17.

<sup>1</sup> See generally 1 Paul Robinson, *Criminal Law Defenses* 62-200 (1984). The categorization of defenses set out in this chapter is largely based on the influential work of Professor Robinson.

<sup>2</sup> Some defenses result in the defendant's conviction of a lesser offense. They are sometimes described as “partial defenses.” For example, the “heat of passion” (or “provocation”) defense to murder, if successfully proven, results in conviction of the defendant for voluntary manslaughter. See § 31.07, *infra*. Partial defenses are complete, however, in the sense that the defendant is acquitted of the crime originally charged, e.g., murder.

<sup>3</sup> See Chapter 7, *infra*.

<sup>4</sup> Loosely speaking, a defense is “any set of identifiable conditions or circumstances that may prevent conviction for an offense.” 1 Robinson, Note 1, *supra*, at 70.

## § 16.02 FAILURE-OF-PROOF DEFENSES

A failure-of-proof defense is one in which the defendant introduces evidence at his trial that demonstrates that the prosecution has failed to prove an essential element of the offense charged. For example, suppose that *D1*, charged with an intentional homicide, seeks to prove that he mistakenly believed that the object at which he fired his gun was a tree stump rather than a human being. Or, suppose that *D2* claims that he was unconscious when he killed *V*. Or, *D3* introduces evidence that he was not at the scene of the crime and, therefore, was misidentified as the wrongdoer. Each of these defendants is raising what courts often describe as a "defense." *D1* claims a mistake-of-fact "defense"; *D2* asserts an unconsciousness (or "automatism") "defense"; *D3* alleges an alibi "defense."

Although courts may characterize such claims as defenses, the purpose of the defendants' evidence in these examples is to raise a reasonable doubt regarding an element of the prosecutor's case-in-chief. The mistake-of-fact "defense" of *D1* negates the *mens rea* of the crime; *D2*'s unconsciousness, if believed, demonstrates that the prosecutor has failed to prove beyond a reasonable doubt that *D2*'s conduct included a voluntary act; and the alibi "defense" calls into question whether *D3* performed the *actus reus* of the offense.

The prosecution must shoulder the burden of disproving beyond a reasonable doubt a defendant's failure-of-proof claim. This conclusion follows from the fact that the prosecutor has the constitutional duty to prove every element of a criminal offense.<sup>5</sup>

## § 16.03 JUSTIFICATION DEFENSES

A justification defense is one that defines conduct "otherwise criminal, which under the circumstances is socially acceptable and which deserves neither criminal liability nor even censure."<sup>6</sup> Justified conduct is conduct that is "a good thing, or the right or sensible thing, or a permissible thing to do."<sup>7</sup> That is, a justified act is an act that is right or, at least, not wrong.

For example, killing a human being ordinarily is wrongful conduct. When *D* kills *V* in self-defense, however, society says that *D*'s conduct is "justified." Although *D* has committed the *actus reus* of criminal homicide, the special circumstance of the situation—*D* killed *V* because *V* was unlawfully attacking him—renders the homicide socially acceptable. By providing *D* with the justification defense of self-defense, society announces that *D*'s act of killing *V* was the right or, at least, a permissible, thing to do. Or, put slightly differently, the result of *D*'s conduct—*V*'s death—was not a socially undesirable outcome under the circumstances.

<sup>5</sup> See § 7.03[B], *supra*.

<sup>6</sup> Peter D.W. Heberling, Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914, 916 (1975).

<sup>7</sup> J.L. Austin, *A Plea for Excuses*, in *Freedom and Responsibility* 6 (Herbert Morris ed., 1961).

## § 16.04 EXCUSE DEFENSES

An excuse defense—e.g., insanity—differs from a justification defense in a fundamental way. Whereas a justification claim generally focuses upon an *act* (i.e., *D*'s conduct), and seeks to show that the result of the act was not wrongful, an excuse centers upon the *actor* (i.e., *D*), and tries to show that the actor is not morally culpable for his wrongful conduct. Thus, an excuse defense "is in the nature of a claim that although the actor has harmed society, [he] should not be blamed or punished for causing that harm."<sup>8</sup> A defendant who asserts an excuse defense claims, "in essence, 'I admit, or you have proved beyond a reasonable doubt, that I did something that I should not have done, but I [still] should not be held criminally accountable for my actions.'"<sup>9</sup>

An insane actor, for example, does not deny that the prosecutor has proved the essential elements of the crime nor that, all things considered, his conduct was wrongful, intolerable, and censurable (i.e., unjustified). He seeks to avoid criminal liability, however, by demonstrating that, as a result of his mental disease or defect, he lacks the moral blameworthiness ordinarily attached to wrongdoers.

## § 16.05 SPECIALIZED DEFENSES ("OFFENSE MODIFICATIONS")

Justification and excuse defenses apply to all crimes. Some defenses, however, pertain to just one or a few crimes. For example, "legal impossibility" is a common law defense to the crime of attempt. In some jurisdictions "abandonment" or "renunciation" is a defense to the crimes of attempt and conspiracy. And, "Wharton's Rule" is a defense peculiar to the crime of conspiracy.<sup>10</sup>

Crime-specific defenses have a common feature: They authorize the acquittal of a defendant, even though his conduct satisfies the elements of the offense, when the underlying purpose for prohibiting the conduct is negated by the conditions that constitute the defense. Professor Paul Robinson treats such defenses "offense modifications."<sup>11</sup>

For example, the Model Penal Code crime of criminal attempt serves the important purpose of providing society with a basis for arresting and punishing a person who has demonstrated his culpability and dangerousness by taking a substantial step toward committing a criminal offense. Suppose, however, that *D* purposely takes a substantial step toward committing a murder, i.e., he commits the *actus reus* and *mens rea* of an attempted murder, but then voluntarily and irrevocably abandons his criminal enterprise. In such a case,

<sup>8</sup> Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1162-63 (1987).

<sup>9</sup> *Id.* at 1163.

<sup>10</sup> See §§ 27.07[D] (legal impossibility), 27.08 (renunciation of an attempt), 29.09[B] (abandonment of a conspiracy), and 29.09[C] (Wharton's Rule), *infra*.

<sup>11</sup> 1 Robinson, Note 1, *supra*, at 77.