CRIMINAL LAW

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INTRODUCTION: GENERAL APPROACH

The Multistate Examination directs examinees to answer questions according to "the generally accepted view" unless otherwise noted. In Criminal Law, this usually means the common law rule, which is the general rule stated in the outline. However, examination fact patterns may also set out statutes defining crimes or defenses and ask questions based upon those statutes. The statutes are usually similar or identical to statutory provisions found in modern criminal codes. To help you better analyze these questions, the outline discusses typical statutes on a variety of topics that may be the subject of examination questions.

I. JURISDICTION AND GENERAL MATTERS

A. JURISDICTION

As used in this section, jurisdiction means the authority of a sovereign to ***create*** substantive criminal law. The authority of a court to ***enforce*** criminal laws is also an aspect of jurisdiction, but is more properly treated as a matter of criminal procedure.

1. Federal Criminal Jurisdiction

The power of the federal government to create crimes falls into the following broad categories:

a. Power over Federally Owned or Controlled Territory

The federal government has extensive power to enact general criminal codes governing conduct in the District of Columbia, the territories, and federal enclaves (*e.g.,* naval yards, federal courthouses, national parks, etc.).

b. Power over Conduct Occurring Within a State

In contrast, federal power to criminalize conduct within a state is limited by the requirement that each statute be founded upon an express or implied constitutional grant of authority.

c. Power over United States Nationals Abroad

Federal criminal statutes may, by express provision, reach conduct by citizens while on foreign soil.

d. Power over Conduct on Ships or Airplanes

Federal "maritime jurisdiction" extends to conduct by all persons aboard American ships or aircraft when on or over the high seas or even in foreign waters or ports.

2. State Criminal Jurisdiction

Unlike the federal government, every state has inherent authority by virtue of its "police power" to regulate its internal affairs for the protection or promotion of the health, safety, welfare, and morals of its citizens.

a. Situs of the Crime

At common law, and in those states that have not expanded jurisdiction by statute, only the state in which the situs of the crime is located has jurisdiction over the crime.

"Situs" is generally defined as the place where the proscribed act (or omission) takes place, if the crime is defined in these terms; or the place of the harmful result, if the crime includes a result as a material element.

Example: A libelous statement may be made a crime where it is published, not where it is written, because the crime of libel proscribes the act of publication rather than the act of writing the libelous statement.

b. Modern Bases for Jurisdiction

A person is subject to prosecution in a state for an offense that he commits within or outside that state, by his own conduct or that of another for which he is legally accountable, under the following conditions:

1) When the ***offense is committed wholly or partly within the state*** ("partly within the state" includes occurrences within the state of either (i) conduct that is an element of the offense, or (ii) a result constituting such an element—*e.g.,* in homicide, the "result" is either the physical contact causing death or the death itself); or

2) When there is ***conduct outside the state that constitutes an attempt or conspiracy*** to commit an offense within the state ***plus an act inside the state***; or

3) When there is ***conduct within the state constituting an attempt, solicitation, or conspiracy to commit, in another jurisdiction, an offense*** under the laws of both the state and such other jurisdiction; or

4) When an offense based on the ***omission of performance of a duty*** imposed by the law of a state is committed within that state, regardless of the location of the offender at the time of the omission.

B. SOURCES OF CRIMINAL LAW

1. Common Law Crimes

A common law crime is one created and enforced by the judiciary in the absence of a statute defining the offense.

a. No Federal Common Law Crimes

Federal criminal law is governed entirely by statute. Although there are no federal common law crimes, Congress has provided for common law crimes in the District of Columbia.

b. Majority View—Common Law Crimes Retained

A majority of the states retain common law crimes either implicitly or by express "retention statutes."

c. Minority View (Modern Trend)—Common Law Crimes Abolished

A minority of the states (about 20) have abolished common law crimes either expressly by statute or impliedly by the enactment of comprehensive criminal codes. These states nevertheless retain the various common law defenses such as insanity and self-defense.

2. Statutory Crimes
Today, state legislative statutes are the primary source of criminal law. Many states have adopted or are in the process of drafting comprehensive criminal codes.

3. Constitutional Crimes
The Constitution defines treason as levying war against the United States, adhering to enemies of the United States, or giving them aid and comfort. No person can be convicted of treason unless two witnesses testify to the same overt act, or unless the defendant confesses.

4. Administrative Crimes
A legislature may delegate to an administrative agency the power to prescribe rules, the violation of which may be punishable as a crime. Note, however, that the legislature may not delegate the power to determine which regulations shall carry criminal penalties; nor may it delegate the power of adjudication (*i.e.,* the determination of guilt or innocence). With the proliferation of administrative agencies, this source of criminal law is becoming increasingly important.
Example: Violation of the antifraud rules adopted by the Securities and Exchange Commission may result in severe criminal liability.

5. The Model Penal Code
Although not a source of law, the Model Penal Code ("M.P.C.") was a scholarly endeavor to compile a comprehensive and coherent body of criminal law. Since its publication in 1962, the M.P.C. has greatly influenced the drafting of state criminal statutes. Due to its enlightened position on many different issues, the M.P.C. may be the single most important source of general criminal law.

C. THEORIES OF PUNISHMENT
Historically, several theories have been advanced to justify criminal punishment.

1. Incapacitation (Restraint)
While imprisoned, a criminal has fewer opportunities to commit acts causing harm to society.

2. Special Deterrence
Punishment may ***deter the criminal*** from committing future crimes.

3. General Deterrence
Punishment may ***deter persons other than the criminal*** from committing similar crimes for fear of incurring the same punishment.

4. Retribution
Punishment is imposed to vent society's sense of outrage and need for revenge.

5. Rehabilitation
Imprisonment provides the opportunity to mold or reform the criminal into a person who, upon return to society, will conform her behavior to societal norms.