Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, as part of our "Listen and Learn" series, we're discussing Criminal Law. Specifically, we'll be talking about defenses to a crime. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We're the co-creators of the Law School Toolbox, the Bar Exam Toolbox, and the career-related website CareerDicta. Alison also runs The Girl's Guide to Law School. If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the Law School Toolbox podcast. If you have any questions, don't hesitate to reach out to us. You can reach us via the contact form on BarExamToolbox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Hello, and welcome back to the "Listen and Learn" series from the Bar Exam Toolbox podcast. Today, we will be looking at a few specific defenses in Criminal Law. The most obvious defense is innocence, when the defendant argues they did not commit the crime charged. They might use an alibi to argue the prosecution has the wrong defendant, or that the facts or events the prosecution is alleging did not occur. A defendant might also argue that the prosecution does not have sufficient evidence to convict them. This is often called "the failure of proof" defense. Innocence and failure of proof are factual defenses. The defendant's arguments rest on the prosecution's inability to prove facts in the case. While factual defenses are common – especially in courtroom dramas on TV – they aren't the only types of defenses. A defendant can make affirmative defenses as well, and that's what we're going to focus on today.

Lee Burgess: So, what is an affirmative defense? If you listened to our podcast on burden of proof, you'll remember that to convict someone of a crime, the prosecution must prove the defendant is guilty beyond a reasonable doubt. But – plot twist – that's not the end of the story! A defendant can still be found not guilty, even if the prosecution meets its burden. When the defendant raises an affirmative defense to a charge against them, the defendant isn't challenging the evidence against them; they are raising a new issue that must be proven. Affirmative defenses are basically excuses or justifications for an act the defendant committed. They aren't saying "I didn't do it!" They are saying "I had a good reason to do it." If a defendant raises an affirmative defense, the burden shifts. The defendant has the burden of proving an affirmative defense.

Lee Burgess: So, what are some affirmative defenses? Great question. Affirmative defenses can be thought of as falling into one of two major categories: perfect and imperfect defenses. Despite how these may sound, the categories don't deal

with whether a defense is good or bad; they have to do with how much of the defendant's conduct is excused by a defense. A perfect defense will completely excuse or exonerate a defendant. They are innocent. On the other hand, an imperfect defense reduces or limits the severity of the offense or punishment. It's important to note that a defendant who successfully makes an imperfect defense is still guilty of a crime. It may just be a lesser crime carrying a lesser punishment.

Lee Burgess: Let's start with perfect defenses – that is, defenses that, if successfully proven, would render a defendant not guilty of the crime charged. The first one we'll discuss today is duress. Because it is an affirmative defense, duress completely excuses the defendant's conduct if the defendant can prove three things: (1) he acted in response to a threat of imminent death or serious bodily injury; (2) to the defendant or another person; and (3) the defendant reasonably believed they were unable to avoid the harm by non-criminal conduct. In other words, if the defendant or someone else was being threatened with imminent death or serious bodily injury, and the defendant could not have successfully used non-criminal conduct to protect themselves or the person being threatened, they can likely show the action was taken under duress. Duress means the defendant did not want to take the illegal action but felt their hand was forced. For that reason, it's important to note that, in most states, a duress defense is not available for intentional killings. The mens rea necessity to prove those crimes would make it impossible to argue the defendant didn't want to kill but was forced to do so. But don't worry, we'll talk about defenses to intentional killings when we discuss self-defense later in this episode.

Lee Burgess: There's one other nugget that I want to point out here. In the first prong, did you notice the level of the threat of harm necessary for a duress defense? Take note of it. It isn't just harm or risk of death. The actions must threaten imminent death or serious bodily injury. The harm must be unavoidable and immediate, and it must be grave – death or serious bodily injury. When you're answering test questions on this topic, look out for these red flags. How grave is the risk of harm? Was it reasonable for the defendant to believe that harm was unavoidable without taking the criminal action they took?

Lee Burgess: Speaking of test questions, let's look at a question together. This question is adapted from the October 2020 California bar exam, so it's a real-life example of how a duress question comes up on an exam:

Lee Burgess: "Needing money and willing to do anything to get it, Don, who is tall, and Al, who is short, set out for Vic's house around midnight to steal from him. On the way, Al said that he did not want to get involved, but Don slapped Al's face and

responded, ‘If you don’t come along now, I will break your legs tomorrow.’ At Vic’s house, Don opened the unlocked front door and he and Al went inside. Don took a wallet on a table in the foyer, and he and Al ran away. After a witness identification, Don and Al were soon arrested and charged with burglary. Might Al successfully raise a duress defense? Discuss.”

Lee Burgess: What do you think? Remember, there are three things Al needs to prove here: the threat of imminent death or serious bodily injury, to himself or another person, and that he reasonably believed he would be unable to avoid the harm through non-criminal means. If some red flags are popping up for you, that’s a good sign – they should be! But, to write a great test answer, you should break down the entire duress definition and discuss which criteria are met and which are not. Then, come to a conclusion. The question asks you whether Al’s duress defense would be successful, so be sure not only to discuss duress, but decide how likely it is Al would win.

Lee Burgess: Okay, with this framework in mind, let’s take this piece by piece. Here, Al will argue that when Don slapped his face and said, "If you don't come along now, I will break your legs tomorrow", that he was, (1) threatened with serious bodily injury; (2) to himself; and (3) deprived of any meaningful choice. However, the threat to Al was that Don would break his legs tomorrow. Therefore, the threat was not imminent. Al may also argue that the fact that Don slapped him was an imminent threat; however, a slap is not imminent serious bodily injury or death, and it was done before the threat was made, so it cannot be called a threat of serious bodily injury or death. Though prongs two and three may be met because he felt like he had no choice but to participate in the burglary, and because the threat was to himself, the first prong is not met – there is no threat of imminent death or serious bodily injury, even given their height discrepancy.

Lee Burgess: Now, if Don had a gun in that moment and threatened to shoot Al if he did not participate, that would be a different story. That risk of harm would exist now. But since the question specifies the harm would be tomorrow, the test fails. I think you could also argue the third prong is met because Al could have refused to participate in the burglary, and then hide, or call the police, or do something else to avoid the injury threatened to come the next day. There was enough time to pursue another, non-criminal option.

Lee Burgess: Okay, that’s enough about duress. Let’s move on to defenses having to do with the defendant’s mental state; specifically the insanity defense and intoxication. Basically, both of these defenses posit that a defendant’s mental state was altered – either permanently or temporarily – such that his mens rea was insufficient to convict.

Lee Burgess: For the insanity defense, a defendant must have a mental disease or defect. But that is not enough on its own. In addition to a mental disease or defect, the defendant must pass one of four tests: the M'Naghten test, the Model Penal Code test, the Irresistible Impulse test, or the Durham test. As you know by now, each state does things slightly differently when it comes to criminal law. So, which test you apply depends on the state in which the defendant is being charged. Most states use the M'Naghten or Model Penal Code tests, so we'll start there.

Lee Burgess: Under the M'Naghten test, the defendant must show he or she is, a) unable to know the wrongfulness of their conduct; or b) unable to understand the nature and quality of his acts. This is essentially moral awareness and an understanding of the reality of their actions.

Lee Burgess: The Model Penal Code test is slightly different. Under that test, the defendant must show he or she was, a) unable to appreciate the criminality of his conduct; or b) unable to conform his actions to the law. Did the defendant have the capacity to understand their actions were illegal? Were they able to control their actions sufficiently to avoid doing such illegal conduct? Note that the test isn't whether the defendant knew their actions were illegal. Ignorance of the law is never a defense. It's whether they were able to know or understand that their actions were illegal.

Lee Burgess: The last two tests are less common, but we'll touch on them briefly anyway. The first is the Irresistible Impulse test. Under the Irresistible Impulse test, a defendant must prove their mental illness made them, a) unable to control their actions; or b) unable to conform their actions to the law. This is pretty similar to the Model Penal Code test, but rather than focusing on whether the defendant could recognize their conduct was illegal, the test focuses solely on the defendant's ability to control their own behavior. That is, can they control what they do, and can they choose to act in a non-criminal manner? What control do they have over the actions, or as the name suggests, their impulses?

Lee Burgess: Finally, we have the Durham test. Under the Durham test, the defendant must only prove their unlawful conduct was the product of mental illness. What does it mean for the conduct to be the product of a mental illness? It's quite vague and definitely leaves room for expert legal argument. If you're in a jurisdiction that uses the Durham test, be sure to flex those legal argumentation muscles!

Lee Burgess: I think it's easiest to understand and remember these tests if you can imagine how they might play out in a hypothetical scenario, so let's look at another question, adapted from the February 2007 California bar exam, together:

Lee Burgess: "Dan has been in and out of mental institutions most of his life. While working in a grocery store, stocking shelves, he got into an argument with Vic, a customer who complained that Dan was blocking the aisle. When Dan swore at Vic and threatened to kick him out of the store, Vic told Dan that he was crazy and should be locked up. Dan exploded in anger, shouted he would kill Vic, and struck Vic with his fist, knocking Vic down. As Vic fell, he hit his head on the tile floor, suffered a skull fracture, and died.

Lee Burgess: Dan was charged with murder. He pleaded not guilty, and not guilty by reason of insanity. At the ensuing jury trial, Dan took the stand and testified that he had been provoked to violence by Vic's crude remarks and could not stop himself from striking Vic. Several witnesses, including a psychiatrist, testified about Dan's history of mental illness and his continued erratic behavior despite treatment. Can the jury properly find Dan not guilty by reason of insanity?"

Lee Burgess: Before we dive into the four tests, let's quickly address the first requirement of any insanity defense, regardless of the applicable test: Does Dan have a mental disease or defect? I think the answer is pretty clearly "Yes" here, given that Dan has been in and out of mental institutions, and that several witnesses, including a psychiatrist, testified as to Dan's history of mental illness and erratic behavior. Pretty straightforward, right? But here's the trick – sometimes issues in a question seem so straightforward that people forget to answer them! That is a mistake; they are missing out on easy points by doing this. Be sure to go through every part of the analysis, even when the answer is clear.

Lee Burgess: That being said, let's move on to the four tests. You may be asked to apply one specific test, or you may need to address all of them. Since the question does not specify a jurisdiction or applicable test, we're going to assume the test writers want to test our ability to apply each of the four tests.

Lee Burgess: Let's start with the M'Naghten test again. Remember, the rule here is that the defendant was, a) unable to know the wrongfulness of their conduct; or b) unable to understand the nature and quality of his acts. Here, Dan testified that the crude remarks were so incendiary that he was unable to stop himself. The argument is not likely to win. There is no evidence in this question that Dan did not know threatening to kill someone or punching them was wrong. While he may have been unable to control his reaction, there is nothing to show he did not know those actions were wrong.

Lee Burgess: What about under the Irresistible Impulse test? Under this test, the defendant may prove a defense of insanity if he shows he lacked the capacity for self-

control and free will. Dan will probably be more successful to claim a defense of insanity under this test. Dan argues that he "could not stop himself", which supports an argument that he had no ability to control himself or resist his impulses. His will was subjugated by the insanity. Based on this evidence, Dan might successfully claim a defense of insanity under this test.

Lee Burgess: Now let's tackle the Durham test, where a defendant will have an insanity defense if his unlawful conduct was the product of his mental illness. Dan will argue that he has spent much time in and out of mental institutions. Indeed, several witnesses testify as to Dan's history of mental illness. Further, he testifies that he could not control his response to Vic's incendiary remarks. Such a history suggests that his conduct was a product of a mental condition rather than the product of his own free will. Dan will likely succeed in bringing a defense of insanity under the Durham test.

Lee Burgess: Finally, we have the Model Penal Code test, in which a defendant's actions may be excused if he was unable to conform his actions to the requirements of the law. Here, Dan will offer his history of mental illness and continued erratic behavior despite treatment as a way to prove that he lacked the ability to conform himself to the requirements of the law, i.e. not to assault or kill. This, however, seems to be a less compelling argument, as Dan has been able to conform himself to the requirements of law in other aspects of his life. He was able to work in a grocery store and successfully stock the shelves. Dan appears to have the ability to conform his actions to the requirements of law in all other instances. On the other hand, Dan could argue that he can control his actions in typical, daily scenarios, but not when such offensive, incendiary remarks are made. Plus, there is evidence that he has been erratic in the past. I think this is a close one – you could argue it convincingly either way!

Lee Burgess: Alright. You can hopefully see now how the different tests can produce different real-life results. Under some of the tests, Dan may have prevailed on his insanity defense, while on others he would not have. So, it's important that you're able to know, recall, and apply all four. We'll move on now, but don't forget these four tests! You're going to need them again in a minute.

Lee Burgess: Next, let's take a look at the defense of Intoxication. There are two types of intoxication defenses: voluntary and involuntary intoxication. Voluntary intoxication arises when the defendant has ingested an intoxicating substance – you guessed it – voluntarily. That is, by their own free will. This defense only applies to specific intent crimes. Involuntary intoxication, on the other hand, arises when the defendant has ingested an intoxicating substance unintentionally. That is, without knowledge or by force. Involuntary intoxication

is a defense to all crimes, similar to the insanity defense we just discussed. In fact, the same four tests – M'Naghten, Model Penal Code, Durham, and Irresistible Impulse – are used to analyze an involuntary intoxication defense. See? I promised these would come up again!

Lee Burgess: Finally, I want to quickly address self-defense and defense of others. These two are what they sound like – acting in defense of yourself or in defense of another person. The question is, when is it justified to use force against another person for the protection of yourself or someone else?

Lee Burgess: It doesn't matter whether the defendant acted in defense of themselves or of another person; self-defense and the defense of others both use the same rules. The question is, how much force did the defendant use, and was it justified? If the defendant used non-deadly force, their actions are justified if, (1) the defendant reasonably believes; (2) that he's in imminent danger of being harmed; and (3) the force used is proportional to the harm threatened. Basically, was the defendant's belief that he or someone else was in immediate danger reasonable? And, was the non-deadly force he used proportionate to the danger he feared? The rule for the use of deadly force is similar. Deadly force is justified when, (1) the defendant kills based on a reasonable belief; (2) that he was in imminent danger of being killed or suffering great bodily injury; and (3) the use of deadly force was necessary. The difference here is the defendant can't have a reasonable fear of harm. That harm he fears must be death or great bodily injury, and the jury must also find that the use of that deadly force was necessary to avoid death or great bodily harm.

Lee Burgess: The rules are pretty straightforward. The tension lies in the facts of each case. What is reasonable? What is imminent? What is necessary? That's what you'll want to analyze and argue if this issue comes up on an exam.

Lee Burgess: Before we wrap up for today, I want to point out a few outlier rules related to self-defense and defense of others. In a minority of states, the defendant has a duty to retreat before they may use deadly force. This is basically the opposite of the "stand your ground" laws you may be familiar with from current events. However, the defendant doesn't have an absolute duty to retreat. There is no duty to retreat when, a) there is no opportunity to retreat; b) they could not retreat safely; or c) if attacked in their own home. Again, analysis of the facts is going to be important in cases like these.

Lee Burgess: And finally, an aggressor may only use force in self-defense if, a) he withdraws and communicates his withdrawal; or b) the other person escalates the fight with deadly force and withdrawal is not possible. In these cases, if the

defendant does not come to the situation with clean hands – if he was the aggressor at some point before he was attacked or feared harm – self-defense is only available to him if he, before using force, backed off and let the other person know he is doing so, or if the other party escalated the fight by using deadly force, making self-defense necessary and a withdrawal impossible. The standard for self-defense or defense of others is higher if the defendant bears some responsibility for the altercation.

Lee Burgess: There is also an imperfect defense in the area of self-defense that is important to discuss since it's our only example today of an imperfect defense. Remember, an imperfect defense mitigates culpability but does not totally excuse conduct like a perfect self-defense does. Imperfect self-defense mitigates murder, bringing the charge down to voluntary manslaughter when, (1) the defendant kills based on a good faith belief that self-defense was necessary; (2) but such belief was unreasonable. Remember this rule if, in your analysis, you find that the defendant's belief that he would be harmed was unreasonable. His criminal conduct can still be mitigated if his belief was genuine.

Lee Burgess: Alright, that's all we have time for today. I hope you have a better sense of some of the defenses available to criminal defendants, and how to analyze their viability. Remember, there are other defenses, including the defense of innocence. So, be sure to review your materials to see if there are any defenses we did not cover today.

Lee Burgess: If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to Lee or Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our website contact form at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

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