NOTES-CRIMINAL JUSTICE

PROFESSOR JEFF KIRCHMEIER

Tuesdays: 6:15-7:45 p.m.

Thursdays: 6:15-7:45 p.m.

Note that the readings are in Dressler and Garvey's *Cases and Materials on Criminal Law (9th ed.)*. **Bring this book and the New York Penal Law (or be prepared to access the relevant NYPL sections) to every class**.

1 in 35 Americans are behind bars or on probation/ parole.

Introduction / Principles of Punishment. *This class will introduce you to the course and some principles of criminal law, such as burden of proof. The main emphasis on Dudley v. Stephens will be to consider the policies the court is using. These principles will be important to the topics we discuss throughout the semester*- Dressler & Garvey (9th ed.): pp. 1-19; 31-45; 47-50; 53-56. NYPL § 1.05.

Class Notes of 08/23/22

Sources of Law

1. **Common Law**
2. **Statutory Law (enacted law/ legislature)**

- Criminal Law
- NY Penal Code
- Model Penal Code

3. **Constitutional Law**

- STATE/FEDRAL Constitutions

4. **Administrative Law** (law from administrative agencies)

- Considered more from coming from Executive Branch
- *In criminal law you will also raise matters of Constitutional law, and can use the State constitutions as well to make arguments*
- **Administrative law** is the division of law that governs the activities of executive branch agencies of government. Administrative law concerns executive branch rule making (executive branch rules are generally referred to as **"regulations"**), adjudication, or the enforcement of laws. Administrative law is considered a branch of public law.
- Administrative law deals with the decision-making of such administrative units of government that are part of the executive branch in such areas as international trade, manufacturing, the environment, taxation, broadcasting, immigration, and transport.
- Administrative law expanded greatly during the twentieth century, as legislative bodies worldwide created more government agencies to regulate the social, economic and political spheres of human interaction.
- Civil law countries often have specialized administrative courts that review these decisions.

- **What is Civil Law?**

Civil law is a legal system originating in mainland Europe and adopted in much of the world. The civil law system is intellectualized within the framework of Roman law, and with core principles codified into a referable system, which serves as the primary source of law.

The civil law system is often contrasted with the common law system, which originated in medieval England, whose intellectual framework historically came from **uncodified judge-made case law**, and gives **precedential authority to prior court decisions.**

Historically, a civil law is the group of legal ideas and systems ultimately derived from the *Corpus Juris Civilis*, but heavily overlain by Napoleonic, Germanic, canonical, feudal, and local practices, as well as doctrinal strains such as natural law, codification, and legal positivism.

Conceptually, civil law **proceeds from abstractions, formulates general principles, and distinguishes substantive rules from procedural rules.** It holds case law secondary and subordinate to statutory law. Civil law is often paired with the inquisitorial system, but the terms are not synonymous.

There are key differences between a statute and a code. The most pronounced features of civil systems are their **legal codes,** with **concise and broadly applicable texts that typically avoid factually specific scenarios.** The short articles in a civil law code deal in generalities and stand in contrast with ordinary statutes, which are often very long and very detailed.

- **Model Penal Code (MPC): a model act designed to stimulate and assist U.S. state legislatures to update and standardize the penal law of the United States.** The MPC was a project of the American Law Institute (ALI) and was published in 1962 after a ten-year drafting period. The chief reporter on the project was Herbert Wechsler, and contributors included Sanford Kadish and numerous other noted criminal law scholars, prosecutors, and defense lawyers.

Since its first publication, the Model Penal Code has provided the basis for legislation in over **two-thirds of American states**. Many have adopted portions. New Jersey, New York, Pennsylvania and Oregon have enacted most of the provisions.

The ALI performed an examination of the penal system in the U.S. and the prohibitions, sanctions, excuses, and authority used throughout in order to arrive at a cohesive synthesis to the extent possible, and the best rules for the penal system in the United States. Primary responsibility for criminal law lies with the individual states, which over the years led to great inconsistency among the various state penal codes. The MPC was meant to be a comprehensive criminal code that would allow for similar laws to be passed in different jurisdictions.

The MPC itself is not legally binding law, but since its publication in 1962 **more than half of all U.S. states have enacted criminal codes that borrow heavily from it.** It has greatly influenced criminal courts even in states that have not directly drawn from it, and judges increasingly use the MPC as a source of the doctrines and principles underlying criminal liability.

- States had radically different types of Penal law

FYI- Hornbooks; explain a type of law

- **Mandatory authority** describes a **source of law that is binding on the court**, while a persuasive authority is a source of law that carries some authoritative weight but that the court is not required to follow. A mandatory injunction requires the performance of an act or course of conduct.

Specific Sources of Criminal Law

1. **English Common Law/ Common Law Developments**

- Basing law on prior decisions
- Developing around the early Middle Ages
- 1700 American Colonies had adopted English Common Law
- ***Laws emanating from courts***
- ***"Common law principles" further development in U.S. Courts***

2. **New York Penal Law (other states statutes/ Mandatory authority)**

- **1829** NY Codified its laws the **Revised Statutes of the State of New York**
- **Now largely based on MPC**

3. **Model Penal Code (p.5)**

- Not enforced anywhere
- A type of model for drafting penal codes

p. 1-19

1. - A series of commands (**enacted law**) about what a person "must not do" rob, rape, or kill (**prohibitions**) vs, "musts" support your family, pay income taxes (affirmative requirements).
2. **Valid and binding** upon all those that fall within their terms
3. **Enforced sanctions for disobedience**; threat an **expression of community moral condemnation** p.3

- inseparable historic ideas of "crime and punishment" (punishment is 6x used in Constitution)

- **the roots of American Criminal Law are found in English Soil** p.3; judge made law- **COMMON LAW**; differences in rulings across different jurisdictions based on precedents of prior cases.

- **TORT; civil wrong (not a crime), based on Common Law Precedent**

- CRIME; "An **Act or Omission** and its accompanying **state of mind** which if duly shown to have taken place will incur a formal and solemn pronouncement of the **moral condemnation** of the community." (p.2-3)

- *Beginning in the 19th century US State Legislatures asserted authority over criminal statutes replacing common law in all states with legislation on criminal codes.*

- *REVIEW DIAGRAM CRIMINAL JUSTICE SYSTEM*

- *Most cases we read are Appellate Decisions*

- Hart, supra, at 412 on p. 4; a legislature deals with crimes always in advance of their commission; "threat of condemnation and punishment"; imposed by other agencies, the code is set in general terms but interpreted by police, attorneys, judges, jurors, etc. Responsible to enforce it on potential offenders. *Limiting what the legislature has set out to accomplish.*

- p. 4 **FOUR CONDITIONS**; needed for general direction to work

1. citizens must know the existence of a law and relevant respects

2. the circumstances of fact which make it applicable

3. Be able to comply with it

4. Must be willing to comply with it

- Cites on p.4 Limitations of Legislative Law Making; the Constitution; they do not have unlimited powers to make these statues.
- "Constitutions are checks upon the hasty action of the majority. They are self-imposed restraints of a whole people upon a majority to secure sober action and a respect for the rights of the minority."- President (later chief justice) Taft.
- **Federalism allows the States great freedom to write and interpret statutes**
- **Federal Courts must keep State Legislatures from violating the Constitution**
- "Presumptions with which..." courts applying to debatable issues of interpretation
- p.5 MODEL PENAL CODE; to bring coherence to State Penal Law the American Law Institute in 1952; developed a model code; 1962; published ***Model Penal Code and Commentaries***
- Some states adopted it, others use it for guidance when holes arise in their own state codes.
- **Case books don't cover Misdemeanor Convictions; 97% result from guilty pleas in what is characterized as "assembly-line-justice" or "McJustice"**
- Described Prof. Natapoff; ***the frontline mechanism through which people are drawn into the criminal justice*** system p. 6
- There are many layers that prevent trial; p.7 was the crime reported, was an arrest ever made, social factors on how the police prioritize the investigation, evidence, probable cause, was the arrest justified, information/ indictment by Grand Jury, pre-trial motions
- Often the defendant pleads guilty rather than proceeding to trial
- 90% of guilty convictions are obtained by guilty pleas seeking more lenient sentencing or dropping of some charges/ reduced sentencing

JURIES

- **Why Do We have a Jury System?**
- Constitutional Right for (any case with 6 months of more in prison) to get a Jury of one's peers, a protection of oppression of the government's authority
- **Unanimous finding** (generally), before they convict someone they must find "GUILT BEYOND A REASONABLE DOUBT."

1. **BURDEN OF PROOF IS ON GOVERNMENT** (prosecutor at trial)

- **6th Amendment;** *speedy, public trial by an impartial Jury*
- **Baldwin v. New York (1970)**; The Sixth Amendment guarantees a defendant the right to a trial by jury for all "serious" offenses that require imprisonment for more than six months.
- Unanimous Jury Verdict (Ramos v. Louisiana)
- **Duncan v. Louisiana**; SC Decision to grant jury of peers
- Juries of 6-12; **(Williams v. Florida) and (Ballew v. Georgia)**
- **VENIREPERSONS**; potential jurors to be examined; under VOIR DIRE is the examination where a juror can be released of duty "for cause", partiality.
- Defense and prosecution can make **PEREMPTORY CHALLENGES**, not based on case but perceptions of bias.
- 14 Amendment Equal Protection Clause would be violated if they excluded women or POC.

Ex. After OJ won his Criminal case he was still brought to Civil Court.

BURDEN OF PROOF: a legal duty that encompasses two connected but separate ideas that apply for establishing the truth of facts in a trial before tribunals in the United States: the **"burden of production"** and the **"burden of persuasion."**

In a legal dispute, one party is initially presumed to be correct, while the other side bears the burden of producing evidence persuasive enough to establish the truth of facts needed to satisfy all the required legal elements of the dispute.

There are varying types of burden of persuasion commonly referred to as **standards of proof**, and depending on the type of case, the standard of proof will be higher or lower. Burdens of persuasion and production may be of different standards for each party, in different phases of litigation.

Burden of production is a minimal burden to produce at least enough evidence for the trier of fact to *consider* a disputed claim.

After litigants have met the burden of production, they have the **burden of persuasion:** that enough evidence has been presented to persuade the trier of fact that their side is correct. There are different *standards* of persuasiveness ranging from a preponderance of the evidence, where there is just enough evidence to tip the balance, to proof beyond a reasonable doubt, as in United States criminal courts

PROOF OF GULT AT TRIAL

- The **due process clause** of the Constitution requires the prosecutor to persuade the factfinder "beyond a reasonable doubt of every fact necessary to constitute the crime charged" SC ruling in **In re Winship** (1970); "concrete substance for the presumption of innocence"

- "Reasonable doubt" standard p.10
- To command the respect and confidence of the community
- ***"Far worse to convict an innocent man than to let a guilty one goes free"***- Justice Harlan
- "Better 10 guilty persons go free than 1 innocent suffer"- (Blackstone, Commentaries on Laws of England)
- **Jackson v. Virgina** (1979) SC; "a juror's mind be in a subjective state of near certitude of guilt.
- **Probable Cause** (to arrest)
- **Preponderance of Evidence** (to bring a Civil Suit the plaintiff must be 51%)

Preponderance of the Evidence (American English), also known as balance of probabilities (British English), is the standard required in most civil cases and in family court determinations solely involving money, such as child support under the Child Support Standards Act, and in child custody determinations between parties having equal legal rights respecting a child (typically the parents of a child who are divorced, separated, or otherwise living apart, assuming that neither has been found unfit).

It is also the standard of proof by which the defendant must prove affirmative defenses or mitigating circumstances in civil or criminal court. In civil court, aggravating circumstances also only have to be proven by a preponderance of the evidence, as opposed to beyond reasonable doubt (as in criminal court).

The standard is met if the proposition is more likely to be true than not true. In other words, the standard is satisfied if there is a greater than fifty percent chance that the proposition is true. Lord Denning, in ***Miller v. Minister of Pensions***, described it simply as "more probable than not." Until 1970, it was also the standard used in juvenile court in the United States.

- "Preponderance of the evidence" is also the standard of proof used in United States administrative law.

- **"Beyond a Reasonable Doubt"** (to convict the burden is always on the state) is **not quantifiable, it is qualifiable**

PRIOR COURT INSTRUCTIONS;

- Judge instructions on arriving at conclusion beyond a reasonable doubt
- **"Moral Certainty"** (Commonwealth v. Webster)
- **"Firmly Convinced"** (State v. Portillo)
- **"No Waiver or Vacillation"** (Standard Jury Instructions)
- **"No Real Doubt**" (United States v. Daniels)

Double Jeopardy means you cannot be re-tried in a Criminal Court, you can however be brought into a Civil Court. Retrial in Criminal, not civil court. Double Jeopardy also doesn't apply to Reverse and Remand; still be retried.

ENFORCING THE PRESUMPTION OF INNOCENCE

p. 14

CASE: **Owens v. State** (1992) Appellate Court Maryland

ISSUE: Whether Owens is guilty of DUI if a. driving on a public road b. while intoxicated.

Issue; **Was there enough evidence to convict him on circumstantial evidence?**

Facts:

A man Owens is found in his car in a driveway that is not his home;

- a. was either intoxicated and leaving or was intoxicated and had just arrived there.
- This case was a matter of **legal sufficiency**; issue, PP; Convicted in lower court, now in appeal. Convicted of DUI under belief he had been on the highway immediately before
- Meager evidence but enough; **an open container between legs, 2 more on floor Bud Beer; was asleep with engine running when Trooper arrived**,
- He was parked in someone else's driveway and PD had been called for suspicious activity.
- Was intoxicated on scene; stumbling, incoherent, + AOB + Declined to submit to BAC
- **Doesn't contend drunkenness, only that he was not operating the vehicle while intoxicated.**
- As to whether this was home, or not, it cannot be admitted to evidence because it was not done so in the lower court.

Reasoning

He was either coming or going but the state needs evidence to support; the fact that he was not driving at the time does not mean that facts don't suggest he had been DUI, recently.

- Alcohol containers in car, presentation of the defendant and the report of suspicious vehicle were enough however to convict him of DUI.
- Circumstances are not consistent with any reasonable hypothesis of innocence

RULE:

"A conviction on circumstantial evidence alone is not enough to be sustained unless the circumstances are inconsistent with any reasonable hypothesis of innocence.

Circumstantial Evidence can be used to convict when the relevant facts do not leave an reasonable hypothesis of innocence..

Holding; ***Yes, there is enough evidence to convict him***.

Judgment: **Affirmed**

Key Terms:

Directed Verdict of Acquittal; A directed verdict of acquittal (also called a non-suit) is a **creature of common law**. R. v. Litchfield, 1993 CanLII 44 (SCC). A directed verdict takes its name from the fact, that historically, the trial judge literally directed the jury to return a verdict of not guilty (a procedure which was reformed in 1994 in R. v. Rowbotham, [1994] 2 S.C.R. 463). It is only after the prosecution has formally closed its case that an application for a directed verdict can be brought.

Indictment; *An indictment is issued as a written document informing a person of the charges leveled against them.* Thus, it is a formal written accusation of a crime confirmed by a grand jury and presented to a court for the trial of a defendant. Therefore, an indictment can refer to both the formal charge and to the physical document denoting the charge.

Information; The Trial Information is a **document drafted by the prosecutor of the jurisdiction in which the charges are brought**. The document will be signed by the prosecutor and approved by the judge. The document will list the exact charges, by statute, that are being pursued against the defendant.

Ex Post Facto legislation; An ***ex post facto* law** ('After the fact') is a law that retroactively changes the legal consequences (or status) of actions that were committed, or relationships that existed, before the enactment of the law. In criminal law, it may *criminalize actions that were legal when committed; it may aggravate a crime by bringing it into a more severe category than it was in when it was committed; it may change the punishment prescribed for a crime, as by adding new penalties or extending sentences; or it may alter the rules of evidence* in order to make conviction for a crime likelier than it would have been when the deed was committed.

Conversely, a form of *ex post facto* law commonly called an **amnesty law** may **decriminalize certain acts.** (Alternatively, rather than redefining the relevant acts as non-criminal, it may simply prohibit prosecution; or it may enact that there is to be no punishment but leave the underlying conviction technically unaltered.) A **pardon** has a similar effect, in a specific case instead of a class of cases (though a pardon more often leaves the conviction itself – the finding of guilt – unaltered, and occasionally pardons are refused for this reason). Other legal changes may alleviate possible punishments (for example by replacing the death sentence with lifelong imprisonment) retroactively. Such legal changes are also known by the Latin term ***in mitius***

Burden of Proof

Burden of proof is a legal duty that encompasses two connected but separate ideas that apply for establishing the truth of facts in a trial before tribunals in the United States: the **"burden of production" and the "burden of persuasion."**

In a legal dispute, one party is initially presumed to be correct, while the other side bears the *burden of producing evidence persuasive enough to establish the truth of facts needed to satisfy all the required legal elements of the dispute.* There are varying types of **burden of persuasion commonly referred to as standards of proof, and depending on the type of case, the standard of proof will be higher or lower**.

of persuasion and production may be of different standards for each party, in different phases of litigation. **The burden of production** is a minimal burden to produce at least enough evidence for the **trier of fact** to *consider* a disputed claim. After litigants have met the burden of production, they have the burden of persuasion: that enough evidence has been presented to persuade the trier of fact that their side is correct. There are different *standards* of persuasiveness ranging from a preponderance of the evidence, where there is just enough evidence to tip the balance, to **proof beyond a reasonable doubt**, as in United States criminal courts.

The burden of proof is always on the person who brings a claim in a dispute. It is often associated with the Latin maxim *semper necessitas probandi incumbit ei qui agit*, a translation of which in this context is: **"the necessity of proof always lies with the person who lays charges."**

In civil suits, for example, the plaintiff bears the burden of proof that the defendant's action or inaction caused injury to the Plaintiff, and the Defendant bears the burden of proving an affirmative defense.

The party that does not carry the burden of proof is presumed to be correct until that burden is met, after which the burden shifts to the opposite party. **The burden of proof is on the prosecutor for criminal cases, and the defendant is presumed innocent.**

If the claimant fails to discharge the burden of proof to prove their case, the claim will be dismissed: the defendant will not have a case to answer. If however the claimant does adduce some evidence and discharges the burden of proof so as to prove its own case, it is for the defendant to adduce evidence to counter that evidence of proof of the alleged facts. If after weighing the evidence in respect of any particular allegation of fact, the court decides whether the

(1) the claimant has proved the fact,

(2) the defendant has proved the fact, or

(3) neither party has proved the fact.

Principles of Punishment

p. 31-45

The Insidious Momentum of American Mass Incarceration (Frankin Zimring 2020)

Prison Population Forecaster; tracks projected numbers by policy arrangements

- Big cuts must happen at the State Level, rethinking sentencing for offenders

- No law applies itself
- Effects of racism
- Exaggeration of difference between incarcerated and law abiding

Theories of Punishment

Kent Greenawalt p. 34

- Moral principles that justify imposing punishment
- Without congruence between threat and punishment there is no real deterrence
- **Retributive-** punishment on moral grounds simply **because the guilty deserve it**
- **Utilitarian**- useful purposes the punishment serves "consequentialist" or "instrumentalist"; they have a useful societal purpose.

Greenawalt Punishment Components

1. Performed by/ directed at agents who are responsible in some sense
2. "designedly" harmful or unpleasant consequences
3. Preceded by judgement or condemnation
4. Imposed by one who has authority to do so
5. Breach of an established rule or law
6. Imposed on a violator of that behavior/ rule

Why is the state justified in punishing anyone? "General Justification"

Utilitarian Justifications

- Jeremey Betham- An Introduction to the Principles of Morals and Legislation
- All mankind is governed by pain and pleasure
- The principle of utility; the social value of measuring acts by their happiness or misery; their effect on society
- Greatest good for greatest number, yet all punishment is a form of evil
- Bentham seeing punishment in terms of economics, of happiness produced by action or law weighed against an alternative

Greenwalt p.39

- **GENERAL DETERANCE**, societies general feeling of if crime, then likely punishment will follow
- **INDIVIDUAL DETERRENCE**, fear they will be punished again
- **INCAPACITAITON, RISK MANGEMENT**- placed out of general circulation, death penalty does so permanently. Those with "dangerous disposition" with destructive tendances are taken out of society or prohibited from full liberty.
- **REFORM**- lessen criminality, "be happier more useful people"
- **REHABILITATION**- has been largely unsuccessful in general "Nothing Works"
- *Treatment programs reduce recidivism by 10%*
- *Islam? Other Religions?*
- *Other factors?*

Conclusions form Notes;

1. No evidence suggests increasing the terms of imprisonment yields general deterrent effects!
2. No evidence that specific deterrent effect from prison outweighs non-custodial options
3. A greater police presence does appear to be a deterrent **"perceived risk of apprehension"**
4. **Certainty of imprisonment is more deterrent than the severity of punishment**

ACTUARIAL RISK ASSESSMENT (finite preidentified variables to be used objectively you decide on prisoners' risk upon re-entry to society) vs. CLINICAL (junk science based on feelings/ hunches/ antidotes; whatever an individual clinician deems pertinent)

RETRIBUTIVE JUSTIFICAITONS

- **LEX TALIONIS** "an eye for an eye"
- HOW MUCH/ WHAT TYPE
- Death penalty and crimes punished by like acts
- The guilty must be punished; no other reasons are needed
- That future crime might be prevented is just a "happy surplus"
- **POSTIVE RETRIBUTIVISM**- desert is a necessary and sufficient condition to punish, vs. **NEGATIVE RETIBUTIVISM**- must be proportionate, some elements of social use

Immanuel Kant *says;*

- "It is better that one man should die than all men perish"
- Penal law is **categorical imperative**; (in Kantian ethics) an unconditional moral obligation which is binding in all circumstances and is not dependent on a person's inclination or purpose.
- **If justice and righteousness perish human life will have no value in this world**
- "Last murderer in prison ought be executed before rule of law is voluntarily dissolved"

Terms:

Proportionality of Punishment; the concept of punishment fitting the crime

"Collateral consequences"- all the other terrible effects of a prison bid besides the bid

Double Jeopardy, the legal term *double jeopardy* refers to the constitutional protection against b**eing made to stand trial or face punishment more than once for the same criminal offense.** The double jeopardy clause is present in the Fifth Amendment to the U. S. Constitution, which provides that "No person shall ... be subject for the same offense to be twice put in jeopardy of life or limb."

p. 47-50/ p.53-56

- Herbert Morris; Persons and Punishment

- Propositions; a right to punish, right to be treated as a person, an inalienable absolute right, on which all other rights depend
- Reasonable to those that follow law without assuming burdens by those who don't, a fair distribution of this punishment, it's fair to punish crime
- Mutuality of benefit and burden
- In short it is unfair to the law abiding to be burdened by the actions of the criminals

Jean Hampton- THE RETRIBUTIVE IDEA

p. 50-56

- Asserting moral truth in the face of its denial
- Mastering the wrongdoer who sought to lord over the victim
- Denying "the lordship"; the power a criminal takes over a law-abiding victim

RESTORTIVE JUSTICE; **Restorative justice** is an approach to justice where one of the responses to a crime is to organize a meeting between the victim and the offender, sometimes with representatives of the wider community.

- The goal is for them to share their experience of what happened, to discuss who was harmed by the crime and how, and to create a consensus for what the offender can do to repair the harm from the offense. This may include payment of money given from the offender to the victim, apologies and other amends, and other actions to compensate those affected and to prevent the offender from causing future harm.

A restorative justice program aims to get offenders to take responsibility for their actions, to understand the harm they have caused, to give them an opportunity to redeem themselves, and to discourage them from causing further harm. For victims, its goal is to give them an active role in the process and to reduce feelings of anxiety and powerlessness. Restorative justice is founded on an alternative theory to the traditional methods of justice, which often focus on retribution.

However, restorative justice programs can complement traditional methods, and it has been argued that some cases of restorative justice constitute punishment from the perspectives of some positions on what punishment is.

Academic assessment of restorative justice is positive. Most studies suggest it makes offenders less likely to reoffend. A 2007 study also found that it had a higher rate of victim satisfaction and offender accountability than traditional methods of justice delivery. Its use has seen worldwide growth since the 1990s. Restorative justice inspired and is part of the wider study of restorative practices.

WHO SHOULD BE PUNISHED?

p. 53

Queen v. Dudley

(1884), Queen's Bench, England

Issue. Does the defense of necessity permit the killing of one person to save others?

FACTS:

The Defendants, Thomas Dudley (Mr. Dudley) and Edwin Stephens (Mr. Stephens) (Defendants) and two other gentlemen, Mr. Brooks and the victim, Richard Parker (Mr. Parker), were stranded on a boat for several days. When it appeared that the whole party would likely die of thirst and starvation, the Defendants decided to sacrifice Mr. Parker for the good of the rest.

The defendants, Mr. Brooks and the victim Mr. Parker were English seamen. The group was cast away in a storm on the high seas and was compelled to put into an open boat that had no supply of food or water. After the group had been without food for seven days and without water for five days, the Defendants spoke to Mr. Brooks about sacrificing the victim Mr. Parker to save the rest. Mr. Brooks dissented, and the victim was not consulted. Mr. Dudley suggested that if no vessel was in sight the next morning, they would kill the victim. No vessel appeared the next day, so Mr. Dudley with the assent of Mr. Stephens killed the victim. The three remaining castaways fed upon the victim Mr. Parker for four days at which time a passing vessel rescued them.

Procedural Posture

William Otto Adolph Julius Danckwerts, a barrister and a specialist in wreck inquiries, was briefed for the prosecution but soon realized that **public sentiment and the lack of evidence posed formidable difficulties.** The only witnesses were the three defendants themselves and their right to silence would impede any formal proceedings. A confession was only admissible against the person making it, not his co-defendants and the contents of the depositions were probably inadequate to convict.

When the case was heard by the magistrates on 18 September, Danckwerts told the court that he intended to offer no evidence against Brooks and requested that he be discharged so that he could be called as a witness for the prosecution. There is no evidence that Brooks had been canvassed about this and the magistrates agreed. Danckwerts opened the prosecution case and called as witnesses those who had heard the survivors' stories and Brooks. The magistrates committed Dudley and Stephens for trial at the winter days of assizes in Exeter but extended their bail.

ISSUE: Should they be punished for murder?

HOLDING: YES.

RULE: A person may not sacrifice another person's life to save his own.

REASONING

At the time of this case the doctrine of necessity was still largely unexplored.

Legal background and theory

Morality, ethics, and legality of the taking of another's life to increase one's chance of survival have been discussed in thought experiments from the Plank of Carneades to The Case of the Speluncean Explorers. In a few legal cases across the British jurisdictions the question had arisen.

Much of the prevailing authority at the time spoke of necessity in terms of what is now called self-defense, i.e. taking another's life to safeguard one's own. Lord Bacon provided some authority for the existence of the defense of necessity to lesser crimes. For example, a hungry man is not guilty of larceny for stealing food. However, the Queen's Bench acknowledged that **no court has ever accepted necessity as a defense to murder and for good reason. Permitting such a defense to be asserted raises poignant questions such as how does one measure the comparative values of lives and who decides such things.**

Further, specific to the present case, Lord Coleridge asks, "Was it more necessary to kill [Parker] than one of the grown men?" While this murder was arguably not "devilish" and even though the men probably would not have survived otherwise, Lord Coleridge held that there is never any absolute or unqualified necessity to preserve one's own life. Once such a defense is allowed, there is no telling what atrocious crimes may be justified by the excuse of necessity.

HOLDING. No. Necessity is never a defense to commit murder.

Saint Christopher Case

In the early 17th century, seven Englishmen in the Caribbean embarked on an overnight voyage from Saint Christopher Island but were blown out to sea and lost for 17 days. During this time, starving, they cast lots to see who would sacrifice his own life for the others. The lot fell to the man who had suggested the scheme, and he consented to his subsequent killing. His body sustained the rest until they made their way to Saint Martin. They were returned to Saint Christopher where they were put on trial for homicide. The judge pardoned them, their crime being "washed away" by "inevitable necessity".

This case was cited in the defense. Its first detailed summary in high-brow British publications was in a post-1884 medical work, not in any law reports.

Essex Case

In 1820 the surviving crew of the whaleship Essex consumed the bodies of seven of their shipmates to stay alive; (six died of starvation and exposure except for Owen Coffin who 'lost' the lottery, and was shot and eaten. The captain volunteered to take Coffin's place, but Coffin refused, saying it was his 'right' to do so that the others might live.)

U.S. v. Holmes

In 1841, the U.S. ship *William Brown* sank after hitting an iceberg. Crewmen, including Holmes, **believed that their overloaded lifeboat was in danger of itself sinking and put 14 or 16 passengers overboard far offshore in the frigid water.** On his return to Philadelphia, Holmes was *arrested and charged with murder.* The grand jury rejected the indictment and substituted manslaughter. The judge in the United States District Court for the Eastern District of Pennsylvania instructed the jury **that necessity might be a complete defense but that "before the protection of the law of necessity can be invoked, a case of necessity must exist, the slayer must be faultless, he must owe no duty to the victim."** The jury convicted Holmes and the principle of necessity was not tested by any higher court. **He was sentenced to six months and a $20 fine.**

The defense also cited this case.

James Archer & the Euxine

On 9 August 1874, the collier *Euxine* was lost, and its second mate James Archer took charge of one of the lifeboats with seven other survivors. Archer and four survivors were picked up on the 31st, and Archer was candid that he and August Muller had killed and butchered Francis Shufus, by all drawing lots. They were ultimately landed at Batavia Road where the acting British consul William J. Fraser took their surprisingly honest depositions.

The men were then shipped to Singapore, with Fraser's depositions, to shipping master Henry Ellis, a character fictionalized in Joseph Conrad's novella *The Shadow Line*. Ellis consulted Attorney General of Singapore Thomas Braddell but then wrote to the Board of Trade in London that no further action was necessary, and the men were free to find another ship to serve. Singapore Governor Sir Andrew Clarke had ordered the men arrested and when he informed the Colonial Office, they insisted that he hold a judicial enquiry. Prosecution was started in Singapore but **ultimately dropped after extended procedural wrangles as to whether Singapore or England was the most appropriate jurisdiction.**

Thur. Aug. 25

Legality & Introduction to Statutory Interpretation.

This class will introduce the principles of legality. The cases for today, like most of the cases in the course throughout the semester, teach principles of statutory interpretation.

- Dressler: 95-117; review 53-56. NYPL §§ 5.00; 5.05.

p. 95-117

The Requirement of Previously Defined Conduct

PRINCIPLES OF LEGALITY

"No crime without law, no punishment without law"

- Acts previously defined as criminal
- **The Principle of Legality** is the first principle of American Criminal Law

1. Criminal Statues need to be **understandable to common people (sufficient definiteness) (not overly broad) (notice must be given)**

2. Crafted to **not delegate basic policy matters to policemen, judges, juries on an ad hoc subjective basis.**

3. Judicial interpretation of ambiguous statues should be "biased in favor of the accused"; **LENITY DOCTRINE**

- If a statute is ambiguous then courts should read it in a way that benefits the defendant.

Commonwealth v. Mochan

Superior Court of Pennsylvania, 1955,

177 Pa. Super. 454

Justice Woodside **PP**; Convicted in lower court appealed to Superior Court

ISSUE: "Is the conduct charged in indictments (indecency) which is not a criminal offense in any statute a misdemeanor under common law?"

FACTS

- ★ Mochan made repeated lewd phone calls to Ms. Louise Zivkovich a married woman of alleged good morale repute.
- ★ His calls at all hours were soliciting sex, sodomy, and generally lewd in their content.
- ★ Her family brought charges

RULE "Acts injuriously affecting public morality may be tried under Common Law"

REASONING

1. **Cites; Commonwealth v. Miller; p.96, "the common law is sufficiently broad to punish as a misdemeanor, without exact precedent...injuriously affects public morality"**
2. **Cites Commonwealth v. DeGrange; p.96, "Whatever openly outrages decency and is injurious to public morals is a misdemeanor under common law.**
3. **Cites Updegraph v. Commonwealth; p. 97; "Christianity is part of common law and whatever vilifies Christian religion is an indictable offense."**

It is not indictable to try and persuade married women to commit adultery Smith v. Commonwealth; lewdness, suggestion of sodomy take this out of Smith case and into the area of "acts injuriously affecting public morality" Other people (operator and family may have heard these lewd words)

HOLDRING: Yes, a person can be tried under common law when they have committed acts injurious to public morality.

DISPO: Affirmed

NOTES

Dissent; (Justice Woodside); you cannot declare such a broad definition with no specific precedent a crime; anything "potentially injurious to public morals"

- What did this person do as a crime under an enacted law?
- Did the court invade the Legislative province?
- SEE; **THE MYTH OF COMMON LAW CRIMES**;
- **Later, no court could create new types of crime**

A **writ of prohibition** is a writ directing a subordinate to stop doing something the law prohibits. This writ is often issued by a superior court to the lower court directing it not to proceed with a case which does not fall under its jurisdiction.

Writs of prohibition can be subdivided into "alternative writs" and "peremptory writs". An alternative writ directs the recipient to immediately act, or desist, and "show cause" why the directive should not be made permanent. A peremptory writ directs the recipient to immediately act, or desist, and "return" the writ, with certification of its compliance, within a certain time.

When an agency of an official body is the target of the writ of prohibition, the writ is directed to the official body over which the court has direct jurisdiction, ordering the official body to cause the agency to desist. Although the rest of this article speaks to judicial processes, a writ of prohibition may be directed by any court of record (i.e., higher than a misdemeanor court) toward any official body, whether a court or a county, city or town government, that is within the court's jurisdiction.

ARGUENDO

Arguendo is a Latin legal term meaning *for the sake of argument*. "Assuming, *arguendo*, that ..." and similar phrases are used in courtroom settings and academic legal settings, and occasionally in other domains, to designate provisional and unendorsed assumptions that will be made at the beginning of an argument in order to explore their implications. The origin of the word *Arguendo* is based on the Latin word *arguendum* which means "to argue".

Notes 8/25/22

- **After many years of unrest in England in 1166 Henry II created a court system**
- **Importance of Statutes in Criminal Law**
- **Legality- "NO CRIME WITHOUT A LAW"**
- **Violate Due Process**

a. **May not be vague (sufficient definiteness)**
b. **Many not be overboard**

NOTES

"Murder is the unlawful killing of a human being, with malice aforethought."

*** Include the statutes being interpreted in the briefs ***

Keeler v. Superior Court

1970, 2 Cal. 3d 619

POSTURE

Justice Mosk, proceeding for a writ of prohibition in Superior Court of California,

ISSUE; Is an unborn fetus a "human being" within the meaning of the California Statute defining murder?

FACTS

- ★ Teresa Keeler obtained a divorce Sept. 27, 1968, after 16 years of marriage
- ★ She was pregnant with child of Ernest Vogt, new boyfriend
- ★ The ex-husband blocked a road with his car then beat her unconscious
- ★ Resulting in death of the fetus
- ★ Cause of death of fetus was skull fracture
- ★ Charged with murder of Baby Girl VOGT

REASONING

Murder under Penal Code 187; "Murder is the unlawful killing of a human being, with malice aforethought"

- Common Law of Abortive Homicide

- an infant could not be the subject of a homicide UNLESS IT WAS BORN ALIVE, 1850, Blackstone/Hale, 1872 Penal Code did not change this ruling

HOWEVER

- A normally developed fetus prematurely born at 28 weeks today has an excellent chance of survival
- One who "unlawfully and maliciously terminates" such life is liable for prosecution for murder?
- We cannot enlarge a statue, or add words or meanings
- Penal Statues will not be made to reach beyond their plain intent
- **Cites US Justice Marshall in US v. Wiltberger (1820); "Dangerous to punish what is within just the provisions not the actual statute"**
- **Second issue is one of Due Proces; cites Connally v. General Construction Co.; (1926) p. 103; "sufficiently explicit to inform those who are subject to the penalties of the statute...fair play and settled rules of law"**
- **Lanzetta v. NJ (1939); no one should be speculating what are the meaning of the penal statutes.**
- **Prohibition of Ex Post Facto Laws**
- **Cannot retroactively apply a new interpretation of penal law 187**
- **Bouie v. City of Columbia (1964) enlarging a statute to punish is prohibited by Supreme Court Decision**
- **There are no common law crimes in California**

TWO ISSUES

- **Separation of Powers-** no judicial enlargement of powers, laws letter and intent emanates from Congress.
- **Due Process-** Defendant must be on notice (14th Amendment)

RULE **The "unforeseeable judicial enlargement of a criminal statute" is a violation of due process.**

HOLDING; **No, defendant cannot be charged with murder.** Unborn fetuses are excluded from the reach of homicide under Section 187 of the Penal Code considering the Common Law rulings, or those of sister states a child must be born alive for homicide to be considered.

DISPO

Reversed

NOTES

Dissent

Burke, "A baby in 35th week of pregnancy had a 96% chance of survival until mother was assaulted."

- **Why under modern medical advances is this unborn child not considered a human being under California Law?**
- **After this case the California Legislature amended the penal code to include killing of a fetus under 187**
- **Concept of Desuetude; laws that are no longer enforced are rendered lapsed from lack of public support to enforce them; such a Adultery laws.**

SEE

Principle of Analogy in Sino-Soviet Criminal Law

THE VALUES OF STATUTORY CLARITY

- People must be informed what the laws are (on notice) but this is mostly a theoretical area, on notice being capable of having looked up the statute.
- **"Statute is void for indefiniteness"- Winters v. New York (1948)**
- **"A Vague Law is no law at all"- US v. Davis (2019)**
- **LENITY DOCTRINE;** if confusion ultimately arises in interpretation of the statute, it should be interpreted in a way that is lenient on the defendant.

In RE Banks

Supreme Court of North Carolina, (1978), 295 N.C. 236, 244 S.E.2d 386

PROCEDURAL

Moore, Justice. Convicted in the lower court/ the trial court ruled the statute was unconstitutional.

ISSUE

Is the Peeping Tom Statute unconstitutional? How definite must the wording of a statute be?

FACTS

- ★ Statute G.S. 14-202 "Secretly peeping into room occupied by female person" allows for fines and imprisonment if any person is seen secretly peeping into any room with a female in it."
- ★ Banks was arrested for peeping

REASONING

- Intent of legislature/ end to be accomplished
- State of the issue pre-law (statute in context/ policy goals)
- Remedy
- **PARI MATERIA**
- DUE PROCESS CHALLENEGES BASED ON

(1) Vagueness/ Definiteness

"A criminal statue must be sufficiently

definite to give notice...and to guide..."

- Can a vague state be saved?

(2) Overbreadth

- **Court had previously defined "SECRETLY" (this is what saved it from being found unconstitutional)**

- ✓ **Cites Connally v. General Construction Co. (1926)- statute is "unconstitutionally vague when men of common intelligence must necessarily guess at its meaning and differ as to its application" also "definiteness is an essential element of due process"**
- ✓ **Cites Boyce Motor Lines v. US (1952)**- a criminal statute must be **sufficiently definite to give notice of the required conduct** to one who would avoid its penalties"
- ✓ **Cites Wainwright v. Stone (1973)** crimes against nature statute **challenged on vagueness-statutes being challenged with impermissible vagueness** must be made in light of previous constructions of law on the same subject.
- ✓ **Cites State v. Banks (1965) and State v. Bivins (1964) of similar content "Peeping Toms" In Banks; spying with intention of invading privacy**

Cites Lemon v. State of Georgia (1975); court holds that law is sufficiently narrow.

- **Defendant Cites Kahalley v. State; Alabama ruled on same subjects' vagueness but lacked the word "secretly" also cites "overbreadth" too broad**

RULE

A statute must be sufficiently definite and narrow in its prescriptions.

HOLDING

The law is sufficiently definite to give an individual fair notice of the conduct prohibited; statute neither violates state constitution nor Due Process clause of Federal Constitution.

DISPO*AFFIRMED*

NOTES

Void-for-Vagueness Doctrine; must have sufficient definiteness that ordinary people can understand what conduct is prohibited (Kolender v. Lawson)Has rarely worked as a defense

Notes Tues. Aug. 23rd

Actus Reus: Acts and Omissions.

After discussing statutory interpretation, we consider this new section that introduces actus reus, which is an important component of every criminal law statute. Thus, many of these principles will be used throughout the course as we interpret statues from the cases. - Dressler: 125-37; 140-45 (notes 3-11); 146-52. NY Penal Law §§ 15.00, 15.10.

WHETHER BROAD LEGAL ISSUE, WHERE LEGALLY RELEVENT FACTS

LAW BECAUSE FACTS!

p.125-37;

p.125

MUSCARELLO v. US (1998)

Frank J. Muscarello v. United States; Donald E. Cleveland and Enrique Gray-Santana v. United States	
Citations	524 U.S. 125 (*more*) 118 S.Ct. 1911; 141 L. Ed. 2d 111; 1998 U.S. LEXIS 3879

Firearms Penalties, 18 U.S.C. § 924(c)(1)

Purpose: This case teaches me the INTERPRETATION OF "CARRYING" within the Federal rules for **mandatory sentencing in relation to combined drug/firearm offences.**

Issue: Whether a particular statute with the phrase **"carries a firearm"** should be interpreted to limit carrying a firearm (only on one's person) or (interpreted more broadly to include carrying a firearm in a vehicle) where (D) F. Muscarello was arrested selling marijuana with a pistol in his truck.

Procedural History: (D) convicted in lower court. Appealed judgment of conviction 5th Circuit, case now in S.C., Justice Breyer delivering opinion of majority.

Facts: (p. 125)

- A gun was seized during a drug-related arrest but **wasn't on the person** of Frank J. Muscarello, the petitioner/defendant
- The federal criminal code has a provision dealing with firearms that **imposes a five-year mandatory prison term on a person who "uses or carries a firearm" both during and in relation to a drug-related crime.**
- Frank J. Muscarello, the petitioner, **was arrested for selling marijuana**; at the time of his arrest Muscarello had a **handgun in the locked glove compartment of the truck** in which he was transporting the marijuana.
- Muscarello's case was consolidated with another case with similar facts except in the other case the firearms in question were in the **trunk of the car** belonging to the other defendants'.
- Muscarello and the other defendants all argued that possessing firearms in a glove compartment or the trunk of a car **fell outside of the scope of the mandatory sentencing statute which** states carrying a firearm "during and in relation" to a "drug trafficking crime" has a mandatory 5-year prison term.

Rule of Law: (p.127-129) An act amounts to **carrying** when it is proximal and generally accessible to use, not necessarily on the person of the accused. "use" is not construed with display or barter" (**Bailey v. U.S.)(1995).**

The Supreme Court previously ruled instead that "use" means "active employment" of a firearm, and sent the cases back to the lower court for further proceedings. As a result of the Court's decision in *Bailey*, Congress amended the statute to expressly include **possession** of a firearm as

Reasoning: (p. 128-119) **Here, the court found** that **(D)'s** combined acts of having a firearm in a glove compartment while selling marijuana is well within the court's interpretation of the seriousness of combining the sale of drugs with firearms. Based upon the Bailey interpretation and Congresses revision of the statute:

- **The court found that that …**

After a lengthy discussion of the linguistics and ordinary meanings of the phrase "carries a firearm." A Linguistic history of carrying; in several dictionaries, the bible, popular media, Lexus Nexus, usages cited p.126

- Establishing no limit to the word "CARRY"
- (Section B); p. 127- will not **circumscribe the scope** of a word in legislative history or intent of the statute; "the dangerous combination of drugs and guns"
- Some strange arguments about **dangerousness is the same between gun on person and gun in car.**
- (Section C); refutes the "transport" linkage phrase; carry v. transport
- Cites **BAILEY v. US**; "use of firearm is active employment of firearm only" "uses or carries previous ruling"
- There are many classifications of listed firearm which cannot be carried directly on a person. P.129

- **Carry DOES NOT MEAN "immediately accessible"**
- To make this analysis the Court looked to the legislative history of the statute where they found that the congressional intent was to deter criminals to leave their guns at home instead of using them during the commission of a drug felony.

Holding: (p. 129) Therefore, the court held that the phrase "carries a firearm" in the mandatory sentencing provision of the firearms chapter of the Federal Criminal Code, 18 U.S.C. § 924(c)(1), **will be broadly interpreted to encompass not only when a suspect is carrying a firearm on his person but also when the firearm is in either the trunk or locked glove compartment** of the vehicle the suspect is driving.

Dissent/Concurrence: Ginsburg; Mocks the linguistics lesson, sees multiple uses of carrying in bible/ literature; court sharply divided in doubt

Comments – none

Bailey 1995 set precedent that "use"/ "active employment" is NOT the same as "possession", so they later changed the law; to be "**use or carrying**".

p. 133

ACTUS REUS

- Sometimes called the external element or the objective element of a crime, is the Law Latin term for the "guilty act" which, when proved beyond a reasonable doubt in combination with the ***mens rea*** **("guilty mind"),** produces criminal liability in the common law–based criminal law jurisdictions.
- In the United States, some crimes also require proof of **attendant circumstances** and/or proof of a required result directly caused by the ***actus reus*.**

CONDUCT OR THE RESULT OF IT' COMPREHENSIVE NOTION OF ACT, HARM, AND ITS CONNECTING LINK; **CAUSATION**; with actus expressing the voluntary physical motion, AND reus- **expressing the fact that this conduct results in proscribed harm**. P. 133, Eser

CONDUCT + HARM RESULT

MENS REA

- In criminal law, ***mens rea*** (Law Latin for "**guilty mind**" is the mental element of a person's intention to commit a crime; or knowledge that one's action (or lack of action) would cause a crime to be committed. It is considered a necessary element of many crimes.

The standard common law test of criminal liability is expressed in the Latin phrase *actus reus non facit reum nisi mens sit rea*, i.e. **"the act is not culpable unless the mind is guilty"**. As a general rule, someone who acted without mental fault is not liable in criminal law. Exceptions are known as strict liability crimes.

Moreover, when a person intends a harm, but as a result of bad aim or other cause the intent is transferred from an intended victim to an unintended victim, the case is considered to be a matter of transferred intent.

The types of mental states that apply to crimes vary depending on whether a jurisdiction follows criminal law under the common law tradition or, within the United States, according to the Model Penal Code.

In civil law, it is usually not necessary to prove a subjective mental element to establish liability for breach of contract or tort, for example. But if a tort is intentionally committed or a contract is intentionally breached, such intent may increase the scope of liability and the damages payable to the plaintiff.

In some jurisdictions, the terms *mens rea* and *actus reus* have been replaced by alternative terminology.

VOLUNTARY ACT

Martin v. State (1944)

PROCEDURAL HISTORY

ISSUE

FACTS

- Martin (defendant) was arrested at his home by police officers and placed in a police vehicle where he was separately charged for being drunk and using loud and profane language on a public highway.
- Martin was convicted under a state statute which held that any person who, while intoxicated or drunk, appeared in "any public place where one or more persons are present, and manifests a drunken condition by boisterous or indecent conduct, or loud and profane discourse, shall, on conviction, be fined."
- Martin appealed.

HOLDING

DISPO

- FOUND THAT HE HAD NOT ENGAGED IN A "VOLUNTARY ACT" WHICH IS ESSENTIAL REQUIREMENT OF THE CRIMINAL STATUE
- **Reversed and Rendered**

- References to P300 Studies and Chicago Policing Algorithms for people likely to engage in handgun violence. P. 135
- S.C. does not punish for mere status, for BEING A DRUG ADDICT

STATE v. UTTER (1971)

- Stabbing murder second degree/ stabbed and killed his son.
- Utter was highly intoxicated and had PTSD from war
- Evidence insufficient to prove what had happened
- **An act committed while one is unconscious is in reality no act at all, it's a physical event,**
- **AUTOMATISM.**
- **Not in this case (ruled very drunk)**

Where, at the time of the killing, the slayer was clearly unconscious thereof, such unconsciousness will constitute a defense, as in the case of a homicide committed by one in a state of somnambulism, or while delirious from disease.

140-45 (notes 3-11); 146-52

-VOLUNTARY vs. MENS REA-

For conduct to constitute an *actus reus*, it must be engaged in voluntarily. Few sources enumerate the entirety of what constitutes voluntary and involuntary conduct. Oliver Wendell Holmes, in his 1881 book *The Common Law*, disputed whether such a thing as an involuntary act exists: "[a] spasm is not an act. The contraction of the muscles must be willed." A few sources, such as the Model Penal Code, provide a more thorough treatment of involuntary conduct:

- **a reflex or convulsion;**
- **a bodily movement during unconsciousness or sleep;**
- **conduct during hypnosis or resulting from hypnotic suggestion;**
- **a bodily movement that otherwise is not a product of the effort or the determination of the actor, either conscious or habitual.**

INVOLUNTARY ACTS:

IS THERE/ IS THERE NOT ABILITY TO CONCEAVE OF A GULTY MOTIVE

p.142

People v. Robert Nelson (2013)

PP: Convicted, reversed in appeals

ISSUE: Does a person with a medical condition (Tourette's) have culpability if they involuntarily engage in offensive speech/ behaviors?

FACTS

- A 37 y/o calling 84-year-old woman yelling obscenities, with an underlying mental condition;
- He had been diagnosed with both OCD and Tourette's
- Did not have an actual intent to harass or offend her
- He did not have control of his actions or words

p.142

People v. Decina (1956)

Had a seizure while driving and killed four children with his car

- Convicted of operating a vehicle in a **"reckless or culpably negligent manner" causing the death of a person**

Reflex or Convulsion

- Generally, if, during an uncontrollable flailing caused by a sudden paroxysmal episode, such as that produced by an epileptic seizure, a person strikes another, that person will not be criminally liable for the injuries sustained by the other person.

However, **if prior to the assault on another, the seized individual was engaging in conduct that he knew to be dangerous given a previous history of seizures, then he is culpable for any injuries resulting from the seizur**e. For example, in *People v. Decina*, 2 N.Y.2d 133 (1956), the defendant, Emil Decina, appealed a conviction under § 1053-a of the New York Penal Law.

- On March 14, 1955, Decina had a serious seizure while operating a motor vehicle. He **swerved wildly through the streets and struck a group of schoolgirls,** killing four of them.
- On direct examination, Decina's physician testified that Decina informed him that prior to the accident "he noticed a jerking of his right hand" and recounted his extensive history of seizures, a consequence of brain damage from an automobile accident at age seven.
- Decina argued that he had not engaged in criminal conduct because he did not voluntarily strike the schoolgirls.
- The **New York Court of Appeals disagreed** and held that since the defendant knew he was susceptible to a seizure at any time without warning and decided to operate a motor vehicle on a public highway anyway, he was guilty of the offense. "To hold otherwise," wrote Froessel, J, **"would be to say that a man may freely indulge himself in liquor in the same hope that it will not affect his driving, and if it later develops that ensuing intoxication causes dangerous and reckless driving resulting in death, his unconsciousness or involuntariness at that time would relieve him from prosecution[.]**"
-

Unconsciousness or Sleep

In *Hill v Baxter*, Kilmuir, LC, articulated the necessity of eliminating automatism, defined as **"the existence in any person of behavior of which he is unaware and over which he has no conscious control," in proving the voluntariness of the *actus reus*:**

- Normally the presumption of mental capacity is sufficient to prove that he acted consciously and voluntarily, and the prosecution need go no further. But, if after considering evidence properly left them by the judge, the jury are left in real doubt whether or not the accused acted in a state of automatism...they should acquit because the necessary mens rea—if indeed the actus reus—has not been proved beyond a reasonable doubt.

Thus, a person with **somnambulism, a fugue, a metabolic disorder, epilepsy, or other convulsive or reflexive disorder**, who kills another, steals another's property, or engages in other facially criminal conduct, may not have committed an *actus reus*, for such conduct may have been elicited unconsciously, and "one who engages in what would otherwise be criminal conduct is not guilty of a crime if he does so in a state of unconsciousness[.]"

- Depending on jurisdiction, automatism may be a defense distinct from insanity or a species of it.

Hypnosis

- While the general scientific consensus is that hypnosis cannot induce individuals to engage in conduct in which they would not otherwise engage, the Model Penal Code, as well as the criminal codes of Montana, New York, and Kentucky do provide hypnosis and hypnotic suggestion as negating volition, and consequently, *actus reus*.

Perhaps the earliest case of hypnotism as negating voluntary conduct is *California v. Ebanks*, 49 P 1049 (Cal. 1897). In *Ebanks*, the court categorically rejected Ebanks' argument that the trial court committed reversible err in denying him leave to present expert testimony concerning the effects of hypnotism on the will.

- The lower court bluntly remarked that "[t]he law of the United States does not recognize hypnotism. It would be an illegal defense, and I cannot admit it."
- Nearly sixty years later, however, the California Court of Appeals ruled that the trial court did not err in allowing expert testimony on hypnosis, though it did not rule on whether hypnotism negates volition.
- The Supreme Court of Canada ruled confessions made under hypnosis inadmissible because they are involuntarily given; Germany and Denmark provide a hypnotist defense.

Omission

Voluntariness includes omission, for implicit in omission is that the actor voluntarily chose to not perform a *bodily movement* and, consequently, caused an injury. The purposeful, reckless, or negligent absence of an action is considered a voluntary action and fulfills the voluntary requirement of *actus reus*.

OMISSIONS

p.146

People v. Beardsley (1907)

PROCEDURAL POSTURE

Beardsley was tried for manslaughter for failure in his duty to act to provide reasonable care to Burns. The prosecutor argued that Beardsley at the time was Burns' natural guardian and had a clear duty to protect her.

ISSUE

People v. Beardsley **150 Mich. 206, 113 N.W. 1128** (1907) is a well-known case that illustrates the **parameters around the legal necessity of a duty to act,** and the criminal liability of failure to act when there is an obligation to provide reasonable assistance.

- Was boozing with a lady friend who took pills, drank and died
- Was he liable for her wellbeing
- Omission to take care of her when she was ill/ "owed a duty he failed to perform"

FACTS

- ★ Carroll Beardsley, his wife being out of town, invited a woman, Blanche Burns, to spend the weekend with him in his living quarters.
- ★ He had an ongoing relationship with Burns and had met with her previously.
- ★ During this time together, the two of them drank steadily.
- ★ Without Beardsley's knowledge, Burns obtained some morphine tablets.
- ★ Beardsley walked in while she was taking the morphine tablets. He slapped the box containing the tablets out of her hand and crushed several on the floor with his foot. Burns picked up and swallowed two of the tablets.
- ★ Near the time of the expected return of his wife, Beardsley asked a friend to help him carry her to a room of a friend in the basement of Beardsley's house, even though she was in a stupor, and asked the friend to watch out for her and let her out the back way when she was ready, as he was too intoxicated to be of help. Burns died a few hours later.

The defense argued that no such legal duty is created by a moral obligation. None of the categories of legal duty fit the case. The fact that Burns was a woman does not create that same legal duty as a husband has toward a wife or a parent to a child, as the prosecutor sought to infer. Nevertheless, **Beardsley was convicted of manslaughter.**

- Beardsley appealed his conviction to the Supreme Court of Michigan and his conviction was **reversed.** The court found it "repugnant to our moral sense" that a duty would be created because Burns was a woman, as no such moral or legal duty would be implied if she had been a man.

- **Had this been a case where two men under like circumstances had voluntarily gone on a debauch together and one had attempted suicide**, no one would claim that this doctrine of legal duty could be invoked to hold the other criminally responsible for omitting to make effort to rescue his companion.
- — *Supreme Court of Michigan*

REASONING

DUTY: May Arise Where...

TEST- Five Situations where there is a duty/ (Criminal liability)

1. A **STATUTE** IMPOSES DUTY
2. ONE STANDS IN A CERTAIN **STATUS REALTIONSHIP** TO ANTHER (eligible/ obligated)
3. ONE HAS **ASSUMED A CONTRATUAL DUTY** to care for another
4. ONE has **VOLUNTARILY ASSUMED** THE CARE OF ANOTHER AND **SO SECLUDED** THE helpless person as to prevent OTHERS from RENDERING AID;
5. Where one **CREATES A RISK OF HARM** to another.

NOTES: Why don't we generally punish omissions? Ambiguity, risk, likelihood of the public fucking it up

JONES v. US (1962)

Jones v. United States, 463 U.S. 354 (1983), is a United States Supreme Court case in which the court;

Purpose: This case teaches me the **DUE PROCESS REQUIREMENT** of 14 the Amendment applies to those confined to mental intuitions.

Issue: Whether Jones (defendant) can be **found not guilty by reason of insanity (NGRI) of a misdemeanor crime,** to be **involuntarily confined to a mental institution** until such times as they are no longer a danger to themselves or others with few other criteria or procedures limiting the actions of the state.

Procedural History: (p. 149) **(D)** convicted in lower court, pled guilty by reason of insanity and hospitalized for a period of 1 year. The case was appealed to the District of Columbia Court of Appeals, which affirmed the lower court's decision, although three judges dissented. The case was then appealed to the Supreme Court, dealing with the issue for first time.

Facts:

-MATERIAL FACTS ONLY-

- On September 19, 1975, Michael Jones was charged with petit larceny, a misdemeanor, for attempting to steal a jacket from a Washington, D.C. department store.

- Upon arraignment in the District of Columbia Superior Court, the judge ordered a competency evaluation at St. Elizabeth's Hospital.
- The competency report to the court was that Jones **suffered from paranoid schizophrenia,** but that he was competent to proceed to trial.
- Eventually, Jones **plead not guilty by reason of insanity** to the misdemeanor offense, which carried a one-year maximum sentence; the prosecution did not contest the plea and Jones was automatically committed to St. Elizabeth's for a minimum of 50 days.
- Upon his first release hearing in May 1976, his request for release was denied. In his second release hearing held in February 1977, his request for either release or civil commitment was also denied, despite the contention of Jones' counsel that his cumulative hospitalization exceeded the maximum penalty of a one-year incarceration for the crime.
- For the government's case, a psychologist from St. Elizabeth's Hospital testified that, in the opinion of the hospital's staff, Jones **continued to actively suffer from paranoid schizophrenia and therefore remained a danger to himself and others.**

Rule of Law: (p.**X**) An act amounts to **X X X** when it is **X X X**

Ex: "so near to the result that the danger of success is very great–there must be dangerous proximity to success" (x v. U.S).

An act constituting **X X X** must

Ex: "come very near to the accomplishment of the crime." (x v. U.S).

Reasoning: (p. **776**) **Here, the court found** that **(D)** acts **did/did not**

Ex.

"come dangerously near to the taking of Rao's property (robbery) because the defendants had not found or seen Rao, the man they intended to rob, and no person with a payroll was at any of the places where they had stopped.

The court found that that …

Ex.

"there was not a reasonable likelihood of the robbery's success but for the interference because when the defendants were arrested, Rao had still not been found; the defendants were still looking for him, so no attempt to rob him could be made "at least until he came into sight."

Holding: (p. 149) **Therefore, the court held that** (D) can be held for treatment indefinitely without violating is 14th amendment rights.

BECAUSE

- A verdict of not guilty by reason of insanity is sufficiently probative of mental illness and dangerousness to justify commitment of the acquittee for the purposes of treatment and the protection of society.

- Such a verdict establishes that the defendant committed an act constituting a criminal offense, and that he committed the act because of mental illness. Indefinite commitment of an insanity acquitted, based on proof of insanity

Judgment: Judgment of conviction of (D) reversed/

Or and new trial granted.

Dissent/Concurrence: None.

Comments – (e.g.) What is the rule to take away from this case? If they had found Rao, would that have satisfied the dangerous proximity test? Is this the rule New York still uses, even though the case is so old (1927)? (And anything else you wondered as you read the case! There are no wrong questions!

Reasoning

The Supreme Court examined two issues. The first was **whether there was a constitutional basis for the practice in most states, and the District of Columbia, of automatically committing insanity acquitees.**

The court found that there was. Justice Powell, writing for the court, said that Jones' verdict established that he committed the crime and that he did so because he was mentally ill by a preponderance of evidence. "Congress has determined that a criminal defendant found not guilty by reason of insanity in the District of Columbia should be committed indefinitely to a mental institution for treatment and the protection of society."

The second issue was the **proportionality of the commitment compared to Jones' hypothetical maximum sentence had he been imprisoned;** that is, does the maximum sentence provide a constitutional limit for Jones' commitment? Although three judges at the District Court level had agreed that the constitution does provide such a limit, the Supreme Court rejected this line of thinking. Writing for the majority, Powell argued that different considerations go into the choosing of a sentence than those underlying a commitment of an insanity acquittee. He argued against the idea that indefinite commitment amounted to punishment.

Indefinite commitment of an insanity acquittee, based on proof of insanity by only a preponderance of the evidence, comports with due process.

Addington v. Texas (1979) held that the government, in a civil commitment proceeding, must demonstrate by clear and convincing evidence that the individual is mentally ill and dangerous. However, the concerns critical to that decision—based on the risk of error that a person might be committed for mere "idiosyncratic behavior"—are diminished or absent in the case of insanity acquitees, and do not require the same standard of proof in both cases. Proof that the acquittee committed a criminal act as a result of mental illness eliminates the risk that he is being committed for mere idiosyncratic behavior.\

Historically, those persons acquitted of a crime by reason of insanity (insanity acquittees) were subjected to commitment procedures to institutions for the "criminally insane" with little

attention or oversight provided as to what these procedures were. In the early 1970s, the procedures began to be examined legally on constitutional as well as therapeutic grounds.

At that time, U.S. state jurisdictions had varying criteria and procedures governing this situation. In some states, insanity acquittees were governed by the same rules and procedures as an individual facing civil commitment. Another group of states, although treating insanity acquittees in a generally similar fashion as the civilly committed, had more stringent criteria governing insanity acquittees; for example, in emergency commitment proceedings in which a civilly committed person may be committed for a maximum of one week, an insanity acquittee may be committed on an emergency basis for 90 days—and then the discharge would take place only after judicial approval. A third group subjected an insanity acquittee to automatic, indefinite commitment, usually with periodic reviews to determine if commitment continued to be necessary.

Pp. 150-151

- Why are there so few states with "Bad Samaritan Laws"?

1. **NON-DOINGS ARE MORE AMBUGUOUS THAN WRONG DOINGS**
2. **LINE-DRAWING PROBLEMS**
3. **BYSTANDERS CAN MAKE THINGS WORSE**
4. **ISSUE OF FREEDOM- duties that compel action**

MISPRISION- concealing a Felony/ not reporting a felony is a crime

NY Penal Law §§ 15.00, 15.10.

§ 15.10

Requirements for criminal liability in general and for offenses of strict liability and mental culpability.

The minimal requirement for criminal liability is the performance by a person of conduct which includes **a voluntary act or the omission to perform an act which he is physically capable of performing.**

If such conduct is all that is required for commission of a particular offense, or if an offense or some material element thereof does not require a culpable mental state on the part of the actor, such offense is one of "strict liability."

If a culpable mental state on the part of the actor is required with respect to every material element of an offense, such offense is one of "mental culpability."

The following definitions are applicable to this chapter:

1. "Act" means a bodily movement.

2. "Voluntary act" means a bodily movement performed consciously as a result of effort or determination and includes the possession of property if the actor was aware of his physical possession or control thereof for a sufficient period to have been able to terminate it.

3. "Omission" means a failure to perform an act as to which a duty of performance is imposed by law.

4. "Conduct" means an act or omission and its accompanying mental state.

5. "To act" means either to perform an act or to omit to perform an act.

6. "Culpable mental state" means "intentionally" or "knowingly" or "recklessly" or with "criminal negligence," as these terms are defined in section 15.05.

NY Penal Law § 15.10.

§15.10 **Requirements for criminal liability in general and for offenses of strict liability and mental culpability.** The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing. If such conduct is all that is required for commission of a particular offense, or if an offense or some material element thereof does not require a culpable mental state on the part of the actor, such offense is one of "strict liability." If a culpable mental state on the part of the actor is required with respect to every material element of an offense, such offense is one of "mental culpability."

DISTINGUISHING ACTS FROM OMISSIONS

p. 152

Barber v. Superior Court *1983)

PP- Magistrate dismissed, Superior Court ordered reinstatement; Drs filed a writ of prohibition in LA judicial district

Parties

Petitioners; Dr. Nejdl and Dr. Barber

Deceased; Clarence Herbert

ISSUE

Whether there was a voluntary act or a duty?

1. **Is withholding life support an omission or an act?**
2. **If an omission, what duties does a physician owe to a patient in a comatose state from which meaningful recovery of a brain function unlikely?**

- *Court balances burden and benefits*

ALSO: Whether the petitioners should be charged with murder?

- **Acts v. Duty**
- **'An omission' deals with A DUTY**
- **Did they have a duty to keep providing life sustaining treatment?**

FACTS

- Clarence Herbert died after an ileostomy surgery performed by Dr. Nejdl surgeon and Dr. Barber attending internist
- ROSC post arrest vegetative state
- Communicated to family a poor prognosis for recovery
- family elected for MOLST/DNR
- Subsquanetly taken off life support and died
- 2 doctors later charged with murder, conspiracy to commit murder

Physicians' responsibility in cases of indefinite vegetative existence of their patient.

HOLDING: NO

REASONING

- It was not an ACT, it was an OMMISSION
- California promotes definition of death irreversible cessation of all brain function
- Life support is not treatment of the pathological condition
- There is no legal requirement to gain prior judicial approval to terminate life sustaining care

RULE

There is no criminal liability to act unless there is legal duty to act

DISPO

Superior court erred; charges dismissed

STATUTE: MURDER is "the unlawful killing of a human being with malice aforethought"

NOTES-09/01/22

SOCIAL HARM

- **RESULT CRIMES**
- **CODUCT CRIMES**

Social Haram is the result of crime on the society

Voluntary Act Requirement

- **MPC Section 2.01**
- **NYPL Section 15.10**
- **Martin Case**

"Bodily movement performed consciously"

Rule Based Analysis

- **Did culprit do a voluntary act within definition of the rule**

Case Based

- **Precedent**

Policy-Based Analysis

Why did the Court REVERSE Beardsley?

- Generally, when someone may be criminally responsible for a failure to act (omission)
- EX; Kitty Genovese (37 witnesses of a murder)
- Guzman Bronx case

ACTUS REUS STATUTE

Actus reus language in a statue may be classified in one of three ways;

(a) Conduct
(b) Result
(c) Attendant Circumstances

USE THE LANGUAGE IN THE STATUTE

- What you did
- Prohibiting results example; homicide crimes; CAUSING OF DEATH (the result) "causes"- RESULT CRIMES
- Anything that is not conduct or result

COMMON LAW BURGLARY

- Guilty if **"breaking and entering (conduct) a dwelling house of another at nighttime"**
- **Crime of "operating (conduct) a vehicle (AC) causing the death (Result) of another person (AC)**

1. **Vehicle**
2. **Operating vehicle**
3. **Death**
4. **Another person**
5. **VOLUTNARY ACT**

Mens Rea

Queen v. Cunningham

PP-

Parties

- **Ripped out a gas meter to steal its coins**
- Sarah Wade exposed to coal gas, partially asphyxiated
- Charged with malice

RULE

Regina v. Cunningham (1957) is an English Court of Appeal ruling that clarified that indirect, not reasonably foreseeable consequences to a totally distinct, reprehensible, even "wicked" activity would not be considered "malicious" where that is set out as the mens rea for a particular offence.

"Destructive noxious thing"

FACTS

- Stole the gas meter to get the coins
- Caused the gas exposure of a person in his building
- The court rejects that he had a wicked motive, because he didn't have **"MALICE"**
- The level of mens rea, by statute, specifically needed to accompany "administration", which it was common ground that negligent release would amount to, of noxious gases.

DISPO

NOTES

- The precedent value of the case has been applied to broadly analogous situations and rules where an enhanced *mens rea* is required for a particular class of offence to be proven

RULE

p.165

"A PERSON WHO, IN COMMITTING A BATTERY (INTENTIONALLY) or (KNOWINGLY) CAUSES GREAT BODILY HARM, or PERMANENT DISABILITY or DISFIGUREMENT COMMITS AGGRAVATED BATTERY."

ACTUS REUS the act is undisputed (swung the bottle)/ elements met in act

MENS REA deliberation on INTENT

People v. Conley (1989)

PP Appeal in Illinois Appellate Court

FACTS

A fight occurred at a large party. William Conley was charged with aggravated battery after he swung a bottle, hit another person (Sean) trying to hit (Marty) and permanently disfigured the unintended target. Tried to hit Marty, but instead hit Sean

- Caused permanent disability
- Charged with aggravated battery

ISSUE

Whether a defendant can be guilty of aggravated battery if they hit another person unintentionally in a fight?

HOLDING: YES

RULE: A person man culpable of a crime even if the victim is not their intended target.

REASONING

- Establishing "Knowledge and intent"
- **Transferred intent doctrine** (People v. Scott) (1996) p.170 "peculiarly mischievous legal fiction"
- An Intent v. A motive
- **TRANSFERRED INTENT-** when crime requires "intentionally cause death of another"
- D AIMS a gun at X and kills---------
- If D charged with crime requiring "intentionally killing a person" did D have Mens rea?
- "COMMON LAW FICTION"
- Statute more specifically says "ONE IS GUILTY OF MURDER IF WITH THE INTENT TO KILL A PERSON ONE KILLS THAT PERSON OR ANOTHER PERSON"

DISPO

NOTES

INTENT

How can the prosecutor prove a person's intent ex; **what was in the person's mind?**

- Juries may make inference (may be disproved)
- Specific intent v. General Intent
- Denoting is some special intent is set out at the beginning of the commission of the crime
- Mental state relates only to the social harm of the crime

SPECICIAL MENTAL STATUSES a. An Intent (**to commit some future act**) separate from the actus reus, b. An intent (**with a special motive), c. Awareness of attendant circumstances**

p.173

MPC Mens Rea General Recommendations of Culpability

- "Elemental approach to mens rea"
- With a particular state of mind
- Not simply based on proof of an act; actus reus
- FOUR CULPABILITY TERMS;
- "**PURPOSELY, KNOWINGLY, RECKLESSLY, AND NEGLIGENTLY"**
- MATERIAL ELEMENTS OF AN OFFENSE;
- 1. nature of forbidden conduct
- 2. attendant circumstances
- 3. result of the conduct
- **CULPABILITY**; responsibility for a fault or wrong; blame:
- **LIABILITY**; In law, liable means **"responsible or answerable in law; legally obligated"**. Legal liability concerns both civil law and criminal law and can arise from various areas of law, such as contracts, torts, taxes, or fines given by government agencies. The claimant is the one who seeks to establish, or prove, liability.
- **ESTABLISHING INTENT**
- PURPOSE AND KNOWLEDGE; acting with intent
- RECKLESSNESS; conscious risk creating, unjustifiable
- MEASURED IN DUE REGARD; REASONABLE PERSON STANDARD; standards of conduct of law-abiding persons
- Negligence IS NOT a state of awareness; but instead, it is:
- **Negligence a failure to exercise appropriate and/or ethical ruled care expected to be exercised amongst specified circumstances.** The area of tort law known as *negligence* involves harm caused by failing to act as a form of *carelessness,* possibly with extenuating circumstances. The core concept of negligence is that people should exercise reasonable care in their actions, by taking account of the potential harm that they might foreseeably cause to other people or property.
- Someone who suffers loss caused by another's negligence may be able to **sue for damages to compensate for their harm.** Such loss may include physical injury, harm to property, psychiatric illness, or economic loss.
- The law on negligence may be assessed in general terms according to a **five-part model which includes the assessment of duty, breach, actual cause, proximate cause, and damages.**
- **MPC p. 1027 <u>GENERAL REQUIREMENTS FOR CULPABILITY</u>**
- **Purposely;** conscious conduct of that nature or to cause a result

CONSIOUS CONDUCT TO CAUSE RESULT

- **Knowingly;** aware conduct is of that nature and such circumstances exist

AWARENESS

- **Recklessly;** disregards a substantial and unjustifiable risk

DISREGARDS SUBSTANTIAL & UNJUSTIFED RISK

- **Negligently;** should be aware of a substantial/ unjustifiable risk that will result from his conduct and disregard what a reasonable person would do in the situation

RULE

NEW YORK PENAL LAW TERMS*

NYPL Sec. 15.05

1. **INTENTIONALLY**
- ***ACTS TO CAUSE A RESULT***
2. **KNOWINGLY**
- **AWARE OF THE CONDUCT/RESULT**
3. **RECKLESSLYAWARE/ THEN STILL DISREGARDS A SUBSTANTIAL AND UNJUSTIFIBALE RISK**
4. **CRIMINAL NEGLIGENCE**

FAILS TO PERCIEVE (NOT AWARE) OF SUBSTANTIAL AND UNJUSTIFIBALE RISK (BUT A REASONABLE PERSON WOULD BE)

Definitions p.1027

HYPOS

Jacob tries to kill Vanessa, who is holding a baby; WHATS HIGHEST LEVEL MENS REA;

INTENTIONALLY for Vanessa

RECKLESSLY for baby

- **DOESNT SEE THE BABY; criminal negligence**

KNOWLEDGE OF ATTENDANT CIRCUMSANCES

"WILLFUL BLINDNESS" "KNOWINGLY"

Class Notes on Nations: 09/08/22

- *STATUTE REQUIRES MENS REA*
- **ENDANGERING THE WELFARE OF A CHILD IF:**
- **"KNOWINGLY ENCOURAGES, AIDS or CAUSES A CHILD LESS THAN 17 YEARS OLD TO ENGAGE IN ANY CONDUCT (which tends to injure a child's welfare"**
- **Nations denies knowledge of the girl's age**

HYPO

It is a crime to "knowingly transport drugs across state lines".

- **"JUST DONT LOOK IN THE PACKAGE"**
- **In MPC he could be prosecuted, not likely by Nations Court Missouri**
- **HIGH PROBABILITY LANGUAGE (not in NY Penal Code)**

p. 177

State v. Nations

PP: In Missouri Court of Appeals, Eastern District, 1984

Purpose: Teaches us "WILLFUL BLINDNESS"

Issue: When a statute requires knowledge of a fact as an element of a crime, is it sufficient to prove the defendant was aware of the high probability of that fact's existence?

- **Did Sandra Nations endanger the welfare of a child under age 17 when she hired her to dance at the nightclub without knowing her age?**

Facts:

- Sandra Nations was found to have a 16-year-old girl dancing in her nightclub, charged with endangering the welfare of a child less than 17 y/o, claimed she didn't know the girl was 16. Claimed to police that she had checked her ID when she hired her.

Holding: **NO.**

Rule: **Where a statute requires knowledge of a fact as an element of a crime, it is insufficient to prove the defendant was aware of the high probability of that fact's existence, unless the statute provides otherwise.**

Reasoning:

- MPC established "knowingly" as **"when knowledge the existence of a particular fact is an element in an offense, such knowledge is established by...HIGH PROBABILITY OF KNOWING"**;
- However, the defendant under the Missouri statute ACTED RECKLESSLY, NOT KNOWINGLY; Missouri definition REQUIRED ACTUAL AWARENESS
- Didn't prove defendant was underage, only that she was reckless in not checking

- HIGH PROBABILITY DEFINITION
- "**WILLFUL BLINDNESS DOCTRINE**"- DEFINITION OF "KNOWINGLY"
- MPC broader definition;
- KNOWLEDGE ATTENDANT CIRCUMSTANCE; if knowledge of a fact is an element of a crime it is satisfied IF THERE WAS A HIGH PROBABILITY SHE WAS UNDER AGE 17.

Dispo: **REVERSED**

Court agrees

Notes: Nations later testified against her husband in a racketeering case in 1995; most states do recognize the culpability of the MPC definition of willful blindness.

- "Ostrich instruction" p.181
- **U.S. v. Macias (2015)** -

NOTES ON MILES

- STATUTE
- in illegal drugs statute: Any person who KNOWINGLY sells, manufactures, cultivates, delivers, purchases...OR
- Who is knowingly in actual or constructive possession or who KNOWINGLY attempts to become in actual or constructive possession of...
- 4 grams or more of any morphine, opium, salt, isomer, or salt of an isomer thereof, including heroin---
- IS GUILTY OF TRAFFICKING IN ILLEGAL DRUGS.

DIDN'T KNOW THE DRUG TYPE

OR AMOUNT- Miles

As long as there was Actus Reus of 4 gm or more of controlled substance the Mens Rea doesn't require knowledge what type of drugs.

PERSON WHO KNOWINGLY...

- CONSTRUCTIVE OR ACTUAL POSSESSION
- FOUR GRAMS or More
- OF ANY MORPHINE, OPIUM, SALT, ISOMER, OR SALT OF AN ISOMER thereof, including heroin.

★ CONSTRUCTIVE POSSESSION; The legal possession of an object, even if it was not in a person's direct physical control. Often used in criminal law prosecutions for possession crimes, such as possession of illegal drugs. Generally, for a court to find that a person had constructive possession of an object, the person must have had knowledge of the object, and as well as the ability to control it. For example, someone with keys to a safe deposit box may have constructive possession to the contents of that box, and the owner of a car may have constructive possession of the contents of its trunk.

- **“I knowingly”**
- **ATE (modified)**
- **A SANDWHICH**
- **WITH CHEESE (but maybe not this)**

NYPL Sec. 15.15 (1) - if a Mens Rea appears PRESUMPTION IT MODIFIES EVERYTHING UNLESS OTHERWISE SPECIFIED

MPC 2.02 (4)

★ **STRICT LIABILITY-** In criminal and civil law, **strict liability** is a standard of liability under which a person is legally responsible for the consequences flowing from an activity even in the absence of fault or criminal intent on the part of the defendant.

Under the strict liability law, if the defendant possesses anything that is inherently dangerous, as specified under the "ultrahazardous" definition, the defendant is then strictly liable for any damages caused by such possession, no matter how careful the defendant is safeguarding them.

In the field of torts, prominent examples of strict liability may include product liability, abnormally dangerous activities (e.g., blasting), intrusion onto another's land by livestock, and ownership of wild animals.

Other than activities specified above (like ownership of wild animals, etc), US courts also consider the following activities as "ultrahazardous":

- storing flammable liquids in quantity in an urban area
- pile driving
- blasting
- crop dusting
- fumigation with cyanide gas
- emission of noxious fumes by a manufacturing plant located in a settled area
- locating oil wells or refineries in populated communities
- test firing solid-fuel rocket motors.

On the other hand, US courts rule the following activities as not "ultrahazardous": parachuting, drunk driving, maintaining power lines, and letting water escape from an irrigation ditch.

Traditional criminal offenses that require no element of intent (mens rea) include statutory rape and felony murder

STATUTE:

A Defendant is guilty if INTENTIONALY;

- **HITS**
- **OR CAUSES CONTACT**
- **With ANOTHER**

STATUTE

It is felony to "KNOWINGLY AND UNLAWFULLY" possess 625 mg of a hallucinogen.

NYPL Sec. 220.18(5). The legislation can always clarify.

MENS REA IS LESS/ OR NOT MODIFYING ATTENDANT CIRCUMSTANCES.

In law, **Attendant Circumstances** (sometimes **external circumstances**) are the facts surrounding an event.

In criminal law in the United States, the definition of a given offense generally includes up to three kinds of "elements": the ***actus reus*****,** or guilty conduct; the ***mens rea*****,** or guilty mental state; and the attendant (sometimes "external") circumstances. The reason is given in ***Powell v. Texas***, 392 U.S. 514, 533 (1968):

...criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing.

The burden of proof is on the prosecution to prove each "element of the offense" in order for a defendant to be found guilty.

The Model Penal Code §1.13(9) offers the following definition of the phrase "elements of an offense":

(i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as

(a) is included in the description of the forbidden conduct in the definition of the offense; or

(b) establishes the required kind of culpability; or

(c) negatives an excuse or justification for such conduct; or

(d) negatives a defense under the statute of limitations; or

(e) establishes jurisdiction or venue;

State v. Miles

South Carolina Court of Appeals

805 S.E.2d 204 (2017)

★ **Procedural** convicted in trial court in Court of Appeals NC, (2017), J. Hill presiding Miles appeals conviction of drug trafficking, arguing the prosecution had to prove he **knew he possessed** oxycodone.

Purpose

This case teaches us MENS REA "KNOWINGLY" in relation to drug trafficking.

Parties

Lance L. Miles (Defendant/ Appellant) alleged drug dealer v. State of NC

Facts

- ★ Agents tracked a suspicious package to Miles home
- ★ Found with 4g of Oxy
- ★ The jury asked, "Does the State have to prove that the defendant knowingly brought into the state four grams or more of oxycodone or just any amount of illegal drugs in order to consider this trafficking?" The judge responded, "the State does not have to prove that the defendant knew that the drugs in the package were oxycodone, just that he knew that the package contained illegal drugs." Miles appealed his conviction, arguing the prosecution had to prove he knew he possessed oxycodone.
- ★ Caught with a package by agents, he claimed he did not know what was in it, charged with trafficking in Oxy,
- ★ Appealed on basis of Trial Court instructing jury that he didn't need to know what kind of drugs were in the box
- ★ Sheriff's agents suspected a FedEx package contained illegal drugs. They conducted a controlled delivery to the address listed and saw Lance Miles (defendant) retrieve it.
- ★ Miles admitted there were drugs inside but did not know what kind. The prosecution charged him with drug trafficking because the box contained more than four grams of oxycodone. The judge instructed that the prosecution had to prove that Miles knowingly brought into the state, and knowingly possessed or attempted to possess, the oxycodone.
- ★ The jury asked, **"Does the State have to prove that the defendant knowingly brought into the state four grams or more of [o]xycodone or just any amount of illegal drugs in order to consider this trafficking?"**
- ★ The judge responded, "the State does not have to prove that the defendant knew that the drugs in the package were oxycodone, just that he knew that the package contained illegal drugs."

Issue

Do drug crimes require the accused to know he or she possessed an illegal drug, but not which specific drug?

- Did Miles right to due process get violated when the judge instructed the jury that they did not need to prove beyond a reasonable Doubt that Miles knew if the package had Oxy in it?

HOLDING: <u>NO, THEY DO NOT.</u>

<u>RULE</u> Drug crimes require the accused to know he or she possessed an illegal drug, but not which specific drug.

- **The legislature did not intend to require the state to prove a defendant knew the specific type of illegal drug.**

<u>REASONING</u>

p.184; examines KNOWINGLY IN EACH LINE OF THE STATUTE

Cites US v. Jones; (2006)- Court rejected that ARGUEMENT the COURT HAD TO PROVE THAT defendant KNEW the person he was trafficking was underage

- Cites Flores-Figeroa v. US (2009)- KNOWINGLY APPLIES TO VERBS AND OTHER COMPONENTS OF THE OFFENSE; contextually speaking
- Cites State v. Raffaldt (1995); the AMOUNT not the SPECFIC DRUG converts procession to trafficking
- Cites State v. Taylor (1996)- court disagreed they needed her knowledge of the amount of CRANK
- Cites State v. Freeland (1916)- know that he was dealing with contrband drugs to have intent, Carter v. US (2000)- mens rea read to separate only wrongful from otherwise innocent conduct

Drug crimes require the accused to know he or she possessed an illegal drug, but not which specific drug.

- The South Carolina drug-trafficking statute provides that "Any person who knowingly . . . brings into this State, . . . or who is knowingly in . . . possession of: . . . four grams or more of [opiate-based drugs], is guilty of a felony . . . known as 'trafficking in illegal drugs.'"
- Miles argues "knowingly" applies to each element of the offense. Interpreting a statute begins and ends with its text, unless it is ambiguous. Courts often grapple with "knowingly" in criminal statutes. Some courts apply it only to the first verb it precedes.
- The United States Supreme Court sometimes reads a statute that begins with "knowingly," then lists the elements of a crime as requiring each element to have been committed knowingly—but not always. Different elements of a crime can require different levels of intent. Construing the text of a statute often requires considering its context.
- The text usually provides the best evidence of legislative intent, but it must be read in a manner consistent with its intended purpose and context. Here, the legislature did not intend to require the accused to know what specific drug he or she trafficked. The South Carolina Supreme Court has found that all the prosecution need prove is that the accused knew he possessed a "controlled substance." Not even knowledge of an amount sufficient to constitute trafficking is required. Charges for possession and trafficking differ only in the quantity possessed.

No language suggests intent to require knowledge of the specific substance. The subsection title is "trafficking in illegal drugs." Other jurisdictions agree that knowledge of the specific drug is not required for controlled substance offenses. Last, courts must strictly construe statutes absent ambiguity that must be resolved in the accused's favor. The key is that people must know where the line for illegal conduct is drawn. However, there is no

ambiguity here. The line for crimes involving illegal drugs is vividly clear. **The only requirement is that the accused knew the substance was contraband.**

The legislature can amend the statute if it intended to require knowledge of the drug trafficked. Therefore, the judge correctly instructed the jury as to the requirements to convict.

DISPO

Miles's conviction is accordingly **affirmed.**

Notes:

It illustrates that although statutory construction may be complicated, legislative intent remains the key factor.

Holding and Reasoning (Hill, J.)

Yes. Drug crimes require the accused to know he or she possessed an illegal drug, but not which specific drug.

STATUTE/ LEGISLATIVE INTENT

The South Carolina drug-trafficking statute provides that "Any person who knowingly . . . brings into this State, . . . or who is knowingly in . . . possession of: . . . four grams or more of [opiate-based drugs], is guilty of a felony . . . known as 'trafficking in illegal drugs.'"

- Miles argues "knowingly" applies to each element of the offense.

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- Different elements of a crime can require different levels of intent. Construing the text of a statute often requires considering its context. The text usually provides the best evidence of legislative intent, but it must be read in a manner consistent with its intended purpose and context.

Here, the legislature did not intend to require the accused to know what specific drug he or she trafficked. The South Carolina Supreme Court has found that all the prosecution need prove is that the accused knew he possessed a "controlled substance." Not even knowledge of an amount sufficient to constitute trafficking is required. Charges for possession and trafficking differ only in the quantity possessed. No language suggests intent to require knowledge of the specific substance. The subsection title is "trafficking in illegal drugs." Other jurisdictions agree that knowledge of the specific drug is not required for controlled substance offenses. Last, courts must strictly construe statutes absent ambiguity

that must be resolved in the accused's favor. The key is that people must know where the line for illegal conduct is drawn. However, there is no ambiguity here. The line for crimes involving illegal drugs is vividly clear. The only requirement is that the accused knew the substance was contraband. The legislature can amend the statute if it intended to require knowledge of the drug trafficked. Therefore, the judge correctly instructed the jury as to the requirements to convict. Miles's conviction is accordingly affirmed.

NOTE ON MORISSETTE

STATUTE: "Whoever steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes...THING OF VALUE of the United States----- SHALL BE FINED"

IS THERE MENS REA?

- Strict Liability

What factors lead a court to conclude that a statute DOES NOT REQUIRE MENS REA?

- Public health, rape and murder
- Speeding requires NO MENS REA
- (too difficult or too important for public safety

Morissette v. United States
United States Supreme Court

342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952)

Procedural posture:

Purpose: **THIS CASE TEACHES US THE SEMINAL CASE FOR JUDICALLY PRESUMED ELEMENT OF INTENT IN FEDERAL PENAL LAW.**

Issue
Do acts which are bad in themselves, including larceny, require the element of mens rea and will any similar strict liability statute not be construed as eliminating the mens rea element?

Holding Yes.
Facts

- ★ A scrap metal and junk dealer, Morissette (defendant), entered an Air Force bombing range and **took several spent bomb casings** that had been lying around for years exposed to the weather and rusting. Morissette subsequently flattened the casings out and sold them for an $84 profit. Morissette was indicted for violating **18 U.S.C. § 641** which made it a crime to "knowing convert" government property.
- ★ At trial, Morissette admitted he knew he was taking Air Force property but honestly believed the government had abandoned the casings.

- ★ The trial judge rejected Morissette's defense and instructed the jury that "[t]he question on intent is whether or not he intended to take the property." Morissette was convicted and he appealed.
- ★ The court of appeals affirmed and made the assumption that Congress meant for the term "knowingly convert" to mean simply an intentional exercise of dominion over property not belonging to the individual. The U.S. Supreme Court granted certiorari to review.

Rule of Law

Acts which are bad in themselves, including larceny, require the element of mens rea and any similar strict liability statute will not be construed as eliminating the mens rea element.

Reasoning (Jackson, J.)

The relationship between an intrinsically harmful act and some mental element has given way to a legislative scheme creating absolute, or strict, liability to cover many public welfare offenses.

Public welfare laws require a person to exercise care, or not act, when a specific duty is imposed.

Many violations of these laws result in no direct or immediate injury to person or property, but merely create the danger or probability of it which the law seeks to minimize. As a result, regardless of the intent of the violator, the injury and consequences are the same.

Even if a violator "did not mean to" violate the law, he can be found guilty. Thus, strict liability legislation does not specify intent as a required element.

Section 641 at issue here is such a statute. However, stealing, larceny, and its variants were among the earliest offenses known to the law that existed prior to enactment of the legislation and state courts have consistently required intent in larceny-type offenses. **Congressional silence as to the mental element in § 641 will not be construed as eliminating that element from the crimes denounced.**

Here, the trial judge wrongly instructed the jury that it was not allowed to consider Morissette's honest belief that he thought the casings were abandoned as a defense.

DISPO

The judgment of conviction is reversed.

NOTES. None.

ON **STAPLES**

IT SHALL BE UNLAWFUL FOR ANY PERSON TO RECIEVE OR POSSESS A FIREARM WHICH IS NOT REGISTERED....in the National Firearms Registration and Transfer Record."

WHAT IS STAPLESMMENS REA ARGUEMENT?

- Fully automatic to be a firearm under the statute.
- No mens rea in the statute
- Under what principles of punishment do they go for strict liability?
- What is the policy goal?

Staples v. United States

United States Supreme Court

511 U.S. 600 (1994)

Facts

- ★ **Staples (defendant)** possessed a semi-automatic rifle that originally had a metal piece preventing it from firing automatically.
- ★ Staples filed down the metal piece. As a result, the rifle met the statutory definition of a firearm under the National Firearms Act, 26 U.S.C. § 5861(d).
- ★ Staples did not register the weapon as required by the act.
- ★ The United States (plaintiff) charged Staples under the act, which makes possession of an unregistered firearm punishable by up to ten years in prison.
- ★ **Staples claimed he did not know the rifle could be fired automatically.** The trial judge refused to give Staples's requested jury instruction, which stated that the government was required to prove that Staples was aware that the gun would fire automatically.
- ★ Instead, the judge instructed the jury that to sustain a conviction Staples only needed to know that he had a dangerous device that should have alerted him to the possibility of regulation. Staples was convicted, and the court of appeals affirmed. The United States Supreme Court granted certiorari.
- ★ 10-year sentence for having a Machine gun, BATF found an AR-15 during a raid; semi-automatic unless modified, which this one was, charged with unlawful procession of a machinegun, convicted sentenced to 5 years, appeals court affirmed, Stables denied knowledge that the gun could fire automatically.

Issue

Absent a clear statement from Congress that there is no mens rea requirement, should federal felony statutes be interpreted the eliminate the mens rea element?

HOLDING: NO

Rule of Law

Absent a clear statement from Congress that there is no mens rea requirement, federal felony statutes should not be interpreted to eliminate the mens rea element.

Reasoning (Thomas, J.)

- ★ Congress did not intend to give 10-year sentences to people ignorant if their gun was automatic or not.

No. Absent a clear statement from Congress that there is no mens rea requirement, federal felony statutes should not be interpreted to eliminate the mens rea element. A mens rea element is generally required for conviction of a federal crime, absent a clear intent to eliminate it by Congress.

The act makes it unlawful to possess an unregistered firearm. The question is whether the possessor must know the weapon has the characteristics of a firearm to violate the act. The default rule is that a mens rea of scienter is required for any crime. The fact that Congress did not specifically state the required mens rea does not mean it intended to dispense with the element.

Public policy disfavors criminal statutes with no mens rea requirement. In this case, the government argues that the statute is a public welfare regulation that imposes strict liability with no knowledge requirement.

The Court has held that if a defendant knows he is dealing with a dangerous device, the defendant should be aware of the likelihood of regulation. The burden is on the defendant to determine whether the defendant's activities are subject to the statute. The Court has upheld dispensing with the mens rea requirement under the act for possessing grenades without knowing they were unregistered because the defendant could not have thought possessing such dangerous devices innocent.

The government argues that guns are dangerous devices and owners are on notice that they may be subject to regulation by the act. Nevertheless, the Court has been careful not to interpret statutes as eliminating the mens rea requirement where seemingly innocent conduct, such as gun ownership, would be criminalized.

The appellate court below correctly concluded that it was unthinkable that Congress meant to subject law-abiding citizens to lengthy prison sentences for unknowingly possessing automatic weapons. There must be a clear intent on the part of Congress that mens rea is not a required element of the crime; otherwise courts should not interpret felony statutes as eliminating the mens rea requirement on the basis of public welfare. The conviction is vacated.

Concurrence (Ginsburg, J.)

The issue in this case is not whether but what level of knowledge is required. The possible levels include;

(1) knowledge simply of possession of the object;

(2) knowledge, in addition, that the object is a dangerous weapon; or

(3) knowledge, beyond dangerousness, of the characteristics that render the object subject to regulation." The government's contention that the second level is appropriate does not take into consideration the "widespread lawful gun ownership" in this nation. Congress only demands registration of the most dangerous firearms, and thus other guns are not sufficiently dangerous to put owners on notice of possible regulation. In this case, in order to sustain a conviction under the act, Staples must have known that he possessed an unregistered machine gun.

DISPO: Reversed, remanded

NOTES

Dissent (Stevens, J.)

The Court here substitutes its judgment for that of Congress. Staples possessed a semiautomatic rifle capable of conversion to automatic, and the jury concluded it was a dangerous device. This was not the type of gun lawfully owned by many Americans.

First, the text of the act specifically omits a knowledge requirement. Had the conduct proscribed been a common law crime, interpreting the statute to include a mens rea element would be acceptable. *See* *Morissette v. United States*, 342 U. S. 246 (1952). The act involves no such crime.

Further, the act mirrored the construction of the Harrison Anti-Narcotic Act, which this Court interpreted as having no knowledge requirement. *United States v. Balint*, 258 U. S. 250 (1922). Possession under the act was, instead, a "public welfare" crime. Public welfare regulations generally relate to dangerous devices, heighten duties, and have no mens rea requirement, and the act is one such regulation. Next, courts consistently interpreted the act as having no knowledge requirement, and Congress did not add one in later amendments. The conviction should be affirmed.

If NO MENS REA IN STATUTE:

MPC Sec. 2.02 (3)- purposely, knowingly, recklessly respect there to (presumption that its still reckless)

NYPL Sec. 15.15 (2)- when no mens rea in statute a culpable mental state may still be required to some or all of the mental elements there or (UNLESS A CLEAR INDICATION OF LEGISALTIVE INTETN TO IMPOSE STRICT LIABILITY)

Presumption to read in Mens Rea

MPC doesn't like SL or Negligence findings.

STATUTE

PERSON IS GUILTY OF SECOND-DEGREE RAPE IF ENGAGES IN VAGINAL INTERCOURSE WITH ANOTHER PERSON "WHO IS UNDER 14 YEARS OF AGE AND THE PERSON PERFORMING THE ACT IS A LEAST FOUR YEARS OLDER THAT THE VICTUM.

- Severe penalty (20 years)
- Severe stigma
- NO MENS REA = STRICT LIABILITY

Garnett v. State

332 Md. 571, 632 A.2d 797 (1993)

PP

Charged with statutory rape, convicted in trial, affirmed in appeal in Court of Appeals of Maryland.

A 20 y/o Ray L. Garnett w. IQ 52, learning disabled, introduced to Erika Frazier age 14, had sex, a year later 15 y/o Erica gave birth to a baby. Raymond was tried and convicted of rape second degree due to age spread (6 years); at trial Erica/ her friends testified they had told Ray that ERICA WAS 16 (when they had sex); **STRICT LIABILITY OFFENSE**;

Statutory Rape 2 degree

a. Force/ threat force/ without consent OR
b. Mentally defective, incapacitated, physically helpless AND the person performing the act KNOWS or SHOUL REASONABLY KNOW, the other persons state OR
c. Age 14 or below AND PERSON IS 4 years OLDER
d. Not more than 20 years

NO MENS REA requirement

1. Vaginal intercourse +
2. Age 14
3. + more than 4 years older than her

Facts

- ★ **Raymond Lennard Garnett** (defendant) is mentally handicapped.
- ★ At the age of twenty, when the events in question occurred, his social development mirrored that of an eleven or twelve-year-old. Garnett was introduced to a thirteen-year-old girl named **Erica Frazier** in late 1990.
- ★ On February 28, 1991, Frazier invited Garnett into her bedroom, and they engaged in sexual intercourse.
- ★ Maryland has in effect a statutory rape law that defines second degree rape as sexual intercourse between a victim under fourteen and one who is four years or more older than the victim.
- ★ The law also defined second degree rape as sexual intercourse obtained by force and sexual intercourse between a victim who is mentally handicapped, mentally incapacitated, or physically helpless, and one who knows or should know about the victim's condition.
- ★ The penalty for second degree rape in Maryland is imprisonment for up to twenty years.

Issue

Should courts imply a mens rea requirement into a statutory rape law that does not specify one?

Holding: NO

Rule of Law

Courts should not read a mens rea requirement into a statutory rape law unless the legislature clearly intended for one.

Reasoning

Some Legal scholars reject the concept of strict liability

- Assigned to punishment/ stigma without being morally blameworthy
- p. 203 arguments against having no Mens Rea/ SL
- Mistake of age defense

(Murphy, C.J.)

- No. Statutes are within the province of the legislature.
- If a legislature chooses to enact a statutory rape statute without a requirement of mens rea, a court is not to read one in unless the legislature clearly meant for there to be one.
- Modern scholars generally disapprove of strict liability for statutory rape, since it imposes criminal liability and a heavy punishment on those who are not morally blameworthy. However, courts are bound by the intent of the legislature.
- Here, the Maryland second degree rape statute does not expressly set forth a mens rea requirement and makes no provision for mistake of fact. It is clear, from both the plain language of the statute and from the legislative history, that the legislature did not intend to include a mens rea requirement.
- The legislature could easily have included a mens rea requirement in the statute if it desired.
- Part of the statute proscribes sexual intercourse between a victim who is mentally handicapped, mentally incapacitated, or physically helpless, and one who knows or should know the victim is in that condition.
- Thus, the legislature imposed a mens rea requirement in that subsection. But in the very next subsection, which proscribes sexual intercourse between a victim under fourteen and another who is four or more years older than the victim, a mens rea requirement is conspicuously absent. This demonstrates that the legislature intentionally left out a mens rea requirement for that subsection.
- The legislature considered including a mens rea requirement and explicitly rejected it. Any requirement of mens rea must come from the legislature itself and not from a court.
- Clearly, the Maryland legislature intended for this statute to impose strict liability for statutory rape.

DISPO: **Affirmed Conviction**

NOTES:

Dissent (Bell, J.)

The legislature did indeed intend to make statutory rape a strict liability offense. However, holding that this provision does not require any element of mens rea is **contrary to the concept of due process.**

Dissent (Eldridge, J.)

It is untrue that the statute requires no mens rea at all. **Strict liability offenses tend to have light penalties.** The heavy penalty imposed by the statutory rape statute is evidence that the legislature did not intend for it to be a pure strict liability crime.

With statutory rape, a defendant is supposed to appreciate the risk that a sexual partner may be younger than they appear. Mental appreciation is the mens rea of statutory rape. The **legislature most likely did not intend to punish one who could not even appreciate the risk due to a mental handicap or incapacity.**

MISTAKE AND MENS REA

NOTES:

MISTAKE OF FACT

Mens rea

HYPO

Killing a ghost in the cemetery, that turned out to be a person, charged to knowingly kill a human being: defense;

- Mens rea KNOWINGLY
- You didn't "know" it was a human being, truly believed it was a ghost
- MISTAKE OF FACT ARGUEMENT
- No mens rea/ MISTAKE BELIEF
- **Nations** (successfully argued a mistake of fact), **Garnett** (failed to argue it)

LARCENY: "TRESPASSORY TAKING AND CARRYING AWAY OF PERSONAL PROPERTY OF ANOTHER WITH INTENT TO STEAL THE PROPERTY"

DEFENDENTS DESIRED JURY INSTRUCTION (of general intent) (just reasonable mistake)

Vs.

JUDGES JURY INSTRUCTION (specific intent mens rea; "reasonable", he actually believed it)

Mistake of Fact Under?

MPC 2.04- mistake negatives mens rea

NPPL 15.29- same- unless it negatives the culpable mental state

HYPO

A government official is guilty of a crime if "she or he KNOWINGLY" makes a false statement to the public about the validity of an election"

KNOWINGLY REQUIRES ACTUAL AWARENESS

Recklessly

R CHARGED WITH "RECKLESSLY CASUING SERIOUS PHYSICAL INJURY TO ANOTHER BY MEANS OF A DEADLY WEAPON" after he shot and wounded V with a rifle.

-Defendant claims he did not know the gun was loaded

- WHAT WORD DO YOU THINK YOU NEED TO DEFINE to determine if a D has a mistake of fact defense?

People v. Navarro

160 Cal. Rptr. 692 (1979)

PP Appellate Department of the Los Angeles County Superior Court

Parties

Issue

Is a mistake of fact a defense to a specific intent crime even if the mistake was unreasonable?

Facts

- ★ Appellant Navarro (defendant) took four wooden beams from a construction site.
- ★ He was convicted of petty theft.
- ★ The relevant statute says that anyone who steals another person's property with a felonious motive is guilty of theft.
- ★ At trial, Navarro proposed jury instructions saying that if he took the wood beams with the **good faith belief they were abandoned** or that he had permission to take them, he was not guilty of theft, even if his good faith belief was unreasonable.
- ★ The court instead instructed the jury that if Navarro took the wood beams with the good faith belief that they were abandoned or that he had permission to take them, he was not guilty of theft as long as his good faith belief was reasonable.

Rule of Law

An honest mistake of fact is a defense to a specific intent crime regardless of whether the mistake was unreasonable.

Holding: YES

Reasoning (Dowds, J.)

- Specific intent crimes require a person to possess a particularized mental intent.
- If, due to one's honest mistake of fact, a person is incapable of possessing a specified mental intent, that person cannot be guilty of that crime.
- This is the case even if the defendant's mistake of fact is unreasonable, as long as the defendant is sincere in his mistake. This is distinct from general intent crimes, where a specific mental intent is unnecessary. In those situations, the mistake of fact must be reasonable.
- Here, Navarro is accused of the crime of theft. Theft is a specific intent crime.
- It requires Navarro to possess the felonious intent to steal another's property. In order to possess a felonious intent to steal, Navarro must have known that what he was taking was not his to take.
- If for any reason, Navarro truly believed the beams were abandoned or that he had permission to take them, he did not possess the necessary felonious intent. At trial, the judge instructed the jury that Navarro's mistake of fact could exonerate him only if his belief was reasonable. This was in error.
- **If Navarro in good faith believed the beams were his, regardless of whether that belief was reasonable, he was incapable of formulating the specific intent required for the crime of theft.** Since an essential element of the crime is not established, Navarro cannot be guilty.

DISPO

The judgment is r**eversed/remanded**

NOTE

If specific intent is at issue, a good faith mistake is a valid defense.

Cites

State v. Blurton; "tricked into robbing a drug store by a man claiming he was CIA"

And thought it was an Op, not a crime.

NY PENAL CODE;

15.15

Construction of statues with respect to culpability requirements

- When an offense requires a culpable mental state designated as
- **INTENTIONALLY**
- **KNOWINGLY**
- **RECKLESSLY**
- **CRIMINAL NEGLIGENCE**

Or

- WITH INTENT TO DEFRAUD
- KNOWING IT TO BE FALSE

WHEN ONE AN ONLY ONE OF SUCH TERMS APPEARS, IT APPLIES OT EVERY ELEMENT UNLESS: **AN INTENT TO LIMIT ITS APPLICATION CLEARLY APPEARS**

15.20

Effect of Ignorance or mistake upon liability

- NOT RELEAVED OF LIABILITY UNLESS;
- a. factual mistake negatives the culpable mental state requires
- b. statute expressly provides that such a factual mistake connotes a defense
- c. ARTICLE 31 defines

2. Ignorance of the law is not a defense

3. Knowing the age of the child is not a defense

4. Not knowing the weight of a controlled substance is not a defense

NOTES 09/09/22

Common Law Mens Rea

GENERAL INTENT OR **SPECIFIC INTENT**

- But different courts applied different definitions to these
- Some courts only used it IF the STATUTE had a stated order of INTENT, would forgo that if it wasn't stated
- When no specific intent is stated, then general intent

GENRAL INTENT

Any mental state that relates Soley to the act that constitutes the criminal offense.

"Knowingly hit"

SPECFIC INTENT

Contains a special mental element that is required beyond the mental state for the act of offense

A) **intent to commit a future act**

B) **a special motive**

C) **Awareness of an attendant circumstance**

In law, **attendant circumstances** (sometimes **external circumstances**) are the facts surrounding an event.

In criminal law in the United States, the definition of a given offense generally includes up to three kinds of "elements": the *actus reus*, or guilty conduct; the *mens rea*, or guilty mental state; and the attendant (sometimes "external") circumstances. The reason is given in *Powell v. Texas*, 392 U.S. 514, 533 (1968):

...criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing.

The burden of proof is on the prosecution to prove each **"element of the offense"** in order for a defendant to be found guilty. The Model Penal Code §1.13(9) offers the following definition of the phrase "elements of an offense":

(i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct as

> (a) is included in the description of the forbidden conduct in the definition of the offense; or

(b) establishes the required kind of culpability; or

(c) negatives an excuse or justification for such conduct; or

(d) negatives a defense under the statute of limitations; or

(e) establishes jurisdiction or venue;

Less likely for MENS REA TO MODIFY ATTENDANT CIRCUMSTANCES

Terms

Causation is the **"causal relationship between the defendant's conduct and end result"**. In other words, causation provides a means of connecting conduct with a resulting effect, typically an injury. In criminal law, it is defined as the ***actus reus*** **(an action)** from which the specific injury or other effect arose and is combined with ***mens rea*** **(a state of mind)** to comprise the elements of guilt.

Causation only applies where a result has been achieved and therefore is immaterial with regard to **inchoate offenses.**

An **inchoate offense**, **preliminary crime**, **inchoate crime** or **incomplete crime** is a crime of preparing for or seeking to commit another crime. The most common example of an inchoate offense is **"attempt".** "Inchoate offense" has been defined as the following: "Conduct deemed criminal without actual harm being done, provided that the harm that would have occurred is one the law tries to prevent.

INTENT

NOTES

Thur. Sept. 8 Mens Rea (cont.): **Strict Liability Offenses & Mistake of Fact.** Statutory interpretation skills continue to play an important role as we continue addressing strict liability crimes.

Note that "Mistake of Fact" is a mens rea issue. **Note that Garnett v. State would also fit under the "Mistake of Fact" section that follows.** Why? How does Mistake of Fact work under the New York Penal Law? - Dressler: pp. 193-213. NYPL §§ 15.15, 15.20.

CLASS NOTES

Tue. Sept. 13 Mens Rea (cont.): **Mistake of Law**. This section discusses two types of Mistake of Law defenses. Read Cheek v. United States carefully. Why does the court reach the outcome that it does? - Dressler: pp. 213-30.

Why do courts dislike to punish defendants for strict liability?

- No real deterrence if were not proving a MENS REA
- Based on utilitarianism
- But some crimes are deemed so dangerous that they trigger strict liability; such as rape, murder and dangerous **public welfare offenses** issues

HYPO

STATUTE PROHIBITS

(1) Attempting to board a train
(2) While carrying a deadly or dangerous weapon
(3) Which was concealed on person
- Punishable by a fine up to $1000 and prison for one year

Nothing here lists a MENS REA; it is a strict liability offense.

- Which normally carry lighter punishments vs. A punishment of 20 years in prison.
- STEPS

♦ STATUTORY INTERPRETATION- Congressional intent
♦ Statute OMITS mention of mens rea,
♦ POLICY (I.e., public welfare offenses);
♦ The standard is REASONABLE and proper to expect people to follow;

- ♦ THE PENALTY IS RELATIVELY SMALL
- ♦ The crime does not carry a heavy STIGMA;
- ♦ Common Law treatment of the crime

IGNORANCE/ Mistake of Law

(1) Mistake/ignorance of law as PENAL LAW EXEMPTION
(2) Constitutional claim (Lambert)
(3) Mistake/ ignorance of the law as a mens rea issue (Cheek)

NOTES

- "Ignorance of law is no excuse"
- Definition of "Peace Officer"
- His defense is that he is entitled to have gun as peace officer

MISTAKE OF LAW

People v. Marrero

69 N.Y.2d 382, N.Y.S.2d 212, 507 N.E.2d 1068, (1987)

p. 213

PROCEDURAL

Trial judge grants motion to dismiss/ Appellate court by narrow 3-2 vote reinstates the indictment. Now in Court of Appeals of New York

PARTIES

Julio Marrero, Connecticut federal prison guard (D)

State NY (P)

FACTS

- Marrero convicted of possession of a 0.38 caliber automatic pistol under NYPL 265.20(a)(1)
- CPL defines "Peace officer" 1.20 and 2.10 "any official or guard of any state correctional facility or of any penal correctional institution"

ISSUE

Whether Marrero as a "peace officer" is exempt from criminal liability under the statute as a mistake of law?

HOLDING

No.

RULE

A mistake of law defense cannot be applied to statute 265.20(a)(1) where a defendant cannot be classified in all reasonable fairness as a state "peace officer", when he is in fact a Federal guard.

REASONING

- Mistake of Law statute 15.20
- "Ignorance of the law is no excuse" p.214
- Cites *Gardner v. People*; on mistakenly reading a statue and thinking their conduct was legal/ not relieved of criminal liability
- Cites counter *People v. Weiss*; kidnapping done "within the authority of law" intent negated, reversed.
- Justice Homes/ The Common Law cited "to admit the excuse would be to encourage ignorance"
- 15.20: "EFFECT OF IGNORANCE OR MISTAKE UPON LIABILITY", "A PERSON IS NOT RELIEVED OF CRIMINAL LIABILITY FOR CONDUCT BECAUSE HE ENGAGES IN SUCH CONDUCT UNDER A MISTAKEN BELIEF THAT IT DOES NOT AS A MATTER OF LAW CONSTITUUTE AN OFFENSE...**UNLESS. FOUNDED UPON AN OFFICIAL STATEMENT OF THE LAW CONTAINED IN a. a statute or b.** statement made by a public servant, agency, or body legally charged. "
- MPC p.215;
- Opens a wide range of defenses based on claims of basic ignorance
- Court refers to MPC- "ACTS IN REASONSABLE RELIANCE UPON AN OFFICIAL STATEMENT OF THE LAW. AFTERWORDS DETERMINED TO BE INVALID OR ERRONOUS"- relying on law to later be found to be invalid
- Court then follows MPC definition not the statute
- Consulting a lawyer or professor who then supports the mistake of law claim will not be valid as it is not an official statement.

PRONG 1: **mistake of law defense**

PRONG 2: was considered a peace officer under the statute-dismissed

DISPO

Affirmed, Criminal Possession of a weapon 3rd degree

NOTES

Judge Hancock DISSENT:

"Mistaken but entirely reasonable assumption"

Defendants statutory reading of what a peace officer was although incorrect showed "tenaciously attempting to ferret out the meaning. P.221

NOT PROMOTING "STRATEGIC HEEDLESSNESS"

MPC- says "acts in reasonable reliance upon an official statement of the law. AFTERWORD DETERMINED TO BE INVALID OR ERRONEOUS...."

NYPL 15.20- Not relieved of criminal liability for mistake of law unless founded upon an official statement of law contained in (a) **a statute**...or (b) **an interpretation of the statute officially made.**

NOTES

Lambert v. California (1957)- "anyone convicted of a felony could not stay in LA for more than 5 days without registering"/ Lambert arrested after staying for 7 years/ claimed unaware of ordinance/ USSC Reversed/ Due Process defense

MALUM PROHIBITUM WRONG BECASUE PROHIBITED

MALUM INSE- inherently bad

1. It punished omission
2. The duty to act was based on a STATUTS that wouldn't alert ordinary law-abiding persons of the need to register.

Malum prohibitum (plural *mala prohibita*, literal translation: "wrong [as or because] prohibited") is a Latin phrase used in law to refer to conduct that constitutes an unlawful act only by virtue of statute, as opposed to conduct that is evil in and of itself, or ***malum in se.***

Conduct that is so clearly violative of society's standards for allowable conduct that it is illegal under English common law is usually regarded as *malum in se*. An offense that is *malum prohibitum* may not appear on the face to directly violate moral standards. The distinction between these two cases is discussed in *State of Washington v. Thaddius X. Anderson*:

Criminal offenses can be broken down into two general categories *malum in se* and *malum prohibitum*. The distinction between *malum in se* and *malum prohibitum* offenses is best characterized as follows: a *malum in se* offense is "naturally evil as adjudged by the sense of a civilized community," whereas a *malum prohibitum* offense is wrong only because a statute makes it so. *State v. Horton*, 139 N.C. 588, 51 S.E. 945, 946 (1905).

"Public welfare offenses" are a subset of *malum prohibitum* offenses as they are typically regulatory in nature and often "'result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize.'" *Bash*, 130 Wn.2d at 607 (quoting *Morissette v. United States*, 342 U.S. 246, 255–56, 72 S. Ct. 240, 96 L. Ed. 288 (1952)); see also *State v. Carty*, 27 Wn. App. 715, 717, 620 P.2d 137 (1980).

Examples of offenses that are generally regarded as *mala prohibita* include:

→ **disorderly conduct**

→ **gambling**
→ **possession of controlled substance**
→ **prostitution**
→ **public intoxication**
→ **speeding**
→ **vagrancy**

Conley v. U.S. (2013)- gun in vehicle in DC Laws/ USSC reversed on basis of due process.

- The Federal Government has no authority to charge us taxes- claimed.
- Advised by lawyers he didn't have to pay
- Believed his WAGES are not taxable income

SECTION 7201:

Cheek v. U.S.

Supreme Court of United States, (1991)

Caption p.225

PROCEDURAL

- Indicted on 10 violations of Federal Law
- 6 counts willful failing to file/3 counts of to evade
- Specific intent crimes
- Convicted in trial court, US Court of Appeals 7th Circuit affirmed the conviction.

PARTIES

- Petitioner John L. Cheek
- State

FACTS

- Pilot J. Cheek for AA since 1973
- Has not filed returns since 1979
- Increasing number of withholdings; 60 allowances
- Indicated exemption from 1981 to 1984
- Was attending a group encouraging his belief that Federal income taxes are not constitutional
- Did not act with "willfulness" as he had come to believe the taxes were unconstitutional
- Income far exceeded the minimum needed to trigger statutory filing requirement

- Argued in court that **16th Amendment does not authorize imposition of an income tax**
- Under Title 26 (§) 7201 of US Code any person "who **willfully** attempts in any manner to evade or defeat any tax imposed by this title of the payment thereof" shall be guilty of a felony.
- Under 26 U.S.C. (§) 7203; **willfully** fails to make return" + misdemeanor

ISSUE

Whether a good-faith misunderstanding of the law **will negate the specific intent requirement of willfulness** under criminal tax laws is a question of fact for the jury; there is no legal requirement that the belief be objectively reasonable.

HOLDING

NO

RULE

A purportedly good faith misunderstanding of the law **will negate the specific intent requirement of willfulness** under criminal tax laws is a question of fact for the jury; there is no legal requirement that the belief be objectively reasonable.

REASOING

- p.227
- Disagreement with a law does not prevent willfulness p.226
- CITES U.S. Murdock (1933)- WILLFULL; an act done with bad purpose or evil motive
- U.S. v. Bishop (1973)- "voluntary intentional violation of a known legal duty" with "Bad faith or evil intent"

No. There is no requirement that a good-faith mistake about federal tax laws be objectively reasonable to negate the willfulness requirement. Ignorance or a mistake of the law is generally no defense to criminal prosecution. The complexity of federal tax regulations has made it difficult for average citizens to keep up.

Consequently, Congress made specific intent to violate the law an element of criminal offenses. A defendant will satisfy the willfulness requirement if she made a "voluntary, intentional violation of a known legal duty."

- This means that the defendant must
- (1) **know about the duty** and
- (2) **purposely violate it.** The issue of whether a good faith but mistaken belief about the law will negate the knowledge requirement is a question of fact for the jury. The belief need not be objectively reasonable, as this would convert the issue into a question of law.

- That said, a jury is less likely to find that the defendant was unaware of a duty if the belief is outrageous or unreasonable.
- Here, **Cheek argues that his good faith belief that the federal tax laws were unconstitutional negates the willfulness requirement needed for a criminal conviction.** Such a finding is completely inappropriate here.
- Cheek knew about the duty and ignored his obligation. The purpose of the specific intent requirement was to ensure that taxpayers who attempted to comply with the tax code would not be convicted of crimes for innocent mistakes, not to allow taxpayers to ignore known duties imposed by the tax code.
- Cheek was free to challenge the law, but he chose not to file returns instead. A trial judge may instruct a jury that it should not consider claims like Cheek's that the tax code is unconstitutional.
- Cheek's beliefs that wages did not constitute income and that he was not a taxpayer should have been put to the jury.
- The judgment of conviction is vacated, and the matter is remanded. [On retrial, the jury was instructed to consider "whether the defendant's stated belief about the tax statute was reasonable as a factor in deciding whether he held that belief in good faith."

JURISDICTION A: murder...intentionally kills

JURISDICTION B: murder....intentionally kills a human being AND KNOWS THAT THE KILLING IS UNLAWFUL.

- Punishing people who ALSO KNOW ABOUT THE LAWS

DISPO

Cheek was convicted. *United States v. Cheek*, 3 F.3d 1057 (7th Cir. 1993)].

Remanded, re-convicted sentenced 1 year and $62,000 fine

NOTES

The **Sixteenth Amendment** (**Amendment XVI**) to the United States Constitution allows Congress to levy an income tax without apportioning it among the states on the basis of population.

It was passed by Congress in 1909 in response to the 1895 Supreme Court case of *Pollock v. Farmers' Loan & Trust Co.* The Sixteenth Amendment was ratified by the requisite number of states on February 3, 1913, and effectively overruled the Supreme Court's ruling in *Pollock*.

Prior to the early 20th century, most federal revenue came from tariffs rather than taxes, although Congress had often imposed excise taxes on various goods.

The Revenue Act of 1861 had introduced the first federal income tax, but that tax was repealed in 1872. During the late nineteenth century, various groups, including the Populist Party, favored the establishment of a progressive income tax at the federal level. These groups believed that tariffs unfairly taxed the poor, and they favored using the income tax to shift the tax burden onto wealthier individuals. The 1894 Wilson–Gorman

Tariff Act contained an income tax provision, but the tax was struck down by the Supreme Court in the case of *Pollock v. Farmers' Loan & Trust Co.* In its ruling, the Supreme Court did not hold that all federal income taxes were unconstitutional, but rather held that income taxes on rents, dividends, and interest were direct taxes and thus had to be apportioned among the states on the basis of population.

For several years after *Pollock*, Congress did not attempt to implement another income tax, largely due to concerns that the Supreme Court would strike down any attempt to levy an income tax.

In 1909, during the debate over the Payne–Aldrich Tariff Act, Congress proposed the Sixteenth Amendment to the states.

Though conservative Republican leaders had initially expected that the amendment would not be ratified, a coalition of Democrats, progressive Republicans, and other groups ensured that the necessary number of states ratified the amendment. Shortly after the amendment was ratified, Congress imposed a federal income tax with the Revenue Act of 1913.

The Supreme Court upheld that income tax in the 1916 case of *Brushaber v. Union Pacific Railroad Co.*, and the federal government has continued to levy an income tax since 1913.

NOTES

Thur. Sept. 15 **Causation: Actual Cause**. Causation is the third basic component of criminal law statutes. What are the three tests for actual causation discussed in the reading, and when do they apply? - Dressler: pp. 231-37.

"BUT-FOR TEST"

Legal Cause/ proximate cause

WEISS

"A PERSON WHO WILFULLY SEIZES, CONFINES, INVEIGLES, or KIDNAPS ANOTHER, WITH INTENT to cause harm, WITHOUT AUTHORITY OF LAW, to be confined or imprisoned within the state...against his will....IS GUILTY OF KIDNAPPING."

CAUSATION

Velazquez v. State

PP

- At trial, the defendant was convicted of vehicular homicide.

FACTS

- On April 23, 1988, **Velazquez (defendant)** and an acquaintance, Alvarez, agreed to race against each other in a drag race.
- They set the start line at the beginning of the road, near a guardrail overlooking a canal, and set the finish line a quarter-mile away from the canal. Velazquez and Alvarez completed the agreed-upon course.

- Alvarez then turned his car around and began racing towards the start line. Velazquez followed closely behind. Both were unable to apply their brakes in time to avoid crashing through the guardrail. Alvarez's car went over the canal and he died instantly.
- Velazquez landed in the water and escaped to safety.

ISSUE

Is a defendant's conduct **the proximate cause of a prohibited result** where the result is beyond the scope of the defendant's conduct or it would otherwise be unjust to impose criminal liability?

HOLDING

No, it is not.

RULE OF LAW

Even where a defendant's conduct is a cause-in-fact of a prohibited result, it is not the proximate cause if the prohibited result is beyond the scope of the defendant's conduct, or it would be unjust to impose criminal liability.

REASONING

Even where a defendant's conduct is the cause-in-fact of a prohibited result, it is not the proximate cause if the prohibited result is beyond the scope of the defendant's conduct or it would otherwise be unjust to hold the defendant criminally responsible. Traditionally, courts have employed the "but for" test to determine whether a defendant's action caused a particular result.

Under this test, if the result would not have occurred "but for" the defendant's conduct, then the defendant is not the cause-in fact.

There is a situation where the "but for" test fails. This is when the independent actions of two different actors are each sufficient to cause the specified result. Consider a scenario where two people each shoot a victim and both shots are sufficient to kill the victim. Neither actor is the "but for" cause because even if one person had not shot the victim, the victim would still have died from the other person's shot. In these situations, courts employ the substantial factor test.

If a defendant is a **substantial factor in producing the specified result, then they are each a cause-in-fact of the result.**

CITES

In *J.A.C. v. State* (1979), this court held that a driver in a drag race was not the proximate cause of a passenger's death because the passenger's reckless act of grabbing the steering wheel was a superseding cause of his own death.

The passenger had effectively killed himself by his own recklessness and it would have been unjust to hold the defendant criminally responsible. Similarly, it would be unjust to hold Velazquez criminally responsible for Alvarez's death. Velazquez was indeed a cause-in-fact of Alvarez's death. If Velazquez had not agreed to participate in the drag race, Alvarez would not have died from driving his car over the guardrail.

However, Alvarez effectively killed himself through his own recklessness. The drag race was over when Alvarez independently extended it back to the finish line. No one forced him to continue the race or to drive at a reckless speed. Because Alvarez primarily caused his own death, it is unfair to hold Velazquez criminally responsible for Alvarez's death. Velazquez is therefore not the proximate cause of Alvarez's death.

DISPO

The conviction is reversed.

NOTES

Classic example of proximate cause in a criminal case.

CAUSATION IS "ANTECEDENT BUT FOR WHICH THE RESULT IN QUESTION WOULD NOT HAVE OCCURRRED"

BUT-FOR TEST

In law and insurance, a **proximate cause** is an event sufficiently related to an injury that the courts deem the event to be the cause of that injury. There are two types of causation in the law: cause-in-fact, and proximate (or legal) cause. Cause-in-fact is determined by the "but for" test: But for the action, the result would not have happened.

(For example, but for running the red light, the collision would not have occurred.) The action is a necessary condition, but may not be a sufficient condition, for the resulting injury. A few circumstances exist where the **but for test** is ineffective (see But-for test). Since but-for causation is very easy to show (but for stopping to tie your shoe, you would not have missed the train and would not have been mugged), a second test is used to determine if an action is close enough to a harm in a "chain of events" to be legally valid. This test is called proximate cause. Proximate cause is a key principle of Insurance and is concerned with how the loss or damage actually occurred. **There are several competing theories of proximate cause** (see Other factors). For an act to be deemed to cause a harm, both tests must be met; proximate cause is a legal limitation on cause-in-fact.

The formal Latin term for "but for" (cause-in-fact) causation, is ***sine qua non*** causation.

WHERE BUT FOR FAILS

2 defendants are acting independently AND NOT IN CONCERT...

….AND....commit two separate acts, EACH ALONE IS SUFFICIENT to bring about the prohibited result...

….THEN courts apply the **"substantial factor"** test-

UNDER THE SPECFIC STATUTE, if the defendant was a substantial factor in bringing about the result, then the defendant IS AN ACTUAL CAUSE.

VELAZQUEZ v. STATE

V v. S leads to BUT-FOR TEST

Majority of cases

ACCELERATION TEST

1. **When do you consider acceleration?**
2. **Under what condition, if...then...**

A defendant is guilty of manslaughter when;

A non-lethal injury inflicted after a lethal injury is the cause-in-fact of a victim's death if it accelerates the victim's death.

SUBSTANTIAL FACTOR TEST

LOOK UP:

2 people independently not in concert that bring about a prohibited result

PROXIMATE CAUSE

A fairness limitation determining who among those that satisfy the but-for standard should be held accountable for the resulting harm

NOT an ACTUAL CAUSE/ NOT Proximate cause

INTERVENING FACTORS/ INTERVENING CAUSES

If there are not intervening causes, an act that is an actual cause of the harm is also a proximate cause.

Dr. I- couldn't decide

Dr. H.- earlier was underlying first injury

Dr. Hof- second injury accelerated

Oxendine v. State (1987)

ISSUE

Is a non-lethal injury inflicted after a lethal injury a cause-in-fact of a victim's death if it causes the victim to die sooner than he otherwise would have?

Facts

1. **J. Oxendine** and his girlfriend **Leotha Tyree** separately beat Oxendine's 6-year-old son J. Oxendine Jr, ultimately both casing his death by intra-abdominal hemorrhage and acute peritonitis.
2. 2 distinct sets of injuries 24 hours apart
3. Medical testimonies by Dr. Inguito and Dr. Hamel were not wholly conclusive on which injury pattern was more responsible/ or accelerating death
4. Oxendine/ Tyree both convicted of manslaughter and sentenced to 12 years imprisonment

Rule

Reasoning

"Contribution without acceleration is not sufficient.

DISPO

Remanded charged with lesser crime assault second degree.

Notes

Notwithstanding the fact that causation may be established in the above situations, the law often intervenes and says that it will nevertheless not hold the defendant liable because in the circumstances the defendant is not to be understood, in a legal sense, as having caused the loss. In the United States, this is known as the doctrine of **proximate cause.** The most important doctrine is that of *novus actus interveniens*, which means a 'new intervening act' which may 'cut the chain of causation'.

Proximate Cause

The but-for test is factual causation and often gives us the right answer to causal problems, but sometimes not. Two difficulties are immediately obvious.

The first is that under the **but-for test, almost anything is a cause.**

But for a tortfeasor's grandmother's birth, the relevant tortious conduct would not have occurred. But for the victim of a crime missing the bus, he or she would not have been at the site of the crime and hence the crime would not have occurred. Yet in these two cases, the grandmother's birth or the victim's missing the bus are not intuitively causes of the resulting harm. This often does not matter in the case where cause is only one element of liability, as the remote actor will most likely not have committed the other elements of the test. The **legally liable cause is the one closest to or most proximate to the injury. This is known as the Proximate Cause rule**. However, this situation can arise in strict liability situations.

Intervening Cause

Imagine the following. A critically injures B. As B is wheeled to an ambulance, she is struck by lightning. She would not have been struck if she had not been injured in the first place. Clearly then, A caused B's whole injury on the 'but for' or NESS test.

However, at law, the intervention of a supervening event renders the defendant not liable for the injury caused by the lightning.

The effect of the principle may be stated simply:

If the new event, whether through human agency or natural causes, does not break the chain, the original actor is liable for all the consequences flowing naturally from the initial circumstances. **But if the new act breaks the chain, the liability of the initial actor stops at that point,** and the new actor, if human, will be liable for all that flows from his or her contribution.

Note, however, that this does not apply if the Eggshell skull rule is used. For details, see article on the Eggshell Skull doctrine.

Independent sufficient causes

When two or more negligent parties, where the consequence of their negligence joins together to cause damages, in a circumstance where either one of them alone would have caused it anyway, each is deemed to be an "Independent Sufficient Cause," because each could be deemed a "substantial factor," and both are held legally responsible for the damages. For example, where negligent firestarter A's fire joins with negligent firestarter B's fire to burn down House C, both A and B are held responsible.

(e.g., *Anderson v. Minneapolis, St: P. & S. St. R.R. Co*., 146 Minn. 430, 179 N.W. 45 (1920).) This is an element of Legal Cause.

***Summers v. Tice* Rule**

The other problem is that of overdetermination. Imagine two hunters, A and B, who each negligently fire a shot that takes out C's eye. Each shot on its own would have been sufficient to cause the damage. But for A's shot, would C's eye have been taken out? Yes. The same answer follows in relation to B's shot. But on the but-for test, this leads us to the counterintuitive position that neither shot caused the injury. However, courts have held that in order to prevent each of the defendants avoiding liability for lack of actual cause, it is necessary to hold both of them responsible. This is known, simply, as the *Summers v. Tice* Rule.

Concurrent actual Causes

Suppose that two actors' negligent acts combine to produce one set of damages, where but for either of their negligent acts, no damage would have occurred at all. This is two negligences contributing to a single cause, as distinguished from two separate negligences contributing to two successive or separate causes. These are "concurrent actual causes". In such cases, courts have held both defendants liable for their negligent acts. Example: A leaves truck parked in the middle of the road at night with its lights off. B fails to notice it in time and plows into it, where it could have been avoided, except for want of negligence, causing damage to both vehicles. Both parties were negligent. (*Hill v. Edmonds*, 26 A.D.2d 554, 270 N.Y.S.2d 1020 (1966).)

Foreseeability

Legal Causation is usually expressed as a question of 'foreseeability'. An actor is liable for the foreseeable, but not the unforeseeable, consequences of his or her act. For example, it is foreseeable that if I shoot someone on a beach and they are immobilized, they may drown in a rising tide rather than from the trauma of the gunshot wound or from loss of blood. However it is not (generally speaking) foreseeable that they will be struck by lightning and killed by that event.

This type of causal foreseeability is to be distinguished from foreseeability of extent or kind of injury, which is a question of remoteness of damage, not causation. For example, if I conduct welding work on a dock that lights an oil slick that destroys a ship a long way down the river, it would be hard to construe my negligence as anything other than causal of the ship's damage. There is no *novus actus interveniens*. However, I may not be held liable if that damage is not of a type foreseeable as arising from my negligence. That is a question of public policy, and not one of causation.

Tue. Sept. 20

Causation (cont.): Proximate Cause.

Why do courts apply the doctrine of proximate causation?

Dressler: pp. 237-255.

Causation is the **"causal relationship between the defendant's conduct and end result".** In other words, causation provides a means of connecting conduct with a resulting effect, typically an injury.

In criminal law, it is defined as the *actus reus* (an action) from which the specific injury or other effect arose and is combined with *mens rea* (a state of mind) to comprise the elements of guilt.

Causation only applies where a result has been achieved and therefore is immaterial with regard to **inchoate offenses.**

An **inchoate offense**, **preliminary crime**, **inchoate crime** or **incomplete crime** is a crime of preparing for or seeking to commit another crime. The most common example of an inchoate offense is "attempt". "Inchoate offense" has been defined as the following: "Conduct deemed criminal without actual harm being done, provided that the harm that would have occurred is one the law tries to prevent.

inchoate offenses:

List of inchoate offenses

- Being an accessory
- Attempt—see *State v. Mitchell*
- Compounding a felony

- Compounding treason
- Conspiracy
- Criminal facilitation
- Incitement
- Misprision
- Misprision of felony
- Misprision of treason
- Offences under the Racketeer Influenced and Corrupt Organizations Act (RICO)
- Solicitation
- Stalking
- Mail and wire fraud

Proximate Cause = "LEGAL CAUSE"

- The **But-For Test** is imprecise
- Fails to exclude remote candidates for legal responsibility
- Identify who and what events to be held accountable
- THUS, A PERSON OR EVENT CANNOT BE A PROXIMATE CAUSE OF HARM UNLESS SHE OR IT IS AN ACTUAL CAUSE, BUT A PERSON OR EVENT CAN BE THE ACTUAL CASUSE WITHOUT BEING THE PROXIMATE CAUSE. P.238
- When some but-for causal agent comes into play AFTER THE defendants VOLUNTARY ACT or OMMISSION...AN BEFORE THE SOCIAL HARM occurs.
- **INTERVENING FORCES:**
- 1. **An Act of God** (no human intermediary)
- 2. **An act of independent third party**
- 3. **an act or omission of the victim that assists in bringing about** the outcome
- OR a **NEW INTERVENING ACT** that breaks the chain of causation
- CAUSATION IS DEFINED MORE NARROWLY IN CRIMINAL LAW THAN TORTS

p.238

People v. Rideout (2006)

STATUTE

"OWI, OWVI, thereby causing death"

PP

Convicted trial, appealing to Michigan Court of Appeals (who will vacate, then it will after this go to Michigan Supreme Court (who will partially reverse again)

FACTS

- Rideout (D) stuck into Reichelt's car with BAC 0.16
- Reichelt's passenger Keiser was then killed at the MVA scene; killed by an ongoing car driven by Tonya Welch.
- Jury may not have been given correct instructions on causation

ISSUE

Whether the jury gave proper instruction on what Causation is?

HOLDING

No they did not.

REASONING

- People v. Schaefer (USSC 2006)

1. FACTUAL CAUSE

2. PROXIMATE CAUSE

- PROXIMATE CAUSE IS "LEGAL COLLOQUIALISM"; Constructed to prevent criminal liability from attacking when the (D) conduct is TOO REMOTE/ UNNATURAL p.239 People v. Tims.

A FACTUAL CAUSE THAT "OF WHICH THE LAW WILL TAKE COGNIZANCE"

- **"A direct and natural result of actions"**- p.240 Schafer
- WAS THERE ANY "INTERVENING CAUSE" to break the chain of causality
- Superseded it?
- REASONABLE FORSEEABILITY
- "GROSS NEGLIGENCE" or "INTENTIONAL MISCONDUCT"
- FORESEEBALE UNDER AN OBJECTIVE STANDARD OR REASONABLENESS

"A-CAUSE OF THE ACCIDENT, but not necessarily THE-CAUSE"

-If BUT-FOR that causes contribution, the death would not have occurred= A Proximate Cause

BUT

- The problem here goes deeper than Jury Mis instruction.
- INSUFFICIENT EVIDENCE TO ESTABLISH A PROXIMATE CASUE AT ALL p.241
- KEISNER CHOSE TO RE-ENTER THE ROADWAY
- It is arguably foreseeable that a person involved in an accident would go check their vehicle.
- THERE IS NO UNIVERSAL TEST TO DETERMINE IF AN INTERVENING CAUSE IS ALSO A SUPERCEDING CAUSE.
- Just Factors
- FORSEEABILITY IS THE LYNCHPIN

RULE

- **Six Proximate Cause Factors:**

(1) **De minimis** contribution to social harm factor

Something too trivial or too minor to merit consideration, especially in forming culpability.

De minimis acts will not ever be enough to establish proximate cause.

(2) the **Intended-consequence doctrine**

This rule states that if the consequences intended and the one which happened belong to the same genus; even if different species, they will be treated the same.

(3) Omissions by intervenor

A negative act no matter how intervening will not override a positive act.

(THESE THREE ARE NOT RELEVANT IN THIS CASE)

(4) **Foreseeability Factor** (Key)

(5) "**APPARENT SAFETY DOCTRINE**" A new chain then began for which the victim was now made responsible

Factor (6) **Voluntary; "Free, Deliberate, and Informed Human Intervention"**

"Free, deliberate and informed" choices

Regina v. Blaue (1975)

1. **CAUSATION**

Three Tests for Actual Cause

1. **But-for (always try this first)**
2. **Acceleration**
3. **Substantial Factor**

Helps the prosecution to satisfy actual cause

In the outline you should set out each test, with its rule, and the facts that trigger that alternative.

- Proximate Cause is a policy issue that asks whether it is fair to hold the defendant liable, even where the defendant is the ACTUAL CAUSE.

Proximate cause acts as limit on criminal culpability, even where actus reus, mens rea and actual cause are satisfied.

- Try not to act on common sense or intuition: ASK ON RULES

Ordinary Negligence is "foreseeable".

ALWAYS MENTION IN MINI CONCLUSION A OF MINI IRAC

State v. Preslar (1856)

Man threatens his wife, she runs into cold, she dies in cold. Man found to NOT BE the proximate cause of death.

- Keisner returning to his car from the apparent safety of the side of road broke the causality chain.

p.243

- Jehovah witness was stabbed, died because of wounds + refused to get a blood transfusion.

-Welch driving down road was purely coincidental

Keiser re-entering the roadway renders foreseeability factor to be of little value to the analysis.

"Contributary negligence of the victim"

People v. Tims- rules of causation in criminal trials are not tied to those rules of civil cases.

DISPO

R/R

NOTES/ D/C

p. 247

MODAL PENAL CODE:

Section 2.03

“Recklessness or negligence” needed

But-For Supremacy

Liability requires purpose, knowledge, recklessness or negligence with respect to result.

ACTUAL RESULT

2.A- Situations where result differs from the purpose contemplated only in that it affects a different person.

Difference is then immaterial

2.B- result was same kind of injury as contemplated/ planned but occurred in different way;

3. Deals with REKLESS or NEGLEGENT,

Ultimately MPC uses BUT-FOR, inputting culpability,

Velazquez v. State (1990)

PP

Convicted of vehicular homicide. Appealed DC Florida

Facts

Drag race occurs, race is over. Alavarez then dies in a car accident on the way back. Velazquez survived.

Issue

Can you be convicted of vehicular homicide participating in a race?

Held

No

Reasoning

Manner likely to cause death

And applied proximate cause

Factual Cause: BUT-FOR

Legal Cause Prong: legal cause (a policy consideration about liability)

Rule:

DISPO

Velazquez was found not to be the proximate cause of death.

COINCIDENTAL/ Response Test: Steps

(1) Identify intervening cause(s)
(2) Determine whether each intervening cause is **COINCIDENTAL** or **RESPONSIVE** in relation to Defendant's act(s)
(3) Then, for COINCIDENTAL, D is NOT proximate cause IF the intervening cause is UNFORSEEABLE.
- FOR RESPONSIVE INTEVENING CAUSES, UNFORSEEABLE AND ABNORMAL.

p. 255-260

CONCURRENCE OF THE ELEMENTS

State v. Rose

- See spread sheet

Thur. Sept. 22

Homicide: Introduction. After finishing causation (and the other basic principles of criminal law, we will use what we have learned to examine a specific type of criminal statutes: homicide crimes. We will then look at other crimes and defenses, applying the principles we have learned up to this point. For this class, take a close look at the New York homicide statutes.

Dressler: pp. 257-60;

COMMON LAW: "**UNLAWFUL KILLING OF ANOTHER HUMAN BEING** WITH **MALICE AFORETHOUGHT**"

(Any number of arbitrary mental statuses)

(1) intent to kill (2) intent to cause grievous bodily harm (3) Depraved-heart murder/ implied/presumed intent or extreme recklessness regarding homicidal risk **(4) intent to commit a felony** (STRICT LIABILITY COMMITITNG HOMICIDE WHILE COMMITTING ANOTHER FELONY)

- Subsequent division of murder into degrees
- Later, Murder 1, 2 vs. Manslaughter
- **Manslaughter** (NO MALICE AFROETHOUGHT/ NO JUSTIFICATION)
- Voluntary vs. Involuntary Manslaughter
- Heat of passion, act unduly dangerous, misdemeanor manslaughter
- ALI/MPC- began to formulate a more specific type of mens rea
- MPC 210.2- murder "homicide"

Statutes on pp. 261-274

- Alabama (no malice aforethought)
- California (mentions fetus/abortion) (death after 3 years and one day rule)
- Michigan (mentions PD/Corrections=1degree) (some manslaughter can be paid as a 7,500 fine) (assisting with abortion as manslaughter)
- Missouri (no malice aforethought/ after deliberation on the matter) while engaged in a felony is only 2nd degree, Involuntary manslaughter becomes voluntary manslaughter if its law enforcing officer or their immediate family member.
- New York; A person is a human being who HAS BEEN BORN and IS ALIVE. Begins with Crim-Neg-Hom (E-Felony), then Manslaughter 1 & 2 (which in second degree includes encouraging someone's suicide), then Murder (an explicit mention of gender identity/ sexual orientation trigger not being a reasonable explanation for emotional disturbance (Peace, Correction Officer, Judge becomes first degree)
- Pennsylvania: long sentences/ aiding or soliciting suicide charges
- TEXAS- INTENTIONALLY, KNOWINGLY, RECKLESSLY, or with CRIMINAL NEGLEGENCE/ adequate cause/ sudden passion/ "CAPITAL MURDER" "passion can drop charges to 2nd degree 2-20 years"/ CAPITAL: FF/PD, felony. More than one or under10 (chapter doesn't apply to death of an unborn child/ abortion)

NYPL Sec. 125 +

Murder 2nd Degree know sub sections 1,2, 3,

Manslaughter in 1st degree know subsection ½

Manslaughter in second degree, know section 1

Criminally Negligent Homicide

p. 274-293

THE PROTECTED INTEREST: HUMAN BEING

People v. Eulo

63 N.Y.2d341, 482 N.Y.S.2d 436, 472 N.E.2d 286. (1984)

ISSUE

In homicide proceedings, may courts determine when death occurs using brain-based criteria rather than the traditional cardiorespiratory criteria?

HOLDING

YES

REASONING

A defendant commits homicide if he causes the death of another. Defining precisely when a person dies is necessary in a homicide proceeding because criminal liability does not attach until a person has in fact died.

Traditionally, the medical community has used cardiorespiratory criteria, defining death as the irreversible cessation of breathing and heartbeat.

There has been a shift towards defining death as the irreversible cessation of brain activity. Advances in science reveal that once the brain dies, all bodily functions, including cardiorespiratory functions, cease as well. Although artificial respirators may prolong breathing and heartbeat, the body can no longer independently sustain breathing and heartbeat after brain death.

Consequently, **a number of jurisdictions now view brain activity as a more reliable indicator of life.** In this jurisdiction, the legislature has not expressly determined whether to define death according to traditional cardiorespiratory criteria or brain-based criteria. Legislative history shows that the legislature had several opportunities to officially define death as the irreversible cessation of brain functions, but did not act.

However, that does not prevent this court from adopting brain-based criteria as a means of determining death. There is no evidence that the legislature disapproves of using brain-based criteria to determine death, and the legislature has emphasized that in the absence of a legislative pronouncement defining a term, courts should interpret the term according to its fair meaning.

In light of medical and scientific advances, this court finds that determining death according to brain-based criteria is not unfaithful to the legislature's perception of death. While death is ordinarily determined according to cardiorespiratory criteria, brain activity may serve as supplemental criteria to help determine when death occurs.

In this case, Eulo argues that he can only be guilty of homicide if he caused the irreversible cessation of the victim's heartbeat. Eulo contends the trial court erred because it failed to instruct the jury on this matter. Without such instruction, Eulo argues, **the jury may have improperly convicted him for causing the victim's brain death, rather than causing the victim's irreversible cessation of heartbeat and breathing.**

It is true that the trial court did not instruct the jury on how to determine when death occurs.

The judge did instruct, however, that the transplantation procedures could be a cause of the victim's death that superseded Eulo's conduct.

By implication, the jury was instructed that the victim was not dead at the time he was declared brain dead, since the subsequent transplantation procedures were possible causes of death.

While it would have been ideal if the trial court had given instructions as to both cardiorespiratory criteria and brain-based criteria, the failure to do so was not improper because **this court recognizes theories of homicide based on either set of criteria.**

NOTES

Dr. Putting them on life support was A RESPONSIVE INTERVENING CAUSE; coincidental/ responsive intervening cause test; but court held that victims were dead before the doctors set up or discontinued life support.

Refers to Common Law "Year and a Day Rule", as in someone who survived for over a year the assailant could not be convicted.au

- **Causation eliminated by a time frame**

The case book is organized around intentional and unintentional; categorizing intentional/ unintentional murder or manslaughter.

- Intentional Murder (Premeditation –Deliberation formula for murder)
- Intentional Manslaughter
- HEAT OF PASSION
- WHO IS A REASONABLE PERSON
- MPC and NYPL: Extreme Emotional Disturbance

Premeditation and Deliberation FOR FIRST DEGREE MURDER

- PA introduced degrees of murder in 1794 "premeditated, willful and deliberate"-

State v. Gutherie

194 W.Va. 657, 461 S.E.2d 163 (1995)

FACTS

A man got angry, stabbed a coworker in neck: 1st or 2nd degree?

ISSUE

To constitute first-degree murder, must the defendant have had some period of time between the development of the intent to kill and the actual killing to indicate that the act was premeditated and deliberate and not impulsive?

HELD: YES

REASONING:

The jury instructions given by the trial judge failed to adequately inform the jury of the difference between first-degree murder, which requires premeditation and deliberation, and second-degree murder, which may only require an intent to kill.

To allow the prosecution to prove premeditation and deliberation by only showing that the intent came "into existence for the first time at the time of such killing" eliminates the distinction between the two degrees of murder.

Although there is no specifically-defined period of time which distinguishes between the two, there must be a period of time between the formation of the intent to kill and the actual killing to constitute first-degree murder. Such period of time indicates the killing was calculated and by design.

There must be an opportunity for some reflection on the intention to kill after the intent is formed by the accused. An elaborate plan or scheme is not needed for first-degree murder, only that there be evidence that the defendant considered and weighed his decision to kill. **Any other spontaneous, but intentional, killing is second-degree murder.**

Midgett v. State

Supreme Court of Arkansas

292 Ark. 278, 729 S.W.2d 410 (1987)

Rule of Law

The crime of first-degree murder generally requires the killing to be premeditated and deliberate.

Facts

Appellant Midgett (defendant) was charged with the first-degree murder of his eight year old son. At trial, Midgett's daughter testified that several days before the son died, Midgett had been heavily drinking and began beating the son in the stomach and back with a closed fist. She had witnessed Midgett choking the son on several prior occasions. She attributed bruising on the son's body over the past six months to Midgett. On the day of the son's death, Midgett took the body to the hospital. The medical examiner concluded that the son died due to an abdominal hemorrhage caused by blunt force trauma. The trauma was consistent with injuries caused by a human fist. Midgett was convicted of first degree murder. Midgett appealed.

Issue

Does the crime of first degree murder require the killing to be premeditated and deliberate?

Holding and Reasoning (Newbern, J.)

Yes. Generally, a defendant may not be convicted of first degree murder unless he has killed with premeditation and deliberation. In some jurisdictions, legislatures have made exceptions. These jurisdictions allow convictions for first degree murder when death results from child abuse, even if the death is not premeditated or deliberate. But unless this jurisdiction's law is amended to forego the elements of premeditation and deliberation, this court must require them. Here, there was sufficient evidence to show that Midgett had been abusing his son for at least six months. This evidence demonstrates that Midgett intended to abuse the child. It may even demonstrate that he developed an intent to kill the son while in a drunken rage as he disciplined the child. But the evidence in no way demonstrates that Midgett killed the child with premeditation and deliberation. There was thus insufficient evidence to sustain Midgett's conviction of first degree murder. There was, however, sufficient evidence to sustain a conviction of second degree murder, based on Midgett's intent to cause serious physical injury.

Dissent (Hickman, J.)

The degree of murder is an issue for the jury to decide. The jury could have concluded that Midgett's continuous abuse of the child amounted to an intent to kill the child.

State v. Forrest

Shoots his father suffering with sickness.

PREMEDITATION TEST

(1) No provocation by deceased
(2) Conduct and statements by the (D)
(3) Threats and declarations of the (D)
(4) Ill-will between parties
(5) Lethal blows after the deceased have been rendered helpless
(6) Brutal manner

NYPL and MPC reject premeditation and deliberation

NYPL §125.00 et seq.

NY "Intentionally causing the death"

+ aggravating factors

MPC- "Causing the death Purposely or Knowingly"

Neither have degrees

Tue. Sept. 27

Homicide: **Degrees of Intentional Killings (cont.)**

Question: Are all intentional killings classified as murder? If not, why? What is the modern approach (MPC and NYPL) for treating **heat-of-passion killings**?

Dressler: pp. 293-321.

- Provocation doctrine
- "Crime of passion killing"
- A relic from when all Murder resulted in death penalty
- Should all intentional killings be murder?
- CASE

Girouard v. State

Maryland Cout of Appeals

FACTS

Man, murders taunting wife, stabs her 19x sentenced 12 years for **second degree murder** (22-10) seeks a reduction to manslaughter

Issue: Are words enough of a provocation to reduce murder to manslaughter?

HELD: **NO**

Recognized circumstances that mitigate an intentional killing into being manslaughter.

(1) Discovering one's spouse in bed with another
(2) Mutual combat
(3) Assault and battery
(4) Threat or death of a child

"RULE OF PROVOCATION"

1. Require adequate provocation (which words are not)

2. The killing must be in heat of passion. It must have been a **sudden heat of passion**- immediately following provocation;

3. No period to cool

4. Must be **casual connection** between the provocation and the fatal act.

Dressler asks: Why keep the provocation defense- p.302

FURY is not enough.

- ***Only some provocations are adequate to trigger this defense***
- Reducing homicide to manslaughter
- Concession to human frailty
- "Excusable loss of self-control?"
- REASONABLE PERSON
- - an objective standard
- To what extent should the defense incorporate characteristics and life experiences
- REASONABLE PERSON AND GRAVITY OF PROVOCATION

- WORDS ALONE CANNOT PROVOKE ADEQUATELY
- STATE v. AVERY "a little more required than words"
- **Capacity for self-control** vs. **Gravity of provocation**
- WORDS ALONE RULE, doesn't apply in states with MPC homicide provisions
- Homicide is predominantly male act 70-80% of the time

The drafters of the defense as stated in the Model Penal Code (MPC), from which the state's law was modeled, noted that **(1) the particular defendant must have acted under the influence of extreme emotional disturbance, and (2) there must have been a reasonable explanation or excuse for such disturbance.** To determine "reasonableness," the court views the defendant's situation from both a subjective and objective stance.

AFFIRAMTIVE DEFENSE; where (d) has burden of proof

Two Categories of Defenses

JUSTIFICATION DEFENSES:

- What a (d) did is approved/ excused, approval of an actor's conduct
- as in self-defense

EXCUSE DEFENSES

- (D) did wrong, but is not morally blameworthy,
- such as an insanity defense

People v. Casassa (1980)

RULE OF LAW

A New York defendant may reduce a charge of murder to manslaughter if he is able to show "extreme emotional disturbance" and that there was a reasonable explanation or excuse for his actions as determined by the court from both a subjective and objective analysis.

FACTS

Victor Casassa (defendant) lived in the same apartment complex as Victoria Lo Consolo. Shortly after they met, they began dating socially for a brief period.

After Lo Consolo told Casassa that she was not "falling in love" with him, Casassa became devastated and undertook bizarre acts such as breaking into her apartment while she was away and lying in her bed naked for a while. During the break-in, Casassa was in possession of a knife "because he knew that he was either going to hurt Victoria or Victoria was going to cause himself to commit suicide."

After Lo Consolo rejected Casassa's last attempt to win her over, **he took out a knife and stabbed her several times. Casassa then dragged her body into the bathroom and submerged her in a tub full of water to "make sure she was dead."**

PP

Casassa was charged with second-degree murder and waived his right to a jury trial. The sole issue at trial was whether, at the time of the killing, he acted under the influence of "extreme emotional disturbance." Defense counsel presented one witness, a psychiatrist who testified that Casassa became obsessed with Lo Consolo. The prosecution produced several rebuttal witnesses including a psychiatrist who said that although Casassa was emotionally disturbed, he was not under the influence of "extreme emotional disturbance."

The trial court concluded that the appropriate test to determine whether Casassa was under the influence of "extreme emotional disturbance" was to examine the totality of the circumstances from the perspective of Casassa as well as from the point of view of a reasonable person.

The court found Casassa's emotional reaction at the time of the killing was so peculiar that it could not be considered reasonable so as to reduce the charge of second-degree murder to manslaughter. **Casassa was convicted of second-degree murder and he appealed.**

ISSUE

May a New York defendant reduce a charge of murder to manslaughter if he is able to show **"extreme emotional disturbance"** and that there was a reasonable explanation or excuse for his actions as determined by the court from both **a subjective and objective analysis**?

HOLDING

Yes. Under New York law it is an affirmative defense to the crime of second-degree murder if a defendant can prove that he "…acted under the influence of extreme emotional

disturbance for which there was a reasonable explanation or excuse." An individual acting under "extreme emotional disturbance" does not necessarily mean that a defendant engaged in a spontaneous action. Rather, it is quite possible that significant mental trauma affected a defendant's mind over a period of time.

REASONING

Under New York law it is an affirmative defense to the crime of second-degree murder if a defendant can prove that he "…acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." An individual acting under "extreme emotional disturbance" does not necessarily mean that a defendant engaged in a spontaneous action. Rather, it is quite possible that significant mental trauma affected a defendant's mind over a period of time.

In *People v. Patterson*, 39 N.Y.2d 288 (1976), the court noted that while the extreme emotional disturbance defense is permitted if a defendant shows that his actions were caused by a mental infirmity not reaching the level of insanity, not all mental infirmities constitute extreme emotional disturbance. The drafters of the defense as stated in the Model Penal Code (MPC), from which the state's law was modeled, noted that

(1) the particular defendant must have acted under the influence of extreme emotional disturbance, and

(2) there must have been a reasonable explanation or excuse for such disturbance. To determine "reasonableness," the court views the defendant's situation from both a subjective and objective stance.

One requirement involves a determination that the particular defendant did act under extreme emotional disturbance and not a sham. The other component involves a determination of whether there is a reasonable explanation or excuse for the emotional disturbance. The determination of whether there was a reasonable explanation or excuse involves both a subjective analysis, viewing the internal situation in which the defendant found himself and the circumstances as he perceived them to be however illogical or inaccurate, and an objective standpoint to determine whether the explanation for the disturbance was reasonable. Here, the trial court correctly applied the objective and subjective tests to Casassa's extreme emotional disturbance defense. The judge accepted that Casassa killed Lo Consolo while under the influence of "extreme emotional disturbance." Then the court considered other mitigating factors offered by Casassa, but found that the excuse was so peculiar to him that it was unworthy of reducing the charge of murder to manslaughter.

DISPO: The judgment of conviction is affirmed.

NOTES

- Provocation is a male centered and male dominated defense
- A legal disguise to partially excuse male aggression

Thur. Sept. 29

Homicide (cont.)**: Unintentional Killings** (and Intro to Felony Murder)-

Dressler: pp. 324-353.

Unintentional Killings-Unjustified Risk-Taking

- Determining Murder, Manslaughter or Civil Tort liability
- Drawing a line between risk taking that manifests malice aforethought vs. That which doesn't and constitutes manslaughter

People v. Knoller

Supreme Cout of California (2007)

Rule of Law

A finding of implied malice requires that one act with a conscious disregard to human life.

PP

Knoller charged with second degree murder and Noel charged with manslaughter (he was not there at time), their dog killed Whipple.

Facts

Marjorie Knoller and her husband Robert Noel owned 2 **dogs which attacked and killed Diane Whipple in their hall.** The dogs were a Presa Canario; a very large and dangerous breed of dog. They had acquired these large attack dogs th9ugh dealings with two convicts in the Aryan Brotherhood.

Knoller and Noel were attorneys that filed a lawsuit on behalf of Brenda Storey against Janet Coumbs, women breeding 4 of these dogs. Coumbs didn't contest the issue and dogs were transferred to Storey.

Warned by Dr. Martin of the potential for danger.

There were 30 incidents leading up to the death of Whipple. Died of 77 discrete bite marks.

Knoller and Noel then appeared on Good Morning America and blamed Whipple for her own death.

ISSUE

Does a finding of **implied malice require one to act only with a conscious disregard for the risk of serious bodily injury** to another rather than with a conscious disregard for human life?

HOLDING

NO.

REASONING

A murder conviction requires a finding of malice, which can be express or implied. A finding of implied malice requires that one act with a conscious disregard for human life. The Court of Appeal erroneously ruled that implied malice only requires a conscious disregard for the risk of serious bodily injury. It based its definition of implied malice on *People v. Conley*, 411 P.2d 911 (1966), in which this court said an act that is likely to cause either serious injury or death demonstrates malice.

However, the ruling in *Conley* dealt with a defendant's action, whereas implied malice concerns a defendant's mental state. Therefore, *Conley* is not applicable to the issue of what type of mental state a defendant must possess for a finding of implied malice. This court has consistently stated in cases before and after *Conley* that implied malice requires an awareness of a risk to human life, not merely of serious bodily injury. Thus, the trial court properly required that the defendant act with a conscious disregard to human life. Nevertheless, the trial court still erred in defining implied malice. The proper test for implied malice is laid out in *People v. Phillips*, 414 P.2d 353 (1966). The *Phillips* test requires that a defendant have awareness of engaging in conduct that endangers the life of another. Here, the trial court set the bar too high and required that a defendant have an awareness that her conduct had a high probability of resulting in death.

DISPO

The Court of Appeal set the bar too low and permitted a conviction of second degree murder where the defendant knew his or her conduct risked causing death *or serious bodily injury*. Under the proper test (that is, the *Phillips* test), malice is implied when a defendant acts with conscious disregard for life. Because it based its order granting a new trial on an erroneous definition of implied malice, the trial court must reconsider its order granting a new trial in accordance with this court's opinion.

NOTE

THOMAS TEST

Malice is implied if the (D) for a base, antisocial motive and with wanton disregard for human life, does act involving a degree of probability that will result in death.

PHILLIPS TEST

Malice implied if killing caused by the act the natural consequences of which hare dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.

DISPO

Ultimately convicted of murder

State v. Williams

Washington Court of Appeals

484 P.2d 1167 (1971)

RULE

If a person commits ordinary negligence, *i.e.* fails to exercise ordinary caution that a reasonable person would exercise under the same or similar circumstances, and such negligence proximately causes the death of another, the person is guilty of involuntary manslaughter.

FACTS

Native Americans Walter and Bernice Williams (defendants) were married. Walter was 24 years old, and Bernice was 20 years old.

Before they were married, Bernice had two children. The younger child, William, became sick when he was about 17 months old. William had an abscessed tooth that developed into an infection of the mouth and cheeks.

Walter and Bernice attempted to treat the problem using aspirin. William's cheek started swelling up, and he was not able to keep his food down. William's cheek also started turning a bluish color. William's tooth then became gangrenous, and his resistance was reduced due to malnutrition. After this, William suffered from pneumonia and died. Walter and Bernice did not take William to the doctor because they did not realize how sick he was.

Walter did not believe that a doctor or dentist would pull the tooth when the cheek was swollen. Walter and Bernice were also afraid that if they went to the doctor, they would be reported to the welfare department, and William would be taken away from them. If William

had received medical treatment soon after developing gangrene, which has a particular odor, then the doctors could have treated his abscessed tooth and saved his life.

PP

The State of Washington (plaintiff) charged Walter and Bernice with manslaughter for negligently failing to provide medical care to William. The trial court found Walter and Bernice guilty, and they appealed.

ISSUE

If a person commits ordinary negligence, *i.e.* fails to exercise ordinary caution that a reasonable person would exercise under the same or similar circumstances, and such negligence proximately causes the death of another, is the person guilty of involuntary manslaughter?

REASONING

If an individual fails to take the kind of caution that a reasonable person would exercise under similar circumstances, regardless of his ignorance, good intentions and good faith, he is guilty of ordinary negligence. If such negligence proximately causes the death of another, then the individual is guilty of manslaughter. Here, Walter and Bernice failed to take the kind of caution that a reasonable person would exercise under similar circumstances. The remaining issue is whether their failed actions proximately caused the death of their child. If Walter and Bernice's duty to seek medical attention for the infant was not activated until after it was too late to save the infant's life, then failure to furnish medical care could not be said to have proximately caused the child's death. Timeliness in the furnishing of medical care also must be considered in terms of "ordinary caution." A reasonable amount of discretion is afforded to parents in conducting the welfare of their children. Parents do not need to seek medical attention for every sniffle. The standard is at what time would an ordinarily prudent person in the same situation deem it necessary to seek medical attention for an ill child. *People v. Pierson*, 68 N.E. 243 (1903). Here, the infant's infection lasted for about two weeks. During that period of time, Walter and Bernice had noticed that the child was fussy, could not keep food down, and that the child's cheek was swelling and eventually turned a "bluish" color. Walter and Bernice gave the child aspirin during this critical two-week period thinking that the swelling would go down. The evidence produced at trial showed that the Williamses did not understand the seriousness of the infant's symptoms. Further, there was no evidence that they were physically or financially unable to obtain the services of a physician to treat the child. There was, however, sufficient evidence to prove that Walter and Bernice were sufficiently put on notice concerning the child's symptoms and lack of

improvement during the two-week period to have required them to obtain medical care for the child. Their failure to do so is ordinary negligence.

DISPO

The judgment of conviction is affirmed.

p. 342

UNINTENTINAL KILLINGS: UNLAWFUL CONDUCT

1. **The Felony Murder Rule**

a. The Doctrine

- One of four traditional branches of the murder tree
- A FELONY + A KILLING = A MURDER

Murder committed in commission or attempt of any other felony, a Strict liability homicide, when coupled with the felonious act.

b. The Policy Debate

- Roth/ Sundby
- Probably an anachronism at best
- Most U.S. states still use it
- One of the only Western countries that recognizes the rule
- Makes it possible that the most serious sanctions of law can be used for an accidental homicide

I. Conceptual Basis

a. Originally all felonies were punished by death
b. Deterrence, transferred intent, retribution and general culpability

Class Notes

09/27/22

If you attend Skills, you get +1

If you had in a good faith effort to IRAC MINI IRAC +1

Class Notes

09/29/22

"Reasonable man" is a person having the power of self-control to be expected of an ordinary person of the **sex** and **age** of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation."

- Director of Public Pros vs. Camplin (1978)
- EXTREME EMOTIONAL DISTURBANCE
- (MPC and NYPL)
- No heat of passion defense in NY

People v. Casassa

49 N.Y.2d 668, 404 N.E.2d 1310 (1980)

NYPL Secs 125.25, 125.27

MPC Sec. 210.3

Should a jury be able to reduce the charge under EED?

RULE

A New York defendant may reduce a charge of murder to manslaughter if he is able to show "extreme emotional disturbance" and that there was a reasonable explanation or excuse for his actions as determined by the court from both a subjective and objective analysis.

FACTS

Victor Casassa (defendant) lived in the same apartment complex as Victoria Lo Consolo. Shortly after they met, they began dating socially for a brief period. After Lo Consolo told Casassa that she was not "falling in love" with him, Casassa became devastated and undertook bizarre acts such as breaking into her apartment while she was away and lying in her bed naked for a while.

During the break-in, Casassa was in possession of a knife "because he knew that he was either going to hurt Victoria or Victoria was going to cause himself to commit suicide." After Lo Consolo rejected Casassa's last attempt to win her over, he took out a knife and stabbed her several times. Casassa then dragged her body into the bathroom and submerged her in a tub full of water to "make sure she was dead."

Casassa was charged with second-degree murder and waived his right to a jury trial. The sole issue at trial was whether, at the time of the killing, he acted under the influence of **"extreme emotional disturbance."** Defense counsel presented one witness, a psychiatrist who testified that Casassa became obsessed with Lo Consolo. The prosecution produced several rebuttal witnesses including a psychiatrist who said that although Casassa was emotionally disturbed, he was not under the influence of "extreme emotional disturbance."

REASONING

Under New York law it is an affirmative defense to the crime of second-degree murder if a defendant can prove that he "…acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse." An individual acting under "extreme emotional disturbance" does not necessarily mean that a defendant engaged in a spontaneous action. Rather, it is quite possible that significant mental trauma affected a defendant's mind over a period of time.

In *People v. Patterson*, 39 N.Y.2d 288 (1976), the court noted that while the extreme emotional disturbance defense is permitted if a defendant shows that his actions were caused by a mental infirmity not reaching the level of insanity, not all mental infirmities constitute extreme emotional disturbance.

The drafters of the defense as stated in the Model Penal Code (MPC), from which the state's law was modeled, noted that

(1) the particular defendant must have acted under the influence of extreme emotional disturbance, and

(2) there must have been a reasonable explanation or excuse for such disturbance.

To determine "reasonableness," the court views the defendant's situation from both a subjective and objective stance. One requirement involves a determination that the particular defendant did act under extreme emotional disturbance and not a sham. The other component involves a determination of whether there is a reasonable explanation or excuse for the emotional disturbance.

The determination of whether there was a reasonable explanation or excuse involves both a subjective analysis, viewing the internal situation in which the defendant found himself and the circumstances as he perceived them to be however illogical or inaccurate, and an objective standpoint to determine whether the explanation for the disturbance was reasonable. Here, the trial court correctly applied the objective and subjective tests to Casassa's extreme emotional disturbance defense.

HOP

(1) Sudden heat of passion
(2) Adequate provocation
(3) No period to cool off
(4) Casual connection between provocation and act

EDD

(1) No immediate timeline
(2) doesn't require provocation

(ONLY FOR ½ degree intentional killings)

Reasonable Explanation or EXCUSE BASED ON:

1. The subjective internal situation in which the (D) found self,
2. The external circumstances as the person perceived them at the time, however inaccurate the perception may have been
3. Assessing from that standpoint whether the explanation or excuse for the persons ED was REASONABLE, so as to entitle the D to a reduction of the crime from murder to manslaughter
4. Hard to be concrete about this: WHETHER THE ACTORS' LOSS OF SELF CONTROL CAN BE UNDERSTAOOD IN TERMS THAT AROUSE SYMPATHY IN THE ORDIARY CITIZEN.

UNINTENTIONAL KILLINGS

KNOLLER

DOG BREEDING OPERATION

- Ferocious Dogs maul and kill her neighbor
- She did nothing to aid, or even call 911

FULLER (1978_

On February 20, 1977, Fuller (defendant) and an accomplice participated in the burglary of an automobile parked in a car lot. They broke into four vans on the lot and took spare tires from each of them. An officer observed Fuller and his accomplice rolling the tires to their car. The officer approached them to investigate. Fuller and his accomplice got into their car and sped away. While fleeing, they ran a red light and hit another car, causing the other driver's death. Fuller was charged with murder under the felony-murder rule.

People v. Fuller (1978)

86 Cal. App. 3d 618 (1978)

FACTS

On February 20, 1977, Fuller (defendant) and an accomplice participated in the burglary of an automobile parked in a car lot. They broke into four vans on the lot and took spare tires from each of them.

An officer observed Fuller and his accomplice rolling the tires to their car. The officer approached them to investigate.

Fuller and his accomplice got into their car and sped away. While fleeing, they ran a red light and hit another car, causing the other driver's death.

PP

Fuller was charged with murder under the felony-murder rule. The trial court struck the murder charges. Appeal challenges the California felony murder rule as it applies to an unintentional death caused in a high-speed chase/ following the non-violent commission of felony daylight burglary on an unattended vehicle.

ISSUE

Is a death resulting from the commission of a dangerous felony considered to be murder?

HELD

YES

REASONING

Under the felony-murder rule, if a killing results from the perpetration or attempted perpetration of certain felonies enumerated by statute, the perpetrator is guilty of first-degree murder, even if the killing is negligent or accidental. In California, such felonies include arson, rape, robbery, burglary, mayhem, and lewd acts with a minor. This court does not believe the felony-murder rule should apply to the facts of this case because Fuller did not participate in an inherently dangerous crime. He stole tires from an empty van on an empty car lot. He carried no weapons and did not anticipate resorting to violence. Nor did he intend to cause the victim's death. But the felony-murder rule governs, and the applicable statute expressly designates burglary as a felony within the felony-murder rule. Fuller and his accomplice were committing a burglary when they caused another's death. Fuller's actions are therefore punishable as first degree murder.

RULE

Under the felony-murder rule, a death resulting from the commission of a dangerous felony is murder.

DISPO

The trial court should not have stricken the murder charges against Fuller.

NOTES

Felony Murder Rule makes any deaths committed during the commission of a Felony: Murder

Thur. Oct. 6 Homicide (cont.):

Felony Murder Rule. Question: What differentiates felony murder from other types of homicide crimes? - Handout on People v. Howard; Dressler pp. 363-74.

NOTES of 10/06/22

Criminal Negligence

NYPL 15.05.

"Fails to perceive a substantial and unjustifiable risk"

Mens Rea requires no awareness with criminal negligence, prosecutor just has to show that a reasonable person would so something different.

NEGLIGENT HOMICIDE

WILLIAMS (1971)

FACTS:

Death of a child with a tooth ache

ISSUE

If a person commits ordinary negligence, *i.e.* fails to exercise ordinary caution that a reasonable person would exercise under the same or similar circumstances, and such negligence proximately causes the death of another, is the person guilty of involuntary manslaughter?

RULE

If a person commits ordinary negligence, *i.e.* fails to exercise ordinary caution that a reasonable person would exercise under the same or similar circumstances, and such negligence proximately causes the death of another, **the person is guilty of involuntary manslaughter.**

Felony Murder

w. no Mens Rea

- Somone dies during commission of a Felony/ Mens Rea is removed

Murder while committing any other Felony (can be limited)

- Hanging 1 in 10 chicken thieves would have same effect

FULLER (1978)

PP

Convicted of burglary + felony murder rule

FACTS

On February 20, 1977, Fuller (defendant) and an accomplice participated in the burglary of an automobile parked in a car lot.

They broke into four vans on the lot and took spare tires from each of them. An officer observed Fuller and his accomplice rolling the tires to their car. The officer approached them to investigate.

Fuller and his accomplice got into their car and sped away. While fleeing, **they ran a red light and hit another car, causing the other driver's death.** Fuller was charged with murder under the felony-murder rule

ISSUE

Is a death resulting from the commission of a dangerous felony considered to be murder?

RULE

Under the felony-murder rule, a death resulting from the commission of a dangerous felony is murder.

REASONING

Under the felony-murder rule, if a killing results from the perpetration or attempted perpetration of certain felonies enumerated by statute, the perpetrator is guilty of first degree murder, even if the killing is negligent or accidental. In California, such felonies include arson, rape, robbery, burglary, mayhem, and lewd acts with a minor. This court does not believe the felony-murder rule should apply to the facts of this case because Fuller did not participate in an inherently dangerous crime. He stole tires from an empty van on an empty car lot. He carried no weapons and did not anticipate resorting to violence. Nor did he intend to cause the victim's death. But the felony-murder rule governs, and the applicable statute expressly designates burglary as a felony within the

felony-murder rule. Fuller and his accomplice were committing a burglary when they caused another's death. **Fuller's actions are therefore punishable as first degree murder.**

If car had been unlocked, wouldn't have been burglary (and also not Felony) then not (Felony Murder)

- A homicide "which is committed IN THE PERPETRATION OF, or attempt to perpetrate ARSON, RAPE, ROBBERY, BURGLARY, MAYHEM, or is murder of the first degree."
- Only Western country with FELONY MURDER RULE
- 125.25 NYPL Felony Murder
- Second Degree Murder Statute
- NYS; First Degree is AN INTENT TO CAUSE DEATH

Does MPC have a Felony Murder Rule Law?

MPC

210.2

Does not have Felony murder Rule, but influenced but it "recklessness with depraved indifference"

Inherently dangerous felony limitation

- Felony is punishment of 1 year or more
- **A-E Felonies**

People v. Howard

FACTS

On May 23, 2002, an officer witnessed Howard (defendant) driving a car missing its back license plate. The officer signaled for Howard to pull over. Howard did not comply and a high speed chase ensued. During the chase, Howard ran stop signs and traffic lights, and drove over the speed limit. Eventually, Howard ran a red light and crashed into a car, killing its driver. Howard was charged and convicted of fleeing from an officer while driving with a willful or wanton disregard for the safety of other people or property.

ISSUE

Is a felony inherently dangerous even if it can be committed without creating a substantial risk of death to another?

RULE

If a felony can be committed without creating a substantial risk of death to another, it is not "inherently dangerous."

REASONING

In California, a killing resulting from the commission of an inherently dangerous felony is at minimum a second-degree murder.

Only felonies that create a substantial risk of death to another can serve as the basis of a felony-murder charge.

The elements of the felony must be inherently dangerous in the abstract. Courts must look to the elements of the felony removed from the specific facts or circumstances surrounding the case.

Here, the case is concerned with whether the crime of fleeing from an officer while driving with a willful and wanton disregard for the safety of other people or property is an inherently dangerous felony.

The court of appeals ruled in another case that the same crime is inherently dangerous to human life. However, the statute defining the crime was amended since the court of appeals made that ruling. The legislature left the original language of the statute unchanged but added a new subdivision. This subdivision defined the crime to include violations such as driving an unregistered car, driving without a valid license, or failing to signal 100 feet before making a right turn. These violations can be committed without endangering human life. Therefore, due to the addition of the new subdivision, the crime is no longer inherently dangerous in the abstract.

IN a jurisdiction that adopts this limitation it only applies to IDF; a "**substantial risk that someone will be killed."**

Payne

On June 27, 1987, Pervis Tyrone Payne (defendant) entered the apartment of his girlfriend's neighbor, Charisse Christopher. Payne made sexual advances towards Charisse. She refused and Payne became violent. Police were called to the scene. They found Payne just leaving the building covered in blood. When they got inside, they found the bodies of Charisse and her two children on the floor. Charisse and her two-year-old daughter were dead. Charisse's three-year-old son survived. **At sentencing, the State had Charisse's mother testify about how the murders affected Charisse's son**. She stated that he frequently cried for his mom and sister. The prosecutor also made remarks on how difficult the experience was for the son. The jury subsequently sentenced Payne to death for each murder count.

ISSUE **May a jury hear victim impact evidence at a capital sentencing hearing?**

RULE A capital sentencing jury may hear victim impact evidence if it is relevant to the jury's decision as to whether the death penalty should be imposed.

HYPO:

Willfully discharges a firearm....is a dangerous felony

False imprisonment: "imprisonment effected by violence, menace, fraud, or deceit"

"Facts of the case" TEST

v.

Those that apply "IN THE ABSTRACT" TEST

MERGER DOCTRINE

Manslaughter: a felony with death

SO DOES THAT MEAN THAT.... MANSALUGHTER = FELONY MURDER?

- Ireland case: it takes away the need to prove malice/ prosecution can a

A felony that is assaultive in nature cannot serve as the basis of a felony-murder charge unless the felony was committed with an independent felonious purpose.

THE FELONY MURDER DOCTRINE DOES NOT APPLY TO FELONIES THAT ARE AN INTEGRAL PART OF AND INCLUDED IN FACT WITHIN HOMIDIDE

Tuesday, October 4: No classes (Yom Kippur).

Thur. Oct. 6 Homicide (cont.):

Felony Murder Rule.

Question: What differentiates felony murder from other types of homicide crimes?- Handout on People v. Howard; Dressler pp. 363-74.[Corresponding pages in Dressler 8th: pp. 341-60 (includes Howard case).

Felony Murder does not apply to a felony if both:

1. **The felony is an integral part of and included in fact within) the homicide and**
2. **The homicide did not result from conduct for an independent felonious purpose**

Tue. Oct. 11

Race, Punishment, and Introduction to the Death Penalty

Questions: What are the arguments for and against the death penalty? What would it have meant if the Supreme Court reached a different outcome in McCleskey v. Kemp?

- Dressler: pp. 383-99 (including notes 2-12 on pp. 383-91). Skim section 125.27of the New York Penal Law (First Degree Murder)

Skim section 125.27 of the New York Penal Law (First Degree Murder).]

Fisher

FACTS In 1997 Rita Fisher, a nine-year-old child, **died of dehydration and malnutrition.** An autopsy revealed that Rita was neglected and physically abused before her death. Rita's mother, Mary Utley (defendant), and sister, Rose Mary Fisher, were charged with child abuse and second-degree felony murder.

Utley and Rose Mary appealed their convictions, making three arguments.

First, Utley and Rose Mary **asserted that the felonies that could underlie felony murder in Maryland were limited to those listed in Article 27, §§ 408 to 410 of the Maryland Code, which included arson, rape, robbery, burglary, and kidnapping.**

Second, Utley and Rose Mary asserted that **any additional felonies that could underlie felony murder beyond those listed in the statute were limited to felonies that were recognized at common law.**

Third, Utley and Rose Mary asserted that **if felonies that did not exist at common law could underlie felony murder, they were limited to those that were inherently dangerous to life according to the elements of the crime in the abstract, rather than the circumstances of the specific crime in the case at issue.**

ISSUE Does the second-degree felony-murder rule apply to deaths that occur during the perpetuation of an inherently dangerous felony as determined by the circumstances of the specific case?

RULE: The second-degree felony-murder rule applies to deaths that occur during the perpetuation of an inherently dangerous felony as determined by the circumstances of the specific case.

What is the rationale for the felony murder rule: make criminals more careful about killing; not including a (merger) of INTEGRAL PART OF CRIME

- **NYPL lists specific FMC in second degree murder list 125.25**

LIMITING FELONY MURDER RULE- NOT ASSASULTIVE IN NATURE

Smith (1984)

FACTS

Smith was convicted of **child abuse and second-degree murder based on a theory of felony murder.** Child abuse, assaultive nature. Smith (defendant) lived with her two-year-old daughter. Her daughter one day refused to listen to Smith. In response, Smith took her daughter to the corner and began hitting her repeatedly. Smith knocked her daughter against a closet door and the daughter went into respiratory arrest. She died at the hospital.

ISSUE **Can a felony that is assaultive in nature serve as the basis of a felony-murder charge?**

RULE **A felony that is assaultive in nature cannot serve as the basis of a felony-murder charge unless the felony was committed with an independent felonious purpose.**

FMR limited/ doesn't apply when:

(1) INTEGRAL PART OF THE HOMICIDE

(2) INDEPNDANT FELONIOUS PURPOSE

KILLINGS "in the Perpetration" or "furtherance" of a Felony

Souphaphone (2001)

FACTS Sophophone (defendant) and three other men broke into a residence. The resident was home and called the police. When they arrived, one officer apprehended Sophophone while another chased down one of Sophophone's accomplices, Sysoumphone. While the other officer held Sysoumphone to the ground, Sysoumphone fired a gun at him. **The officer returned fire and killed Sysoumphone. Sophophone was charged with felony-murder based on the officer's killing of Sysoumphone.**

ISSUE Is the felony-murder rule applicable when the killing is performed lawfully by a non-felon?

RULE Where a killing is the lawful act of a non-felon, the felony-murder rule is inapplicable.

The majority of jurisdictions have arrived at this conclusion by following:

- the **"Agency" approach:** Under this approach, the act of killing is imputed to the defendant when committed by an accomplice. (IF A CO FELONY DID THE KILLING YOU ARE RESPONSIBLE FOR THAT DEATH TOO.)

In contrast, the acts of an independent third-party are not imputed to a defendant because there is no agency between the defendant and the third-party.

- Other jurisdictions follow the **"proximate causation" approach.** They reason that if the killing committed by a non-felon is the result of a sequence of events set forth by the defendant, the defendant is ultimately responsible.

RES gestae Doctrine:

- Factors for determining whether the killing occurred during the felony/ escape from

- **Time, distance**, and the **casual relation** between the felony and the killing.

Gregg

FACTS Gregg (defendant) was convicted by a jury on two counts of armed robbery and two counts of murder. After the verdicts were handed down, a penalty hearing was conducted before the same jury, which imposed the death penalty.

ISSUE Is the death penalty a per se violation of the Eighth and Fourteenth Amendments to the federal constitution?

RULE The death penalty is not a per se violation of the Eighth and Fourteenth Amendments to the federal constitution but should be imposed under sentencing procedures to avoid capricious or indiscriminate use.

- The imposition of the death penalty does not, automatically, violate the Eighth and Fourteenth Amendment. If the jury is furnished with standards to direct and limit the sentencing discretion, and the jury's decision is subjected to meaningful appellate review, the death sentence may be constitutional. If, however, the death penalty is mandatory, such that there is no provision for mercy based on the characteristics of the offender, then it is unconstitutional.

Mcklensky (1987)

FACTS McCleskey (defendant), an African American man, was convicted of two counts of armed robbery and **one count of murdering a Caucasian police officer** in Atlanta, Georgia. At trial, the jury recommended that McCleskey be sentenced to death on the murder charge and two consecutive life sentences on the armed robbery charges. The court followed this recommendation and sentenced McCleskey to death. McCleskey filed a petition for a writ of habeas corpus in federal district court, alleging that Georgia's capital sentencing process was administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution. To support his claim, **McCleskey offered a statistical study that purported to prove a disparity in the imposition of death sentences in Georgia based on the race of the murder victim and the race of the defendant**.

ISSUE Does statistical data that suggests racial motivations enter into capital sentencing determinations constitute an equal protection violation if a jury convicts the defendant?

RULE **A criminal defendant alleging an equal protection violation must prove the existence of a discriminatory purpose and a racially disproportionate and discriminatory effect.**

Payne

FACTS On June 27, 1987, Pervis Tyrone Payne (defendant) entered the apartment of his girlfriend's neighbor, Charisse Christopher. Payne made sexual advances towards Charisse. She refused and Payne became violent. Police were called to the scene. They found Payne just leaving the building covered in blood. When they got inside, they found the bodies of Charisse and her two children on the floor. Charisse and her two-year-old daughter were dead. Charisse's three-year-old son survived. **At sentencing, the State had Charisse's mother testify about how the murders affected Charisse's son**. She stated that he frequently cried for his mom and sister. The prosecutor also made remarks on how difficult the experience was for the son. The jury subsequently sentenced Payne to death for each murder count.

ISSUE **May a jury hear victim impact evidence at a capital sentencing hearing?**

RULE A capital sentencing jury may hear victim impact evidence if it is relevant to the jury's decision as to whether the death penalty should be imposed.

Tison

See spreadsheet

Furman

Furman v. Georgia, 408 U.S. 238 (1972), was a landmark criminal case in which the United States Supreme Court invalidated all death penalty schemes in the United States in a 5–4 decision, with each member of the majority writing a separate opinion.[1]:467–8 Following *Furman*, in order to reinstate the death penalty, states had to at least remove arbitrary and discriminatory effects in order to satisfy the Eighth Amendment to the U.S. Constitution.

The decision mandated a degree of consistency in the application of the death penalty. This case resulted in a *de facto* moratorium of capital punishment throughout the United States, which ended when the case *Gregg v. Georgia* was decided in 1976 to allow the death penalty.[2][3]

The Supreme Court consolidated the cases ***Jackson v. Georgia*** and ***Branch v. Texas*** with the *Furman* decision, thereby invalidating the death penalty for rape; this ruling was confirmed post-*Gregg* in *Coker v. Georgia*. The Court had also intended to include the case of *Aikens v. California*, but between the time *Aikens* had been heard in oral argument and a decision was to

be issued, the Supreme Court of California decided in *California v. Anderson* that the death penalty violated the state constitution; *Aikens* was therefore dismissed as moot, since this decision reduced all death sentences in California to life imprisonment.

Thur. Oct. 13Mid-termReview.

PURPOSE

FACTS

ISSUE

HOLDING

Rule of Law: (p.**X**) An act amounts to **X X X** when it is **X X X**

Ex: "so near to the result that the danger of success is very great–there must be dangerous proximity to success" (x v. U.S).

An act constituting **X X X** must

Ex: "come very near to the accomplishment of the crime." (x v. U.S).

Reasoning: (p. **776**) **Here, the court found** that **(D)** acts **did/did not**

Ex.

"come dangerously near to the taking of Rao's property (robbery) because the defendants had not found or seen Rao, the man they intended to rob, and no person with a payroll was at any of the places where they had stopped.

The court found that that …

Ex.

"there was not a reasonable likelihood of the robbery's success but for the interference because when the defendants were arrested, Rao had still not been found; the defendants were still looking for him, so no attempt to rob him could be made "at least until he came into sight."

Holding: (p. 149) **Therefore, the court held that** (D)

BECAUSE

Judgment: Judgment of conviction of (D) reversed/affirmed

Dissent/Concurrence: None.

Comments – (e.g.) What is the rule to take away from this case? (And anything else you wondered as you read the case! There are no wrong questions!

Reasoning

[redacted]

10/13/2022

- Mccleskey (1987)
- Robbing a furniture store and a policeman was killed
- 4.3 Racial Bias found in Baldus study
- Mccleskey v. Kemp
- 14A: **"Purposeful discrimination"**
- 8A: **"Arbitrariness"**
- Both were defeated in this case. It was found that it didn't rise to an 8A challenge
- J. Powel/Majority opinion: INEVITABLE
- Was chosen as a case where race was the more significant factor
- Slippery slope argument
- Legislatures should decide and re-write the laws
- **McCleskey offered a statistical study that purported to prove a disparity in the imposition of death sentences in Georgia based on the race of the murder victim and the race of the defendant**.
- For example, the study concluded that in instances where a Caucasian victim was killed by an African American defendant, the defendant was twenty-two times more likely to be sentenced to death than if the victim was also African American. The study also suggested that prosecutors were significantly more likely to seek the death penalty for African American defendants than for Caucasian defendants.
- Justice Powell eventually recanted the support of the Death Penalty, when he retired
- Blackmun shifted from conservative to liberal
- There are 2,414 people on death Row Since Gregg; 1,551 people executed
- NYPL Sec. 125.27
- People v. Lavalle (2004) no death penalty in New York State since
- Focus has been on legislature
- Approx.. 50% of America does not have the death penalty
- State v. Greogory- Washington's death penalty is unconstitutional
- Most of North no DP/ Most of South D/P, moratoriums in CA, OR, PA

- WWW.PROCON.ORG
- Alot of opposition around the DNA evidence controversy, international law is frowning on it, 23 states/DC don't allow it, 24 do. 3 Moratorium
- 8A; evolving standards of decency/ could BECOME cruel and unusual
- Q: A constitutional amendment? Difficult.
- Increasing the number of justices?

Midterm Hints:

I: Is X guilty of Second-Degree Manslaughter?

Mens Rea

Sub-I- Did x recklessly cause death?

R- Define reckless

A

C

Sub-I; was Taylor aware of a substantial and unjustifiable risk of death?

(a) Substantial and unjustifiable risk; was there a gross deviation and a reasonable persons conduct?
(b) Was he aware of the risk?
(c) Did Taylor consciously disregard a risk

Actus Reus

(a) Voluntary act, conscious willed bodily movement
(b) Statutory Actus Reas

Death, of a person

Causation

(a) Did he cause the death of the fireman

Actual Cause- But For

But for the arson the death would not have occurred?

Proximate Cause-

State rule for proximate causation including rule for intervening causes:

A/ double parked car B/ fire truck accident

Intervening cause COINCIDENTAL-**UNFORSEEABLE**

Intervening cause RESPONSIVE- **UNFORSEEABLE + ABNORMAL**

(Chain of causation not broken)

- CONCLUSION/based on interpretation of fact pattern

II. Special Arson

"Damages a special building intentionally starting a fire"

MR: **Intentionally** (apply ones MR modifies all unless legislature means differently) (or they meant to)

Conscious objective: yes

AR: VA, yes.

Statutory: vagueness "what a special building", can violate due process by notice/ state that we are missing a critical piece of the definition; constitutionally too vague. "LEGALTY, OVERBREADTH, VAGUENESS, stating rules thereof)

NO Lenity in NYS;

- + causation analysis

[redacted]

Tuesday Oct. 18

Defenses: Introduction, Burden of Proof, Self-Defense.

We return to the concept of burden of proof, which we discussed during the first week of classes. Note that while burden of proof may at first seem like a technical concept, it can affect the outcome of cases.

Question: How do justification defenses differ from excuse defenses?

Dressler: pp. 507-36. NYPL § 35.15.

- The main elements of a crime; Actus Reus, Mens Rea, Causation
- Defenses after all elements are basically established

- **FAILURE OF PROOF DEFENSE**- failed to prove all elements of the crime, **mistake of fact defense** which negates the Mens Rea, prosecution fails to prove the Mens Rea (Mistaken Belief).
- **OFFENSE MODIFICATION DEFENSE- modify the role the (D) played in relation to the facts of the crime**
- **JUSTIFICATIONS-** justifying the acts by material facts and circumstances (typical example is **self-defense**);
- Ex: Stealing an ambulance/ vehicle to save a life
- **EXCUSE DEFENSES**
- **EXCUSES-Insanity Defense;** whereby a mental condition causes life of knowledge of right and wrong. **EED- not a complete defense, just a lesser crime. PARTIAL DEFENSE.**
- **NONEXCULPATORY PUBLIC POLICY DEFENSES-** countervailing public policy about why we might not punish someone (statute of limitations)/ diplomatic immunity/ competency to stand trial
- Common law Justifiable Homicide- killing to prevent an atrocious felony
- Excusable Homicide- killing during an insane delusion
- **Burden of Production-BURDEN OF GOING FORWARD WITH TRIAL, by introduction of the evidence that a crime has been committed. PROSECUTER HAS BURDEN OF PRODUCTION**
- BURDEN OF PERSUASION- convincing the fact finder of the truth of the claim in question.
- NYPL 35.15.
- **NON-DEADLY**
- A Person may "use physical force upon another person when and to the extent he or she reasonably believes"
- (1) such to be necessary to defend self or third party
- (2) from use or imminent use of unlawful physical force by the other person.

EXCEPTION: (NYPL 35.15)

(a) Other person was provoked by the (D) with intent to cause physical injury to another, or

(b) Defendant WAS THE INITIAL AGRRESSOR (however initial aggressor may use defense if has withdrawn and effectively communicated that withdrew to another person persists**, or**

(c) Combat by agreement not authorized by law

DEADLY SELF DEFENSE

Same as above BUT ALSO "ACTOR REASONABLY BELIEVE"

1. That other person is using or about to use deadly force
2. That other person is committing or attempting to commit KIDNAPPING, FORCIBLE RAPE, FORCIBLE CRIMINAL SEXUAL ACT or ROBBERY, OR
3. That such other person is committing or attempting to commit burglary and the defendant is on control of the building. SEE 35.20

EXCEPTIONS:

1. RETREAT DOCTRINE- if you can retreat do so
2. CASTLE EXCEPTION- no duty to retreat from your own dwelling/ not initial aggressor or a police officer or assisting a police officer.

IN RE WINSHIP (1970)

DUE PROCESS REQUIRES PROOF BEYOND A REASONIBLE DOUBT OF EVERY FACT NECESSARY TO CONSTITUTE THE CRIME CHARGED.

Burden of Proof (lower in Civil Court) (preponderance of evidence)

Burden of Production-the burden of introducing an issue/ defense to the jury, if a justification/excuse is made to introduce a type of defense (EDD)

ALL ELEMENT OF CRIME- on prosecution + BRD persuasion for every element

DEFENSES/ JUSTIFICATIONS- on defense

Burden of Persuasion-who can persuade the jury and by how much; the prosecutor must persuade the jury BEYOND A REASONIBLE DOUBT.

SECOND DEGREE MURDER

(1) Intent to cause death of another person
(2) Causing death of such person or a third person.

DEFENSE: Acted under the influence of EDD for which there was reasonable explanation or excuse.

Patterson v. New York (1977), SCOUTUS, 1977

432 U.S. 197, 97 S. Ct. 2319, 53 L.Ed.2d 281.

Facts: NY Man shot his ex-wife's lover, then claimed EDD defense. Gordon Patterson, Jr. (defendant) had a brief and unstable marriage with his wife, Roberta. After they separated, Roberta began seeing an old boyfriend. Patterson borrowed a rifle from an acquaintance and shot the boyfriend, killing him. Patterson was charged with second-degree murder. At trial, Patterson raised the state-recognized affirmative defense that he had acted under extreme emotional disturbance. The jury was instructed that Patterson had the burden of proving his affirmative defense by a preponderance of the evidence. If Patterson proved the affirmative defense, it would have mitigated the second-degree murder charge to manslaughter.

Procedural:

The jury found Patterson guilty of second-degree murder and he appealed. The Court of Appeals of New York affirmed the conviction and rejected Patterson's argument that the burden of proving extreme emotional disturbance fell on the state, not on Patterson. Patterson appealed.

ISSUE: **Is the state required to prove every element of a crime beyond a reasonable doubt and may a defendant be required to prove an affirmative defense?**

HOLDING: The prosecution does not have that burden, (D) has affirmative defense burden.

RULE:

Shifting the burden of proof of a mitigating circumstance affirmative defense to the defendant does not violate the Due Process Clause of the U.S. Constitution.

Dispo

The Supreme Court affirmed and decided that shifting the burden of proof of a mitigating circumstance affirmative defense to the defendant is allowed by the Due Process Clause of the U.S. Constitution.

FOOT NOTE 15: "Permitting states to put the burden on defendants for some defenses will allow legislative reform." They will remove the defenses in laws.

ELEMENTS OF CRIME- BRD PROSECUTION, not an element of the crime (in statute) CAN be on defense.

WHICH CITED:

Mullaney v. Wilbur

Maine murder case, common law based, had to prove heat of passion based on

Mullaney v. Wilbur, 421 U.S. 684 (1975), is a criminal case in which a unanimous court struck down a state statute requiring a defendant to prove the defense of provocation to downgrade a murder conviction to manslaughter. Previous common law, such as in *Commonwealth v. York* (1845), allowed such burden on the defense.

Maine's statute defined murder as unlawfully killing with malice, with malice defined as deliberate and unprovoked cruelty, and added that killings were presumed to be unprovoked unless the defense proved provocation by a preponderance of the evidence. Justice Powell delivered the opinion for the court that provocation was a crucial part of the charge in that it determined "the degree of culpability attaching to the criminal homicide".

States were able to circumvent this decision by careful wording, as in *Patterson v. New York*, in which provocation, or "extreme emotional disturbance", was classified as an allowable defense excuse not as a listed element.

NY LEGISLATURE HAS BUT THE BURDEN ON THE DEFENDANT TO PROVE AN AFFIRMATIVE DEFENSE. NYPL 25.00

- TRIGGERING CONDITIONS- circumstances that must exist to trigger a JUSTIFICATION defense
- NECESSARY + PROPORTIONAL
- NECESSITY REQUIRMENT

An **affirmative defense** to a civil lawsuit or criminal charge is a fact or set of facts other than those alleged by the plaintiff or prosecutor which, **if proven by the defendant, defeats or mitigates the legal consequences of the defendant's otherwise unlawful conduct.** In civil lawsuits, affirmative defenses include the statute of limitations, the statute of frauds, waiver, and other affirmative defenses such as, in the United States, those listed in Rule 8 (c) of the Federal Rules of Civil Procedure.

In criminal prosecutions, examples of affirmative defenses are self-defense, insanity, entrapment and the statute of limitations.

1. SELF DEFENSE (prosecution must prove BRD)
2. INSANITY
3. ENTRAPMENT
4. STATUTE OF LIMITATIONS

U.S. v. Peterson

United States Court of Appeals, District of Columbia Circuit. (1973)

483 F.2d 1222 (1973)

PROCEDURAL

At trial, Peterson sought a judgment of acquittal based on insufficient evidence, which was denied. The judge instructed the jury on self-defense. The judge said that self-defense generally does not excuse a killing if the defendant provoked the altercation, though words alone did not constitute provocation. The judge also told the jury that even if Peterson started the fight, self-defense was available if he withdrew from the conflict in good faith and let Keitt know by words or acts. The judge instructed the jury that Peterson was under no duty to retreat but it could consider whether he could have safely retreated in deciding whether his actions were justified. Peterson was found guilty of manslaughter. Peterson appealed, arguing that the judge wrongly instructed the jury.

FACTS

The victim drove to an alley behind the Defendant's house to obtain windshield wipers off of the Defendant's junked car. The Defendant observed the victim doing this and came out of his house to protest. Words were exchanged, after which the victim got back in his car and the Defendant went back into his house. The Defendant then reemerged from his house carrying a pistol and threatened to shoot victim if he moved. When the victim emerged from his car carrying a wrench, the Defendant shot him in the face. Bennie Peterson (defendant) came out of his house and discovered Charles Keitt stealing windshield wipers from his car, which was parked in the alley behind Peterson's property. Peterson argued with Keitt, then went back inside and got a gun. When Peterson returned, Keitt was about to drive off. Peterson threatened to kill Keitt. Keitt got out of the car, grabbed a lug wrench, and walked toward Peterson with the wrench in the air. Peterson told Keitt not to come closer. Keitt advanced, though he was still in the alleyway, and Peterson shot and killed him. Peterson was standing in his yard at the time. Peterson was indicted for second-degree murder.

ISSUE

(1) May the initial aggressor in a fatal conflict invoke the doctrine of self-defense to justify killing his adversary?

(2) Is the initial aggressor in a fatal conflict under a duty to retreat before using deadly force in self-defense?

HOLDING

YES/YES

RULE

An affirmative unlawful act reasonably calculated to produce an affray foreboding injurious or fatal consequences is an aggression which, unless renounced, nullifies the right of homicidal self-defense. P.527

(1) Under the law of the District of Columbia, the initial aggressor in a fatal conflict may not invoke the doctrine of self-defense to justify killing his adversary, unless he withdrew from the conflict in good faith and communicated his withdrawal by words or acts.
(2) Under the law of the District of Columbia, the initial aggressor in a fatal conflict is under a duty to retreat, if he may do so safely, before using deadly force in self-defense.

REASONING

(1) No. **The right to use deadly force in self-defense is generally not available to the initial aggressor in an altercation.** The doctrine is rooted in necessity. Deadly force is only justified if there is no alternative. A person must honestly and reasonably believe that there is an imminent threat of death or serious injury. Only then may he use deadly force to save himself. Nevertheless, a person who provokes a fatal conflict does not have a right to kill in self-defense.

The right will only be restored if

(1) the aggressor makes a good-faith effort to withdraw from the conflict and

(2) communicates that intent to his adversary. Here, the jury instruction comported with these principles. There was sufficient evidence that Peterson was the aggressor; he got the gun and threatened to kill Keitt. Even if Keitt had initially been the aggressor, he was not at that point. The denial of Peterson's motion for judgment of acquittal was not erroneous.
(2) Yes. **Historically a person was not permitted to use deadly force if he could retreat safely, because this negated the strict necessity of killing the attacker.** The District of Columbia still follows this rule, though it is now in the minority. There is no duty to retreat if it would be dangerous to do so. Next, the castle doctrine, which provides that a person may stand his ground if he is attacked in his home or its curtilage, does not apply if the person was the initial aggressor. Here, Peterson was not an innocent party to the conflict. The castle doctrine is thus inapplicable, even though Peterson was standing in his yard when he shot Keitt. The trial judge correctly instructed the jury that it could consider whether Peterson could have safely retreated.

DISPO

The verdict is affirmed.

CON/DIS

none

NOTES

STAND YOUR GROUND LAWS: A law that provides that there is no duty to retreat and that the use of deadly force is justified when a person is under reasonable belief of imminent death or great bodily harm.

SELF DEFENSE NYPL 35.15.

NON-DEADLY

DEADLY

- IF YOU CAN RETREAT- YOU MUST DO SO (RETREAT DOCTRINE)
- IF ATTACKED IN YOUR HOME YOU HAVE NO DUTY TO RETREAT (CASTLE DOCTRINE)
- Another person is "about to use deadly force"
- Another person in "BRAKERS"

Defenses: Self-Defense (cont.); Battered Spouse Syndrome.

Dressler: pp. 536-75. 576-596.

People v. Goetz

Court of Appeals of New York, (1986)

68 N.Y.2d 96, 506 N.Y.S.2d 18, 497 N.E.2d 41. (1986)

PROCEDURAL

The lower court dismissed the charges, concluding that the prosecutor's inclusion of an objective element of self-defense in the instructions was erroneous. The prosecution appealed, and the appellate division affirmed. The prosecution then appealed to the Court of Appeals of New York.

FACTS

Bernhard Goetz was indicted for murder, assault, weapons possession other charges after shooting 4 youths on an NYC subway, one who asked him for $5.

Bernhard Goetz (defendant) boarded a subway train. Four youths, Troy Canty, Darryl Cabey, James Ramseur, and Barry Allen approached Goetz and said, "give me five dollars."

Two of the four had screwdrivers in their pockets, but the group was otherwise unarmed. Goetz pulled out an unlicensed gun and shot all four of them, leaving one paralyzed. Goetz told the conductor that the youths tried to rob him.

Goetz fled but later surrendered to the police. Goetz told the police he did not think the youths had weapons but was afraid of being "maimed," because he had been mugged in the past. Goetz was brought before a grand jury. The grand jury indicted Goetz on weapons charges, but the attempted murder and assault charges were dismissed. The prosecution was permitted to resubmit the charges to the grand jury on the basis of new evidence.

That grand jury **indicted Goetz on ten counts, including attempted murder and assault.** Goetz moved to dismiss, claiming that the evidence was insufficient to support the charges and the prosecutor's jury instructions were invalid. Specifically, the prosecutor instructed the jurors that the state's justification defense depended on a finding that Goetz had acted as "a reasonable man in his situation" would have.

ISSUE

Is a person justified in using deadly force in self-defense if he subjectively believed such force was necessary to prevent an attack or a robbery?

HOLDING

No

RULE

In New York, a person is justified in using deadly force in self-defense or defense of another only if she objectively and reasonably believes an attacker is either (1) using or about to use deadly force or (2) committing or attempting to commit a kidnapping, forcible rape, forcible sodomy, or robbery.

REASONING

In New York, the defense of justification permits the use of deadly force in self-defense or defense of another when the person reasonably believes

(1) that **deadly force will be used against him** (or)

(2) an **attacker is attempting to commit a kidnapping, forcible rape, forcible sodomy, or robbery.** The right to use deadly force in self-defense has contained an element of objective reasonableness from the days of the common law.

Despite repeated amendments to New York's penal codes, this element has never been eliminated. In fact, the legislature declined to follow the Model Penal Code, which allowed a justification defense where the defendant "believe[d]…[deadly force] was necessary" but considered the intent requirement negated if that belief was mistaken (thus allowing conviction only of reckless or negligent homicide).

Instead, New York's drafters inserted the word **"reasonably" before "believes."** The case law repeatedly references the reasonableness element. A justification of self-defense may be permitted when the defendant's belief was mistaken, but only if there was an **objectively reasonable basi**s for the belief in the first place. Under reasonable person standard.

In this case, Goetz argued that proving self-defense required only a showing of subjective belief that deadly force was necessary, and that an objective element would take away the jury's ability to consider the circumstances. This is unpersuasive; courts may consider the situation, including the defendant's knowledge and prior experience, in determining whether the belief was reasonable.

DISPO

The prosecutor's instructions were sufficient for a grand jury, and the charges are reinstated. [Editor's Note: After a jury trial, Goetz was convicted only of illegal possession of a weapon, not the assault or attempted murder charges. Darryl Cabey, the shooting victim who was paralyzed, later sued and obtained a civil judgment against Goetz.]

CON/DIS

NOTES

- Why don't more people shoot to wound?
- NYPL 35.15 Deadly Self Defense
- About using deadly force
- If a person is engaged in kidnapping, forcible rape, forcible criminal sexual act or robbery deadly force
- Or breaking into your home (Castle Doctrine)
- Exception:
- If you can with complete safety retreat, you must do so (RETREAT DOCTRINE)

- Unless it is your own dwelling, no duty to do so (CASTLE EXCEPTION), or a peace officer (stand your ground in all places)
- MPC DOES NOT SAY IMMINENT: USES "IMMEDIATELY NECESSARY" MPC 3.04
- Example of poisoning the next water source, in NY not imminent, MPC was immediately necessary to stop him
- GOETZ case:
- GRAND JURY is used to decide if there is enough evidence to go forward with a trial. **PROBABLE CAUSE STANDARD t**o bring to trial.
- "REASONABLY BELIEVES"
- Asserting he can use deadly force because of the belief victims were committing robbery.
- DID HE ACTUALLY BELEIVE vs. DID HE REASONABLY, BELEIVE (like reasonable person), they note MPC does not use "Reasonable"; "when the actor believes"- it's a subjective standard-MPC Sec.3.09(2)
- OBJECTIVE vs SUBJECTIVE
- If you wholeheartedly believe the off or irrational belief, how can it deter?
- Goetz court decides on using "reasonable person" standard; it's not just man on subway; can consider reasonable person with Goetz's experience.
- Goetz's prior experiences can be factored in.
- Jury instruction is given for each charge
- In self-defense you meet the elements, the Mens Rea does not matter.
- Issues of mental illness
- Concept of race switching
- Ask jurors to ignore an element?
- Getting POC off jury will bring the conviction rate can rise to 81%, white 66%, with one Black person rate 71/73%.

State v. Wanrow, (1977)

Supreme Court of Washington. (1977)

88 Wash.2d 221, 559 P.2d 548. (1977)

PROCEDURAL

FACTS

On August 11, 1972, Wanrow (defendant) left her son with her friend, Hooper. While playing in Hooper's neighborhood, the son was nearly abducted by a neighbor, Wesler. Hooper learned that day that Wesler was suspected of previously attempting to molest a young boy, and **Hooper suspected Wesler had also molested her daughter.** She asked police to arrest him but they stated that they could not take action until after the weekend. That night, Hooper invited Wanrow, Wanrow's sister, and Wanrow's brother-in-law to spend the night because she did not feel safe. During the night, Wanrow's brother-in-law went to Wesler's house to confront him. Wesler suggested they go back to Hooper's house and settle everything. The brother-in-law remained outside while Wesler entered Hooper's home. Wesler was a 6'2" man and was intoxicated when he entered the home. He was told to leave but he refused. Wanrow went outside to get her brother-in-law's help. Upon turning around to go back inside, she was startled to find that Wesler was standing directly behind her and she shot him. At the time, Wanrow was a 5'4" woman with a broken leg.

ISSUE

Does the justification of self-defense require a subjective standard of reasonableness? TO what degree are the totality of circumstances factored into the situation?

HOLDING

RULE

The justification of self-defense requires a subjective standard of reasonableness that takes into account **all the facts and circumstances known to the defendant.**

REASONING

When determining whether the defendant's act of self-defense was reasonable, juries must consider the defendant's actions according to her own subjective perception of the situation.

The jury must also take into account all the facts and circumstances known to the defendant. Here, the trial court did not instruct the jury to consider Wanrow's perceptions or all the facts and circumstances of which she was aware. In fact, the trial court instructed the jury to employ an objective standard of reasonableness and used language that suggested that the jury should consider reasonableness from a man's perspective.

However, the perception of danger caused by a drunken 6'2" man late at night from the point of view of a 5'4" woman with a broken leg is considerably different from the perception of danger held by a an uninjured man. The trial court should have instructed the jury to consider Wanrow's unique perception of the situation rather than hold her to an objective standard.

Similarly, the trial court's instruction should not have employed language suggesting that the reasonable person in such a situation is a man. In another paragraph of the instruction, the court instructed the jury to consider only acts and circumstances occurring at or just before the time of the killing when assessing the gravity of the danger to Wanrow.

However, *State v. Ellis* (1902) established that a **jury could consider facts and circumstances that occurred months before.** The focus is on the defendant's perception, which may have been formed by facts and circumstances occurring over a long period of time.

DISPO

Because the trial court's instruction improperly characterized the law of self-defense, the conviction is reversed, and a new trial is ordered.

CON/DIS

none

NOTES

Factors in Gender and circumstance (not Native American culture).

State v. Norman

Court of Appeals of North Carolina, 1988

89 N.C.App. 384, 366 S.E.2d 586 (1988)

PROCEDURAL

Norman was convicted of voluntary manslaughter and sentenced to six years imprisonment, and she appealed. The appellate court reversed and granted a new trial on the ground that Norman **exhibited battered-wife syndrome**, and therefore, the trial court should have submitted to the jury a possible verdict of acquittal by reason of perfect self-defense. The North Carolina Supreme Court granted review of the case.

FACTS

For most of her 25-year marriage, Norman (defendant) was badly abused by her husband, including being punched and kicked, having objects thrown at her, being burned with cigarettes and hot coffee, and being forced to eat pet food from a bowl on the floor. Norman's husband also forced her into prostitution at a local truck stop, humiliated her in public, and constantly threatened to kill her. After being beaten very badly one day, Norman called the police. The police refused to arrest her husband unless Norman filed a complaint,

which she was afraid to do. An hour later, Norman attempted suicide and when the paramedics arrived, Norman's husband insisted that they let her die. Norman sought guidance from a mental-health center and then a social-services office, but Norman's husband followed her to the social-services office, dragged her out of the interview, took her home and beat her, and burned her with cigarettes. Shortly thereafter, Norman obtained a pistol and shot and killed her husband while he was asleep. Norman was charged with first-degree murder. During the trial, Norman's **expert witness**, Dr. Tyson, testified that Norman believed she was doomed to a life of torture and abuse leading to her "inevitable" death. Norman also testified that she believed her husband would kill her if he had the chance.

ISSUE

Will evidence of battered-wife syndrome absolutely justify a killing of an abusive spouse?

HOLDING: NO

RULE

Evidence of battered-wife syndrome will not absolutely justify a killing unless the defendant believed the killing was necessary in order to avoid imminent death or great bodily harm.

REASONING

A defendant is entitled to have a jury consider acquittal by reason of perfect self-defense when the evidence, viewed in the light most favorable to the defendant, tends to show the defendant killed another person because she believed it to be necessary to save herself from imminent death or great bodily harm. The defendant's belief as to the circumstances necessitating the killing must be reasonable.

State law also recognizes an imperfect right of self-defense in instances when the defendant is the initial aggressor, but without intent to kill or seriously injure another, and the other person escalates the confrontation to a point where it reasonably appears necessary to the defendant to kill the other person in order to save herself from imminent death or great bodily harm. In these types of cases, the culpability of the defendant is reduced but is never completely justified.

The term "imminent," as used to describe the type of threat of death or injury in both forms of self-defense, typically means immediate danger that will instantly affect the defendant and cannot be protected against by asking for help from law enforcement or others. In this case, the evidence does not indicate that Norman reasonably believed that she was faced with the threat of imminent death or great bodily injury. In fact, all of the evidence tends to show that Norman had ample time and opportunity to seek other means of preventing further abuse by her husband. Instead, Norman fired three shots into her husband's head while he was asleep.

Although Dr. Tyson testified that Norman believed she was doomed to a life of abuse leading to her "inevitable" death, **Norman's subjective belief as to "inevitable" death does not equate to a belief that death is "imminent."** Dr. Tyson's testimony as to indefinite time

frames and Norman's own testimony of what her husband might do at some future time does not tend to establish a fear, reasonable or otherwise, of imminent death or great bodily harm at the time of the killing. Moreover, it is far from clear from Norman's evidence that any abuse inflicted by her husband was ever to the degree that would justify the use of deadly force, even when the threats were imminent.

DISPO

The appellate court's judgment is reversed. Later given 6 years for Voluntary Manslaughter, sentence commuted by state governor.

DIS

Norman does not seek to expand the self-defense requirements in order to allow any abused spouse to "legally" kill their abusive husbands. Rather, Norman argues that the evidence presented under the current law of self-defense is sufficient to require that a self-defense instruction be submitted to the jury. For the battered wife, there is no escape from the abuse. The next attack from the abuser could be the fatal one and thus, the abused wife is in constant fear of imminent death. The question here was not whether the threat was in fact imminent, but whether Norman's belief in the impending nature of the threat, given the circumstances as Norman viewed them, was reasonable in the mind of a reasonable person.

NOTES

State v. Giminski

247 Wis.2d 750, 634 N.W.2d 604. (2001)

POSTURE

The trial court denied Giminski's request, explaining that it was objectively unreasonable for Giminski to believe that Hirt would have shot Elva. The jury convicted Giminski. Giminski appealed.

FACTS

On July 30, 1998, three United States Secret Service agents, including John A. Hirt, went to the residence of John F. Giminski (defendant) and explained that they were there to seize two vehicles. The agents told Giminski's daughters, Elva and Ava, to remove the family's items from one of the vehicles but did not mention the other vehicle to the daughters. Soon after,

Elva attempted to leave in the other vehicle. The agents drove after Elva and crashed into the vehicle she was driving. Giminski looked out a window and saw Hirt pulling Elva out of the vehicle by her hair while pointing a gun at her face. Giminski ran outside and grabbed Hirt's gun. The gun fired, and bullets hit Giminski and Hirt. Giminski was charged with attempted first-degree intentional homicide. At trial, Giminski testified that he did not intend to kill Hirt but that he believed Hirt was going to kill Elva and wanted to defend her. Giminski asked the trial court to instruct the jury on defense of others, arguing that he was justified in using force against Hirt because he reasonably believed that Elva was in danger.

ISSUE

May a person use force to protect a third party if he could not reasonably believe that the third party was in danger of imminent harm?

HOLDING

RULE: A person may not use force to protect a third party if he could not reasonably believe that the third party was in danger of imminent harm. Thus, the privilege of defense of others, like the privilege of self-defense, has two components, both of which must be satisfied by a defendant claiming the privilege: (1) subjective-the defendant must have actually believed he or she was acting to prevent or terminate an unlawful interference; and (2) objective-the belief must be reasonable.

REASONING

A person may not use force to protect a third party if he could not reasonably believe that the third party was in danger of imminent harm. Defense of others is a privilege available to a person who reasonably believes that a third person is in danger of imminent harm. Defense of others is available in situations in which the third party would be entitled to use self-defense. An objective standard is applied to determine whether a defendant's belief in the necessity to defend the third party was reasonable, asking whether an ordinary person in the defendant's circumstances would have reasonably believed the third party was in danger. Here, **a reasonable person would not have believed that Elva was in danger of harm to a degree that justified Giminski's actions.** Giminski knew that the agents were seizing his vehicles, and therefore, he knew that Hirt was entitled to stop Elva from driving away in one of the vehicles. Further, Giminski could not have reasonably believed that Hirt would have actually shot Elva while removing her from the vehicle. Because Giminski could not have reasonably believed that Elva was in danger of harm in a way that justified his actions, he was not entitled to a jury instruction on defense of others.

DISPO: **Giminski's conviction is affirmed.**

CON/DIS: **none**

NOTES

- SUBJECTIVE/ OBJECTIVE COMPONENT: GIMINSKY HAD TO BELEIVE + hinges WOULD A REASONABLE PERSON BELIVE THAT SECRET SERVICE WOULD KILS HIS DAUGHTER
- **ALTER EGO RULE:** YOU WOULD ONLY HAVE RIGHT OF DEFENSE AS FAR AS HE/SHE WHO IS BEING DEFENDED
- SHOULD BE SURE WHO THEY ARE DEFENDING IS IN THE RIGHT

State v. Boyett, (2008)

144 N.M. 184, 185 P.3d 355, (2008)

PP

The trial court did not instruct the jury on defense of habitation because Rhodes had not crossed the threshold into the home before Boyett killed her. Boyett was convicted of first-degree murder and he appealed. Appealing a conviction of first-degree murder. Jury instruction did not give self-defense justification.

FACTS

Deborah Rhodes and Renate Wilder were childhood friends who eventually developed an intimate relationship and moved in together. Thereafter, the couple's romance ended, but they continued to remain close and live together. Wilder later met Cecil Boyett (defendant) and the two became romantically involved. Eventually, Wilder began spending more time with Boyett than with Rhodes. Wilder even fired Rhodes from her job at Wilder's bar and hired Boyett instead. Rhodes moved out of the couple's home and Boyett moved in. Wilder and Boyett planned to get married. Prior to the wedding, Wilder left the couple's home and spent time with Rhodes without telling Boyett where she was going. Although Boyett suspected that Wilder was with Rhodes, he could not confirm that fact. After a short period of time, Wilder left Rhodes' home to return to Boyett but had a car accident which required her to walk back to her house. After Wilder had returned to Boyett, Rhodes arrived at their house and knocked on the door. Sometime after opening the door but before Rhodes entered the home, Boyett shot and killed her. Boyett was charged with first-degree murder. At trial, Boyett testified that he shot Rhodes because he believed she was reaching for a gun that she often carried on her person and that he fired in self-defense, defense of Wilder, and in defense of his home.

ISSUE

In New Mexico, does the defense of habitation require an intruder to physically enter a home before the owner may use deadly force necessary to prevent the commission of a felony inside the home?

HOLDING

NO

RULE

In New Mexico, the defense of habitation does not require an intruder to physically enter a home before the owner may use deadly force necessary to prevent the commission of a felony inside the home.

REASONING

On appeal, Boyett argues that the trial court erred in not providing a jury instruction related to defense of habitation. The defense of habitation has long been recognized in the state and gives a home resident the right to use lethal force against an intruder when such force is necessary to prevent the commission of a felony inside the home. The defense is grounded in the theory that "[t]he home is one of the most important institutions of the state, and has ever been regarded as a place where a person has a right to stand his [or her] ground and repel, force by force, to the extent necessary for its protection." State v. Couch, 193 P.2d 405, 409 (N.M.1946).

However, the use of deadly force is only justified if the defendant reasonably believed that the commission of a felony was immediately at hand and that it was necessary to kill the intruder to prevent that occurrence.

Regardless, the court has never held that entry into the defendant's home is a prerequisite for the defense.

The court has refused to apply the defense to situations in which a victim was fleeing from the defendant, as well as situations in which the victim had lawfully entered a defendant's home. In some instances, lethal force may be justified against an intruder who is outside the home but attempting to gain immediate entry and commit a felony therein. See State v. Bailey, 198 P. 529, 534 (N.M. 1921). Here, the trial court erred when it excluded the defense of habitation instruction on the ground that Rhodes was required to have crossed the home's threshold. However, there was no evidence produced at trial to show that Rhodes was trying to gain immediate entry into Boyett's home or any evidence that she intended to commit a felony once inside. Instead, the evidence showed that, after knocking on Boyett's front door, Rhodes retreated back approximately four feet and was waiting for the door to open.

DISPO

The judgment of the trial court is affirmed.

CON/DIS: NONE

NOTES

- [redacted]THERE IS A DEFENSE OF YOUR HOME RULE (CASTLE DOCTRINE)

Nelson v. State, (1979)

597 P.2d 977. (1979)

PP

Subsequently, the district court convicted Nelson of reckless destruction of personal property and joyriding. The superior court affirmed.

FACTS

On May 22, 1976, just after midnight, Dale Nelson (defendant) was driving on a side road when his truck became stuck in a marshy area. He and his two passengers were unable to get the truck out. Nelson feared that the truck might tip over. They were able to get help from a passerby, who drove two of them to a Highway Department Yard. They waited a few hours for assistance, but no one was at the yard. Ignoring the signs that forbade trespassing, they took a dump truck, intending to use it to free Nelson's truck. However, the dump truck became stuck as well. At about 10:00 am, Nelson met another stranded motorist who also needed assistance moving his car. Nelson and the motorist went back to the yard and took a front-end loader. They successfully freed the dump truck and were able to free the motorist's car. However, they were unable to free Nelson's truck, and the front-end loader also became stuck. At that point, Nelson and his companions had been trying to free the truck for twelve hours and they decided to go to sleep. Two of them slept in a tent and one of them slept in Nelson's truck.

ISSUE:

Is the commission of a crime justifiable if it is necessary to prevent greater harm from occurring?

HOLDING YES/ NOT IN THIS CASE

RULE:

The commission of a crime is justifiable if it is necessary to prevent greater harm from occurring.

REASONING:

The defense of necessity is available if the defendant commits a crime in order to prevent a greater harm from occurring. In order to use the defense, three requirements must be met:

(1) the criminal act must have been committed in order to prevent a substantial harm;

(2) there must have been a lack of an alternative; and

(3) the harm caused must be proportional to the harm avoided. The defense only requires that a defendant reasonably believes the requirements are met, even if he is mistaken. Furthermore, necessity should be assessed in regard to reasonably foreseeable harm at the time the crime is committed, not the harm that actually resulted.

Here, there is insufficient evidence to support a finding of necessity. First, there was no substantial harm to be avoided. Nelson feared his truck might tip over. But when Nelson committed his crime, the truck had already been stuck for several hours, substantially reducing the likelihood his truck would have tipped over.

The fact that one of the three subsequently took a nap in the truck demonstrates that there was no emergency that required the taking of the High Department Yard vehicles.

Second, Nelson had other lawful alternatives. **He received offers of help from others while his truck was stuck. He could have asked for a ride to someone else who could have helped, or have made a phone call to a state trooper or a tow truck.**

Third, the harm avoided did not outweigh the harm his actions caused. The legislature has clearly designated the crimes of reckless destruction of personal property and joyriding as serious crimes, given the serious penalties associated with them. Nelson's desire to prevent his truck from tipping over did not outweigh his taking of the equipment. Therefore, the defense of necessity is not available to Nelson.

DISPO

AFFIRMED/ had not met requirements of necessity defense

CON/DIS

NOTES

10/25/22

Affirmative Defense- shifts burden is on defense

Defense- burden of proof is on Prosecutor

NYPL §§ 35.15, 35.20, 35.05, 35.05(2).

NYPL Sec. 35.15

Self Defense (non-deadly)

A person may "use physical force upon another person when and to the extent he reasonably believes:

(1) necessary to defend self or a third person

(2) from use or imminent use of unlawful physical force by the other person

- A policy choice to put the burden on prosecution for self defense

NOTES 11/1/22

NECESSITY & DURESS

NELSON CASE- attempting to apply necessity to property

- Self-Defense, Property, Necessity
- Might be guilty of all elements of crime: MAKE THE RULING NOT GUILTY
- ASSESSING THE REASONABLENESS OF THE DEFENDANTS THINKING
- HARM MUST BE GREATER, IMMEDIATE, DIRE
- Court in Nelson points to reasonableness of his thinking and states that it was NOT REASONABLE.
- There were vehicles that stopped to offer help
- He slept in the vehicle
- Life was not at stake
- JUSTIFICATION DEFENSE: NECESSSITY
- We are condoning crime (done for the right reasons)

NYPL 35.05: CONDUCT JUSTIFIED IF CONDUCT IS:

(a) Necessary emergency measure
(b) To avoid an imminent or public injury which is about to occur
(c) By reason of a situation occasioned or developed through no fault of the actor
(d) And which is of such gravity that according to ordinary standards of intelligence and morality; GOOD **CLEARLY OUTWEIGHS** THE HARM

- How does one weigh these things?

- MPC- 3.02 p. 1029
- (1) no imminence like NY
- (2) no concept of causation or fault

- Dudley & Stevens; they do not have the necessity defense
- DURESS 40.00
- A person coerced to break the law
- (1) use or threatened imminent use of
- (2) unlawful physical force upon them or third party
- (3) REASONABLE FIRMNESS/ UNABLE TO RESIST

MPC DOES NOT HAVE IMMENCE CONCEPT

DURESS IS NOT A DEFENSE FOR MURDER IN NYC

United States v. Contento-Pachon

United States Court of Appeals for the Ninth Circuit

723 F.2d 691 (1984)

p.617

PP
Contento-Pachon attempted to submit the defenses of duress and necessity. The trial court excluded both.

Facts
Juan Manuel Contento-Pachon (defendant) was a taxi driver in Bogota, Colombia. One of his passengers (Jorge) offered to hire him as a private driver. Contento-Pachon agreed to meet him to discuss the details. Rather than discussing the job, Jorge asked Contento-Pachon to transport cocaine-filled balloons to the United States. When Contento-Pachon refused, Jorge recited details about Contento-Pachon's private life that Contento-Pachon had never divulged to him. Jorge threatened Contento-Pachon that if he refused to cooperate, his wife and child would die. Contento-Pachon agreed to cooperate. About three weeks later, Contento-Pachon swallowed 120 balloons of cocaine and arranged to land first in Panama and then the United States. He was told that he would be watched at all times, and that his failure to follow directions would lead to the deaths of him and his family. Prior to the trip, Contento-Pachon did not go to the police because he feared they were corrupt. He did not go to police in

Panama for the same reason, and because he feared for his family's safety. Upon arriving in the United States, customs x-rayed Contento-Pachon's stomach and found the cocaine. Contento-Pachon was charged with unlawful possession of narcotics with intent to distribute.

Issue

Is a defendant excused from criminal culpability if he commits his crime under a threat of death or serious bodily injury?

HOLDING: YES

Rule of Law

A defendant is excused from criminal culpability if he commits his crime under a threat of death or serious bodily injury.

Reasoning (Boochever, J.)

Yes.

A defendant is excused from criminal culpability if he commits the crime under duress. There are three elements to the defense of duress.

(1) the threat of death or serious bodily injury must be immediate.

(2) the defendant must act on a well-grounded fear that the threat will be realized.

(3) there must be no reasonable opportunity for the defendant to escape.

Here, the district court held that the threat was not immediate because the threat would only be acted upon after Contento-Pachon's future failure to cooperate. But Contento-Pachon's evidence supports a finding that the threat was immediate. Jorge had a lot of money at stake and took it upon himself to find information about Contento-Pachon's personal life that Contento-Pachon had never revealed to him. He knew the name of his wife and child and where they lived. He also told Contento-Pachon that his accomplices would be watching him at all times during the trip.

These were concrete threats implying that Contento-Pachon's failure to cooperate would lead to immediate harm to both him and his family. Thus, there is sufficient evidence to support a finding of immediacy. Furthermore, Contento-Pachon presented enough evidence to support the contention that he did not have a reasonable opportunity to escape. Duress does not require that a defendant be physically constrained from seeking help. Contento-Pachon was constrained by his belief that the police were corrupt and turning to them for help would be futile. It should be left to the trier of fact to determine whether his belief renders going to the police an unreasonable means of escape. In the alternative, Contento-Pachon could technically have fled.

However, he would have had to pick up and move his family and all his possessions, leave his job, and run away to a place where Jorge could not find him. This is not a reasonable means of escape. As a result, the district court should have allowed the defense of duress.

Contento-Pachon also tried to submit the defense of necessity, arguing that the death of him and his family was a greater harm to be avoided than the trafficking of drugs. However, Contento-Pachon failed to differentiate properly between the defenses of duress and necessity. The defense of necessity is traditionally reserved for coercion brought forth by natural forces, whereas the defense of duress is generally reserved for coercion brought forth by human forces. With duress, it is thought that the coercion overrides the defendant's free will. With necessity, the defendant is thought to freely exercise his will in order to avoid a greater evil. Furthermore, necessity is usually limited to situations that protect the general welfare. Contento-Pachon's crime was motivated by human coercion and did not promote the general welfare. Thus, the defense of necessity is unavailable to Contento-Pachon. The district court properly excluded the defense of necessity. But because the district court improperly excluded the defense of duress, the conviction is reversed.

Concurrence/Dissent (Coyle, J.)

Contento-Pachon failed to present sufficient evidence to support the elements of immediacy and inescapability. The first threat was made three weeks before the trip, and was conditioned on his failure to cooperate in the future. Furthermore, he was not physically restrained from seeking help from the police or running away. However, the majority was correct in affirming the district court's decision to exclude the necessity defense.

NOTES 11/3/22

135.25

Kidnapping 1

1. **When he/she abducts another person**
2. **Compel a third person to give money/property Ransome**

- **MORE THAN 12 hours with intent to**
- **(a) inflict physical injury/ abuse sexually**
- **(b) accomplish or advance the commission of a felony**
- **(c) Terrorize them or third person**
- **(d) interfere w. government or political functions**

3. **The person dies during the abduction**

135.15

Kidnapping 2nd degree

When he/she abducts another person.

Unlawful Imprisonment 1

- Restrains a person and exposes them to physical injury

Unlawful Imprisonment 2nd degree

- Restrains another person

135.30 Defense- a. relative b. assume control

INCHOATE DEFENSES

Inchoate Offences Intro, Attempt

- **"Incomplete crimes"**
- **ATTEMPT, CONSPIRACY (agreement to), SOLICITATION (asks to)**
- **WHY PUNISH PEOPLE WHO DO NOT SUCESSFULLY COMPLETED A CRIME?**
- Giving law enforcement the ability to intervene before the actual crime
- An **inchoate offense**, **preliminary crime**, **inchoate crime** or **incomplete crime** is a crime of preparing for or seeking to commit another crime. The most common example of an inchoate offense is "attempt". "Inchoate offense" has been defined as the following: "Conduct deemed criminal without actual harm being done, provided that the harm that would have occurred is one the law tries to prevent."
- Intent
  - Every inchoate crime or offense must have the ***mens rea*** **of intent or of recklessness, typically intent.**
  - Absent a specific law, an inchoate offense requires that the defendant have the specific intent to commit the underlying crime. For example, for a defendant to be guilty of the inchoate crime of solicitation of murder, he or she must have intended for a person to die.
  - **Attempt, conspiracy, and solicitation** all require *mens rea*.
  - On the other hand, committing an offence under the US Racketeer Influenced and Corrupt Organizations Act merely requires "knowing", that is, recklessness.
  - Facilitation also requires "believing", yet another way of saying reckless.
  - Intent may be distinguished from recklessness and criminal negligence as a higher *mens rea*.

- **Proof of intent**
  - Specific intent may be inferred from circumstances. It may be proven by the doctrine of "dangerous proximity", while the Model Penal Code requires a "substantial step in a course of conduct".

- Merger doctrine
- The doctrine of merger has been abandoned in many jurisdictions in cases involving a conspiracy, allowing an accused to be convicted of both conspiracy and the principal offense. However, an accused cannot be convicted of either attempt or solicitation and the principal offense.

- Defenses
- A number of defenses are possible to the charge of an inchoate offense, depending on the jurisdiction and the nature of the offense.

- **Impossibility**
- Impossibility is no defense to the crime of attempt where the conditions creating the impossibility are unknown to the actor.
- Originally at common law, impossibility was a complete defense; as it was under French law at one point. Indeed, the ruling in *Collins's Case* L. and C. 471 was that an offender cannot be guilty of an attempt to steal his own umbrella when he mistakenly believes that it belongs to another. Although the "moral guilt" for the attempt and the actual crime were the same, there was a distinction between the harm caused by a theft and the harmlessness of an impossible act.
- This principle was directly overruled in England with the rulings *R v Ring* and *R v. Brown* The example from *R v Brown* of an attempt to steal from an empty pocket is now a classic example of illustrating the point that impossibility is no defense to the crime of attempt when the conditions creating the impossibility are unknown to the actor. This principle has been codified in the Model Penal Code:
- A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime he: purposely engages in conduct which would constitute the crime *if the attendant circumstances were as he believes them to be.* MPC § 5.01 (1)(a) (emphasis added).
- Consequently, the principle is universal in the United States either in Model Penal Code jurisdictions (40 states) or those remaining common law jurisdictions influenced by the reasoning in *R v Brown*.
- Other cases that illustrate the case law for impossibility defenses are *People v. Lee Kong* (CA, 1892), *State v. Mitchell* (MO, 1902), and *United States v. Thomas (1962)*.

- **Abandonment**
- A defendant may plead and prove, as an affirmative defense, that they:
- Stopped all actions in furtherance of the crime or conspiracy
- Tried to stop the crime as it was ongoing
- Tried to convince the co-conspirators to halt such actions, or reported the crime to the police or other authorities

- Disputes
- **Burglaries as inchoate crimes**
- There is some scholarly treatment of burglaries in American law as inchoate crimes, but this is in dispute. According to scholar Frank Schmalleger, burglaries "are actually inchoate crimes in disguise."
- Other scholars warn about the consequences of such a theory:
- Burglary, as a preliminary step to another crime, can be seen as an inchoate, or incomplete, offense. As it disrupts the security of persons in their homes and in regard to their personal property, however, it is complete as soon as the intrusion is made. This dual nature is at the heart of a debate about whether the crime of burglary ought to be abolished, leaving its elements to be covered by attempt or as aggravating circumstances to other crimes, or retained and the grading schemes reformed to reflect the seriousness of the individual offense.
- — *McCord and McCord.*
- Certainly, *possession of burglary tools*, in those jurisdictions that criminalize that activity, creates an inchoate crime (*going equipped* in the UK).
- It is clear that:
- In effect piling an inchoate crime onto an inchoate crime, the possession of burglary tools with the intent to use them in a burglary is a serious offense, a felony in some jurisdictions. Gloves that a defendant was trying to shake off as he ran from the site of a burglary were identified as burglar's tools in *Green v. State* (Fla. App. 1991).
- — *McCord and McCord.*

- Examples
- Examples of inchoate offenses include conspiracy, solicitation, facilitation, misprision of felony (and misprision generally), organized crime, Racketeer Influenced and Corrupt Organizations Act (RICO), and attempt, as well as some public health crimes; see the list below
- **GRADING CRIMINAL ATTEMPT**
- Should it be punished the same as a complete crime?
- Attempt used to be published significantly less
- MPC 5.05- MOST ATTEMPT CRIMES ARE PUNISHED SAME AS COMPLETED CRIMES; most severe felonies are one step down from complete
- NYPL 110.05- MOST SERIOUS ATTEMPT FELONIES ARE PUNISHED THE SAME AS THE FELONIES, and the less serious crimes NYPL punishes one step down
- NYPL 110.0- "A PERSON IS GUILTY OF AN **ATTEMPT** TO COMMIT A CRIME WHEN, **WITH INTENT** TO COMMIT A CRIME, **he engages in conduct which tends to effect the commission of such crime.**

People v. Gentry
Illinois Appellate Court, First District

157 Ill. App. 3d 899 (1987)

Facts
Stanley Gentry (defendant) lived with his girlfriend, Ruby Hill. On December 13, 1983, Gentry and Hill had an argument, during which Gentry spilled gasoline on Hill. She later went into the kitchen and was near the stove when the gasoline ignited. Gentry was able to put the fire out, but Hill sustained serious burns. Gentry was tried for attempted murder.

PP

The trial court instructed the jury on the definition of attempted murder, as well as the four different mental states that were sufficient to prove murder. Gentry appealed, arguing that the court's instruction as to the four different mental states allowed the jury to convict him for attempt murder without showing that he had the specific intent to kill.

Issue: Whether a conviction of attempt murder requires a specific intent to kill.
HOLDING: Yes

Rule of Law: A conviction of attempt murder requires a specific intent to kill.

Reasoning (Linn, J.)

Yes. According to *People v. Kraft*, 478 N.E. 2d 1154 (1985), a finding of a specific intent to kill is necessary to sustain a conviction for attempt murder. Mere knowledge that death or serious bodily harm may occur is insufficient. Thus, the trial court's instruction listing the culpable mental states of murder, which included both intent and knowledge, erroneously allowed the jury to convict Gentry of attempt murder without finding a specific intent to kill.

DIPSO

Gentry's conviction is reversed, and a new trial is ordered.

NOTES:

INTENT REQUIRES INTENTIONAL MENS REA

NEED TO LOOK AT ATTEMPT STATUTE/ AND / UNDERLYING CRIME must intend to do the underlying crime.

Bruce v. State
Court of Appeals of Maryland

566 A.2d 103 (1989)

Facts
On December 2, 1986, Leon Bruce (D) and two other men robbed a store owned by Barry Tensor. When Bruce found that the cash register was empty, **Bruce pointed his gun at Tensor and threatened to kill him. Tensor ducked down and Bruce shot him.** Tensor was in the hospital for five weeks but survived.

PP:A jury later convicted Bruce of attempted first degree felony murder.

Issue: Whether a defendant can be guilty of attempt of a crime that does not require specific intent.

NO

Rule of Law

A defendant cannot be found guilty of the attempt of a crime that does not require specific intent.

Reasoning

(Murphy, J.)

No. To be convicted of criminal attempt, the prosecution must prove that the defendant had a specific intent to commit the crime and took an overt act that furthered the intent beyond mere preparation. Because all attempt convictions require specific intent, only crimes that require specific intent may serve as the basis of an attempt conviction. In *Cox v. State*, 311 Md. 326 (1988), this court held that attempted voluntary manslaughter is a crime because voluntary manslaughter is an intentional homicide.

Conversely, involuntary manslaughter is an unintentional killing, and therefore, a defendant cannot be convicted of attempted involuntary manslaughter.

In this case, Bruce was found guilty of attempted felony murder.

Felony murder is not a specific intent crime. The only mental state required for a felony murder conviction is the specific intent to commit the underlying felony, not to cause the death itself.

DISPO

Therefore, attempted felony murder is not a crime.

According to *People v. Kraft*, 478 N.E. 2d 1154 (1985), a finding of a specific intent to kill is necessary to sustain a conviction for attempt murder. Mere knowledge that death or serious bodily harm may occur is insufficient. Thus, the trial court's instruction listing the culpable mental states of murder, which included both intent and knowledge, erroneously allowed the jury to convict Gentry of attempt murder without finding a specific intent to kill.

DISPO

Gentry's conviction is reversed, and a new trial is ordered.

NOTES:

LAST ACT TEST- done all the things, but has been prevented by intervention from the outside (Common Law)

DANGEROUS PROXIMITY TEST- Commonwealth v. Peasley

UNEQUIVVOCALITY (res ipsa loquitur) Test

MPC (substantial test)

United States v. Mandujano, (1974)
United States Court of Appeals for the Fifth Circuit

499 F.2d 370 (1974)

Facts

Alfonso Cavalier was a police officer working undercover as a narcotics trafficker. He met with Roy Mandujano (defendant) to obtain heroin. Mandujano told Cavalier that he had heroin available from a reliable source. Cavalier gave Mandujano money to purchase the drugs. Mandujano tried multiple times to locate the heroin source but was unsuccessful. The United States (plaintiff) charged Mandujano with attempted distribution of heroin. The jury found Mandujano guilty. Mandujano appealed, arguing that he could not be guilty of the crime because his actions amounted to preparation, not attempt.

Issue
Does criminal attempt require a defendant to have acted with criminal culpability and to have taken a substantial step toward committing the crime?

Holding: Yes

Rule of Law
Criminal attempt requires a defendant to have acted with criminal culpability and to have taken a substantial step toward committing the crime.

Reasoning
Yes. Criminal attempt requires a defendant to have acted with criminal culpability and to have taken a substantial step toward committing the crime. In most jurisdictions, a defendant's actions go beyond mere preparation if the crime would be completed unless circumstances other than the will of the defendant intervene. Preparation alone is not enough to prove that a defendant attempted a crime. However, distinguishing attempt from mere preparation is difficult, and the test varies among jurisdictions. Many jurisdictions do not require a defendant to take every required step before a jury can find the defendant guilty of attempt. Generally, conduct rises to the level of attempt if the defendant **(1) acted with the type of culpability otherwise required for the crime and (2) takes a substantial step toward committing the crime.** A substantial step includes actions that strongly corroborate the steadfastness of a defendant's criminal intent. Here, Mandujano offered Cavalier heroin and received money to purchase the drugs. Mandujano's conduct went beyond mere preparation because the crime would have been completed if he located the source. Mandujano thus acted with the criminal culpability required for distribution of heroin.

Further, his multiple attempts to locate the heroin source constituted a substantial step towards committing the crime.

DISPO

Therefore, the evidence presented to the jury was sufficient to warrant the lower court's guilty verdict. The ruling of the district court is **affirmed.**

NOTES

No bright line distinction between preparation and attempt; Mims v. U.S. (1967), U.S. v. Williamson (1995)

PREPARATION DISTINGUISHED FROM PERPETRATION

1. **Physical Proximity Test: overt act must be proximate to the completed crime; commencement of consummation.**
2. **The Dangerous Proximity Doctrine:** greater the gravity and probability of the offence, and the nearer the act to the crime, the stronger the case for calling an act attempt.
3. **The INDISPENSIBEL ELEMENT TEST:**
4. **The PROBABLE Desistence Test- conduct constitutes attempt when in ordinary and natural course of events, without interruption the crime will result**
5. **The Res ISPA LOQUITUR/ Unequivocal Test- an attempt is committed when the actor's conduct manifests an intent to commit a crime.**

Is Preparation enough for actus reus of attempt?

McQuirter/ racial bias

Commonwealth v. Peaslee, (1901)
Supreme Judicial Court of Massachusetts

59 N.E. 55 (1901)

Facts

Lincoln Peaslee (D) made plans to burn down a building and to defraud its insurers. He collected and prepared combustibles so that only the lighting of the combustibles remained. Peaslee solicited an employee of his to light the fire. The employee refused. At a later time, Peaslee and the employee were driving toward the building. When they were about a quarter of a mile away from the building, Peaslee decided not to go through with the plan and drove away. Peaslee was indicted for the attempted burning of the building.

PP

Peaslee brought a motion to quash the indictment and requested a directed verdict in his favor.

Issue

To be found guilty of attempt, must a defendant have a present intent to commit the crime in the near future and have the intent at a time and place where he is able to carry it out?

HOLDING: YES

Rule of Law

To be found guilty of attempt, a defendant must have a present intent to commit the crime in the near future and must have the intent at a time and place where he is able to carry it out.

Reasoning

If a defendant has committed the last act necessary to complete a crime but outside forces interrupt the crime, the defendant is clearly guilty of attempt. It is less clear whether the defendant is guilty of attempt when the last act necessary had not yet taken place. Acts taken with intent to commit a crime may or may not constitute an attempt, depending on the degree of preparation taken and the gravity of the offense. The defendant must possess a present intent to commit the crime in the near future and must have this intent while in a position to carry it out. In this case, the evidence is insufficient to show that Peaslee's actions went beyond mere preparation.

Although Peaslee set up the combustibles so that only the lighting of the combustibles remained, he did not have the present intent to set the fire when he did so. Had Peaslee's solicitation of his employee been properly presented as an overt act, he could have been found guilty of attempt. However, Peaslee's solicitation was not presented as an overt act, and the facts before the court do not demonstrate that Peaslee ever went beyond preparation.

DISPO

Accordingly, Peaslee's motion is granted.

People v. Rizzo, (1927)

Court of Appeals of New York

246 N.Y. 334, 158 N.E. 888 (1927)

Facts

Charles Rizzo (D) and three other men intended to rob Charles Rao of a payroll valued around $1,200. Rizzo was supposed to point out Rao to the other men, who would then commit the actual robbery. The men, two of whom had guns, drove around town in a car looking for Rao, but they were never able to find him. The men drove to the bank where Rao was supposed to pick up the payroll, as well as to various buildings being constructed by the company for which Rao was carrying the payroll. During the men's search, nearby police became suspicious and followed the vehicle. Rizzo jumped out of the car and ran into a building, and police arrested all four men. Although the men never found Rao, and nobody with a payroll was located at the buildings where the men stopped, the men were charged with attempted robbery.

PP

After a trial, a jury convicted Rizzo and the others of attempted first-degree robbery. Rizzo appealed. The appellate court affirmed the conviction, and Rizzo appealed to the New York Court of Appeals.

Issue

Whether a defendant be convicted of the crime of attempt if the defendant has not committed an act tending to the commission of a crime, which is so near to accomplishment of the crime that in all reasonable probability the crime itself would have been committed but for timely interference?

Holding: NO

Rule of Law

A defendant may not be convicted of attempt unless the defendant intentionally commits an act tending to the commission of a crime, which is so near to accomplishment of the crime that in all reasonable probability the crime itself would have been committed but for timely interference.

Reasoning

A defendant may not be convicted of attempt unless the defendant intentionally commits an act tending to the commission of a crime, which is so near to accomplishment of the crime that in all reasonable probability the crime itself would have been committed but for timely interference. Attempt is defined by New York statute as "[a]n act, done with intent to commit a crime, and tending but failing to effect its commission. . . ." The word tending is very indefinite. Tending means to exert activity in a particular direction. Any act taken in preparation to commit a crime can be said to be "tending" towards its accomplishment. But only those acts which advance very near to the accomplishment of the intended crime will support an attempt conviction. In other words, the act must have a "dangerous proximity" to successful commission of the crime. Here, Rizzo and the other men were looking for Rao to rob him of the payroll, but they were never able to even locate him. Rizzo and the others had the intent to commit the crime, but they never had the opportunity. Their acts are too remote to support a conviction for attempted first-degree robbery.

DISPO

Accordingly, Rizzo's judgment of conviction is reversed.

SO NEAR TO THE RESULT THAT THE DANGER OF SUCCESS IS VERY GREAT

NOTES

FOR YOUR HOMICIDE SECTION UNDER YOUR FELOMY MURDER SUBSECTION: Note that NYPL Sec. 125.25 (3) includes attempted version of the enumerated felonies.

NO ATTEMPT STATUTE FOR EACH CRIME, YOUR GET TO ATTEMPT BY NYPL 110.00 "WITH INTENT TO COMMITT A CRIME, he ENGAGES IN CONDUCT WHICH TENDS TO EFFECT"

INSERT Underlying Crime

RESULT CRIME (such a homicide, there won't be ATTEMPTED RECKLESSNESS/ CRIMINAL NEGLIGENCE), reckless/ negligence NO ATTEMPT CRIME

CONDUCT CRIME (CAN HAVE ATTEMPT) CAN INTEND TO DO RECKLESS CONDUCT, IE: ATTEMPTED RECKLESS DRIVING

ATTENDANT CIRCUMSTANCES: Statutes with MR: INTENTIONALLY CASUING DEATH OF PERSON WITH KNOWLEDGE THEY ARE A POLICE OFFICER. MR "knowledge" is SAME in attempted/completed crime.

Arranging to go to hotel with underage person (ex) Strict Liability of the attendant circumstances.

LAST ACT TEST- gets very close to the result

DANGEROUS PROXIMITY TEST- (People v. Rizzo), how close were they to their objective? An act amounts to an attempt when it is so near to the result that the danger of success is very great. ACT MUST BE NEAR TO THE ACCOMPLISHMENT OF THE CRIME.

UNEQUIVOCALITY (res ipsa loquitur) Test

MPC (substantial step)

INDESPENSIBLE ELMENT TEST

State v. Sawyer, (2018)

(Note 1a p.790) Planning and preparation for a school shooting.

FACTS

The defendant purchased a shotgun and planned to purchase at least one more gun. He planned to conduct surveillance at FHUHS to determine when the School Resource Officer was not generally present. Defendant had not yet purchased another gun or conducted surveillance at FHUHS. He sent Facebook messages to the effect that he planned to commit a shooting at FHUHS, and he wrote at length in his journal that he currently planned to commit such an act at some future time. Defendant also kept lists of the items that he needed before actually committing a shooting at the school, many of which he did not have. He researched the FHUHS calendar to select an optimal date for the planned shooting.

Just as the defendant in Hurley did not commit an attempt to break out of jail based on the mere possession of the hacksaws to saw through the jail window bars, defendant in this case took no action so proximate to the commission of the school shooting as to constitute an attempt. Each of defendant's actions was a preparatory act, and not an act undertaken in the attempt to commit a crime. Therefore, as a matter of law, defendant's acts did not fall within the definition of an attempt. See Hurley, 79 Vt. at 31, 64 A. at 78 ("The preparation must be such as would be likely to end, if not extraneously interrupted, in the consummation of the crime intended."); see also Devoid, 2010 VT 86, ¶ 11, 188 Vt. 445, 8 A.3d 1076 ("An overt act must advance beyond mere intent and reach far enough toward accomplishing the desired result to amount to the commencement of the consummation." (quotation omitted)); Curtis, 157 Vt. at 631, 603 A.2d at 357 ("[A]n attempt consists not only of an intent to commit a particular crime, but... some overt act designed to carry out such intent." (quotation omitted)); Boutin, 133 Vt. at 533, 346 A.2d at 532 (holding that "holding of a bottle in one hand ten feet from the intended victim does not make it likely to end in the consummation of the crime intended"). In other words, defendant undertook no act that was the "commencement of the consummation" of the crimes he is charged with here. Devoid, 2010 VT 86, ¶ 11, 188 Vt. 445, 8 A.3d 1076.

"It is commonly stated that a crime consists of both a physical part and a mental part; that is, both an act or omission ... and a state of mind."). The abandonment defense limits the substantial-step rule such that a preparatory act, like the collection of tools needed to commit a crime, is not criminalized when the actor abandons his or her intent to commit the crime, even if the actor retains the tools needed for the crime. Without the abandonment defense, the substantial-step analysis would permit the criminalization of an act much farther removed from the commission of the actual crime than Vermont's law allows, and effectively criminalize intent uncoupled with action.

People v. Mahboubian
New York Court of Appeals

543 N.E.2d 34 (1989)

Facts
Houshang Mahboubian (defendant) insured his collection of Persian antiquities for $18.5 million. The stated purpose for the insurance was to allow Mahboubian to ship his collection from Switzerland to New York, where the collection would be offered for sale. Nedjatollah Sakhai (defendant) engaged some men experienced in robberies and burglaries of art-storage facilities for "an insurance job." Unbeknownst to the others, one of the men—Daniel Cardebat—had agreed to act as a police informant. Mahboubian later made arrangements for his collection to be stored at a secure art-packaging and customs warehouse upon its arrival in New York and was given a full tour of the warehouse. Mahboubian then flew to Switzerland to visit his collection and marked his initials in red on all the shipping crates in which his collection was packed; Sakhai had earlier told Cardebat and the others that the shipping crates would be so marked. The crates were shipped to New York and placed in the warehouse. Sakhai met with the thieves, showed them a diagram of the warehouse floor, and indicated where Mahboubian's crates were being stored. The men managed to gain access to the warehouse, found the crates near the location Sakhai had indicated, and started to remove pieces from their crates, but were caught and arrested by warehouse guards, who had been alerted by Cardebat. Mahboubian and Sakhai were both arrested and later convicted of attempted grand larceny.

PP

Mahboubian and Sakhai appealed.

Issue
In order to establish attempt, must the defendant's conduct have come dangerously close to completion of the substantive crime?

(H): YES

Rule of Law

In order to establish attempt, the defendant's conduct must have come dangerously close to completion of the substantive crime.

Reasoning (Kaye, J.)

Yes. In order to establish attempt, the defendant's conduct must have come dangerously close to completion of the substantive crime. To determine whether conduct has come dangerously close to success, the need of further steps for completion of the crime, the likelihood of abandonment or renunciation, and the potential or immediate dangerousness of the conduct are each considered. In the present case, Mahboubian and Sakhai assert there was insufficient evidence to support the conclusion that their conduct amounted to attempt. Their argument rests on the fact that several steps requiring time remained to be taken and, further, that Mahboubian and Sakhai still had time to change their minds and abandon their scheme after the warehouse break-in. Neither argument is convincing. First, Mahboubian and Sakhai planned a complex crime that necessarily had to proceed in several stages removed in time and space from one another. Mahboubian and Sakhai were nevertheless near success because the steps taken up to the point of arrest were substantial: Mahboubian secured insurance, arranged for shipment of the goods from Switzerland and storage in a particular New York warehouse, and Sakhai hired professional thieves who, in fact, broke into the warehouse and removed pieces of the collection from their crates. Mahboubian and Sakhai had reached a point where only a few comparatively minor acts—all wholly within their power—remained to be accomplished, namely, reporting of the supposed theft to the insurer. Considering these facts, it is reasonable to conclude that Mahboubian and Sakhai were past the point of potential abandonment. Furthermore, Mahboubian and Sakhai's actions in causing the break-in were potentially and immediately dangerous. For all of these reasons, Mahboubian and Sakhai's conduct amounted to attempted grand larceny. Affirmed.

People v. Miller

Supreme Court of California

42 P.2d 308 (1935)

Facts

Miller (defendant) threatened to kill a man named Albert Jeans. Later that day, Jeans was at work on a hop ranch owned by Ginochio, who was also the town constable. Miller entered the field and began walking directly towards Ginochio with a rifle in hand. At one point, he paused and seemed to be loading his rifle, but he did not aim his rifle at any time. As soon as Jeans saw Miller approaching, he fled. Miller continued towards Ginochio until he reached him. Ginochio then took the rifle from Miller, who did not resist.

Issue

Whether any act in furtherance of a crime is an overt act as long as the defendant's conduct unequivocally demonstrates intent to commit the crime.

Holding: YES

Rule of Law

Any act in furtherance of a crime is an overt act as long as the defendant's conduct unequivocally demonstrates his intent to commit the crime.

Reasoning

Yes. When a defendant's conduct clearly shows he intends to commit a crime, any act done in furtherance of the intent constitutes attempt. But where the defendant's conduct exhibits any degree of equivocality, his conduct is at most preparation, and not an act in furtherance of the crime. Thus, whether a defendant is guilty of attempt hinges upon whether he exhibits unequivocal conduct evidencing his intent to commit a crime.

Here, Miller's conduct up to the point when Ginochi took his rifle away did not clearly demonstrate that he intended to kill Jeans. He may have entered the field to simply demand that Ginochi, the constable, arrest Jeans.

DISPO

Because Miller did not exhibit unequivocal conduct that evidenced his intent to kill Jeans, his actions do not amount to attempted murder.

NOTE

UNDER STRICT APPLICATION OF THIS RULE, AN ACT ONLY CONSITUTUES AN ATTEMPT IF THE ACTOR'S SPECIFIC CRIMINAL PURPOSE IS SHOWN FROM THE ACTOS CONDUCT, WITHOUT CONSIDERING ANY STATEMENTS THE ACTOR MAY HAVE MADE BEFORE, DURING, OR AFTER THE INCIDENT: DOES THAT MAKE IT CLEAR ENOUGH?

Res ipsa loquitur (Latin: *"the thing speaks for itself"*) is a doctrine in the common law and Roman-Dutch law jurisdictions under which a court can infer negligence from the very nature of an accident or injury in the absence of direct evidence on how any defendant behaved in the context of tort litigation.

Although specific criteria differ by jurisdiction, an action typically must satisfy the following elements of negligence: the existence of a duty of care, breach of appropriate standard of care, causation, and injury.

In *res ipsa loquitur*, the existence of the first three elements is inferred from the existence of injury that does not ordinarily occur without negligence.

MPC REJECTS THIS TEST

- CONCEPT: WHY ARE THERE NOT MORE GRADIENTS/ BENCHMARKS IN THE AREA BETWEEN CONSPIRACY, ATTEMPT, AND CRIMINAL ACT.

State v. Reeves
Supreme Court of Tennessee

916 S.W.2d 909 (1996)

FACTS

Tracie Reeves (defendant) and Molly Coffman were twelve-year-old girls who attended the same middle school. On the night of January 5, 1993, **Reeves and Coffman agreed over the phone to kill their homeroom teacher, Janice Geiger, with rat poison.** The next morning, Coffman took a packet of rat poison to school. During the bus ride to school, Coffman told another student of the plan. They had sought to enlist another student to drive them to Smokey Mountains. The student told school officials once she arrived at school. Geiger noticed when she arrived in her classroom that Reeves and Coffman were leaning over her desk. They left a purse on Geiger's desk next to her coffee cup. Authorities found rat poison in the purse.

PP

Both Reeves and Coffman were found guilty of attempted second degree murder. Tenn. Case Law before statute: attempt requires (1) intent to commit a specific crime; (2) an overt act toward the commission of the crime; and (3) a failure to consummate the crime. Dupay: Possession of materials was not enough to find attempt. In 1989 statue (influenced by MPC) was re-written to SUBSTANTIAL STEP "TOWARD THE COMISSION OF THE OFFENSE" "STRONGLY CORROBARATIVE OF THE CRIMINAL PURPOSE"

ISSUE

Whether a defendant is guilty of attempt only if the defendant was on the brink of completing the offense.

HOLDING:

NO

Rule of Law

The crime of attempt does not require that the defendant is on the brink of completing the offense. Substantial Steps are enough to prove attempt.

Reasoning

Prior to 1989, the law of attempt required that a defendant intended to commit a crime and took an overt act toward the commission of that crime. Under *Dupuy v. State*, 325 S.W. 2d 238 (1959), this court defined an overt act very narrowly.

In *Dupuy*, a man was convicted for attempting to conduct an illegal abortion. He had arranged for the woman to meet him in a hotel room. He had his instruments laid out and he instructed the woman to remove her clothes. **The police interrupted before he could go any further**. This court reversed the conviction, citing the fact that he did not use any of his instruments and that he did not even touch the woman's body. Thus, under *Dupuy*, a defendant would have to be on the brink of completing the crime in order to be found guilty of attempt.

In 1989, the Legislature overhauled the criminal law by enacting a criminal attempt statute, which was closely modeled after the Model Penal Code.

It set forth a test for criminal attempt that focuses on whether the defendant took a substantial step towards the commission of the crime. The question is whether the Legislature intended the substantial step test to continue to encompass the distinction between mere preparation and an overt act. The prosecution argues that the Legislature instead intended to adopt the Model Penal Code approach and its explanatory examples. One of the examples says that an attempt can be established if the defendant possesses materials for the commission of the crime while at or near the place of commission; the defendant has no lawful reason to possess such materials under the circumstances; and the evidence is corroborative of the defendant's criminal intent. Although the Legislature closely modeled its attempt law after the Model Penal Code's attempt law, this court cannot rule that the Legislature explicitly intended to adopt the Model Penal Code approach because it did not include any of the Model Penal Code's examples.

However, this does not mean the Legislature intended to adhere to the distinction between mere preparation and an overt act as laid out in *Dupuy*. *Dupuy* has been criticized because its requirement that a defendant be on the very brink of completing the crime places others in danger and fails to deter people from attempting crimes.

Under *Dupuy*, Reeves and Coffman could not be guilty until they actually placed the poison in their teacher's cup. Because the *Dupuy* rule produces potentially harmful results, this court abandons it. This court instead holds that **if a defendant possesses materials for the commission of a crime while at or near the scene of the crime, and the defendant has no lawful purpose to possess the materials under the circumstances, a jury may rely on such evidence to find that the defendant has taken a substantial step, if the evidence strongly corroborates the actor's criminal intent.**

DISPO

The conviction is affirmed.

Concurrence/Dissent (Birch, J.)

The majority properly abandoned the *Dupuy* rule. However, it erred in affirming the conviction. The relevant statute requires that the defendant's "entire course of action" strongly corroborates an intent to commit the crime. There was not enough evidence to demonstrate that these girls' entire course of action strongly corroborated their intent to commit second-degree murder.

Progression:

Completed crime

Last Act

Dangerous Proximity

Substantial Step

Conspiracy

No Crime

"RENUNCIATION AS A DEFENSE"

Affirmative defense: the burden of proof is on defendant

VOLUNTARY AND COMPLETE RENUNCIATION 40.10(3)

COMPLETE 40.10(5)

VOLUNTARY 40.10(5)

→ Can't change day, victim time, or another criminal objective.
→ Can't have desisted because of fear of being caught.

ABANDONMENT IN ATTEMPT

Commonwealth v. McCloskey
Superior Court of Pennsylvania

341 A.2d 500 (1975)

Facts
Shortly after midnight, an alarm went off at Luzerne County Prison, alerting guards that a prisoner was attempting to escape from the recreation area. The alarm was only audible in the guard's office. The guards immediately checked the inmates, but no prisoners were found missing. Investigation revealed that someone had cut a piece of barbed wire in the area where the alarm went off. The guards also found a bag filled with civilian clothing. The guards later determined the bag belonged to McCloskey (defendant). **McCloskey approached one of the guards and confessed that he had planned on breaking out of prison that night but decided against it when he thought about the consequences.**

PP
McCloskey was convicted of attempted prison breach, and he appealed to the Superior Court of Pennsylvania.

Issue

Is a defendant guilty of attempt if his plans **never go beyond mere contemplation**?

HOLDING: NO

Rule of Law

A defendant is not criminally liable for attempt if his plans never go beyond mere contemplation.

Reasoning (Hoffman, J.)

McCloskey did not commit the crime of attempted prison breach. If a defendant plans to commit a crime but goes no further than mere preparation, he cannot be found guilty of attempt.

The crime of attempt is **"an overt act done in pursuance of an intent to do a specific thing"** that falls short of completion of the crime. When an accused party's actions go no further than preparation, such that the party would have committed no crime if he abandoned the plan, there is no criminal attempt. *Commonwealth v. Eagan*, 190 Pa. 10 (1899). The question of how close the party's actions must come to the crime to constitute attempt is a difficult one.

Numerous tests have been formulated. The last act doctrine requires the defendant to do that "last act necessary to the commission of a crime."

The dangerous-proximity test looks at how dangerous the crime is and how close the defendant came to committing it. The movie-camera test looks only at whether the defendant's conduct, as opposed to his statements, indicate a criminal intent. If the defendant crosses the line into intent and later abandons the plan, he may be able to avoid liability for the crime, but not the attempt. *See Eagan, supra*.

Here, McCloskey intended to escape from the prison and made preparations accordingly. Nevertheless, **the evidence shows that McCloskey only got to the prison wall, which is still inside the prison, before deciding to abandon his plans.** McCloskey never reached the point of actually carrying out his plan and thus never went beyond merely contemplating the escape. Because McCloskey never set his plans in motion, he cannot be found guilty of attempt. The conviction and sentence are vacated.

Concurrence (Cercone, J.)

The majority correctly holds that McCloskey's conviction for prison breach should be vacated, but for the wrong reasons.

The majority's ruling would essentially require escaping inmates to "be plucked from the prison wall" before they could be convicted for attempting to escape. Deciding when preparations have passed the line into perpetration is difficult, and the final decision in close cases is often based on external considerations. R. Perkins, Criminal Law 561 (2d ed. 1969).

Voluntary abandonment of an attempt should be a defense to the crime, but in areas where it is not recognized as an affirmative defense to attempt, courts often simply find the defendant's acts in such cases as "merely preparatory."

The majority has fallen into this trap. The legislature has now adopted the defense of voluntary abandonment, though McCloskey was charged under the old law. This best serves public policy, because the defendant ceases to be dangerous upon abandonment and such a defense encourages others to abandon their plans to commit a crime. **Voluntary abandonment was therefore an affirmative defense in Pennsylvania before it was explicitly codified.**

DISPO

Thus, McCloskey's conviction should be overturned based on the voluntary abandonment of the crime.

NOTE:

40.10 (3) RENUNCIATION: VOLUNTARY AND COMPLETE RENUNCIATION OF CRIMINAL PURPOSE/ (2) D AVOIDED THE COMISSION OF THE CRIME ATTEMPTED BY ABANDONING HIS CRIMINAL EFFORT.

- COMPLETE (40.10)- TOTAL

- VOLUNTARY (40.10 (5)- on your own, not fear of getting caught

INCHOATE OFFENSES

ATTEMPT- failed attempt/ significant step/ dangerous proximity

SOLICITATION- ASKING SOMEONE TO COMMITT A CRIME

CONSPIRACY- PLAN A CRIME WITH 1 or more

- Intervening early before the crime is completed

MERGER OF INCHOCATE CRIME

NYPL: merger only applies to **attempt only** (CANNOT BE CONVICTED OF ATTEMP AND THE ACTUAL CRIME) can't double up the punishment

MPC AND COMMON LAW: **Merger applies to attempt, conspiracy and solicitations**

NYPL 100.00 (5th degree Solicitation)

'WITH INTENT THAT ANOTHER PERSON ENGAGE IN CONDUCT CONSITUTING A CRIME, HE **SOLICITIS, REQUESTS, COMMANDS, IMPORTUNES OR OTHERWISE ATTEMPTS TO CAUSE** SUCH OTHER PERSON TO ENGAGE IN SUCH CONDUCT"

SOLICITATION

p.825

State v. Mann
Supreme Court of North Carolina

345 S.E.2d 365 (1986)

Facts
Penelope Dawkins and Richard Lockamy helped Charlie Mann (defendant) with household chores and worked at his sawmill. At some point during their acquaintance, Mann told Lockamy and Dawkins that he knew Lockamy had a criminal record and that Lockamy and Dawkins needed money. Mann told Lockamy and Dawkins that he knew of an elderly man who carried large amounts of money in his clothes and would be easy to rob. Mann gave them ideas about how to rob the man and brought up the subject to Lockamy and Dawkins three or four times a week. At one point, Mann told Lockamy that if Lockamy did not rob the

man, Mann would either rob the man himself or find someone else to do it. Subsequently, Keith Barts, the manager of the trailer park where Lockamy and Dawkins were staying, revealed that he knew Mann and that Mann had provided him with previous robbery jobs. According to Barts, the robbery of the elderly man would be a good job. Two weeks later, Barts told Lockamy that he had committed the robbery of the elderly man, but that he thought he had killed the man during the robbery. The man had in fact died.

PP

After a jury trial, the jury convicted Mann of soliciting Lockamy to commit common-law robbery. The trial court sentenced Mann to seven years in prison on the solicitation conviction, which was a felony. The appellate court found no errors in the trial itself but remanded the case for Mann to be sentenced only for a misdemeanor. The North Carolina Supreme Court granted the State of North Carolina's petition for review.

Issue

Is solicitation to commit common-law robbery an infamous crime under North Carolina law?

Holding: YES

Rule of Law

Solicitation to commit common-law robbery is an infamous crime under North Carolina law. Solicitation occurs when one person conceives a crime and asks, entices, induces, or counsels another to carry it out. The solicitor is considered more dangerous than the solicitee because the solicitor instigates the crime. The solicitor is also considered more morally culpable, as he seeks to shield himself from liability by soliciting another to carry out the actual crime.

Reasoning (Martin, J.)

Yes. Solicitation to commit common-law robbery is an infamous crime. Under North Carolina law, an infamous crime is a depraved act involving moral turpitude, *i.e.*, conduct that reveals the perpetrator's mischievous mind and disregard of social duties. An infamous crime is punishable as a felony. Solicitation occurs when one person conceives a crime and asks, entices, induces, or counsels another to carry it out. The solicitor is considered more dangerous than the solicitee because the solicitor instigates the crime. The solicitor is also considered more morally culpable, as he seeks to shield himself from liability by soliciting another to carry out the actual crime. Common-law robbery involves taking a person's money or property by violence or intimidation. A person who asks, entices, induces, or counsels someone to steal from a person using violence or intimidation has committed a depraved act that involves moral turpitude, and accordingly, solicitation to commit common-law robbery is an infamous crime.

DISPO

Here, Mann was convicted of solicitation to commit common-law robbery, which is an infamous crime punishable as a felony under North Carolina law. Accordingly, the trial court correctly sentenced him. The appellate court's decision finding no error in the trial is affirmed, and the appellate court's order to remand Mann for sentencing as a misdemeanant is reversed.

State v. Cotton
Court of Appeals of New Mexico

790 P.2d 1050 (1990)

Facts
In 1987, Cotton (defendant) was charged with the crime of **engaging in sexual conduct with his stepdaughter.** While in jail awaiting trial, Cotton wrote many letters to his wife discussing his strategy for defending against the charges. Specifically, he wrote a letter to his wife **telling her to convince his stepdaughter not to testify against him.** He instructed his wife to **offer his stepdaughter money** to leave the state so she could not testify. Unknown to Cotton, his cellmate intercepted this letter and turned it over to the authorities. Cotton wrote his wife another letter indicating that he had revised his plans and that he was arranging to be released in bond; he stated that his wife should **try to arrange for the stepdaughter to visit at Christmas and convince her not to testify or to testify favorably for Cotton.** He never mailed the second letter. Upon his release on bond two days later, Cotton was arrested and charged with criminal solicitation and conspiracy.

PP

After a trial, a jury convicted Cotton of two counts of criminal solicitation. Cotton appealed.

Issue
Is an uncommunicated solicitation sufficient to constitute the offense of criminal solicitation?

Holding: NO

Rule of Law
An uncommunicated solicitation is insufficient to constitute the offense of criminal solicitation.

Reasoning (Donnelly, J.)
No. **Proof that a defendant meant to communicate a solicitation is insufficient to constitute the offense of criminal solicitation**. There must be proof that the solicitation was actually communicated to the solicitee. This is distinct from the Model Penal Code's approach. The Model Penal Code only requires that the defendant intended to communicate the solicitation. Thus, under the Model Penal Code, uncommunicated solicitations constitute a crime. When this jurisdiction's legislature adopted the Model Penal Code's definition of solicitation in its criminal code, it specifically omitted the provision on uncommunicated

solicitations. This suggests that the legislature meant to require actual communication from the defendant to the solicitee or an intermediary.

If the solicitation is not communicated to the solicitee or an intermediary, the crime of solicitation is incomplete, but the evidence may support a charge of attempted solicitation in appropriate circumstances. In this case, Cotton was not charged with attempted solicitation; he was charged with solicitation. Cotton's wife did not receive either of Cotton's letters.

DISPO

The lack of actual communication prevents Cotton's conviction under the solicitation statute. Therefore, Cotton's convictions for solicitation are reversed.

NYPL 100.00 (5th degree)

-UNCOMMUNICATED REQUESTS WOULD STILL CONSTITUTE AN ATTEMPT in NY

CONSPIRACY

NYPL 105.00, 105.20, 105.30

Pp.831-850, 850-864

105.00 CONSPIRACY in 6th DEGREE

- "INTENT THAT CONDUCT CONSITUTING A CRIME BE PERFORMED HE AGREES WITH ONE OR MORE PERSON TO ENGAGE IN OR CASUE THE PERFORAMCNE OF SUCH CONDUCT"

- ACT OF AGRREING TO CRIME

"A partnership in criminal purposes", filling the gap created by law of attempt too narrowly conceived.

- **Intent to combine with others**
- **Intent to accomplish the illegal objective**

MOST COURTS DONT MERGE CONSPIRACY

People v. Carter

415 Mich. 588, 330 N.W. 2d 314.

Facts
The State of Michigan (plaintiff) charged Alvin D. Carter (defendant) with aiding and abetting unarmed robbery, aiding and abetting extortion, and conspiracy to commit both

unarmed robbery and extortion. Edward Kimble robbed a business by handing an employee a threatening note and demanding money. At Carter's trial, Kimble testified that he and Carter met at a bar the day before the robbery to discuss the plans and to write the note.

PP

The jury found Carter guilty of all charges, and Carter appealed. The appellate court affirmed the jury's ruling on some of the charges but reversed the other charges. Carter appealed to the Supreme Court of Michigan.

Issue
Can a defendant be charged with both conspiracy and aiding and abetting the completed crime when the completed crime can be committed by one person?

Holding YES:

Rule of Law
A defendant can be charged with both conspiracy and aiding and abetting the completed crime unless the completed crime requires the participation of two or more people

Reasoning (Moody, J.)

Yes. A defendant can be charged with both conspiracy and aiding and abetting the completed crime if the completed crime could have been committed by one person. A criminal conspiracy exists if two or more people agree to commit an unlawful act. The crime of conspiracy does not require an overt act. Thus, once the agreement is made, a defendant commits conspiracy. Conspiracy requires evidence of two specific purposes. First, the conspirator must intend to partner with others. Second, the conspirator must intend to commit the crime. The crime of conspiracy is distinct from the completed crime because the goal of conspiracy statutes is to punish criminal collaborations, which generally isn't achieved by conviction of the completed crime. Therefore, conspiracy usually does not merge into the completed crime. Also, aiding and abetting a completed crime is treated the same as committing the crime itself. So, because a conspiracy conviction doesn't merge into a conviction of the completed crime, the conspiracy conviction also doesn't merge into a conviction of aiding and abetting the completed crime. Nonetheless, under Wharton's Rule, if it takes two or more people to commit the completed crime, a defendant can't be convicted of both conspiracy and aiding and abetting the crime. Here, Carter intended to partner with Kimble because he met with him at a bar the day before the robbery. Carter also intended to commit the crime because he helped Kimble write the threatening note used to facilitate the robbery. Because a conspirator can be charged with both conspiracy and aiding and abetting the completed crime, Carter's conviction of both conspiracy and aiding and abetting was proper unless Wharton's Rule applies. The rule doesn't apply because convicting Carter of robbery and extortion doesn't require the prosecutor to prove that two or more people were involved.

DISPO

Therefore, Carter could've been convicted of conspiring to commit robbery and extortion and aiding and abetting robbery and extortion. The ruling of the appellate court is **affirmed.**

The **Wharton Rule** (or **Wharton's Rule**), in American criminal law, is a rule prohibiting the prosecution of two individuals for conspiracy to commit an offense when the offense can only be committed by the involvement of at least two individuals.

Pinkerton v. United States
United States Supreme Court

328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946)

Facts

Walter and Daniel Pinkerton (defendants) were brothers who lived a short distance from each other on Daniel's farm. The brothers were indicted for various violations of the Internal Revenue Code involving the unlawful possession, transportation, and sale of whiskey. The proof presented at trial demonstrated that Daniel and Walter had agreed to commit the crimes, but the government's evidence demonstrated that it was Walter alone who committed the substantive offenses without any assistance from Daniel. The court instructed the jury that Daniel could be convicted of the substantive offenses committed by Walter if Walter did them in furtherance of the conspiracy. The jury found Walter guilty on nine of the substantive counts and on the conspiracy count, and the jury found Daniel guilty on six of the substantive counts and on the conspiracy count. Each brother was fined and sentenced to terms of imprisonment. Walter and Daniel appealed, and their convictions were affirmed by the circuit court of appeals. The United States Supreme Court granted certiorari to review.

Issue
Is a defendant who conspires with another person criminally liable for all substantive offenses committed by the coconspirator in furtherance of the conspiracy, even if the defendant did not know about the coconspirator's acts and did not assist him in any manner?

HOLDING: YES

Rule of Law
A defendant who conspires with another person is criminally liable for all substantive offenses committed by the coconspirator in furtherance of the conspiracy, even if the defendant did not know about the coconspirator's acts and did not assist him in any manner.

Reasoning (Douglas, J.)
Yes. If two or more individuals conspire to commit illegal acts, the criminal intent to commit the substantive offenses has been achieved, regardless of who actually commits the illegal substantive offenses. Further, the conspiracy is ongoing until one of the coconspirators affirmatively withdraws from it. Until a conspirator does some act to disavow the conspiracy or defeat the conspiracy's purpose, he continues to be a part of the conspiracy. Therefore, the

ongoing conspiracy is attributable to all coconspirators until one intentionally removes himself from it. In this case, there is no evidence that Daniel directly participated in the commission of the substantive offenses. However, the evidence shows that the illegal acts committed by Walter were done in furtherance of an unlawful agreement, *i.e.*, conspiracy, between Walter and Daniel. Daniel argues that his alleged participation in a conspiracy is not enough to sustain his conviction on the substantive offenses even though they were committed by Walter in furtherance of the conspiracy. However, the unlawful agreement between Daniel and Walter contemplated precisely what was subsequently accomplished. The acts were done in execution of the conspiracy. An overt act is an essential ingredient of the crime of conspiracy. If that act can be supplied by one conspirator, there is no reason why other acts in furtherance of the conspiracy cannot be equally attributable to other members of the conspiracy.

DISPO

The judgments of conviction are affirmed.

Dissent (Rutledge, J.)
The judgment of conviction against Daniel should be reversed. There is no evidence to establish that Daniel participated in, or aided and abetted Walter in, the commission of the substantive offenses. In fact, Daniel was in prison when some of the crimes were committed by Walter. The majority has created a dangerous precedent that allows an ignorant and passive member of a conspiracy to be convicted of all substantive crimes committed by a coconspirator in furtherance of the conspiracy. Further, the majority's holding is not consistent with what Congress intended in its enactment of the laws about conspiracy and aiding and abetting. Those are distinct classes of crimes, and the majority has wrongly allowed a defendant to be convicted of substantive offenses, which the defendant did not aid or abet, based on a mere conspiratorial agreement.

PINKERTON LIABILITY RULE

The Supreme Court concluded that **if an overt act that is an essential ingredient in a conspiracy can be supplied by one conspirator, then the same or other acts in furtherance of the conspiracy should be attributable to the others for the purpose of holding them responsible for the substantive offense(s).**

They noted that a different result would arise if the substantive offense committed by one of the conspirators was not done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan that could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.

The Pinkerton liability rule does service where the conspiracy is one to commit offenses of the character described in the substantive charges.

Aiding and abetting has a broader application. It makes a defendant a principal when he consciously shares in any criminal act, whether or not there is a conspiracy. If a conspiracy is also charged, it makes no difference, so far as aiding and abetting is concerned, whether the substantive offense is done pursuant to the conspiracy. *Pinkerton* is narrow in scope. Aiding and abetting rests on a broader base. It states a rule of criminal responsibility for acts that one assists

another in performing. The fact that a particular case might conceivably be submitted to the jury on either theory is irrelevant. It is sufficient if the proof adduced and the basis on which it was submitted were sufficient to support the verdicts.

Accomplice Liability (PINKERTON IS FEDERAL DOCTRINE) which greatly magnifies the crime to all charges included.

People v. Swain
Supreme Court of California

12 Cal.4th 593 (1996)

Facts

Jamal K. Swain and David Chatman (D) participated in a drive-by shooting that resulted in the death of a 15-year-old boy. At trial, the court instructed the jury on the theories of express and implied-malice murder. The jury returned general verdicts convicting Chatman of second-degree murder and conspiracy to commit second-degree murder, and convicting Swain of conspiracy to commit second-degree murder. Swain and Chatman appealed their convictions, and the People appealed the sentences imposed by the trial court.

PP

The appeals court affirmed the convictions and the sentences. The California Supreme Court granted the parties' petitions for review. Among other things, the court considered the question of whether the trial court improperly instructed the jury on the principles of implied-malice murder in connection with the conspiracy charge, because implied malice does not require a finding of intent to kill.

Issue
Does a conviction for conspiracy to commit murder requires proof of the intent to kill?

HOLDING: YES
Rule of Law
A conviction for conspiracy to commit murder requires proof of the intent to kill.

Reasoning (Baxter, J.)

Yes. A conviction for conspiracy to commit murder requires proof of the intent to kill. The crime of conspiracy occurs when two or more people agree to commit a target offense and undertake an overt act in furtherance of the conspiracy. The crime generally requires two specific intents. The defendant must both intend to conspire and intend to commit the elements of the target offense.

In first-degree-murder cases, an element of the offense is the specific intent to kill. Accordingly, conspiracy to commit first-degree murder clearly requires that the defendant

specifically intended to kill. It is less clear whether conspiracy to commit second-degree murder also requires a specific intent to kill.

In second-degree-murder cases, the element of intent may be implied, such as when the defendant acts with extreme recklessness. Thus, in second-degree-murder cases, the specific intent to kill is not required. However, this does not mean that conspiracy to commit second-degree murder does not require a specific intent to kill. Because conspiracy is a specific-intent crime, it would be illogical to find the defendant guilty of conspiracy to commit murder without finding that the defendant possessed the specific intent to commit murder. Accordingly, a conviction of conspiracy to commit murder must be based on a finding of intent to kill, not on an implied-malice theory.

Here, the trial court instructed the jury on both express and implied-malice murder, and the jury returned general verdicts. It is thus unclear on which theory the jury based the conspiracy convictions. Furthermore, it cannot be said that this error was harmless, because there is no way to determine whether the jury based the conspiracy convictions on an improper theory.

DISPO

Thus, the appellate court's judgment affirming the convictions must be reversed.

CORRUPT MOTIVE DOCTRINE:

Corrupt motive doctrine is a principle of criminal law that says that conspiracy is punishable only if the agreement was entered into with an evil purpose. Mere intention to do the act prohibited in ignorance of the prohibition will not suffice. Persons, who agree to do an act in good faith without the use of criminal means, are not converted into conspirators, because it turns out that the contemplated act was prohibited by statute. The actual criminal intention must be shown to justify a conviction for conspiracy. The principle originated in the case People v. Powell, 63 N.Y. 88 (N.Y. 1875) and therefore is also known as Powell Doctrine.

However, this doctrine has been rejected by the Model Penal Code.

People v. Lauria

California District Court of Appeal

251 Cal.App.2d 471 (1967)

Facts

A police investigation revealed that three known prostitutes were using Lauria's (defendant) telephone answering service for business purposes. Stella Weeks, a police officer, went undercover, posed as a prostitute, and signed up with Lauria's answering service. Over

approximately a three month period, Weeks periodically complained to Lauria's office manager about losing calls and not receiving messages for "tricks." Lauria defended his service and emphasized that "his business was taking messages." Thereafter, Lauria and the three prostitutes were arrested and charged with conspiracy to commit prostitution, a misdemeanor. Lauria objected to the arrest and told the police that, while he knew of only one known prostitute, his records were always available whenever the police had a specific name to investigate, but also that his service did not "arbitrarily tell the police about prostitutes."

PP

The trial court dismissed the indictment brought against Lauria and the three prostitutes as lacking probable cause. The People appealed.

Issue

In order to make a supplier of goods or services a participant in a criminal conspiracy, must the prosecution show that the supplier had knowledge of the illegal use of the goods or services and had an intent to further the illegal use of the goods or services?

Holding: YES

Rule of Law

In order to make a supplier of goods or services a participant in a criminal conspiracy, the prosecution must show the supplier had knowledge of the illegal use of the goods or services and had an intent to further the illegal use of the goods or services.

Holding and Reasoning (Fleming, J.)

Yes. The prosecution attempted to establish the element of an agreement to further an illegal act, required to show the presence of a conspiracy, by showing that Lauria knew his co-defendants were prostitutes who used his service to receive "business" calls and continued to furnish them with the service. This approach attempts to equate knowledge of another's criminal activity with a conspiracy to further that illegal activity. In *United States v. Falcone*, 311 U.S. 205 (1940), sellers of sugar, yeast and cans, who had only knowledge of an illegal liquor conspiracy, were held not to have participated in the conspiracy with distillers who purchased the goods from them. In *Direct Sales Co. v. United States*, 319 U.S. 703 (1943), a wholesaler of drugs was convicted of conspiracy to violate the federal narcotic laws by selling drugs in quantity to a co-defendant physician who was supplying them to addicts. There, the wholesaler actively promoted the sale of morphine sulfate and sold the drug in quantities 300 times his normal requirements. The Court in *Direct Sales* said that there must be more than just knowledge of illegal activity to be a conspiracy, there must be an intent to further it and a stake in the venture. To show intent, it is easiest if there is proof of direction participation in the illegal acts. But when such evidence is lacking, intent may be inferred when the supplier of services has a stake in the illegal venture. Here, Lauria did not inflate his answering service prices for his co-defendant prostitutes in order to financially gain from

their illegal activity versus his other customers. Additionally, intent may be inferred when no legitimate use for the goods or services exists. Here, there is nothing inherently illegal or useless about an answering service. Finally, intent may be inferred when the supplier's volume of business with the buyer is grossly disproportionate to any legitimate demand or when the sales for the illegal use account for a very high proportion of the supplier's total business. Here, no such evidence of unusual volume of Lauria's business was shown. When the supplier has a "special interest" in the outcome of the illegal activity, as shown by the above examples, then the supplier may be held to have participated in the conspiracy. There have been cases when a supplier who simply had knowledge of a buyer's illegal activity was held criminally culpable in a conspiracy. However, those cases all involved felony crimes, not misdemeanors as Lauria has been charged here. Here, there is no proof that Lauria took any direct action to further, encourage, or direct the prostitution activities of his co-defendants.

DISPO

The order dismissing the indictment is affirmed.

Commonwealth v. Azim
Superior Court of Pennsylvania

313 Pa.Super. 310 (1983)

Facts
Charles Azim (defendant) was arrested for conspiracy, assault, and robbery, together with Mylice James and Thomas Robinson. Azim was driving with James and Robinson when he pulled over and stopped the car nearby the victim, Jerry Tennenbaum. Robinson opened the window of the passenger seat and called Tennenbaum over. When Tennenbaum refused to approach the car, Robinson and James exited the car and, **beat, choked, robbed Tennenbaum.** Azim remained in the car. When Robinson and James returned, Azim drove them away.

PP

Azim was convicted as charged. He appealed, arguing that the evidence on the conspiracy charge was insufficient to sustain a conviction.

Issue
May a conviction of conspiracy be based solely upon **circumstantial evidence?**

Holding: YES

Rule of Law
A conviction of conspiracy may be based solely upon circumstantial evidence.

Reasoning (Per curiam)

A conviction of conspiracy may be based solely upon circumstantial evidence. **Conspiracy may be inferred from certain factors, such as the defendant's relationship with other conspirators or the defendant's conduct or presence at the scene of the crime.** Conspiracy has previously been proven in cases where the defendant drove his codefendants to the scene of the crime and picked them up afterwards. There are a number of factors in the present case that indicate there is sufficient evidence to support a conviction of conspiracy. Azim drove Robinson and James to and from the scene of the crime. He sat waiting in the car while James and Robinson assaulted and robbed Tennenbaum nearby. Azim thus had full knowledge of the commission of the crime. It is possible that a reasonable person could find beyond a reasonable doubt that Azim conspired with James and Robinson to assault and rob Tennenbaum.

DISPO

Azim's motion for dismissal is therefore denied.

Commonwealth v. Cook
Appeals Court of Massachusetts

10 Mass. App. Ct. 668, 411 N.E.2d 1326 (1980)

Facts
Dennis Cook (defendant) was charged with conspiring with his brother, Maurice, to rape a girl. The victim was in the Cooks' neighborhood to visit her boyfriend. Finding that her boyfriend was not home, she passed by a project office, where the Cooks invited her to join them. The area was a common place for socializing, and the three sat there talking for about forty-five minutes. Because the victim was having trouble remembering their names, the Cooks showed her their identification cards. Maurice then suggested that they walk to a nearby convenience store to get more cigarettes. Maurice suggested the three walk through a path cutting through a wooded a hill. At one point, the victim slipped. Maurice then jumped on her. He took off his belt and handed it to Dennis, proceeding to rape the victim. Maurice was charged with rape and Dennis was charged as an accessory to rape, in addition to the conspiracy charge. Dennis filed a motion for a required verdict of not guilty, which was denied. A jury convicted him of conspiracy.

Issue
Is evidence that the defendant was an accomplice to a crime sufficient evidence to prove a conspiracy?

HOLDING: NO

Rule of Law

Mere evidence that the defendant was an accomplice to a crime is insufficient evidence to prove a conspiracy.

Reasoning (Greaney, J.)

No. A conspiracy is formed when two or more people agree to commit a crime. Because the agreement is central to the formation of a conspiracy, sufficient evidence proving the existence of an agreement is required. Although such proof may be supported solely by circumstantial evidence, the evidence must go beyond mere suspicion or conjecture. The evidence presented in this case is insufficient to prove the existence of a preconceived agreement between the Cook brothers. The Cooks happened to meet the victim by chance in a popular common area. At no time did the Cooks speak with each other outside the presence of the victim, giving them no opportunity to conspire after meeting the victim. Furthermore, the Cooks were forthcoming about their identities. Although the isolated path was a suspicious choice, the path provided a direct route to the convenience store. On the way to the store, it appears that the victim fell by chance and that Maurice spontaneously took advantage of the situation. While Dennis appears to have encouraged the crime and therefore became an accomplice, there is no evidence that Dennis and Maurice previously conspired to commit the crime. Accomplice liability is distinct from conspiracy liability, and mere evidence that the defendant was an accomplice to the crime is insufficient evidence of an agreement to form a conspiracy. A finding of accomplice liability does not require an agreement to conspire.

DISPO

Accordingly, there is insufficient evidence to prove the existence of a conspiracy.

People v. Foster
Supreme Court of Illinois

457 N.E.2d 405 (1983)

Facts

On September 28, 1981, James Foster (defendant) approached John Ragsdale to enlist his help in robbing an elderly man named A.O. Hedrick. Once Ragsdale ascertained that Foster was serious, he decided to find out more information from Foster in order to turn him over to the police. Ragsdale told police that the robbery would occur on October 3. On that day, Foster and Ragsdale met at Hedrick's home, where they were met by police. Foster was arrested and charged with conspiracy. A jury convicted Foster of conspiracy to commit robbery. The appellate court reversed Foster's conviction, holding that the crime of conspiracy requires an actual agreement between at least two people (*i.e.*, the bilateral theory of conspiracy), and Ragsdale had only pretended to agree to Foster's plan for the robbery.

The people of the State of Illinois (plaintiff) appealed to the Illinois Supreme Court. On appeal, the state argued that the crime of conspiracy only requires one person's intent to agree to commit a crime (*i.e.*, the unilateral theory of conspiracy), or, alternatively, that there was enough evidence to convict Foster under the bilateral theory.

Issue

Under the bilateral theory of conspiracy, does the crime of conspiracy require an actual agreement between two or more people to perform an illegal act?

HOLDING: YES

Rule of Law

Under the bilateral theory of conspiracy, the crime of conspiracy requires an actual agreement between two or more people to perform an illegal act.

Reasoning (Underwood, J.)

Yes. The bilateral theory of conspiracy requires an actual agreement between two or more people to perform an illegal act. Under this theory, if a defendant attempts to conspire with another who is merely feigning agreement, no conspiracy is formed. However, under the unilateral theory of conspiracy, only one person's intent to agree to commit a crime is sufficient for a conviction. Thus, if a defendant attempts to conspire with another who is feigning agreement, the defendant can still be convicted of conspiracy. Prior to 1961, this jurisdiction followed the bilateral theory of conspiracy. It is unclear whether the legislature intended to adopt the unilateral theory through its 1961 amendment to the conspiracy statute. The original statutory language said that a conspiracy is formed when two or more persons agree to commit a criminal act. The amended statutory language says that conspiracy is formed when a person agrees to commit a criminal act. Although the shift in emphasis from two or more persons to one person suggests that the legislature intended to adopt the unilateral theory of conspiracy, it is unlikely that the legislature would have made such a sweeping change in the law of conspiracy without explaining its rationale in its comments to the statute. Additionally, this jurisdiction has a solicitation statute that theoretically already covers every scenario in which a defendant could be convicted under the unilateral theory. There would thus be no need for the legislature to adopt the unilateral theory. Moreover, other provisions of the conspiracy statute prevent a defendant from obtaining acquittal if his co-conspirators are acquitted or lack capacity to commit a crime. This provision would be unnecessary if the legislature had truly adopted a unilateral theory, as a unilateral theory would already preclude these defenses. Keeping in mind the importance of interpreting criminal statutes in favor of the defendant, this jurisdiction will continue to adhere to the bilateral theory of conspiracy. In this case, even though the state argues that there is sufficient evidence to convict Foster under the bilateral theory, this argument is without merit.

DISPO

Ragsdale did not actually agree to the robbery; rather, the most the jury could have found is that Ragsdale considered Foster's offer to participate in the robbery before Ragsdale went to the police. Accordingly, the appellate court's judgment is affirmed.