

Criminal Law outline, Spring 2004. Professor Anderson.

I. Criminal conduct, generally

A. Underlying theories

1. Retribution

2. Incapacitation

3. Deterrence

a) **Specific (special) deterrence:** deterring the actor.

(1) Consider the suicide bomber: if she detonates the bomb but survives, and will be lying in a hospital from now on, will criminal justice deter her from anything? Yes, it can--it can deter her from being a conspirator or an abettor in the future.

(2) **Enhancing deterrence (the criminal's economics):** let P be the magnitude of the punishment and p be the probability of getting caught and getting punished; let B be the magnitude of the benefit of the crime and q be the probability of realizing that benefit; let D be the expected time delay between the potential benefits and the potential detriments. For effective deterrence, we need:

$$p(P - D) > Bq$$

We can increase P with things like torture. We can increase p by using more surveillance and roadblocks, e.g.

b) **General deterrence:** deterring everyone besides the actor.

(1) Consider the suicide bomber: punishing her might inspire worse badness in the future--prospective suicide bombers may try to do a better job than their predecessor.

(2) Consider hostage situations: if the hostage holder has killed one hostage, why shouldn't he then just kill all of them?

(3) **Enhancing deterrence:** in the case of the suicide bomber, for instance, we could kill her family. Note that this strategy is used in the criminal world. This variety of deterrence is the flip-side of retribution (which is largely a fancy name for vengeance). Why doesn't the state do it? For one thing, the state doesn't want to punish innocence.

4. Reform

B. Elements

1. Actus reus

a) **Underlying theories:** do we need to sort out the people who have caused harm from those who haven't? If I didn't cause any harm, am I not guilty? If I did cause harm, am I guilty?

(1) **Lady Wooten:**

(2) **"Kill em all, let God sort em out":**

(3) **Multiple options for dealing with harm causers**

(a) **Imprisonment**

(b) **Civil commitment**

- i) Consider a grandfather with Alzheimer's who harms nurses in a nursing home.

b) Voluntariness

(1) **Underlying theories:** is voluntariness condemnable (i.e., from a retributive perspective)? Is it deterrable (i.e., from a deterrence perspective)?

(2) **MPC**

Comment: MPC § 2.01. Requirement of Voluntary Act.

(1) A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.

(2) The following are not voluntary acts within the meaning of this Section:

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

(a) **"Includes":** criminal conduct must simply include a voluntary act; it needn't be entirely voluntary. See *Martin*.

(3) **Common law**

(4) **Cases**

(a) ***Martin*:** drunk guy arrested in his home and taken onto a public highway, where he was drunk in public. The issue here is about "appears" in the statute ("... [who] appears in any public place . . .")--must the appearance be voluntary?

i) MPC § 2.01(1): not guilty unless the conduct includes a voluntary act or omission. Note "includes": the State etc. will argue that Df.'s conduct did include a voluntary act-- viz., "manifesting" a drunken condition.

ii) MPC § 2.01(2)(d): a bodily movement that's not a "product of the effort or determination of the actor" is not a voluntary act.

(b) ***Newton*:** in the struggle for possession of Df.'s gun during a traffic stop, the gun fired and injured a police officer, who then shot Df., who in turn fired several shots and killed a second police officer. The problem on appeal is that the jury didn't receive an instruction re: unconsciousness.

i) **Unconsciousness:** etc., unconsciousness is a complete defense to criminal homicide.

a. In some jurisdictions, unconsciousness is also part of an affirmative defense--but that affirmative defense also requires an insanity element, which would lead to civil commitment if used successfully.

b. Unconsciousness could be argued, alternatively, with respect to the result element--i.e., "I didn't have the requisite MR, because I was unconscious."

(c) ***Decina*** (n4pp179-180): Df. drove his Buick knowing he was subject to

epileptic attacks and could go unconscious during them and killed four people.

i) The chain of causation:

1. Voluntary act (getting in the car knowing of the seizure possibility)
2. Involuntary act (the seizure)
3. Result (the accident, killing four)

The involuntary act in (2) does not break the chain here, the court says. ("To hold otherwise 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 under the statute.")

c) Omissions

(1) Underlying theories

- (a) Rights-based approach:** "you're you and I'm me," or individualism. This approach lets us draw a line between what happens and what normally would have happened, and so to define duties. Sometimes, the law takes a strictly rights-based approach, e.g. with contracted lifeguards.
- (b) Utilitarian approach:** this approach may mitigate or alter some of the rights we have to individualism.

(2) Duties to act: arising from:

- (a) Contract**
- (b) Status**
- (c) Isolating from rescue**
- (d) Voluntary assumption**
 - i)** But see *Pope*, below.

(3) Cases

- (a) *Pope*:** Df. takes in a child and its indigent mother, who goes into a religious frenzy and seriously injures the child. Df. can't be liable for just taking the mom in, because she didn't have the requisite MR at that point. But when the mother was causing the harm, Df. was at least "knowing" (i.e., she was aware to a practical certainty that the harm would be caused). It's Df.'s status that gets her off, though; the statute only proscribes child abuse by a parent, adoptive parent, or someone in loco parentis or otherwise responsible for the child's supervision. Df. isn't any of these, and note that she still wouldn't be any of them even if she had participated in the beating herself (although she'd probably be guilty of other crimes in that case).
- i) Underlying theory:** don't we want Df. to bring this family in off the street? If she could face criminal liability as a result of doing so, Df. would probably hesitate to be such a good samaritan. Cf. *Oliver* (n3p195) (woman brings heroin addict home from a bar, then leaves

him unattended and he ODs).

- (b) *Jones*: child died in Df.'s basement. The issue is whether Df. had a duty to supervise and care for the child. This is a failure to instruct case, and Anderson notes that the prosecutor probably could have won at trial if he'd asked for the correct instruction, instead of apparently getting overwrought with the emotion provoked by the facts etc.
- (c) *Barber*: a plug-pulling case. The issues are (1) whether there was an omission in the first place and (2) if there was, What duty does the doctor owe because of his status?
 - i) **Mens rea**: "knowing," etc. Thus, Df. doctor's only hope is to argue that he had no duty to act. But, if we consider the Df.'s conduct (pulling the hydration tube) and act, then Df. can't even talk about duty.
 - ii) **Act**: how is pulling a hydration tube not an act?
 - a. Consider what would normally happen. Normally, "you're you and I'm me" (the policy of individualism); I have no obligation to cross the line and help you unless I have a duty to you. Consider, if a bad guy comes in and pulls the tube, that would be an act-- normally, the respirator would have continued, but the bad guy interrupted what would normally have happened.
 - b. **Omission**: if the doctor's conduct was not an act, was it an omission? I.e., did he have a duty to act?
 - 1) In determining whether there is a duty to act: consider the benefits and detriments of enforcing a duty. Note that in plug-pulling cases there is no benefit.
 - 2) Is the act/omission scheme we have a good one? In plug-pulling cases, does it help the patient or does it hurt him? For one thing, the rule puts the patient through having his organs dry out, whereas another rule could allow for a legal, quick and dignified death.

2. Attendant circumstances

3. Result

4. Mens rea

a) MPC

(1) Taxonomy of *mentes rea*e

(a) Purposely

Comment: MPC § 2.02(2)(a). Purposely.

A person acts purposely with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
- (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes they exist.

i) Conditional purpose

Comment: MPC § 2.02(6). Requirement of Purpose Satisfied if Purpose is Conditional.

When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives

the harm or evil sought to be prevented by the law defining the offense.

- a. *Holloway*: Df. carjacker had an intent to cause harm only if he met with resistance. SCOTUS reads the statute to apply whether the intent to cause harm was conditional or unconditional: (1) because the statute reflects legislative intent to deter carjacking, generally, and (2) that the statute was enacted against a common law background recognizing that "specific intent" is culpable even if conditional.

Comment: Carjacking "with the intent to cause death or serious bodily harm" is a federal crime.

- 1) Scalia's dissent: Scalia says "intent" doesn't usually mean conditional purpose, and especially doesn't mean conditional purpose where the actor hopes that the condition won't occur. He says that had the legislature wanted to proscribe all carjacking, regardless of whether intent to harm was conditional, they could have converted the MR requirement (purpose) into an AR element (e.g., "take a car by threat").

(b) Knowingly

(c) Recklessly

Comment: MPC § 2.02(2)(c) Recklessly.

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

- i) **Awareness**: what do you have to be aware of? Consider *Shimmen* (the glass punching case, n6p215). The MPC seems to say you have to be aware of all the stuff (substantiality, unjustifiability).

(d) Negligently

(e) Strict liability

i) Underlying theories

- a. **Deterrence?:** that if we provide for strict criminal liability in some industries, we may deter risk-averse people from going into those industries, when the very people we want in those industries are risk-averse people.

ii) Cases

Comment: The three starting points in strict liability cases:

1. What did congress mean?
2. Is the statute constitutional?
3. Are there other relevant arguments (e.g., voluntariness)?

- a. *Balint* and *Dotterweich*: congress may set strict criminal liability in order to protect the helpless public.
- b. *Morissette*: from a bombing range, Df. takes shell casings that he honestly believed were abandoned. SCOTUS must decide between strict liability and some minimum MR on the taking element. It picks a minimum MR.

Comment: Whoever embezzles, steals, purloins, or knowingly converts to

his use or the use of another or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United states, shall be fined, or imprisoned, or both.

- 1) **Not a regulatory statute:** when congress enacts a strict criminal liability statute, it is concerned with the creation of risks that can mean big trouble--such statutes are regulatory in nature. The statute itc. isn't regulatory--it's more like the common law of theft.
- 2) N.b., that Df. thought the shell casings were nobody's property--that they were abandoned. So he wasn't even reckless.
- c. *Staples:* Df. has a rifle that he doesn't realize has been modded to full auto, and so hasn't registered it. The statute is silent on MR on the "fully automatic" element; the State argues for strict liability, Df. argues for at least some MR.

Comment: It shall be unlawful for any person . . . to receive or possess a [fully automatic] firearm which is not registered to him.

- 1) **Df. had not warning he was entering a highly-regulated environment:** for strict liability on a regulatory offense:
 1. Strict liability must be express in the statute, or
 2. Potential violators must have some warning that they are entering a highly-regulated environment.

Itc., we're dealing with guns, and there's a long-standing tradition of gun ownership in America, so Df. wouldn't have had notice of high regulation.

- d. *Baker:* Df. caught for speeding says his cruise control was malfunctioning. He argues that his act of speeding wasn't voluntary. The court says that argument would work if the throttle was broken, or if Df. was a passenger in a trespassing car, or if the brakes failed, but that it won't work itc. Anderson says this holding is simply wrong.
 - 1) N.b., this case involves all kinds of stuff at once: voluntariness, MR, causation.

(2) "Material element" requirement

Comment: MPC § 1.13(9)

[Unless a different meaning plainly is required:] "element of an offense" means (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) negative a defense under the statute of limitations; or (e) establishes jurisdiction or venue.

MPC § 1.13(10)

[Unless a different meaning plainly is required:] "material element of an offense" means an element that does not relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a

justification or excuse for such conduct.

(3) Rules of construction

- (a) **"Reckless" is the default:** if the statute says nothing about MR, "recklessly" is the minimum MR.

Comment: MPC § 2.02(3). Culpability Required Unless Otherwise Provided.
When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.

- (b) **Undistinguished MR applies to all elements:** if the statute gives one MR requirement but doesn't distinguish which element it applies to, that MR applies to all material elements of the offense.

Comment: MPC § 2.02(4). Prescribed Culpability Requirement Applies to All Material Elements.

When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

- (c) **Knowledge = aware of a high probability:** if knowledge of a fact is required, then awareness of a high probability of that fact will do, unless the person actually believes it's not a fact.

Comment: MPC § 2.02(7). Requirement of Knowledge Satisfied by Knowledge of High Probability.

When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

- i) *Jewell*: Df. mule seems to have purposely avoided finding out he was carrying pot. This case turns on a problem with a jury instruction, which talks about purposeful avoidance rather than actual awareness.

- (d) **"Willfully" = "knowingly":** if an offense has to be committed wilfully, "knowing" MR will do.

Comment: MPC § 2.02(8). Requirement of Wilfulness Satisfied by Acting Knowingly.

A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears.

(4) Mistakes (of the first kind)

Comment: N.b., these are the mistakes of fact that can make you not guilty by depriving you of the requisite MR.

MPC § 2.04. Ignorance or Mistake.

(1) Ignorance or mistake as to a matter of fact or law is a defense if:

- (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or
(b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

(2) Although ignorance or mistake would otherwise afford a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as he supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.

(a) **Mistakes of fact**

Comment: N.b., MPC MR law would not change if we didn't use "mistake of fact"; i.e., we could abrogate MPC § 2.04 and the law would stay the same. (However, some states have added "reasonably" to the § 2.04 standard, which effectively makes "knowingly" mean "negligently.")

i) **Cases**

- a. *Prince*: Df. took a girl who he thought was 18. She was actually 14. The MR here for the attendant circumstances is "recklessly," except for the age element--that's strict liability, the court says. Df. argues for at least a "negligently" MR for the age element.

Comment: Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any person having the lawful care of charge of her, shall be guilty of a misdemeanor.

- b. *Olsen*: Df. makes out with a girl 13 years and 10 months old, but he thought she was over 16 (and she apparently looked it).

Comment: Cal. Pen. Code § 288, subd. (a): Any person who shall willfully and lewdly commit any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the state prison

- 1) **Mistake standard--subjective or objective?:** "good faith belief" is a subjective standard, whereas "reasonable" is an objective one. Note that we can distinguish (1) those who choose not to be reasonable from (2) those who are incapable of being reasonable (but can't meet the standards under the insanity defense).

Could you choose to be careless but not be reckless? Yes, you could, if either (1) the risk is not unjustified or substantial, or (2) you choose to be careless but not with respect to a particular material element.

Hypo: I'm nearsighted and think your wallet is a gun. Will we take my nearsightedness into account when we prosecute you? Yes, but we will not allow paranoia into the analysis--we will draw a hard line between the two (see the battered wife syndrome cases).

- 2) **Which offense?:** the state can't charge Df. with statutory rape because of its AR requirement--statutory rape requires actual intercourse (although it only requires negligent MR on the victim's age). Lewd and lascivious doesn't have as high an AR requirement, but has a higher MR requirement. In other words, the prosecutor had four "chains," or offenses, she could pursue:

1. Forcible L&L: L&L + force (not us--we don't have force)
2. Forcible rape: intercourse + force (we have neither intercourse nor force)

3. Statutory rape: intercourse + age (we don't have intercourse)
4. Regular L&L: L&L + age (us! We might have both of these)

The issue with statutory L&L is MR. The dissent argues that setting the age MR at strict liability will lead to cruel and unusual punishment. The majority looks at the probation statute in response to this; Anderson says the cruel and unusual punishment argument is a weak one in the first place.

(b) Mistakes of law

(5) Cases

- (a) D.C. destruction of property statute (p212): the required MR is "recklessly," because the statute says nothing about MR, and the default is "recklessly" under the MPC rules of construction (MPC § 2.02(3)0.

Comment: D.C. Code Ann. § 22-3108. Destruction of Property.

Whoever maliciously cuts down or destroys by girding or otherwise, any standing or growing vine, bush, shrub, sapling, or tree on the land of another, . . . shall, if the value of the thing destroyed or the amount of the damage done . . . is fifty dollars or more, be imprisoned for not less than 180 days nor more than three years. . . .

- i) I cut down a vine that I thought was on my property but it was really just barely on yours. If I didn't even perceive a risk of it being on your property, then I'm not guilty.
 - ii) I build a fence just barely on your side of the boundary line. Ten years and one month later, I cut down a vine that's barely on your side of the line, but is on my side of the fence. I thought the statute of limitations for adverse possession was ten years, but it's actually fifteen. If I didn't even perceive a risk, I'm not guilty.
 - a. Does it matter if my belief was reasonable or not? See the MPC § 2.02(4) rule of construction, which says that when an MR requirement is given without distinguishing between the offense elements, that requirement applies to all the elements.
 - iii) I cut down a vine that's on your property, thinking it's worth only \$40. It's actually worth \$60. I would argue that the "value" is not a material element, because it's not connect to the harm or evil. See MPC § 1.13 (10)(i).
- (b) *Neiswender* (pbp217): Df. says he'll fix a jury for \$2K, but investigators discover Df. has no juror contacts. Df. argues that the State failed to prove the "endeavor" element, and so he is only guilty of an attempt to get money by fraud. The court held that Df. "need only have had knowledge or notice that success in his fraud would have likely resulted in an obstruction of justice," and that "reasonable foreseeability of the natural and probably consequences of one's acts" is enough for "notice." Thus, since the court is using a "reasonable foreseeability" test, Df. gets held liable for having only a negligent MR when the statute was meant to require purpose MR.

Comment: 18 U.S.C. § 1503: "Whoever . . . corrupts or by threats or force, or by

any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice" shall be fined or imprisoned or both.

C. Defenses

II. Rape

III. Homicide

A. Murder

IV. To be filed

- A. Hypo: I take your book and then decide to destroy it. So, I have knowingly acted, since I knowingly took your book. But what if the police bust in and prevent me from destroying it? There has been no result. This just means that we look for an offense that requires no result--"theft" is one; we also have "attempted theft" for other situations.
- B. Hypo, suicide bombers: should we punish a suicide bomber who is caught before she detonates the bomb?
- C. **Procedural contexts:** (w/r/t voluntariness cases only???)
 1. "I didn't do it." (E.g., *Martin*.)
 2. Failure to instruct the jury properly. (E.g., *Newton*.)
 3. Excluded evidence. (E.g., the trial judge didn't allow Df.'s expert witness to testify, or struck that testimony.)
 - a) Trial judges often just allow lots of evidence in as a sort of reversal insurance. However, if the trial judge thinks the jury might get confused by too much irrelevant evidence, she may not allow it because a confused jury means a higher likelihood of reversal, too.
- D. Hypo, MR material elements, jurisdiction: Df. kills someone in a building that's in both ID and WA. The homicide actually happens in ID, but Df. reasonably believed he was in WA. It doesn't matter what Df. thought; MPC § 2.02 applies only to material elements of an offense. Where the homicide happened is an element of the offense, but not a material one. See MPC § 1.13(9) and (10).
- E. Hypo, MR material elements, "federal officer": Df. assaults a federal officer; is "federal officer" in the offense a material element? Between a federal officer and someone who's not an officer at all, "federal officer" is a material element. Between a federal officer and a state officer, it doesn't matter--distinguish between "federal" versus state (which is not material) and "officer" (which is the material aspect of this element).
- F. Hypos, grenade in a classroom full of people.
 1. You toss it into a hallway that's empty at that time. When it goes off, though, one person is in the hallway and is killed. You would argue that you weren't reckless because, although there was a risk, there wasn't a substantial risk, considering that you noted that the hallway was empty.
 2. You toss it into a hallway, aware that pack of schoolkids are out there, but you know that there are less people in the hallway than in the classroom. This looks like "knowingly": it's not your conscious purpose to cause a bad result, but you are aware to a practical certainty of what the result will be. Note how there's nothing in "knowingly" about justifiability, as there is in "recklessly" and "negligently."