

# Criminal Law I

## Review of Problem Sets 1–9

### Problem Set 1—Burdens of Proof and Production; Presumptions

1. Prosecution has burden of proof beyond reasonable doubt for all elements of offense.
2. There are probably constitutional limits on what legislature may remove from the elements of the offense (e.g., may not delete voluntary act; or mens rea for serious crimes).
3. Even if an element can be omitted from the offense, if it is not, prosecution must prove beyond reasonable doubt.
4. Even where prosecution has burden of proof, defendant may have burden of production. (This may explain why permissive presumptions are constitutional even when the fact proved does not establish the fact presumed beyond a reasonable doubt: it may so establish it if defendant fails to offer evidence to negate the presumption and has the burden of doing so.)
5. Mandatory presumptions, rebuttable or irrebuttable (conclusive), are unconstitutional, though legislature can produce the same result by changing the definition of the crime.

### Problem Set 2—Voluntary Acts

1. A willed physical or mental act.
2. Constitutionally required as condition for criminal punishment (no status crimes).
3. Query: Why are certain things regarded as consistent with a voluntary act (e.g., habits, brainwashing) but others not (e.g., hypnosis, somnambulism, automatism)?
4. Note the problem of deviant causal chains between will and act (e.g., St. Vitus dance).
5. Prosecution must prove voluntary act, but defendant may have burden of production re: negating facts (e.g., hypnosis). In other words, there may be a permissive presumption that the act was not under hypnosis, etc.
6. Note the time-framing problem for voluntary acts where no culpable choice (Baker; Newton).
7. Possession is usually an omission (failure to dispossess within a “reasonable” time). Legality (vagueness) problem.

### Problem Set 3—Omissions

1. Usually no duty to act.
2. Exception: Where cause the victim’s peril and can effect easy (safe) rescue.
  - a. Must one must cause culpably (A in our hypo), or is innocent causation sufficient (B)?
  - b. One must know or be reckless regarding whether one caused the peril. (See Tennant case from W. Va.)

- c. Causation of peril through reliance without a promise (D)?
- d. Causation (worsening) of peril through withdrawal of rescue plus reliance (F).
- 3. Status-based duty to rescue—which statuses (C)?
- 4. Contract-based duty to rescue (E): all contracts, even if victim not relying and not the promisee (the gardener)?
- 5. Line between causing harm and omitting to rescue (F)?
- 6. Level of risk that eliminates duty to rescue? (Note vagueness problem.)

### **Problem Sets 4 & 5—Mens Rea**

- 1. Purpose (conscious object).
  - a. Can be conditional (e.g., Thelma and Louise, et al).
  - b. Need only belief in slight increase in background risk (e.g., Jackal).
  - c. Transferred intent.
- 2. Knowledge
  - a. Belief in a practical certainty.
  - b. On same continuum (of belief in probability) as recklessness.
  - c. Problem: Know all facts but have odd metaphysics (e.g., “spirit”).
  - d. Problem: “Knowledge” by combination of errors (e.g., “heroin” and its chemical compound)?
  - e. Problem: Willful blindness—knowledge or just recklessness?
- 3. Recklessness
  - a. Justification (or lack) built into definition (unlike knowledge).
  - b. Risk believed in must be substantial and unjustifiable, though the unjustifiability prong really does all the work.
  - c. Whether risk defendant believes exists is “substantial” or “unjustifiable” is a matter of law, not a matter of defendant’s own characterization. Query: Does this create a vagueness problem?
  - d. Query: Must “actual” risk be substantial, etc. (objective versus subjective accounts of recklessness) (e.g., believe 80 MPH when actually 55). And what is “actual” risk (if not God’s-eye—1 or 0)?

4. Negligence
  - a. How construct “reasonable person in actor’s situation”?
  - b. Should people like the Williams be punished? Is negligence culpable? Or is it just ignorance, stupidity, forgetfulness, etc.?

#### **Problem Set 6—Strict Liability**

1. What justifications for strict liability in criminal law?
  - a. Prevent truly culpable from escaping.
  - b. Increase deterrence and prevent suffering of innocent victims.
  - c. Save costs in prosecuting.
  - d. RE: strict liability aggravating elements of non-strict liability crimes (Joe’s tavern): a punishment lottery? double punishment for recklessness?
2. Against strict liability
  - a. Punishment unrelated to desert.
  - b. How time-frame re: voluntary act (Baker)?

#### **Problem Set 7—Mistakes**

1. Under MPC and modern approach to mens rea, mistakes of fact or law are negations of various types of mens rea depending on whether and to what extent the mistakes of fact or law are culpable.
  - a. Thus, if must “knowingly take property of another,” and don’t know that taking X, or don’t know that X belongs to another, then lack the mens rea. Mistake could be one of fact or of law (of property). But mistakes are immaterial when it comes to purpose.
  - b. Not a “defense,” but a negation of mens rea. But defendant may have burden of production.
  - c. If crime requires recklessness, the question is not “mistake” but what risk did defendant believe he was taking? No “attempted recklessness.” If it requires negligence, non-negligent mistake negates.
2. Note how MPC 2.04(2) deals with mistake re: the crime one is committing (e.g., swanicide).

#### **Problem Set 8—Mistakes of Criminal Law**

1. Rarely is the existence of the criminal law under which we are punishing the defendant itself an element of the crime it defines, although sometimes it is (e.g., “it is a crime to do X knowing that it is a crime to do X”). In other words, usually, ignorance of the criminal law is immaterial.

- a. There are some constitutional limits to this—e.g., Lambert—although what they are is uncertain.
- b. There is criticism of punishing defendants whose ignorance of the law under which they are punished is truly nonculpable and does not itself reveal a defective character.
- c. The exceptions to the general rule are: the law hasn't been published or otherwise made available to defendant; the defendant reasonable relied on an official interpretation (that was legally invalid or erroneous and didn't amend the law).

### **Problem Set 9—Causation and Concurrence**

1. Cause links conduct to result (and sometimes part of conduct to the rest of conduct).
2. Why do we care about results? Would retributivist care, or would she focus on culpability? Would a utilitarian care?
3. Cause in fact: problems of joint sufficient causation (Hertz hypo).
4. Proximate cause:
  - a. Note different types of problems: deviant causal chains (poison hypo); intervening human causes (with knowledge of the risk? culpable? unusual?)
  - b. Are these problems soluble without an answer to 2. above?
5. Concurrence is better analyzed as intervening human cause where defendant intervenes in his own causal chain.

Rev. 09-26-12