Hedonic Damages

Plaintiffs in recent years have increasingly been seeking compensation for what are called **hedonic damages**, the loss of enjoyment of life. States differ as to whether to recognize the impairment of a person's ability to experience the normal pleasures and enjoyments of life such as being a member of a family, falling in love, becoming a parent or grandparent, enjoying music, travel, or other common life activities as compensable losses. Supporters would argue that such "losses" are compensable as a stand-alone type of damages. Hedonic damages, they would assert, are different in kind from the physical pain and mental anguish traditionally compensated as pain and suffering. But several states refuse to recognize hedonic damages as compensable. Other states consider hedonic damages to be included within pain and suffering.

INTERNET TIP

Students wishing to learn more about hedonic damages can read *Overstreet v. Shoney's, Inc.*, and *Kansas City Southern Railway Company, Inc. v. Johnson* on the textbook's website.

Punitive Damages

Damages can also be awarded to punish defendants for their conduct and to deter others from similar conduct. These are called **punitive** or **exemplary damages**, and are awarded to the plaintiff beyond the compensatory amount. They are additional damages for a civil wrong and are not imposed as a substitute for criminal punishment. Punitive damages are awarded to plaintiffs to deter them from repeating their conduct, and to deter others from following their example. An award of punitive damages also may include an award of attorneys' fees, although this varies by jurisdiction.

Such an award is appropriate only when a defendant has engaged in aggravated, wanton, reckless, malicious, or oppressive conduct. This includes all acts done with an evil disposition or a wrong and unlawful motive, or the willful doing of an injurious act without a lawful excuse. Punitive damages are generally available only for intentional torts and for some statutory wrongs. The reason courts generally refuse to award punitive damages where defendants have acted negligently is that such persons did not intend to cause the harmful result that ensued. A person cannot be deterred from causing harms that were never intended in the first place.

Some of the actions that may result in punitive damage awards are copyright and trademark infringement, corporate crimes such as antitrust violations, insurers not paying compensation as required by their policies, employers wrongfully discharging employees, libel and slander, wrongful death, trespass, conversion, battery, and securities fraud. Traditionally, punitive damages have not been awarded in contract cases, even in situations in which there has been a malicious breach. Some jurisdictions have modified this rule in some situations: if a breach of contract is accompanied by a malicious tort, exemplary damages will be awarded for the tort.

The facts in the next case, *Wilen v. Falkenstein,* have been summarized in order to enhance understanding and to conserve space.

Summary of Facts in *Wilen v. Falkenstein*

William Falkenstein and John Wilen were neighbors. Falkenstein planted some thirty trees on his land, two of which were matching trees that he had placed one on each side of his swimming pool. One of these matched trees grew so as to interfere with Wilen's view from the balcony of his house. Wilen tried to work something out with Falkenstein, but his offer to pay for the trimming of Falkenstein's tree was rejected. While Falkenstein was on a trip, the tree in question was reduced in height by some five feet by employees of TLS Landscaping. This fact was discovered by Falkenstein upon returning home after his trip. Falkenstein investigated and concluded that Wilen was responsible for the tree's damage. Falkenstein thereafter filed suit against Wilen, accusing him of trespass and of damaging his tree.

The case was tried to a jury. TLS Landscaping employees testified at the trial. An employee named Story, who actually "trimmed" the tree in question

on Falkenstein's property, testified that Wilen had instructed him to cut the top off the tree. Story also testified that because of the manner in which the tree had been cut, it was no longer marketable. Additional testimony indicated that it would cost $4,151.39 to replace the damaged tree with one that matched the surviving poolside tree. Wilen testified that he had assumed that TLS Landscaping had Falkenstein's permission to trim the tree. Wilen admitted to having told the tree cutter "which tree to trim and how much to trim it," but denied ever entering Falkenstein's land or receiving a bill from TLS Landscaping for the tree cut on his neighbor's land. The jury returned a verdict in favor of Falkenstein.

Wilen claimed on appeal that there was insufficient evidence to support the jury's trespass finding. The Texas Court of Appeals disagreed. It ruled that Wilen could be found to be legally responsible in trespass for Story's cutting off the top of the tree on Falkenstein's land. Judge Walker ruled that the jury was entitled to find that Story's actions were directed and controlled by Wilen.

Wilen also claimed that the proof was insufficient to support the jury's compensatory damage award because there was no evidence that Falkenstein's land had become less valuable in the aftermath of the cutting. Furthermore, argued Wilen, the tree was still alive. The appellate court again disagreed. Judge Walker pointed out that when a tree is damaged in conjunction with a trespass but the land's fair market value is unaffected by the damage, the injured party is still entitled to compensation for "the intrinsic value" of the tree. This would be the amount of money it would take to replace the cut tree with a tree that matched the surviving tree from the original matching pair. The appellate court concluded that the jury's compensatory damage award was reasonable under the circumstances.

The last two issues the appellate court had to resolve had to do with the award of punitive damages and the award of attorneys' fees. Could reasonable jurors, as a matter of law, have found Wilen's actions to have been malicious, spiteful, outrageous, oppressive, or intolerable? Was Falkenstein entitled to an award of attorneys' fees? This case has been substantially edited because of its length.

John C. Wilen v. William Falkenstein
191 S.W.3d. 791
Court of Appeals of Texas, Second District, Fort Worth
April 6, 2006

Sue Walker, J.

Opinion: I. Introduction

This appeal arises from a trespass suit brought by Appellee William Falkenstein against his neighbor, Appellant John C. Wilen, for causing a tree service to trim a tree on Falkenstein's property. The trial court entered judgment in accordance with the jury's verdict, awarding Falkenstein $5,300.00 in actual damages, $18,000.00 in exemplary damages, and attorney's fees of $29,700.00….

3. Sufficiency of the Evidence…
C. Damages …
2. Exemplary Damages
a. The Malice Finding

… Wilen argues [on appeal] that the evidence is factually insufficient to support the exemplary damages award because his conduct was not malicious. Exemplary damages are recoverable for the tort of trespass if the trespass was committed maliciously…. The trespass must be initiated by or accompanied with some evil intent or with complete disregard of anyone's rights…. Exemplary damages may not be awarded where it appears that the defendant acted in good faith or without wrongful intention or in the belief that he was exercising his rights….

Here, the trial court asked the jury whether it found by clear and convincing evidence that the harm to Falkenstein resulted from malice. The charge defined malice as including a "specific intent by John C. Wilen to cause substantial injury to William Falkenstein," and the jury answered yes to this question.

We note that the cases prescribing exemplary damages for a "malicious" or "willful" trespass are based on the old, common law "actual malice" definition requiring proof of "ill-will, spite, evil motive, or purposing the injuring of another." … The common

law definition of malice was incorporated into the statutory definition codified in the civil practice and remedies code…. The statutory definition of malice raised the standard of proof required to attain exemplary damages; the statutory definition requires proof of the defendant's specific intent "to cause substantial injury to the claimant."…

Because clear and convincing evidence is required to support the jury's malice finding … we focus our review on whether there was clear and convincing evidence that Wilen's trespass through TLS Landscaping was performed with malice, that is, performed with a specific intent to cause substantial injury to Falkenstein. The evidence established that Wilen directed TLS Landscaping to enter Falkenstein's yard and to trim five feet off the top of the view-blocking tree. When Wilen told Story how he desired Falkenstein's tree to be trimmed, Story testified that he explained that TLS Landscaping usually did not "top" a tree. Wilen reassured Story that it was "okay" and directed Story to proceed. Wilen's actions in ordering Falkenstein's tree to be trimmed while Falkenstein was on vacation reveal Wilen's disregard for Falkenstein's right to maintain his property in the way he saw fit. The jury was free to discredit Wilen's protestations that no harm was intended…. Additionally, the jury could have discredited Wilen's testimony that he assumed TLS Landscaping had permission to trim the tree as not plausible because when Story arrived, he went to Wilen's house, not to Falkenstein's. And Story did not ask if Wilen knew which of Falkenstein's trees he was supposed to trim, as he would have done if he had obtained Falkenstein's permission to trim his trees. Nor did Story give any indication that Falkenstein had requested TLS Landscaping to trim the view-blocking tree. Instead, Story reported to Wilen's home to perform whatever work Wilen requested, and when Wilen said that he wanted a tree trimmed, Story asked which tree and how much. Wilen pointed out Falkenstein's tree and indicated that five feet should be cut off the top of the tree. This evidence is sufficient to permit the jury to find that the conduct of Wilen, through his use of TLS Landscaping, constituted a specific intent to cause substantial injury to Falkenstein…. We hold that the jury's finding that the harm to Falkenstein resulted from Wilen's malicious trespass is supported by clear and convincing evidence….

b. Amount of Exemplary Damages

…Wilen argues that the exemplary damages award is excessive…. We may only reverse if the exemplary damages award is so against the great weight and preponderance of the evidence as to be manifestly unjust….

We begin by noting that the jury's award of $18,000.00 in exemplary damages is less than $200,000.00 and is therefore within the statutory exemplary damages cap…. The amount of exemplary damages rests largely in the discretion of the jury and should not be disturbed unless the damages are so large as to indicate that they are the result of passion, prejudice, or corruption.

Here, evidence existed from which the jury could have found that Wilen intentionally disregarded the wishes of his neighbor, Falkenstein. Falkenstein wanted to care for his own trees. Wilen wanted his neighbor's tree to be trimmed back drastically because it blocked Wilen's balcony view of the clubhouse. When Falkenstein rebuffed Wilen's offers to pay to have the tree trimmed, Wilen took matters into his own hands. He directed TLS Landscaping to enter Falkenstein's property and to trim five feet off the top of the tree while his neighbor was vacationing. Despite Story's warning that "topping" the tree was inappropriate and abnormal, Wilen proceeded, disregarding Falkenstein's superior property rights and Story's warning and subjecting his neighbor's property to his own wishes. Evidence further revealed that Wilen had a net worth of over $496,000.00, not including his home and the other assets he owned jointly with his wife. The character of Wilen's conduct, his degree of culpability, the situation and sensibility of the parties involved, and a public sense of justice, as well as Wilen's significant net worth, support the award of $18,000.00 in exemplary damages….

IV. CHARGE ERROR….

A. Attorney's Fees Question

Wilen argues that the trial court erred by overruling his objections to jury charge questions on attorney's fees and by entering judgment on the jury's determination of attorney's fees because attorney's fees are not recoverable in this case….

To recover attorney's fees, a party must prove entitlement by contract or statute….

Falkenstein's action was not founded on the interpretation of a contract, and attorney's fees were not authorized by statute…. Because Falkenstein did not seek recovery of his attorney's fees as a sanction and because attorney's fees are not authorized by statute or contract in this case, we hold that the trial court erred by submitting questions to the jury

regarding attorney's fees and by entering judgment on the jury's finding awarding Falkenstein attorney's fees of $29,700.00….

V. Conclusion
… [W]e modify the judgment by deleting the award of attorney's fees to Falkenstein…. As modified, we affirm the trial court's judgment….

Case Questions

1. What must be present to justify an award of punitive damages?
2. What kinds of activities did the court indicate the jury could have considered that would have sustained its conclusion that Wilen acted maliciously in committing the trespass?

The Texas Court of Appeals stated in its opinion that "The character of Wilen's conduct, his degree of culpability, the situation and sensibility of the parties involved, and a public sense of justice, as well as Wilen's significant net worth, support the award of $18,000.00 in exemplary damages…." Given the fact that Falkenstein's property value did not decline as a result of the decapitation of his tree, do you think Wilen should have been awarded punitive damages as well as compensatory damages in this case?

Nominal Damages

If a defendant breaches a legal duty owed to the plaintiff and injures that person, compensatory damages may be awarded. The compensatory damages are measured by the amount of the loss. **Nominal damages** are awarded when there has been a breach of an agreement or an invasion of a right but there is no evidence of any specific harm. This occurs, for example, if a person trespasses on your land but causes no actual harm. In such a situation, the plaintiff would only be entitled to a judgment for a trivial amount, such as $1 or $50. The judge awards this token sum to vindicate the plaintiff's claim or to establish a legal right. Nominal damages also are awarded when a plaintiff proves breach of duty and harm but neglects to prove the value of the loss. They are likewise allowable when the defendant's invasion of the plaintiff's rights produces a benefit.

Courts award nominal damages because a judgment for money damages is the only way a common law court can establish the validity of the plaintiff's claim. Students should be careful not to confuse nominal charges with small compensatory damage awards, which are awarded when the actual loss was minor.

Liquidated Damages

Parties may agree, in advance, about the amount to be paid as compensation for loss in the event of a breach of contract. **Liquidated damages** are the stipulated sum contained in such an agreement. An example can be seen in the *Campbell Soup* case (page 237), where Campbell's contract with the Wentz brothers included a provision for damages of $50 per acre if the contract were breached. If the court determines that the amount stipulated in the agreement is a punishment used to prevent a breach rather than an estimate of actual damages, it will deem that sum a penalty and refuse to enforce it. Traditionally, the court upholds a liquidated damage clause only when (1) the damages in case of breach are uncertain or difficult to compute, (2) the parties have agreed in advance to liquidate the damages, and (3) the amount agreed on is reasonable and not disproportionate to the probable loss. Another form of liquidated damages results when money is deposited to guarantee against future damages.

Occasionally, a plaintiff who has suffered no actual damages can recover substantial liquidated damages; however, this occurs only rarely. Some

courts require plaintiffs to prove some actual loss before the liquidated damage clause is triggered.

EQUITABLE REMEDIES

An equitable remedy would have been awarded by a court of equity before the merger of equity and the common law courts. Today, most courts in the United States are empowered to grant both equitable and legal relief as required to achieve justice. However, the availability of equitable remedies is a matter for judges and not juries. Traditionally, courts only grant equitable remedies when the common law remedies are inadequate.

Injunctions

An injunction is an equitable remedy in the form of a judicial order directing the defendant to act or refrain from acting in a specified way. An order compelling one to do an act is called a **mandatory injunction**, whereas one prohibiting an act is called a **prohibitory injunction**. An injunction may be enforced by the contempt power of a court, and a defendant may be fined, sent to jail, or deprived of the right to litigate issues if he or she disobeys an injunction. This order must be obeyed until it is reversed, even if it is issued erroneously or the court lacks jurisdiction.

Injunctions may be divided into three classes: (1) permanent, (2) preliminary or interlocutory, and (3) temporary restraining orders. A permanent injunction is a decree issued after a full opportunity to present evidence. It is permanent only in the sense that it is supposed to be a final solution to a dispute. It may still be modified or dissolved later. A preliminary or interlocutory injunction is granted as an emergency measure before a full hearing is held. There must be notice to the defendant and a hearing, usually informal. This remedy is generally limited to situations in which there is a serious need to preserve the status quo until the parties' rights have finally been decided. Thus a preliminary injunction continues only until a further order of the court is issued.

The temporary restraining order, known as a TRO, is an **ex parte** injunction. This means that it is granted without notice to the defendant. The trial judge has heard only the plaintiff's side of the case. Because of the potential for abuse, certain procedures protect a defendant. A TRO may not be granted unless irreparable harm would result and there is no time for notice and a hearing. There must be clear evidence on the merits of the case. The court should look at any damage to the defendant that would be noncompensable in money if the plaintiff's relief is later shown to be improper. This consideration must be balanced with the plaintiff's harm if the TRO is not granted. Factors weigh more heavily against the plaintiff, since there is no notice to defendant.

Certain classes of cases are not considered proper subject matter for injunctions. In general, an injunction is not issued to stop a criminal prosecution or to prevent crimes. However, this policy has been modified in recent years by regulatory statutes and civil rights statutes. Injunctions are usually not proper in defamation cases because they would intrude on the defendant's constitutional right of free speech and would be considered prior restraint.

INTERNET TIP

The case of *Harper v. Poway Unified School District*, which follows, was decided by a panel of three judges assigned to the U.S. Court of Appeals for the Ninth Circuit. Two judges concluded that the federal district court's decision not to enjoin the school district should be affirmed. The third judge, Judge Kozinski, disagreed and wrote a lengthy, thought-provoking dissenting opinion. Judge Kozinski was greatly concerned about the adequacy of the proof and the potential implications of the majority's decision on the legitimate exercise of First Amendment freedoms by high school students.

Students who read both opinions will notice how judges on both sides of the debate engaged in a balancing of the interests and the harm, which is a hallmark of equity courts. An edited version of Judge Kozinski's dissent can be read on the textbook's website.

The facts in the case of *Harper v. Poway Unified School District* have been summarized in order to enhance understanding and to conserve space.

Summary of Facts in *Harper v. Poway Unified School District*

Tyler Chase Harper (hereafter Chase) was a high school sophomore attending a school that had experienced conflict over the issue of sexual orientation. The administration of the school, in conjunction with students who had formed a group called the Gay-Straight Alliance, organized what was called a "Day of Silence," purportedly for the purpose of promoting tolerance between gay and straight students. This first "Day of Silence" was followed shortly thereafter by a "Straight-Pride Day," which was loosely sponsored by an opposing group of students. There were incidents involving name-calling; the wearing of special T-shirts, some of which displayed disparaging statements; and at least one physical confrontation in which the principal had to separate students.

When the Gay-Straight Alliance sought to sponsor a second "Day of Silence" in 2004, the school administration insisted that some planning be undertaken to prevent a repetition of the altercations and confrontations that had occurred in 2003.

On April 21, 2004, the date for the 2004 "Day of Silence," Chase wore a T-shirt to school which contained statements on both the front and back that disparaged homosexuality. The following day he wore the same shirt to school but this time the message on the shirt's front was slightly altered. One of Chase's teachers noticed the shirt, unsuccessfully requested that Chase remove it, and referred Chase to the principal's office for violating the dress code. The vice principal talked to Chase and explained the purported purpose of the "Day of Silence," and said that he could return to class only if he changed his shirt. A similar scenario followed when Chase met with the school principal. When Chase asked to be suspended, the principal declined. Chase spent the remainder of the school day in the office doing homework and then went home. Chase was not sanctioned in any way for not having attended classes on that day.

Forty-two days later, Chase filed suit in federal court claiming that the school had violated his First Amendment rights to freedom of speech and religion, as well as rights protected by the Equal Protection and Due Process Clauses under the federal Constitution and the California Civil Code. The school asked the trial court to dismiss the suit, and Chase asked the court for a preliminary injunction prohibiting the school from violating his constitutionally protected rights.

The district court dismissed Chase's due process and equal protection and civil code claims, and dismissed his damage claim against the school district because of the district's qualified immunity. The court refused to dismiss the First Amendment claims. The judge also denied Chase's preliminary injunction request, which decision he appealed to the U.S. Court of Appeals for the Ninth Circuit.

Tyler Chase Harper v. Poway Unified School District
445 F.3d 1166
U.S. Court of Appeals for the Ninth Circuit
April 20, 2006, as amended May 31, 2006

Reinhardt, Circuit Judge:
May a public high school prohibit students from wearing T-shirts with messages that condemn and denigrate other students on the basis of their sexual orientation? Appellant … [who] was ordered not to wear [such] a T-shirt to school … appeals the district court's order denying his motion for a preliminary injunction….

IV. Standard and Scope of Review
For a district court to grant a preliminary injunction, the moving party must demonstrate either "(1) a combination of probable success on the merits and the possibility of irreparable harm; or (2) that serious questions are raised and the balance of hardships tips in its favor."… "Each of these two formulations requires an examination of both the potential merits

of the asserted claims and the harm or hardships faced by the parties." …"These two alternatives represent extremes of a single continuum, rather than two separate tests,…" Accordingly, "the greater the relative hardship to the moving party, the less probability of success must be shown." …

We review a district court's grant or denial of a preliminary injunction for abuse of discretion…. Where, as here, the appellant does not dispute the district court's factual findings, we are required to determine "whether the court employed the appropriate legal standards governing the issuance of a preliminary injunction and whether the district court correctly apprehended the law with respect to the underlying issues in the case." …

V. Analysis

1. Freedom of Speech Claim

The district court concluded that Harper failed to demonstrate a likelihood of success on the merits of his claim that the School violated his First Amendment right to free speech because, under *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, the evidence in the record was sufficient to permit the school officials to "reasonably … forecast substantial disruption of or material interference with school activities." …

a. Student Speech Under Tinker

Public schools are places where impressionable young persons spend much of their time while growing up. They do so in order to receive what society hopes will be a fair and full education—an education without which they will almost certainly fail in later life, likely sooner rather than later…. The public school, with its free education, is the key to our democracy…. Almost all young Americans attend public schools….

The courts have construed the First Amendment as applied to public schools in a manner that attempts to strike a balance between the free speech rights of students and the special need to maintain a safe, secure and effective learning environment…. Although public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," …the Supreme Court has declared that "the First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment." …Thus, while Harper's shirt embodies the very sort of political speech that would be afforded First Amendment protection outside of the public school setting, his rights in the case before us must be determined "in light of [those] special characteristics." …

This court has identified "three distinct areas of student speech," each of which is governed by different Supreme Court precedent: (1) vulgar, lewd, obscene, and plainly offensive speech … (2) school-sponsored speech … and (3) all other speech….

In *Tinker*, the Supreme Court confirmed a student's right to free speech in public schools…. In balancing that right against the state interest in maintaining an ordered and effective public education system, however, the Court declared that a student's speech rights could be curtailed under two circumstances. First, a school may regulate student speech that would "impinge upon the rights of other students." …Second, a school may prohibit student speech that would result in "substantial disruption of or material interference with school activities." …

I. The Rights of Other Students

In *Tinker*, the Supreme Court held that public schools may restrict student speech which "intrudes upon … the rights of other students" or "collides with the rights of other students to be secure and to be let alone." …Harper argues that *Tinker*'s reference to the "rights of other students" should be construed narrowly to involve only circumstances in which a student's right to be free from direct physical confrontation is infringed…. Harper contends that … a student must be physically accosted in order to have his rights infringed.

… The law does not support Harper's argument. This court has explained that vulgar, lewd, obscene, indecent, and plainly offensive speech "by definition, may well 'impinge upon the rights of other students,'" even if the speaker does not directly accost individual students with his remarks…. So too may other speech capable of causing psychological injury….

We conclude that Harper's wearing of his T-shirt "collides with the rights of other students" in the most fundamental way…. Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation have a right to be free from such attacks while on school campuses. As *Tinker* clearly states, students have the right to "be secure and to be let alone." … Being secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society…. The "right to be let alone" has been recognized by the Supreme Court, of course, as "'the most comprehensive of rights and the right most valued by civilized men.'" … Although name-calling is ordinarily protected outside the school context, "students cannot hide behind the First

Amendment to protect their 'right' to abuse and intimidate other students at school." …

Speech that attacks high school students who are members of minority groups that have historically been oppressed, subjected to verbal and physical abuse, and made to feel inferior, serves to injure and intimidate them, as well as to damage their sense of security and interfere with their opportunity to learn…. The demeaning of young gay and lesbian students in a school environment is detrimental not only to their psychological health and well-being, but also to their educational development. Indeed, studies demonstrate that "academic underachievement, truancy, and dropout are prevalent among homosexual youth and are the probable consequences of violence and verbal and physical abuse at school." … it is well established that attacks on students on the basis of their sexual orientation are harmful not only to the students' health and welfare, but also to their educational performance and their ultimate potential for success in life.

Those who administer our public educational institutions need not tolerate verbal assaults that may destroy the self-esteem of our most vulnerable teenagers and interfere with their educational development…. To the contrary, the School had a valid and lawful basis for restricting Harper's wearing of his T-shirt on the ground that his conduct was injurious to gay and lesbian students and interfered with their right to learn….

We consider here only whether schools may prohibit the wearing of T-shirts on high school campuses and in high school classes that flaunt demeaning slogans, phrases or aphorisms relating to a core characteristic of particularly vulnerable students and that may cause them significant injury. We do not believe that the schools are forbidden to regulate such conduct….

In his declaration in the district court, the school principal justified his actions on the basis that "any shirt which is worn on campus which speaks in a derogatory manner towards an individual or group of individuals is not healthy for young people…." If, by this, the principal meant that all such shirts may be banned under *Tinker*, we do not agree. T-shirts proclaiming "Young Republicans Suck" or "Young Democrats Suck," for example, may not be very civil but they would certainly not be sufficiently damaging to the individual or the educational process to warrant a limitation on the wearer's First Amendment rights. Similarly, T-shirts that denigrate the President, his administration, or his policies, or otherwise invite political disagreement or debate, including debates over the war in Iraq, would not fall within the "rights of others" *Tinker* prong….

Although we hold that the School's restriction of Harper's right to carry messages on his T-shirt was permissible under *Tinker*, we reaffirm the importance of preserving student speech about controversial issues generally and protecting the bedrock principle that students "may not be confined to the expression of those sentiments that are officially approved." …Limitations on student speech must be narrow, and applied with sensitivity and for reasons that are consistent with the fundamental First Amendment mandate. Accordingly, we limit our holding to instances of derogatory and injurious remarks directed at students' minority status such as race, religion, and sexual orientation…. Moreover, our decision is based not only on the type and degree of injury the speech involved causes to impressionable young people, but on the locale in which it takes place…. Thus, it is limited to conduct that occurs in public high schools (and in elementary schools). As young students acquire more strength and maturity, and specifically as they reach college age, they become adequately equipped emotionally and intellectually to deal with the type of verbal assaults that may be prohibited during their earlier years. Accordingly, we do not condone the use in public colleges or other public institutions of higher learning of restrictions similar to those permitted here.

Finally, we emphasize that the School's actions here were no more than necessary to prevent the intrusion on the rights of other students. Aside from prohibiting the wearing of the shirt, the School did not take the additional step of punishing the speaker: Harper was not suspended from school nor was the incident made a part of his disciplinary record.

Under the circumstances present here, we conclude that … the district court did not abuse its discretion in finding that Harper failed to demonstrate a likelihood of success on the merits of his free speech claim….

b. Viewpoint Discrimination

In reaching our decision that Harper may lawfully be prohibited from wearing his T-shirt, we reject his argument that the School's action constituted impermissible viewpoint discrimination. The government is generally prohibited from regulating speech "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." … However, as the district court correctly pointed out, speech in the public schools is not always governed by the same rules that apply in other circumstances…. Indeed, the Court in *Tinker* held that a

school may prohibit student speech, even if the consequence is viewpoint discrimination, if the speech violates the rights of other students or is materially disruptive….

The dissent claims that although the School may have been justified in banning discussion of the subject of sexual orientation altogether, it cannot "gag only those who oppose the Day of Silence." … As we have explained, however, although *Tinker* does not allow schools to restrict the non-invasive, non-disruptive expression of political viewpoints, it does permit school authorities to restrict "one particular opinion" if the expression would "impinge upon the rights of other students" or substantially disrupt school activities…. Accordingly, a school may permit students to discuss a particular subject without being required to allow them to launch injurious verbal assaults that intrude upon the rights of other students. "A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school." … Part of a school's "basic educational mission" is the inculcation of "fundamental values of habits and manners of civility essential to a democratic society." … For this reason, public schools may permit, and even encourage, discussions of tolerance, equality and democracy without being required to provide equal time for student or other speech espousing intolerance, bigotry or hatred. As we have explained … because a school sponsors a "Day of Religious Tolerance," it need not permit its students to wear T-shirts reading, "Jews Are Christ-Killers" or "All Muslims Are Evil Doers." … In sum, a school has the right to teach civic responsibility and tolerance as part of its basic educational mission; it need not as a quid pro quo permit hateful and injurious speech that runs counter to that mission….

2. Free Exercise of Religion Claim

Harper … asserts that his wearing of the T-shirt was "motivated by sincerely held religious beliefs" regarding homosexuality … and that the School "punished" him for expressing them, or otherwise burdened the exercise of those views. Additionally, Harper argues that the School "attempted to change" his religious views and that this effort violated both the Free Exercise Clause and the Establishment Clause.

The Free Exercise Clause of the First Amendment provides that Congress shall make no law "prohibiting the free exercise" of religion…. The Clause prohibits the government from "compelling affirmation of religious belief, punishing the expression of religious doctrines it believes to be false, imposing special disabilities on the basis of religious views or religious status, or lending its power to one or the other side in controversies over religious authority or dogma." …

We seriously doubt that there is "a fair probability or a likelihood" that Harper's claim that a companion right—free speech—has been violated will succeed on the merits…. The record simply does not demonstrate that the School's restriction regarding Harper's T-shirt imposed a substantial burden upon the free exercise of Harper's religious beliefs. There is no evidence that the School "compelled affirmation of a repugnant belief," "penalized or discriminated against [Harper] because [he] holds religious views abhorrent to the authorities," or "conditioned the availability of benefits upon [Harper's] willingness to violate a cardinal principle of [his] religious faith." … Nor did the School "lend its power to one or the other side in controversies over religious authority or dogma," or "punish the expression of religious doctrines it believes to be false." …

Schools may prohibit students and others from disrupting the educational process or causing physical or psychological injury to young people entrusted to their care, whatever the motivations or beliefs of those engaged in such conduct. Indeed, the state's interest in doing so is compelling….

Accordingly, we affirm the district court's decision that Harper was not entitled to a preliminary injunction on the basis of his free exercise claim.

3. Establishment Clause Claim

Finally, we consider the district court's conclusion that Harper did not demonstrate a likelihood of success on the merits of his claim that the School violated the Establishment Clause by attempting to "coerce" him into changing his religious beliefs that "homosexuality is harmful to both those who practice it and the community at large." …

Government conduct does not violate the Establishment Clause when (1) it has a secular purpose, (2) its principal and primary effect neither advances nor inhibits religion, and (3) it does not foster excessive government entanglement in religion…. It is … clear from the record that the primary effect of the School's banning of the T-shirt was not to advance or inhibit religion but to protect and preserve the educational environment and the rights of other members of the student body….

VI. Conclusion

We hold that the district court did not abuse its discretion in denying the preliminary injunction. Harper failed to demonstrate that he will likely prevail on the merits of his free speech, free exercise of religion, or establishment of religion claims. In fact, such future success on Harper's part is highly unlikely, given the

legal principles discussed in this opinion. The Free Speech Clause permits public schools to restrict student speech that intrudes upon the rights of other students. Injurious speech that may be so limited is not immune from regulation simply because it reflects the speaker's religious views. Accordingly, we affirm the district court's denial of Harper's motion for a preliminary injunction. AFFIRMED; REMANDED for further proceedings consistent with this opinion.

Case Questions

1. How did the court of appeals go about determining whether the injunction should have been granted by the district court judge?
2. Why did the Ninth Circuit panel affirm the trial court?
3. If you were writing an opinion in this case, would you agree with the panel majority?

Reformation and Rescission

The equitable remedy of reformation is granted when a written agreement fails to express accurately the parties' agreement because of mistake, fraud, or the drafter's ambiguous language. Its purpose is to rectify or reform a written instrument in order that it may express the real agreement or intention of the parties.

The equitable remedy of rescission is granted when one of the parties consents to a contract because of duress, undue influence, fraud, or innocent misrepresentation, or when either or both of the parties made a mistake concerning the contract. Rescission means the court cancels the agreement. If a court orders rescission, each party normally has to return any property or money received from the other party in performance of the agreement (*restitution*). This topic, with an illustrative case (*Carter v. Matthews*), is addressed in Chapter X.

The following case involves a contractor who was the successful bidder on a public construction contract. The contractor made a unilateral error in computing his bid and subsequently brought suit seeking the equitable remedy of reformation. The appellate court majority ruled that the plaintiff was not entitled to reformation. The dissenting judge disagreed on the basis of the defendant's inequitable conduct. The majority opinion also discusses the equitable remedy of rescission and explains why the plaintiff has waived any claim to that remedy.

Department of Transportation v. Ronlee, Inc.

518 So.2d 1326
District Court of Appeal of Florida, Third District
December 22, 1987

Per Curiam

The threshold question presented is whether the successful bidder for a government road construction contract is entitled to reformation of the contract to increase the price by $317,463 based on a unilateral mistake, after the competing bids are all opened, where the new contract price would still be lower than the second lowest bid.

The Department of Transportation (DOT) solicited bids pursuant to section 337.11, Florida Statutes (1985), for the construction of an interchange at the intersection of State Road 826 and Interstate 75 in Hialeah. On December 7, 1983, DOT declared Ronlee, Inc. the apparent low bidder with a bid of $15,799,197.90. The second lowest bid exceeded Ronlee's bid by $610,148.

On February 13, 1984, DOT entered into a contract with Ronlee to construct the project based on the bid, and on March 7, 1984, gave Ronlee notice to proceed with the project. Five days later, Ronlee advised DOT that the bid contained a "stupid mistake" in the amount of $317,463. The letter alleged an error with respect to the unit price for concrete culverts which occurred when an employee of Ronlee erroneously

transcribed a phone quote of $525 for each culvert as $5.25 each. By letter dated March 21, 1984, DOT informed Ronlee that it was aware of the apparently unbalanced unit price for the concrete culverts, but that it was unable, as a matter of state policy, to permit an increase in the contract price.

Nevertheless, on March 22, 1984, having made no effort to withdraw the bid, Ronlee began construction of the project. Twenty-one months later, with the project seventy-five percent completed, Ronlee filed suit against DOT seeking reformation of the contract. Both sides moved for a summary judgment, agreeing that the material facts were not in dispute. Ronlee's motion for summary judgment was granted, the trial court holding that DOT's silence about Ronlee's apparent error in price calculations constituted inequitable conduct and that reformation of the contract would not undermine the competitive bidding process. In addition to the $317,463, the court awarded Ronlee $60,000 in prejudgment interest and costs. We reverse.

Where a contractor makes a unilateral error in formulating his bid for a public contract, the remedy is rescission of the contract.... Florida courts have permitted a contractor to *withdraw* a bid on a public contract, subject to certain equitable conditions. In *State Board of Control v. Clutter Construction Corp.* ... a contractor was permitted to withdraw a bid on a showing of the following equitable factors: (1) the bidder acted in good faith in submitting the bid; (2) in preparing the bid there was an error of such magnitude that enforcement of the bid would work severe hardship upon the bidder; (3) the error was not a result of gross negligence or willful inattention; (4) the error was discovered and communicated to the public body, *along with a request for permission to withdraw the bid*, before acceptance.

No reported Florida decision has permitted reformation by belated request of a bid contract for a public project in order to make it profitable to the contractor. *Graham v. Clyde* ... is the only case presented by the parties where reformation was even sought as relief for a mistaken bid. There a building contractor was low bidder on a proposal to construct a public school building and was awarded the contract. The following day he notified public officials that he had made a mistake of $5,000 in computing items in his bid and asked to be relieved of his obligation to perform according to the contract terms. He offered to perform the contract for $5,000 more, which was still less than the next low bidder. The circuit court did not grant a reformation but did rescind the contract and enjoined the school board from attempting to enforce it.

The Florida Supreme Court, citing a number of cases from other jurisdictions, reversed, holding that unilateral errors are not generally relieved and that there was no equitable basis for relief. In an opinion by Justice Terrell the court stated the reason for the firm rule:

> "If errors of this nature can be relieved in equity, our system of competitive bidding on such contracts would in effect be placed in jeopardy and there would be no stability whatever to it. It would encourage careless, slipshod bidding in some cases and would afford a pretext for the dishonest bidder to prey on the public.... After the bid is accepted, the bidder is bound by his error and is expected to bear the consequence of it." ...

The prevailing view is that reformation is not the appropriate form of relief for unilateral mistakes in public contract bids where the bidder is negligent.... The reason for not permitting reformation of bid contracts for public projects based on unilateral mistake is the same in other jurisdictions—to prevent collusive schemes between bidders, or between bidders and awarding officials, or multiple claims from contractors asserting mistake and claiming inequity at taxpayers' expense....

A written instrument may be reformed where it fails to express the intention of the parties as a result of mutual mistake, or unilateral mistake accompanied by inequitable conduct by the other party.... Because the mistake in this instance was admittedly unilateral, in order to obtain reformation of the contract, Ronlee was obligated to show by clear and convincing evidence that DOT's conduct in not calling Ronlee's attention to a possible error in the bid tabulations was fraudulent or otherwise inequitable.... That burden was not carried. The Department's failure to call Ronlee's attention to the error in calculation was of no consequence since Ronlee discovered its own error shortly after the Department learned of the miscalculation.

Competitive bidding statutes are enacted to protect the public and should be construed to avoid circumvention.... A government unit is not required to act for the protection of a contractor's interest; it is entitled to the bargain obtained in accepting the lowest responsible bid and is under no obligation to examine bids to ascertain errors and to inform bidders accordingly.... Absent an obligation to do so, failure of the government in this case to call the bidder's attention to a relatively minor two percent error in its calculations, after the bids were opened, was not such

fraud or imposition as would entitle the bidder to reformation of the contract.

Further, Ronlee forfeited any right it may have had to reformation or rescission. It had knowledge of its own mistake at least ten days before commencement of construction. Ronlee's conduct in performing according to the terms of the agreement for twenty-one months instead of seeking to withdraw the bid, after DOT had advised that it could not administratively correct the error, effected a waiver of rights. *See Farnham v. Blount* … (any unreasonable or unnecessary delay by a party seeking to cancel an instrument based on fraud or other sufficient cause will be construed as a waiver or ratification)….

Reversed and remanded with instructions to enter judgment for the Department of Transportation.

Hendry and Ferguson, JJ., concur.

Schwartz, Chief Judge, dissenting

With respect, I must dissent. The majority does not say that the record shows and the trial judge found just the inequitable conduct by the DOT which, under principles it acknowledges, renders reformation an entirely appropriate remedy; although the DOT was aware of the mistake when the bids were opened and well before construction commenced, it deliberately failed to inform the contractor of this fact. The final judgment under review contains, among others, the following, essentially undisputed determinations:

> "(e) The Defendant acknowledged receipt of notice, *prior* to commencement of construction, of the existence of the error and further acknowledged that the Plaintiff's bid 'error was unintentional' and 'resulted from inexperienced personnel' generating a simple mathematical error by misplacing a decimal point and 'not comprehending the reasonableness of the money figures being used.' (Exhibit 'D' to Plaintiff's Motion).
>
> "(f) Indeed, the Defendant even admitted that *prior* to the Plaintiff's March 12, 1984 notification to the Defendant, the Defendant had already been 'aware of the apparent unbalanced unit price of the item of Class II Concrete Culverts' (Exhibits 'D' and 'C' to Plaintiff's Motion; Plaintiff's Motion at 5–6, 9). Exhibit 'C', a December 19, 1983 computer print-out (entitled 'summary of bids') produced by Defendant during discovery, demonstrates that the 'apparent unbalanced unit price' with respect to the bids 'opened at Tallahassee, Florida on December 7, 1983' was known to Defendant promptly upon examination of the bids.
>
> "3. The Court is therefore of the view that plaintiff has proved inequitable conduct by the Defendant by clear and convincing proof. Clearly, the Defendant was aware, or certainly should have been aware, that the unit item bid price for 400–2–1 Class II Concrete Culverts was one hundred (100) times less than the nearest unit price for the same item. However, the Defendant chose wrongfully to remain silent as to the existence of this error and, further, refused to act equitably after the Plaintiff had discovered the error and promptly acted to notify the Defendant of the error."

On this basis, the trial court held:

> "4. While the Court is not unmindful of the fact that competitive bidding statutes should be construed to avoid circumvention, under the unique facts of the case *sub judice*, the integrity of the competitive bidding process will not be undermined with the granting of contract reformation. Where, as here, the differential between the mistaken bid and the second lowest bid exceeds the amount of the error sought to be reformed, no frustration or harm to beneficial purpose can fairly be demonstrated."

I entirely agree.

It is undisputed that, through a simple mistake in decimal point transcription, Ronlee was out and the DOT was in over $300,000 in material expenses. Short of reliance on the well-known playground maxim about keepers and weepers, there is no reason why the state should be entitled to retain this found money. Under ordinary reformation law, the combination of a unilateral mistake and inequitable conduct fully justifies that relief … and no bases exist or are advanced for the application of a different rule merely because a process of competitive bidding is involved. Since the correction of the mistake would still bring the appellee under the next highest bid, no administratively difficult process of rebidding would be required and none of the purported horribles—"collusive schemes between bidders, or between bidders and awarding officials, or multiple claims from contractors asserting mistake and claiming inequity at taxpayers' expense" … are even arguably implicated…. I would not refuse to reach a just result here because of the mechanical application of an unsupportable rule or out of a necessarily unjustified fear that someone may in the future misapply our holding in a materially different situation.

The very salutary Florida rule of unilateral mistake—which represents a minority view on the question …—is that the courts will relieve one of the consequences of such an error and the opposite party should be deprived of any consequent windfall whenever there is neither a detrimental reliance upon the mistake nor an inexcusable lack of due care which led to its commission…. Neither is present in this case. While the law of our state says otherwise, the majority has permitted DOT successfully to play "gotcha" with Ronlee's money. The state, perhaps even more and certainly no less than a private party, should not be permitted to do so…. I would affirm.

Case Questions

1. Why did the trial court grant the plaintiff's summary judgment motion and order reformation in this case?
2. What is the difference between reformation and rescission of a contract?
3. Could Ronlee have rescinded the contract?

What ethical consideration motivated Chief Judge Schwartz to dissent in this case?

Court of Conscience

In equity's early period, chancellors were almost always members of the clergy attempting to attain justice between parties to a dispute. A court of equity has always been considered to be a court of conscience in which natural justice and moral rights take priority over precedent. For example, a chancellor may decline to grant a plaintiff relief because of the plaintiff's wrongdoing in connection with the dispute. A chancellor may also decline to enforce a contract clause that is too unfair or one-sided. Such a clause would be declared to be **unconscionable**. To enforce it by granting equitable remedies would "shock the conscience of the court."

In the two cases that follow, the plaintiffs/appellants acted inequitably. Why did the courts in these cases decide that equitable relief was inappropriate?

Campbell Soup Company v. Wentz
172 F.2d 80
U.S. Court of Appeals, Third Circuit
December 23, 1948

Goodrich, Circuit Judge

These are appeals from judgments of the District Court denying equitable relief to the buyer under a contract for the sale of carrots….

The transactions which raise the issues may be briefly summarized. On June 21, 1947, Campbell Soup Company (Campbell), a New Jersey corporation, entered into a written contract with George B. Wentz and Harry T. Wentz, who are Pennsylvania farmers, for delivery by the Wentzes to Campbell of *all* the Chantenay red-cored carrots to be grown on fifteen acres of the Wentz farm during the 1947 season…. The contract provides …for delivery of the carrots at the Campbell plant in Camden, New Jersey. The prices specified in the contract ranged from $23 to $30 per ton according to the time of delivery. The contract price for January 1948 was $30 a ton.

The Wentzes harvested approximately 100 tons of carrots from the fifteen acres covered by the contract. Early in January, 1948, they told a Campbell representative that they would not deliver their carrots at the contract price. The market price at that time was at least $90 per ton, and Chantenay red-cored carrots were virtually unobtainable.

On January 9, 1948, Campbell, suspecting that [defendant] was selling it[s] "contract carrots," refused to purchase any more, and instituted these suits against the Wentz brothers … to enjoin further sale of the contract carrots to others, and to compel specific performance of the contract. The trial court denied

equitable relief. We agree with the result reached, but on a different ground from that relied upon by the District Court.... A party may have specific performance of a contract for the sale of chattels if the legal remedy is inadequate. Inadequacy of the legal remedy is necessarily a matter to be determined by an examination of the facts in each particular instance.

We think that on the question of adequacy of the legal remedy the case is one appropriate for specific performance. It was expressly found that at the time of the trial it was "virtually impossible to obtain Chantenay carrots in the open market." This Chantenay carrot is one which the plaintiff uses in large quantities, furnishing the seed to the growers with whom it makes contracts. It was not claimed that in nutritive value it is any better than other types of carrots. Its blunt shape makes it easier to handle in processing. And its color and texture differ from other varieties. The color is brighter than other carrots.... It did appear that the plaintiff uses carrots in fifteen of its twenty-one soups. It also appeared that it uses these Chantenay carrots diced in some of them and that the appearance is uniform. The preservation of uniformity in appearance in a food article marketed throughout the country and sold under the manufacturer's name is a matter of considerable commercial significance and one which is properly considered in determining whether a substitute ingredient is just as good as the original.

The trial court concluded that the plaintiff had failed to establish that the carrots, "judged by objective standards," are unique goods. This we think is not a pure fact conclusion like a finding that Chantenay carrots are of uniform color. It is either a conclusion of law or of mixed fact and law and we are bound to exercise our independent judgment upon it. That the test for specific performance is not necessarily "objective" is shown by the many cases in which equity has given it to enforce contracts for articles—family heirlooms and the like—the value of which was personal to the plaintiff.

Judged by the general standards applicable to determining the adequacy of the legal remedy we think that on this point the case is a proper one for equitable relief. There is considerable authority, old and new, showing liberality in the granting of an equitable remedy. We see no reason why a court should be reluctant to grant specific relief when it can be given without supervision of the court or other time-consuming processes against one who has deliberately broken his agreement. Here the goods of the special type contracted for were unavailable on the open market, the plaintiff had contracted for them long ahead in anticipation of its needs, and had built up a general reputation for its products as part of which reputation uniform appearance was important. We think if this were all that was involved in the case, specific performance should have been granted.

The reason that we shall affirm instead of reversing with an order for specific performance is found in the contract itself. We think it is too hard a bargain and too one-sided an agreement to entitle the plaintiff to relief in a court of conscience. For each individual grower the agreement is made by filling in names and quantity and price on a printed form furnished by the buyer. This form has quite obviously been drawn by skillful draftsmen with the buyer's interests in mind.

Paragraph 2 provides for the manner of delivery. Carrots are to have their stalks cut off and be in clean sanitary bags or other containers approved by Campbell. This paragraph concludes with a statement that Campbell's determination of conformance with specifications shall be conclusive.

The defendants attack this provision as unconscionable. We do not think that it is, standing by itself. We think that the provision is comparable to the promise to perform to the satisfaction of another and that Campbell would be held liable if it refused carrots which did in fact conform to the specifications.

The next paragraph allows Campbell to refuse carrots in excess of twelve tons to the acre. The next contains a covenant by the grower that he will not sell carrots to anyone else except the carrots rejected by Campbell nor will he permit anyone else to grow carrots on his land. Paragraph 10 provides liquidated damages to the extent of $50 per acre for any breach by the grower. There is no provision for liquidated or any other damages for breach of contract by Campbell.

The provision of the contract which we think is the hardest is paragraph 9.... It will be noted that Campbell is excused from accepting carrots under certain circumstances. But even under such circumstances, the grower, while he cannot say Campbell is liable for failure to take the carrots, is not permitted to sell them elsewhere unless Campbell agrees. This is the kind of provision which the late Francis H. Bohlen would call "carrying a good joke too far." What the grower may do with his product under the circumstances set out is not clear. He has covenanted not to store it anywhere except on his own farm and also not to sell to anybody else.

We are not suggesting that the contract is illegal. Nor are we suggesting any excuse for the grower in this case who has deliberately broken an agreement entered into with Campbell. We do think, however, that a party who has offered and succeeded in getting an agreement as tough as this one is should not come to a chancellor and ask court help in the enforcement of its terms. That equity does not enforce

unconscionable bargains is too well established to require elaborate citation.

The plaintiff argues that the provisions of the contract are separable. We agree that they are, but do not think that decisions separating out certain provisions from illegal contracts are in point here. As already said, we do not suggest that this contract is illegal. All we say is that the sum total of its provisions drives too hard a bargain for a court of conscience to assist....

The judgments will be affirmed.

Case Questions

1. If the plaintiff had sued for damages, would the result of the suit have been different?
2. Campbell Soup Company lost this case in its attempt to get equitable relief. May it now sue for money damages?
3. If the contract between Campbell Soup Company and Wentz were not unconscionable, would specific performance of the contract be an appropriate remedy? What is necessary before specific performance will be granted?

Why did the court hold the contract to be unconscionable and therefore unenforceable in equity?

Equitable Maxims

Instead of using rules of law in reaching decisions, courts of equity used *equitable maxims*, which are short statements that contain the gist of much equity law. These maxims were developed over the years (with no agreement as to the number or order) and today are used as guides in the decision-making process in disputes in equity. The following are some of the equitable maxims:

Equity does not suffer a wrong to be without a remedy.

Equity regards substance rather than form.

Equality is equity.

Equity regards as done that which should be done.

Equity follows the law.

Equity acts *in personam* rather than *in rem*.

Whoever seeks equity must do equity.

Whoever comes into equity must do so with clean hands.

Delay resulting in a prejudicial change defeats equity (laches).

Isbell v. Brighton Area Schools
500 N.W.2d. 748
Court of Appeals of Michigan
April 5, 1993

Taylor, Judge

Defendants appeal as of right a December 1990 order denying defendants' motion for summary disposition and granting plaintiff's motion for summary disposition, both brought pursuant to MCR 2.116(C)(10). We reverse.

During each semester of the 1988–89 school year, plaintiff's senior year at Brighton High School, plaintiff was absent without excuse on more than six occasions. She was denied course credit under the school's attendance policy, and was ultimately denied a diploma.

Plaintiff sued defendants alleging constitutional, contract, and tort theories, and also raising equitable claims. The trial court ruled that plaintiff lacked an adequate remedy at law and was entitled to equitable relief (issuance of a diploma) because the school attendance policy was unreasonable. Accordingly, the trial court granted plaintiff's (and denied defendants') motion for summary disposition.

Because we conclude that plaintiff is barred from equitable relief by the clean hands doctrine, we need not and do not reach the question whether defendants' attendance policy was reasonable.

One who seeks the aid of equity must come in with clean hands. This maxim is an integral part of any action in equity, and is designed to preserve the integrity of the judiciary. The ... Court [has] described the clean hands doctrine as "a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of the court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be "the abettor of iniquity." ...

Plaintiff admittedly forged excuse notes, so she does not have clean hands. In determining whether the plaintiffs come before this Court with clean hands, the primary factor to be considered is whether the plaintiffs sought to mislead or deceive the other party, not whether that party relied upon plaintiff's misrepresentations.... Thus, it is plaintiff's deceit, not defendants' reliance on the forged notes, that determines whether the clean hands doctrine should be applied. As Justice Cooley wrote:

> [I]f there are any indications of overreaching or unfairness on [equity plaintiff's] part, the court will refuse to entertain his case, and turn him over to the usual remedies.

We find that the clean hands doctrine applies to prevent plaintiff from securing the relief she requests. In view of our resolution of this matter, we do not reach the other issues raised.

Reversed.

Case Questions

1. Why did the trial court believe that the plaintiff was entitled to an equitable remedy?
2. Why did the appellate court reverse the trial court?

What is the practical significance of the equitable maxim called the *clean hands doctrine*?

Specific Performance

Specific performance is an equitable remedy that is identified with breaches of contract. The plaintiff brings suit to obtain a court order that requires the defendant to fulfill his or her contractual obligations. Specific performance will only be granted where there is a valid contract.[1] It is enforced through the use of the contempt power.

Like all equitable relief, specific performance is limited to situations in which there is no adequate remedy at common law. This means that under the particular circumstances of the case, the plaintiff can establish that a breach of contract action for money damages is inadequate. We saw an example of this in the *Campbell* case. Campbell wanted the court to order the Wentz brothers to live up to their contractual obligations to deliver Chantenay carrots to Campbell. Campbell argued that requiring the Wentz brothers to pay Campbell $50 per acre in liquidated damages for breach of contract was an inadequate remedy. Campbell contended that it couldn't go out on the open market and purchase Chantenay carrots from another seller. There was no alternative source of supply.

Specific performance is usually applied in situations involving contracts for the sale of land and unique goods. Common law relief is often inadequate for unique goods, because one cannot take money damages and go out and purchase the same item. A similar item might be purchased, but that is not what the parties had bargained. The buyer had an agreement to purchase a particular, unique property item. Thus, if a seller and buyer have contracted for the sale of land, a painting, sculpture, an antique car, or a baseball card collection, money damages are just not a substitute

for the item. The Chantenay carrot was unique for Campbell soup. It was the only carrot that would work in the machinery. Consumers of Campbell soups were accustomed to that particular carrot's firmness, consistency, color, and taste.

A plaintiff must have substantially performed, or be ready to perform, his or her obligations under the contract in order to be entitled to specific performance. This is referred to as a condition precedent for specific performance.

In addition, equity courts are concerned with practicality. For example, an equitable court generally will not order one person to fulfill a personal service contract and perform work for another. Such a decree would be tantamount to involuntary servitude. It is also impractical for a court to require one person to work for another. Such an order could involve the court in a never-ending series of employer-employee spats.

A defendant can assert various equitable defenses in response to a plaintiff's claim for specific performance. These include (1) unclean hands (see page 239), (2) hardship, and (3) laches. Hardship involves sharp practices where the contractual terms are entirely one-sided and where there is a gross inadequacy of consideration. Hardship exists because one party is attempting to take unfair advantage of the other party. Laches, as we saw in Chapter VI, is an equitable defense that is used to deny equitable relief where a plaintiff's unreasonable delay in bringing the action has caused prejudicial harm to the defendant. This defense is similar to the common law defense of statute of limitations. The equitable defense of *laches* does not involve any specific period of time.

Contracts for the sale of goods are governed by the Uniform Commercial Code (UCC).[2] The UCC provides buyers with a right to specific performance in 2-716, and sellers with an equivalent remedy in 2-709.

In *Bloch v. Hillel Torah North Suburban Day School*, Helen Bloch's parents brought suit to obtain a court order for specific performance of a contract to prevent the expulsion of their grade-school child from a private Jewish school.

Bloch v. Hillel Torah North Suburban Day School
426 N.E.2d 976
Appellate Court of Illinois, First District, Third Division
September 9, 1981

McNamara, Justice

Plaintiffs appeal from an order of the trial court granting summary judgment in favor of defendant Hillel Torah North Suburban Day School. Helen Bloch is a grade school child who was expelled from defendant, a private Jewish school, at mid-year in 1980. Her parents brought this action seeking to enjoin expulsion and for specific performance of defendant's contract to educate Helen.

The complaint alleged that defendant arbitrarily and in bad faith breached its contract, and that Helen's expulsion was motivated by defendant's disapproval of plaintiff's leadership role in combating an epidemic of head lice at the school. The complaint also alleged that the school uniquely corresponded exactly to the religious commitments desired by plaintiffs. Defendant's answer stated that Helen was expelled, pursuant to school regulations, for excessive tardiness and absences. The parties also disputed the duration of the contractual obligation to educate. Defendant contended that the contract was to endure only for a school year since tuition for only that period of time was accepted by it. Plaintiffs maintained that the contract, as implied by custom and usage, was to endure for eight years, the first year's tuition creating irrevocable option contracts for the subsequent school years, provided that Helen conformed to defendant's rules.

After the trial court denied plaintiff's request for a preliminary injunction, both sides moved for summary judgment. The trial court denied plaintiff's motion and granted the motion of the defendant. In the same order, the trial court gave plaintiffs leave to file an amended complaint for money damages.

Whether a court will exercise its jurisdiction to order specific performance of a valid contract is a matter within the sound discretion of the court and dependent upon the facts of each case.... Where the contract is one which establishes a personal relationship calling for the rendition of personal services, the proper remedy for a breach is generally not specific

performance but rather an action for money damages.... The reasons for denying specific performance in such a case are as follows: the remedy at law is adequate; enforcement and supervision of the order of specific performance may be problematic and could result in protracted litigation; and the concept of compelling the continuance of a personal relationship to which one of the parties is resistant is repugnant as a form of involuntary servitude....

Applying these principles to the present case, we believe that the trial court properly granted summary judgment in favor of defendant. It is beyond dispute that the relationship between a grade school and a student is one highly personal in nature. Similarly, it is apparent that performance of such a contract requires a rendition of a variety of personal services. Although we are cognizant of the difficulties in duplicating the personal services offered by one school, particularly one like defendant, we are even more aware of the difficulties pervasive in compelling the continuation of a relationship between a young child and a private school which openly resists that relationship. In such a case, we believe the trial court exercises sound judgment in ruling that plaintiffs are best left to their remedy for damages....

Illinois law recognizes the availability of a remedy for monetary damages for a private school's wrongful expulsion of a student in violation of its contract.... And especially, where, as here, the issue involves a personal relationship between a grade school and a young child, we believe plaintiffs are best left to a remedy for damages for breach of contract.

For the reasons stated, the judgment of the circuit court of Cook County is affirmed, and the cause is remanded for further proceedings permitting plaintiffs to file an amended complaint for money damages.

Affirmed and remanded.

Rizzi, P. J., and McGillicuddy, J., concur.

Case Questions

1. What problems might have been encountered had the court ordered specific performance?
2. In what types of cases would specific performance be granted?

Restitution

The remedy of restitution is in some situations an equitable remedy and in other cases a common law remedy. **Restitution** means restoration to the plaintiff of property in the possession of the defendant. The purpose of restitution is to prevent unjust enrichment, which means that a person should not be allowed to profit or be enriched inequitably at another's expense. Thus a person is permitted recovery when another has received a benefit and retention of it would be unjust.

The restoration may be *in specie*, in which a specific item is recovered by the plaintiff from the defendant. In many situations, an *in specie* recovery is impossible or impractical. In such instances, the remedy might have to be "substitutionary," whereby the defendant is ordered to return to the plaintiff as restitution the dollar value of any benefit he or she has received. If so, the amount is determined by the defendant's gain, not by the plaintiff's loss, as in the case of money damages. So if D takes P's car, worth $4,000, and sells it to someone else at $8,000, D may be liable to make restitution to P for the full amount of $8,000. P never had $8,000, only a car worth half as much, but is still entitled to the total amount. If there was cash in the glove compartment, P would be entitled to recover that also.

The following case discusses restitution in both the common law and equitable contexts. The court first determines whether the plaintiff was entitled to a statutory mechanics lien or a common law lien. It is only after ruling the plaintiff ineligible for a lien under the common law that the court turns to equity. The balancing of interests and harm to produce a just result is clearly evidenced here. Observe how damages are computed in an unjust enrichment case. The court said the mechanic's recovery would be limited to the difference in a vehicle's value before and after it was repaired and he would not receive damages reflecting his hourly rate.

Iacomini v. Liberty Mutual Insurance Company

497 A.2d 854
Supreme Court of New Hampshire
August 7, 1985

Douglas, Justice

The issue presented in this case is whether a party may subject an owner's interest in an automobile to a lien for repair and storage charges, without the owner's knowledge, acquiescence, or consent. We hold that no common law or statutory lien may be created under such circumstances but that equitable relief for unjust enrichment may be appropriate.

On August 10, 1983, the plaintiff, Richard Iacomini, d/b/a Motor Craft of Raymond, contracted with one Theodore Zadlo for the towing, storage, and repair of a 1977 Mercedes Benz 450-SL. Mr. Zadlo represented himself to be the owner of the car and presented the plaintiff with a New Hampshire registration certificate for the car bearing Zadlo's name. In fact, the car did not belong to Mr. Zadlo but had been stolen in 1981 from a car lot in New Jersey. The defendant, Liberty Mutual Insurance Company, had earlier fulfilled its policy obligations by reimbursing the owner of the stolen car $22,000. It thereby had gained title to the vehicle.

Extensive damage was done to the car after its theft, and Zadlo brought the car to Mr. Iacomini for the purpose of repairing this damage. The plaintiff kept the car at his garage, where he disassembled it in order to give a repair estimate. He apparently never fully reassembled it. Mr. Zadlo periodically returned to the plaintiff's garage to check the status of the repair work.

In October 1983, the Raymond Police Department notified the plaintiff that the Mercedes was a stolen car and also notified Liberty Mutual of the location of the car. Mr. Iacomini at that point moved the vehicle from the lot to the inside of his garage where it remained for the next several months. Liberty Mutual contacted the plaintiff soon after it learned of the vehicle's location to arrange its pick-up. The plaintiff refused to relinquish the car until he had been reimbursed for repair and storage fees.

…Liberty Mutual instituted a replevin action … seeking return of the car…. On the basis of facts presented at a hearing … in the replevin action, the Court … found that the plaintiff (defendant in that action) did not have a valid statutory lien since the vehicle was brought to the plaintiff by one other than the owner. The court then ordered Mr. Iacomini to make the vehicle available forthwith to Liberty Mutual with the proviso that Liberty Mutual retain the vehicle in its possession and ownership for a period of at least ninety days in order to allow Mr. Iacomini the opportunity to file an action against Liberty Mutual relating to repairs.

The plaintiff petitioned for an *ex parte* attachment … claiming approximately $10,000, most of which was for storage fees…. [T]he same court entered judgment in Liberty Mutual's favor finding that "the plaintiff was not authorized or instructed by the legal or equitable owner of the automobile to perform any repair work on the vehicle." On either the day before, or the day of, the hearing … the plaintiff filed a Motion to Specify Claim to include an action for unjust enrichment. Liberty Mutual objected to the plaintiff's attempt to amend his cause of action at that date, and the court denied the motion. It also denied the plaintiff's requests for findings that the value of the car had been enhanced by the plaintiff and that denial of the plaintiff's claim would result in unjust enrichment. This appeal followed.

The law generally recognizes three types of liens: statutory, common law, and equitable…. The statutes provide as follows:

> For Storage. "Any person who maintains a public garage, public or private airport or hangar, or trailer court for the parking, storage or care of motor vehicles or aircraft or house trailers brought to his premises or placed in his care *by or with the consent of the legal or equitable owner* shall have a lien upon said motor vehicle or aircraft or house trailer, so long as the same shall remain in his possession, for proper charges due him for the parking, storage or care of the same." …
>
> For Labor. "Any person who shall, by himself or others, perform labor, furnish materials, or expend money, in repairing, refitting or equipping any motor vehicle or aircraft, *under a contract expressed or implied with the legal or equitable owner*, shall have a lien upon such motor vehicle or aircraft, so long as the same shall remain in his possession, until the charges for such repairs, materials, or accessories, or money so used or expended have been paid." …

"[I]n the case of a statutory lien, the specified requisites must be strictly observed." …By the language of the statute, no lien may be created on an

automobile as to the owner without the owner's knowledge, acquiescence, or consent. Under the present circumstances, where the repairman contracted with the possessor of a stolen vehicle for the repair of the car, it is difficult to imagine how the owner could have consented to, or acquiesced in, the repair of the vehicle. The owner in this case had no idea even where the car was located. Whether the plaintiff was reasonable in believing Mr. Zadlo to be the true owner is irrelevant to whether a contract existed between him and Liberty Mutual.

Prior to the passage of a statute on the subject of mechanics' liens, … "there existed here and elsewhere a lien at common law in favor of anyone who upon request expended labor and materials upon another's property." …The statutory lien does not supplant, but supplements, the common law mechanic's lien, so that we must also look to the rights of the plaintiff under the common law….

As with the statutory liens, common law liens on property for repair costs could be created only by the owner or by a person authorized by him. "By common law, every person, who employs labor and skill upon the goods of another, *at the request of the owner*, without a special contract, is entitled to retain the goods until a proper recompense is made." …New Hampshire common law is consistent with the common law of other jurisdictions which also require the owner's consent or acquiescence before a lien may be established on the property of the owner….

The necessity of the owner's consent is consistent with the contractual relationship between the lienor and the lienee which underlies the establishment of a lien…. As discussed previously, no such contractual relationship may be inferred where a possessor of a stolen vehicle turns it over to a garageman for repairs; accordingly, no lien is created against the owner. This is the correct result under the common law even though hardships may result to a good faith repairman. "There are many hard cases … of honest and innocent persons, who have been obliged to surrender goods to the true owners without remedy…. But these are hazards to which persons in business are continually exposed." …Of course, the repairman would always have a cause of action against the third party who contracted with him for repairs without the owner's consent.

Although the facts of this case do not establish either a statutory or common law lien, the plaintiff may be entitled to restitution under principles of equity. An equitable lien may be imposed to prevent unjust enrichment in an owner whose property was improved, for the increased value of the property…. "In the absence of a contractual agreement, a trial court may require an individual to make restitution for unjust enrichment if he has received a benefit which would be unconscionable to retain." …The trial court must determine whether the facts and equities of a particular case warrant such a remedy….

We here note that "when a court assesses damages in an unjust enrichment case, the focus is not upon the cost to the plaintiff, but rather it is upon the value of what was actually received by the defendants." …In this case, the damages would thus be the difference between the value of the vehicle before and after the plaintiff worked on it, regardless of its worth when stolen.

Reversed and remanded.

Case Questions

1. Why should the defendant insurance company be required to pay the plaintiff repairman for services that the plaintiff performed without the defendant's knowledge or consent?
2. What is an equitable lien? How does it work?
3. How does a judge determine the amount of an award in an unjust enrichment case?

Declaratory Judgment

When someone seeks a judicial determination of the rights and obligations of the parties, that person is seeking the remedy of *declaratory judgment*. The court determines what the law is, or the constitutionality or the meaning of the law. For example, if a legislative body passes a statute making your business activity illegal, you could continue to operate the business and be arrested. You could also try to prevent the enforcement of the law by seeking a declaratory judgment. This action asks a court to determine whether the statute in question is constitutional. Because a judge granting declaratory judgment does not issue any orders telling anyone to act or

refrain from acting, people who are seeking declaratory relief often ask for injunctive relief as well.

Declaratory judgment is considered by some courts to be an equitable remedy and by other courts to be a legal remedy.

Jury Trial

Cases are set for a jury trial only if a right to jury trial exists and one or both of the parties properly asserts this right. For the most part, trial by jury is a constitutional right. The Seventh Amendment to the U.S. Constitution guarantees litigants in federal court a jury trial in suits at common law, and most state constitutions make similar provisions. However, there is no constitutional right to a jury trial in equity cases because jury trials were not a part of chancery procedure.

Parties in most U.S. courts may join common law and equitable remedies in the same action without giving up their right to a jury trial. A jury decides the legal issues, and the judge decides the equitable issues.

INTERNET TIP

State v. Yelsen Land Company is a case in which the parties were seeking both equitable and legal relief. The state objected to being denied a jury trial with respect to issues that were inherently legal. Students can read this case on the textbook's website.

CHAPTER SUMMARY

Students were reminded to refresh their memories with respect to the historical characteristics of the law courts and equitable courts in England because their differences continue to have significance today. It is always important when discussing remedies to remember that equitable remedies are not available to a party who has adequate remedies available at law. It was emphasized that the primary common law remedy is the award of money damages. When a plaintiff establishes that the defendant has committed a tort or breached a contract, the remedy most requested is the award of money damages. Although there are some exceptions, it is generally true that a plaintiff so aggrieved is ultimately entitled to have the decision made as to whether money damages should be awarded in tort and contract cases by a jury. Readers learned about the four types of money damages: compensatory, punitive, nominal, and liquidated.

The use of the equitable remedy of injunction was explained, with particular attention paid to each of the three classes: permanent, preliminary (aka interlocutory), and temporary restraining orders. The three equitable remedies that apply to contract cases, reformation, rescission, and specific performance were explained, as were the two remedies that have roots in both equity and law, restitution, and declaratory judgment. The traditional role of equity as a "court of conscience" was also explained. A plaintiff, for example, may have suffered injury at the defendant's hands, but if the plaintiff has also acted inequitably, a judge may decide to deny the plaintiff any remedy in equity. This concept is reflected in two of the equitable maxims contained on page 239, which provide that "whoever seeks equity must do equity," and "whoever comes into equity must do so with clean hands."

CHAPTER QUESTIONS

1. The federal Food and Drug Administration ("FDA"), after warning Lane Labs on multiple occasions that it was marketing three of its products without having obtained necessary FDA approval, filed suit for a permanent injunction. The FDA alleged that the three

Lane Lab products in question were advertised to the public as remedies for cancer, HIV, and AIDS, and none were properly branded nor approved. The FDA's amended complaint requested injunctive relief and an order of restitution for consumers. The district court judge granted the FDA's summary judgment motion, permanently enjoined Lane Labs, and ordered restitution. Lane Labs appealed to the U.S. Court of Appeals for the Third Circuit, maintaining that the Federal Food, Drug and Cosmetic Act ("FDCA") only permitted the FDA to obtain injunctive relief in cases such as this, and did not authorize district courts to order restitution. Assume that there is no statutory provision authorizing federal judges to issue an order of restitution in FDA cases. Assume you are a judge having to decide this question. Based on your knowledge of the history of remedies, how should the court rule?

U.S. v. Lane Labs-USA Inc., 427 F.3d 219 (2005)

2. The plaintiff rented a Halloween costume to Sharp for $20. The rental agreement included a liquidated damages clause which stated, "an amount equal to one-half the rental fee will be charged for each day the costume is returned late." Sharp returned the costume seventy-nine days late and the plaintiff sued in small claims court.

   At a hearing before a referee, the plaintiff testified that he had lost one rental during the seventy-nine days. The referee awarded the plaintiff $500, noting that the plaintiff's complaint sought only that amount. Sharp filed objections to the referee's report, and the matter was brought to the trial court. It entered judgment against Sharp for $400. The case was appealed to the state intermediate appellate court. Should the appellate court affirm the trial court?

   Lakewood Creative Costumers v. Sharp, 509 N.E.2d 77 (1986)

3. Richard and Darlene Parker leased an apartment from Sun Ridge Investors for $465 per month. The lease provided that the Parkers would be charged a $25 late fee if the rent was not paid by the third day of the month, and $5 per day for each additional day until the account was paid in full. The Parkers were late in making their February 1995 rental payment, for which the landlord assessed the monthly and per diem late fees. The Parkers made their subsequent monthly rental payments in a timely manner, but the landlord, after informing the Parkers, applied their payments to the amount that was past due. The Parkers refused to pay the $5 per diem fee. Sun Ridge brought suit in state court seeking the right to forcibly enter and repossess the apartment and $330 in past due rent. The trial court granted judgment to the landlord, and the Parkers unsuccessfully appealed to the intermediate court of appeals. The Parkers appealed to the Supreme Court of Oklahoma. The landlord argued that the per diem fees were additional rent, but the Parkers contended the fees amounted to an unenforceable penalty. Should the Oklahoma Supreme Court affirm or reverse the lower court? Explain your reasoning.

   Sun Ridge Investors, Ltd v. Parker, 956 P.2d 876 (1998)

4. El Paso Gas Company transports natural gas through pipelines to points throughout the country. TransAmerican is a natural gas producer. The two companies and their predecessors negotiated various contracts during the 1970s and 1980s. TransAmerica brought suit in 1988 against El Paso when the parties were unable to resolve several disagreements about their respective contractual rights and duties. The trial court entered judgment in favor of TransAmerica. While El Paso's appeal was pending, the parties negotiated a settlement agreement that resulted in the termination of all litigation by both sides, the payment of compensation to TransAmerica by El Paso, and a restructuring of their relationship. The agreement also included a choice of forum clause, which provided that a party, in the event of a breach, would have to bring suit in the Delaware Court of Chancery. In 1993,

TransAmerica filed suit against El Paso, in Texas, alleging, among other claims, breach of the settlement contract. El Paso responded by filing suit against TransAmerica in the Delaware Court of Chancery. The Delaware Chancery Court dismissed the petition on the grounds that it did not have jurisdiction, and the Delaware Supreme Court agreed. What was the fundamental problem that caused the court to rule that it did not have subject matter jurisdiction?

El Paso Natural Gas Company v. TransAmerican Natural Gas Company, 669 A.2d 36 (1995)

5. Plaintiff Whalen discovered upon his return from a trip that someone had left a message on his answering machine from an anonymous caller, to the effect that his dog had been found roaming at large, had been given poison, and would die within twenty-four hours unless the dog were treated immediately. Whalen took the dog to the veterinarian, who examined the animal and concluded that the dog had not ingested poison. Whalen filed suit for damages against Isaacs (the anonymous caller) for intentional infliction of emotional distress, believing that the story about the dog poisoning was a hoax. Under Georgia law, the question as to whether the facts supporting the plaintiff's claim are sufficiently outrageous to constitute the tort of intentional infliction of emotional distress is decided by the trial judge. Both parties moved for summary judgment. The plaintiff's evidence primarily consisted of incidents of conduct in which the defendant demonstrated hostility toward the plaintiff's dog when it was unleashed and allowed to run onto the defendant's property. The defendant, in a deposition, admitted making the telephone call, but explained that he was acting as a good Samaritan and made the call to help save the life of the dog. The defendant further claimed that he was only relaying what he had been told about the dog by an unknown bicyclist. Which party should be awarded judgment? Why?

Whalen v. Isaacs, 504 S.E. 2d. 214 (1998)

6. Chris Titchenal, the plaintiff, and Diane Dexter, the defendant, both women, were in an intimate relationship from 1985 until they broke up in 1994. Their home, cars, and bank accounts were jointly owned, and they had jointly acted as caretakers to Dexter's adopted daughter Sarah (who was named Sarah Ruth Dexter-Titchenal). The plaintiff had not sought to adopt the child jointly. Titchenal alleged that she was a de facto parent and had provided 65 percent of Sarah's care prior to the demise of her personal relationship with Dexter. Titchenal brought suit when Dexter severely cut off Titchenal's visitation opportunities with Sarah. The trial court granted Dexter's motion to dismiss the plaintiff's suit, because it concluded that Titchenal had no common law, statutory, constitutional, or compelling public policy right to visitation with Sarah. Titchenal appealed, contending that the trial court had equitable jurisdiction, in the best interest of the child, to grant "non-traditional" family members visitation rights where a parent-like situation existed, as in this instance. Do you agree with the trial court and the Vermont Supreme Court that equity has no jurisdiction in this case?

Titchenal v. Dexter, 693 A.2d 682 (1997)

NOTES

1. You can learn about the requirements of a valid contract by reading the brief discussion in Chapter I or the more detailed presentation in Chapter X. In general, a valid contract must be clear, the terms must be reasonably certain, and there must have been an agreement between

competent parties supported by consideration, which does not contravene principles of law and which in some circumstances must be in writing.

2. Please see the discussion on the Uniform Commercial Code in Chapter X and in the glossary.

VIII

Criminal Law and Procedure

CHAPTER OBJECTIVES

1. *Understand the sources of American criminal law.*
2. *Describe the different classifications of crimes.*
3. *Explain how the federal constitution limits the imposition of criminal liability and punishment.*
4. *Understand and describe the basic components of a criminal offense.*
5. *Understand each of the justification and excuse defenses and how they differ.*
6. *Explain a defendant's rights to counsel under the Sixth and Fourteenth Amendments.*
7. *Understand why the Supreme Court came to require the Miranda warnings.*
8. *Describe why the Supreme Court created the exclusionary rule.*
9. *Describe the procedural steps in a typical criminal trial.*

This chapter introduces students to some of the fundamental principles of criminal law and criminal procedure. Each of these subjects is a course in itself; in one chapter it is only possible to examine some of the major issues associated with each topic, and even then the discussion has to be limited.

CRIMINAL LAW

William Blackstone, an English judge and author of *Commentaries on the Laws of England* (1765–1769), defined a crime as a wrong committed against the public,[1] a definition that is today still widely recognized as appropriate. Because the

general public is injured when a crime is committed, as well as the person who was the perpetrator's targeted victim, the government and not the victim is responsible for deciding whether to initiate a criminal prosecution. It is the government's responsibility, and not the victim's, to investigate, prosecute, and punish those found by the courts to be criminally responsible. This public character of criminal prosecutions means that irrespective of the targeted victim's financial condition the government has an obligation to pay all the costs of investigating and litigating the action. If the accused is convicted and sentenced to incarceration, state-funded correctional institutions will become involved. If the court imposes a sentence of probation, probation officers will be assigned to supervise the probationer at public expense.

Civil remedies, burdens of proof, and court procedures differ significantly from those in criminal cases. Readers might benefit from reviewing Figure 1.2 in Chapter I. Because the actions that are defined as criminal also are recognized as violations of the civil law, it is not uncommon for the victims in criminal cases to maintain separate civil suits against their attackers.

Sources of American Criminal Law

You will recall from the discussion in Chapter I that the colonists along the eastern seaboard of North America were very influenced by the English common law. This diminished because of public opposition to things English.[2] Many of the states that abolished common law crimes converted most of them into statutes.[3] Although these "American" statutes deviated in some respects from the common law, they retained significant aspects of that heritage. Some states continue to recognize common law crimes without statutes, and both federal and state judges are sometimes influenced by the common law when interpreting the meaning of criminal statutes.

In the twentieth century, the legislative branch has replaced the judiciary as the dominant criminal law policymaker. The inventions of the automobile, fax machine, copying machines, airplanes, computers, the internet, and the growth of sophisticated banking/finance companies and the securities industry, produced as a by-product new and previously unforeseen criminal opportunities. Legislative bodies responded by enacting prodigious numbers of new criminal laws. Some of these laws were well thought out; others were enacted on a piecemeal basis to appease voters without sufficient attention to detail or to appropriate constitutional limitations such as vagueness and overbreadth.

The complexities of modern society and the common law's imprecision led reformers, among them the drafters of the influential Model Penal Code, to call for the abolishment of common law crimes. Today, most states define criminal offenses only through statutes, an approach that is consistent with federal law. In 1812, the U.S. Supreme Court decided that Article I, Section 8, of the U.S. Constitution does not include among the enumerated powers the power to adopt the common law. Thus, all federal crimes have to be statutory.

Classification of Crimes

The common law classified crimes as either ***mala in se*** or ***mala prohibita***. *Mala in se* crimes were offenses that were intrinsically bad, such as murder, rape, arson, and theft. Acts that were criminal only because the law defined them as such were classified as *mala prohibita*. A second way of categorizing crimes is in terms of the harm they cause to society. Today, state statutes are often organized so that crimes of a particular type are clustered, for example, crimes against persons (rape, kidnapping, battery, murder, etc.), crimes against property (larceny, robbery, burglary, arson, etc.), and crimes against government (contempt, perjury, bribery, etc.).

Crimes can also be classified as felonies and misdemeanors, and the distinction between the two is essentially a decision of each state's legislature. In some states, felonies are crimes that are

served in state prisons and misdemeanors are offenses served in county jails. Other jurisdictions provide that crimes authorizing a sentence of incarceration of over one year are felonies, whereas those authorizing sentences of one year or less are misdemeanors. The distinction between misdemeanor and felonious theft is usually based on the value of the stolen article. Felony thresholds in theft cases range from $20 in South Carolina to $2,000 in Pennsylvania. In recent years, other classification schemes have gained popularity, for example, white-collar crime (tax evasion, insider trading, kickbacks, defrauding governmental agencies, etc.) and victimless crimes (smoking marijuana, loitering, sodomy, etc.). Other crimes have been reclassified: Driving while intoxicated, a misdemeanor twenty years ago, is today a felony.

Constitutional Limitations on Criminalization

The Constitution limits the imposition of criminal liability and criminal punishments. A criminal statute, for example, must be reasonably precise, since one that is too vague or overly broad (i.e., has an overbreadth problem) violates substantive due process.

Article I, Sections 9 and 10, of the Constitution prohibit federal and state legislative bodies from enacting ex post facto laws—laws that make acts criminal that were not criminal at the time they were committed. Statutes that make a crime greater than when committed, impose greater punishment, or make proof of guilt easier have also been held to be unconstitutional ex post facto laws. Laws also are unconstitutional if they alter the definition of a penal offense or its consequence to the disadvantage of people who have committed that offense. A law is not ex post facto if it "mitigates the rigor" of the law or simply reenacts the law in force when the crime was done. The ex post facto clause restricts only legislative power and does not apply to the judiciary. In addition, the doctrine applies exclusively to penal statutes, whether civil or criminal in form (see *Hiss v. Hampton*, 338 F.Supp. 1141 [1972]).

The Constitution also prohibits **bills of attainder**—acts of a legislature that apply either to named individuals or to easily ascertainable members of a group in such a way as to impose punishments on them without a trial. In *United States v. Brown*, 381 U.S. 437 (1965), for example, an act of Congress that made it a crime for a member of the Communist Party to serve as an officer of a labor union was held unconstitutional as a bill of attainder by the U.S. Supreme Court.

Although no specific provision in the federal Constitution guarantees a general right of personal privacy, the U.S. Supreme Court has recognized that a limited privacy right is implicit in the due process guarantees of life, liberty, and property in the Fourth and Fifth Amendments, and in the First, Ninth, and Fourteenth Amendments. The Court also has recognized that certain fundamental liberties are inherent in the concept of ordered liberty as reflected in our nation's history and tradition and has selected them for special protection. These rights include personal intimacies relating to the family, marriage, motherhood, procreation, and child rearing. The Court has also recognized that a person's home is entitled to special privacy protection. For example, it has been more exacting in assessing the reasonableness of warrantless searches and seizures under the Fourth Amendment that are conducted within a suspect's home.

The limited constitutionally recognized right of privacy is not absolute and is subject to limitations when the government's interest in protecting society becomes dominant. However, a statute affecting a fundamental constitutional right will be subjected to strict and exacting scrutiny, and the statute will fail to pass constitutional muster unless the state proves a compelling need for the law and shows that its goals cannot be accomplished by less restrictive means. If a challenged statute does *not* affect a fundamental constitutional right, the law will be upheld if it is neither arbitrary nor discriminatory, and if it bears a rational relation to a legitimate legislative purpose—protecting the public health, welfare, safety, or morals. A state can satisfy this rational basis test if it can show that there is

some conceivable basis for finding such a rational relationship.

The Equal Protection Clause of the Fourteenth Amendment provides that "No state shall … deny to any person within its jurisdiction the equal protection of the laws." This clause was included in the Fourth Amendment in the aftermath of the Civil War for the purpose of securing freedom for black people. On its face, the clause might seem to guarantee individuals as well as groups not only the equal application of the laws, but also equal outcomes. The Supreme Court has rejected such an expansive interpretation and has ruled that the Equal Protection Clause only requires that the laws be applied equally and leaves issues associated with the existence of unequal outcomes to the political branches of government.

The Supreme Court has ruled that classification schemes are inherently suspect if they are based on race, national origin, or alienage, or if they hamper the exercise of fundamental personal rights. When an inherently suspect classification scheme is challenged in court on equal protection grounds, it is subject to "strict scrutiny." This means that the classification scheme will be overturned unless the government can demonstrate that its discriminatory impact is narrowed as much as possible and that the remaining discrimination is necessary to achieve a "compelling" governmental interest.

Discriminatory classifications that are neither suspect, nor based on gender, will be sustained only if they are rationally related to a legitimate governmental interest. When a challenged classification scheme involves gender, the Supreme Court applies a special rule. In these cases, the discriminatory scheme must bear a "substantial relationship to "important governmental objectives."[4]

Although the Equal Protection Clause has rarely been relied upon to strike down criminal statutes, it has played a small, but important role in preventing legislatures from defining crimes in ways that target groups on the basis of race and gender. Examples of criminal statutes that were overturned by the Supreme Court on equal protection grounds include a Massachusetts statute that made it a crime for unmarried adults to use birth control[5] and an Oklahoma statute that allowed females eighteen years or older to consume beer containing 3.2 percent alcohol, while withholding this right from males until they were twenty-one years of age.[6]

The Imposition of Punishment

It is a principle of U.S. law that people convicted of crimes receive only punishments that have been provided by law. Also, legislative bodies are limited in the types of sentences they can provide by the Eighth Amendment's protection against the imposition of cruel and unusual punishments. The Supreme Court has interpreted this provision as preventing the use of "barbaric punishments as well as sentences that are disproportionate to the crime committed." The meaning of "barbaric punishment" has been the subject of much discussion in the debate over capital punishment. The majority of the Supreme Court has consistently rejected arguments that imposition of capital punishment is barbaric, emphasizing that capital punishment was known to the common law and was accepted in this country at the time the Eighth Amendment was adopted. At this time thirty-eight states have enacted statutes providing for the death penalty.

Since 2002, the Supreme Court has reversed course on two capital punishment issues previously decided in 1989. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court, by a 6–3 margin, reversed its ruling in *Penry v. Lynaugh*, 492 U.S. 302 (1989), which had permitted the execution of mentally retarded offenders. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court by a 5–4 margin reversed its ruling in *Stanford v. Kentucky*, 492 U.S. 361, which had permitted states to execute offenders who were as young as sixteen years old. The justices ruled in *Roper* that the Eighth and Fourteenth Amendments prohibited the imposition of capital punishment on criminal offenders who were less than eighteen years of age when their crimes were committed.

The Eighth Amendment's proportionality requirement can be traced to the Virginia Declaration of Rights (1775), the English Bill of Rights (1689), the Statute of Westminster (1275), and

even Magna Carta (1215). The Supreme Court in the past has used this principle to strike down sentences imposed pursuant to (1) a statute authorizing a jail sentence for drug addiction (because it is cruel and unusual punishment to incarcerate a person for being ill), (2) a statute authorizing the death penalty for rapists, and (3) a statute authorizing a sentence of life imprisonment without parole for a recidivist who wrote a 100-dollar check on a nonexisting account. In the aftermath of the Supreme Court's decision in *Harmelin v. Michigan*, 501 U.S. 957 (1991), the constitutional importance of proportionality in sentencing decisions, especially in noncapital cases, is very much unclear.

THE BASIC COMPONENTS OF A CRIMINAL OFFENSE

Criminal offenses traditionally consist of the following basic components: (1) the wrongful act, (2) the guilty mind, (3) the concurrence of act and intent, and, in some crimes, (4) causation. To obtain a conviction in a criminal case, the government has to establish each of these components beyond a reasonable doubt.

The Wrongful Act

The wrongful act, or *actus reus*, is most easily defined by example. The wrongful act of larceny includes an unlawful taking and carrying away of another person's property. The wrongful act in a battery is the unjustified, offensive, or harmful touching of another person. The law makes a distinction between acts that are classified as voluntary, and those that result from reflexive acts, epileptic seizures, or hypnotic suggestion (see the Model Penal Code in Figure 8.1). A voluntary act occurs when the accused causes his or her body to move in a manner that produces prohibited conduct. The following case illustrates the requirement that criminal acts be voluntary.

People v. Shaughnessy
319 N.Y.S.2d 626
District Court, Nassau County, Third District
March 16, 1971

Lockman, Judge

On October 9th, 1970, shortly before 10:05 P.M., the Defendant in the company of her boyfriend and two other youngsters proceeded by automobile to the vicinity of the St. Ignatius Retreat Home, Searingtown Road, Incorporated Village of North Hills, Nassau County, New York. The Defendant was a passenger and understood that she was headed for the Christopher Morley Park which is located across the street from the St. Ignatius Retreat Home and has a large illuminated sign, with letters approximately 8 inches high, which identifies the park. As indicated, on the other side of the street the St. Ignatius Retreat Home has two pillars at its entrance with a bronze sign on each pillar with 4- to 5-inch letters. The sign is not illuminated. The vehicle in which the Defendant was riding proceeded into the grounds of the Retreat Home and was stopped by a watchman and the occupants including the Defendant waited approximately 20 minutes for a Policeman to arrive. The Defendant never left the automobile.

The Defendant is charged with violating Section 1 of the Ordinance prohibiting entry upon private property of the Incorporated Village of North Hills, which provides: "No person shall enter upon any privately owned piece, parcel or lot of real property in the Village of North Hills without the permission of the owner, lessee or occupant thereof. The failure of the person, so entering upon, or found to be on, such private property, to produce upon demand, the written permission of the owner, lessee or occupant to enter upon, or to be on, such real property, shall be and shall constitute presumptive evidence of the violation of this Ordinance."

The Defendant at the conclusion of the trial moves to dismiss on the grounds that the statute is unconstitutional. Since the Ordinance is *Malum Prohibitum*, in all likelihood the Ordinance is

constitutional.... However, it is unnecessary to pass upon the constitutionality of the Ordinance since there is another basis for dismissal.

The problem presented by the facts in this case brings up for review the primary elements that are required for criminal accountability and responsibility. It is only from an accused's voluntary overt acts that criminal responsibility can attach. An overt act or a specific omission to act must occur in order for the establishment of a criminal offense.

The physical element required has been designated as the *Actus Reus*. The mental element is of course better known as the *Mens Rea*. While the mental element may under certain circumstances not be required as in crimes that are designated *Malum Prohibitum*, the *Actus Reus* is always necessary. It certainly cannot be held to be the intent of the legislature to punish involuntary acts.

The principle which requires a voluntary act or omission to act had been codified ... and reads as follows in part: "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."...

The legislature may prescribe that an act is criminal without regard to the doer's intent or knowledge, but an involuntary act is not criminal (with certain exceptions such as involuntary acts resulting from voluntary intoxication).

In the case at bar, the People have failed to establish any act on the part of the Defendant. She merely was a passenger in a vehicle. Any action taken by the vehicle was caused and guided by the driver thereof and not by the Defendant. If the Defendant were to be held guilty under these circumstances, it would dictate that she would be guilty if she had been unconscious or asleep at the time or even if she had been a prisoner in the automobile. There are many situations which can be envisioned and in which the trespass statute in question would be improperly applied to an involuntary act. One might conceive of a driver losing control of a vehicle through mechanical failure and the vehicle proceeding onto private property which is the subject of a trespass.

Although the Court need not pass on the question, it might very well be proper to hold the driver responsible for his act even though he was under the mistaken belief that he was on his way to Christopher Morley Park. The legislature has provided statutes which make mistakes of fact or lack of knowledge no excuse in a criminal action. However, if the driver had been a Defendant, the People could have established an act on the part of the Defendant driver, to wit, turning his vehicle into the private property.

In the case of the Defendant now before the Court, however, the very first and essential element in criminal responsibility is missing, an overt voluntary act or omission to act and, accordingly, the Defendant is found not guilty.

Case Questions

1. Judge Lockman's opinion explains that a voluntary act is normally necessary for criminal liability. What would be an example of an involuntary act?
2. Under what conditions should people be criminally liable for having omitted to act?

Special Rules

When the law recognizes the existence of a legal duty, the failure to act is equivalent to a criminal act. The duty to act can be imposed by statute (filing income tax returns, making child support payments, registering with selective service, registering firearms), by contract (such as that between parents and a day care center), as a result of one's status (parent-child, husband-wife), or because one has assumed a responsibility (voluntarily assuming responsibility for providing food to a person under disability).

Another exception to the requirement of a physical act is recognized in possession offenses in which the law treats the fact of possession as the equivalent of a wrongful act. For example, a person found with a controlled substance in his jacket pocket is not actually engaging in any physical act. Possession can be actual, as when the accused is found with the contraband on his or her person, or constructive, as when the contraband is not on the suspect's person but is under the suspect's dominion and control.

MODEL PENAL CODE*

Official Draft, 1985

Section 2.01. Requirement of Voluntary Act; Omission as Basis of Liability; Possession as an 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.

(3) Liability for the commission of an offense may not be based on an omission unaccompanied by action unless:

(a) the omission is expressly made sufficient by the law defining the offense; or

(b) a duty to perform the omitted act is otherwise imposed by law.

(4) Possession is an act, within the meaning of this Section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

*A collection of suggestions for reforming American criminal law, the Model Penal Code was prepared by a private association of professors, lawyers, and judges called the American Law Institute. Over two-thirds of the states have adopted at least some of its provisions and hundreds of courts have been influenced by its suggestions.

FIGURE 8.1 Model Penal Code Section 2.01

Status Crimes

The Supreme Court has emphasized the importance of the wrongful act requirement in its decisions relating to status crimes, ruling that legislatures cannot make the status of "being without visible means of support" or "being ill as a result of narcotic addiction" into crimes. Selling a controlled substance can be made criminal because it involves a voluntary act. The condition of being an addict, however, is a status.

The Criminal State of Mind

The second requirement of a criminal offense (subject to a few exceptions) is that an alleged criminal offender must possess a criminal state of mind (*mens rea*) at the time of the commission of the wrongful act. This is called the concurrence of a wrongful act with a wrongful state of mind. Concurrence is required because some people who commit wrongful acts do not have a wrongful state of mind. For example, if the student sitting next to you

mistakenly picks up your copy of a textbook, instead of her copy, and leaves the classroom, there has been a wrongful act but no wrongful intent. While it is theoretically easy to make this distinction between accidental and criminal acts, it is often difficult to prove that a person acted with *mens rea*, and prosecutors often have to prove *mens rea* indirectly and circumstantially. In addition, judges routinely instruct jurors that the law permits them to find that a defendant intended the natural and probable consequences of his or her deliberate acts. This instruction is based on human experience: most people go about their daily affairs intending to do the things they choose to do.

In the United States, *mala in se* offenses require proof of criminal intent. *Mala prohibita* offenses may require criminal intent (in possession of a controlled substance, for instance), or they may involve no proof of intent at all (as in traffic offenses or sales of illegal intoxicating beverages to minors).

There are two major approaches to *mens rea*, one formed by the traditional common law approach, the other by the Model Penal Code. The common law approach recognizes three categories of intent: general intent, specific intent, and criminal negligence. General intent crimes include serious offenses such as rape and arson and less serious offenses such as trespass and simple battery. For conviction of a general intent crime, the prosecution has to prove that the accused intended to commit the *actus reus*. The common law permitted the trier of fact to infer a wrongful state of mind from proof that the actor voluntarily did a wrongful act. Thus a person who punches another person in anger (without any lawful justification or excuse) may be found to have possessed general criminal intent.

A specific intent crime requires proof of the commission of an *actus reus*, plus a specified level of knowledge or an additional intent, such as an intent to commit a felony. A person who possesses a controlled substance (the *actus reus*) and who at the time of the possession has an intent to sell (an additional specified level of intent beyond the commission of the *actus reus*) has committed a specific intent crime.

Criminal negligence results from unconscious risk creation. For example, a driver who unconsciously takes his or her eyes off the road to take care of a crying infant is in fact creating risks for other drivers and pedestrians. Thus the driver's unreasonable conduct created substantial and unjustifiable risks. If the driver is unaware of the risk creation, he or she is acting negligently.

The defendant in the following case was charged and convicted of the specific intent crime of robbery. He appealed his conviction on the ground that he did not have specific intent—the intent to permanently deprive the true owner of his property.

State v. Gordon
321 A.2d 352
Supreme Judicial Court of Maine
June 17, 1974

Wernick, Justice

An indictment returned (on June 27, 1972) by a Cumberland County Grand Jury to the Superior Court charged defendant, Richard John Gordon, with having committed the crime of "armed robbery" in violation of 17 M.R.S.A. § 3401–A. A separate indictment accused defendant of having, with intention to kill, assaulted a police officer, one Harold Stultz. Defendant was arraigned and pleaded not guilty to each charge. Upon motion by the State, and over defendant's objection, the residing Justice ordered a single trial on the two indictments. The trial was before a jury. On the "assault" the jury was unable to reach a verdict and as to that charge a mistrial was declared. The jury found defendant guilty of "armed robbery." From the judgment of conviction entered on the verdict defendant has appealed, assigning ten claims of error.

We deny the appeal.

The jury was justified in finding the following facts.

One Edwin Strode and defendant had escaped in Vermont from the custody of the authorities who had been holding them on a misdemeanor charge. In the escape defendant and Strode had acquired two hand guns and also a blue station wagon in which they had fled from Vermont through New Hampshire into

Maine. Near Standish, Maine, the station wagon showed signs of engine trouble, and defendant and Strode began to look for another vehicle. They came to the yard of one Franklin Prout. In the yard was Prout's 1966 maroon Chevelle and defendant, who was operating the station wagon, drove it parallel to the Prout Chevelle. Observing that the keys were in the Chevelle, Strode left the station wagon and entered the Chevelle. At this time Prout came out of his house into the yard. Strode pointed a gun at him, and the defendant and Strode then told Prout that they needed his automobile, were going to take it but they "would take care of it and see he [Prout] got it back as soon as possible." With defendant operating the station wagon and Strode the Chevelle, defendant and Strode left the yard and proceeded in the direction of Westbrook. Subsequently, the station wagon was abandoned in a sand pit, and defendant and Strode continued their flight in the Chevelle. A spectacular series of events followed—including the alleged assault (with intent to kill) upon Westbrook police officer Stultz, a shoot-out on Main Street in Westbrook, and a high speed police chase, during which the Chevelle was driven off the road in the vicinity of the Maine Medical Center in Portland where it was abandoned, Strode and defendant having commandeered another automobile to resume their flight. Ultimately, both the defendant and Strode were apprehended, defendant having been arrested on the day following the police chase in the vicinity of the State Police Barracks in Scarborough….

[D]efendant maintains that the evidence clearly established that (1) defendant and Strode had told Prout that they "would take care of … [the automobile] and see [that] he [Prout] got it back as soon as possible" and (2) defendant intended only a temporary use of Prout's Chevelle. Defendant argues that the evidence thus fails to warrant a conclusion beyond a reasonable doubt that defendant had the specific intent requisite for "robbery." (Hereinafter, reference to the "specific intent" necessary for "robbery" signifies the "specific intent" incorporated into "robbery" as embracing "larceny.")

Although defendant is correct that robbery is a crime requiring a particular specific intent … defendant wrongly apprehends its substantive content.

A summarizing statement appearing in defendant's brief most clearly exposes his misconception of the law. Acknowledging that on all of the evidence the jury could properly

> "… have inferred … that [defendant and Strode] … intended to get away from the authorities by going to New York or elsewhere *where they would abandon* the car …" (emphasis supplied)

defendant concludes that, nevertheless, the State had failed to prove the necessary specific intent because it is

> "… entirely irrational to conclude … that the defendant himself intended at the time he and Strode took the car, *to keep the car in their possession for any length of time*." (emphasis supplied)

Here, defendant reveals that he conceives as an essential element of the specific intent requisite for "robbery" that the wrongdoer must intend: (1) an advantageous relationship between himself and the property wrongfully taken, and (2) that such relationship be permanent rather than temporary.

Defendant's view is erroneous. The law evaluates the "animus furandi" of "robbery" in terms of the detriment projected to the legally protected interests of the owner rather than the benefits intended to accrue to the wrongdoer from his invasion of the rights of the owner….

[M]any of the earlier decisions reveal language disagreements, as well as conflicts as to substance, concerning whether a defendant can be guilty of "robbery" without specifically intending a gain to himself (whether permanent or temporary), so-called "lucri causa." In the more recent cases, there is overwhelming consensus that "lucri causa" is not necessary….

We now decide, in confirmatory clarification of the law of Maine, that "lucri causa" is not an essential element of the "animus furandi" of "robbery." … [T]he specific intent requisite for "robbery" is defined solely in terms of the injury projected to the interests of the property owner:—specific intent "to deprive permanently the owner of his property." …

The instant question thus becomes: on the hypothesis, arguendo, that defendant here actually intended to use the Prout automobile "only temporarily" (as he would need it to achieve a successful flight from the authorities), is defendant correct in his fundamental contention that this, *in itself*, negates, *as a matter of law*, specific intent of defendant to deprive permanently the owner of his property? We answer that defendant's claim is erroneous.

Concretely illustrative of the point that a wrongdoer may intend to use wrongfully taken property "only temporarily" and yet, without contradiction, intend that the owner be deprived of his property permanently is the case of a defendant who proposes to use the property only for a short time and then to destroy it. At the opposite pole, and excluding (as a matter of law) specific intent to deprive permanently the owner of his property, is the case of a defendant who intends to make a temporary use of the property

and then by his own act to return the property to its owner. Between these two extremes can lie various situations in which the legal characterization of the wrongdoer's intention, as assessed by the criterion of whether it is a specific intent to deprive permanently the owner of his property, will be more or less clear and raise legal problems of varying difficulty.

In these intermediate situations a general guiding principle may be developed through recognition that a "taking" of property is *by definition* "temporary" only if the possession, or control, effected by the taking is relinquished. Hence, measured by the correct criterion of the impact upon the interests of the owner, the wrongdoer's "animus furandi" is fully explored for its true legal significance only if the investigation of the wrongdoer's state of mind extends beyond his anticipated *retention* of possession and includes an inquiry into his contemplated manner of *relinquishing* possession, or control, of the property wrongfully taken.

On this approach, it has been held that when a defendant takes the tools of another person with intent to use them temporarily and then to leave them wherever it may be that he finishes with his work, the fact-finder is justified in the conclusion that defendant had specific intent to deprive the owner permanently of his property….

Similarly, it has been decided that a defendant who wrongfully takes the property of another intending to use it for a short time and then to relinquish possession, or control, in a manner leaving to chance whether the owner recovers his property is correctly held specifically to intend that the owner be deprived permanently of his property.

The rationale underlying these decisions is that to negate, as a matter of law, the existence of specific intent to deprive permanently the owner of his property, a wrongful taker of the property of another must have in mind not only that his retention of possession, or control, will be "temporary" but also that when he will relinquish the possession, or control, he will do it in some manner (whatever, particularly, it will be) he regards as having affirmative tendency toward getting the property returned to its owner. In the absence of such thinking by the defendant, his state of mind is fairly characterized as *indifference* should the owner *never* recover his property; and such indifference by a wrongdoer who is the moving force separating an owner from his property is appropriately regarded as his "willingness" that the owner *never* regain his property. In this sense, the wrongdoer may appropriately be held to entertain specific intent that the deprivation to the owner be permanent….

On this basis, the evidence in the present case clearly presented a jury question as to defendant's specific intent. Although defendant may have stated to the owner, Prout, that defendant

> "would take care of … [the automobile] and see [that] … [Prout] got it back as soon as possible,"

defendant himself testified that

> "[i]n my mind it was just to get out of the area…. Just get out of the area and leave the car and get under cover somewhere."

This idea to "leave the car" and "get under cover somewhere" existed in defendant's mind as part of an uncertainty about where it would happen. Because defendant was "… sort of desperate during the whole day," he had not "really formulated any plans about destination."

Such testimony of defendant, together with other evidence that defendant had already utterly abandoned another vehicle (the station wagon) in desperation, plainly warranted a jury conclusion that defendant's facilely uttered statements to Prout were empty words, and it was defendant's true state of mind to use Prout's Chevelle and abandon it in whatever manner might happen to meet the circumstantial exigencies of defendant's predicament—without defendant's having any thought that the relinquishment of the possession was to be in a manner having some affirmative tendency to help in the owner's recovery of his property. On this finding the jury was warranted in a conclusion that defendant was indifferent should the owner, Prout, *never* have back his automobile and, therefore, had specific intent that the owner be deprived permanently of his property.

Appeal denied.

Case Questions

1. What must a wrongful taker of property do to avoid legal responsibility for having specific intent to deprive the owner permanently of his property?
2. Does a wrongful taker of property have specific intent if the taker does not intend to keep the property for any particular period of time?

The Model Penal Code recognizes four categories of criminal intent. To be criminally culpable, a person must act purposely, knowingly, recklessly, or negligently (see Figure 8 2).

A person acts purposely when he or she has a conscious desire to produce a prohibited result or harm, such as when one person strikes another in order to injure the other person.

A person acts knowingly when he or she is aware that a prohibited result or harm is very likely to occur, but nevertheless does not consciously intend the specific consequences that result from the act. If a person sets a building on fire, the person may be aware that it is very likely that people inside will be injured, and yet hopes that the people escape and that only the building is burned.

A person acts recklessly when he or she consciously disregards the welfare of others and creates a significant and unjustifiable risk. The risk has to be one that no law-abiding person would have consciously undertaken or created. A driver acts recklessly if he or she consciously takes his or her eyes off the road to take care of a crying infant, is aware that this conduct creates risks for other drivers and pedestrians, and is willing to expose others to jeopardy.

As seen in the common law approach, negligence involves unconscious risk creation. A driver acts negligently if he or she unconsciously takes his or her eyes off the road to take care of a crying infant, is unaware that this conduct creates substantial and unjustifiable risks for other drivers and pedestrians, and yet has not acted reasonably while operating a motor vehicle.

Strict Liability

In strict liability offenses there is no requirement that there be a concurrence between the criminal act and criminal intent. In such offenses, the offender poses a generalized threat to society at large. Examples include a speeding driver, a manufacturer who fails to comply with pure food and drug rules, or a liquor store owner who sells alcohol to minors. With respect to such *mala prohibita* offenses, the legislature may provide that the offender is strictly liable. The prosecution need only prove the *actus reus* to convict the accused; there is no intent element.

Causation

There are some criminal offenses that require proof that the defendant's conduct caused a given result. In a homicide case, for example, the prosecution must prove that the defendant's conduct caused death. To be convicted of an assault, the defendant's actions must have caused the victim to fear an impending battery. In a battery, the defendant's conduct must have caused a harmful or offensive touching. In contrast, offenses such as perjury, reckless driving, larceny, and burglary criminalize conduct irrespective of whether any actual harm results.

The prosecution must establish causation beyond a reasonable doubt whenever it is an element of a crime. A key to establishing causation is the legal concept of "proximate cause." Criminal liability only attaches to conduct that is determined to be the proximate or legal cause of the harmful result. This includes both direct and indirect causation. Often the legal cause is the direct cause of harm. If the defendant strikes the victim with his fist and injures him, the defendant is the direct cause of the injury. If the defendant sets in motion a chain of events that eventually results in harm, the defendant may be the indirect cause of the harm.

Proximate cause is a flexible concept. It permits fact finders to sort through various factual causes and determine who should be found to be legally responsible for the result. In addition, an accused is only responsible for the reasonably foreseeable consequences that follow from his or her acts. The law provides, for example, that an accused is not responsible for consequences that follow the intervention of a new, and independent, causal force. The next case, *Commonwealth v. Berggren*, illustrates the legal principle that an accused is only responsible for consequences that are reasonably foreseeable.

MODEL PENAL CODE

Official Draft, 1985

Section 2.02 General Requirements of Culpability

* * *

(2) ***Kinds of Culpability Defined.***

(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 that they exist.

(b) ***Knowingly.***

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

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(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.

(d) ***Negligently.***

A person acts negligently with respect to a material element of an offense when he should be aware of 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 the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

FIGURE 8.2 Model Penal Code Section 2.2

Commonwealth v. Berggren

496 N.E.2d 660
Supreme Judicial Court of Massachusetts
August 26, 1986

Lynch, Justice

The defendant is awaiting trial before a jury of six in the Barnstable Division of the District Court on a complaint charging him with motor vehicle homicide by negligent operation of a motor vehicle so as to endanger public safety (G.L. c. 90, § 24G(*b*) [1984 ed.]). The District Court judge granted the joint motion to "report an issue" to the Appeals Court pursuant to Mass. R. Crim. P. 34, 378 Mass. 905 (1979). We transferred the report here on our own motion.

We summarize the stipulated facts. On March 29, 1983, about 8:28 P.M., Patrolman Michael Aselton of the Barnstable police department was on radar duty at Old Stage Road in Centerville. He saw the defendant's motorcycle speed by him and commenced pursuit in a marked police cruiser with activated warning devices. The defendant "realized a cruiser was behind him but did not stop because he was 'in fear of his license.'" The pursuit lasted roughly six miles through residential, commercial and rural areas. At one point, the defendant had gained a 100-yard lead and crossed an intersection, continuing north. The patrolman's cruiser approached the intersection at about "76 m.p.h. minimal" and passed over a crown in the roadway which caused the patrolman to brake. The wheels locked and the cruiser slid 170 yards, hitting a tree. Patrolman Aselton died as a result of the impact. The defendant had no idea of the accident which had occurred behind him. "No other vehicles were in any way involved in the causation of the accident." The stipulation further states that the decision to terminate a high-speed chase "is to be made by the officer's commanding officer." No such decision to terminate the pursuit had been made at the time of the accident. The Barnstable police department determined that patrolman Aselton died in the line of duty.

We understand the report to raise the question whether the stipulated facts would be sufficient to support a conviction of motor vehicle homicide by negligent operation under G.L. c. 90, § 24G(*b*). We hold that it is.

A finding of ordinary negligence suffices to establish a violation of § 24G.

The Appeals Court has observed: "It would seem to follow that if the jury's task is to find ordinary negligence, then the appropriate principles of causation to apply are those which have been explicated in a large body of decisions and texts treating the subject in the context of the law of torts." …

The defendant argues, however, that the "causation theory properly applied in criminal cases is not that of proximate cause." … If this theory has any application in this Commonwealth … it does not apply to a charge of negligent vehicular homicide. We adopt instead the suggestion of the Appeals Court and conclude that the appropriate standard of causation to be applied in a negligent vehicular homicide case under § 24G is that employed in tort law.

The defendant essentially contends that since he was one hundred yards ahead of the patrolman's cruiser and was unaware of the accident, his conduct cannot be viewed as directly traceable to the resulting death of the patrolman. The defendant, however, was speeding on a motorcycle at night on roads which his attorney at oral argument before this court characterized as "winding" and "narrow." He knew the patrolman was following him, but intentionally did not stop and continued on at high speed for six miles. From the fact that the defendant was "in fear of his license," it may reasonably be inferred that he was aware that he had committed at least one motor vehicle violation. Under these circumstances, the defendant's acts were hardly a remote link in the chain of events leading to the patrolman's death…. The officer's pursuit was certainly foreseeable, as was, tragically, the likelihood of serious injury or death to the defendant himself, to the patrolman, or to some third party. The patrolman's death resulted from the "natural and continuous sequence" of events caused by the defendant's actions….

We conclude that the proper standard of causation for this offense is the standard of proximate cause enunciated in the law of torts. We further conclude that, should the jury find the facts as stipulated in the instant case, and should the only contested element of the offense of motor vehicle homicide by negligent operation be that of causation, these facts would support a conviction under G.L. c.90, §24G(*b*).

Report answered.

Case Question

1. Explain the difference between factual and legal causation, based on the facts of this case.

Berggren claims to have been unaware of the collision involving the officer's cruiser and tree, and he insists that he never intended that the officer die. Why should this defendant be criminally responsible for causing the death of the officer?

Inchoate Crime

The criminal law recognizes society's need to protect itself from those people who have taken some preliminary steps leading to a criminal act, but who have not yet completed their intended criminal objectives. Thus the law defines as criminal the preparatory activities of solicitation, attempt, and conspiracy and refers to them as inchoate crimes.

Solicitation is a specific intent crime committed by a person who asks, hires, or encourages another to commit a crime. It makes no difference whether the solicited person accepts the offer; the solicitation itself constitutes the *actus reus* for this offense. All jurisdictions treat solicitations to commit a felony as a crime, and some jurisdictions also criminalize solicitations to commit a misdemeanor.

The crime of attempt is committed by a person who has the intent to commit a substantive criminal offense and does an act that tends to corroborate the intent, under circumstances that do not result in the completion of the substantive crime. For example, assume that person Y intends to commit armed robbery of a bank. Y dresses in clothing that disguises his appearance, wears a police scanner on his belt, carries a revolver in his coat pocket, wears gloves, and drives to a bank. Y approaches the front door with one hand in his pocket and the other over his face. When he attempts to open the front door, he discovers that the door is locked and that it is just after the bank's closing time. Y quickly returns to his car, leaves the bank, and is subsequently apprehended by police. Y had specific intent to rob the bank, and took many substantial steps to realize that intent; however, he was unable to complete the crime because of his poor timing. Y has committed the crime of attempted robbery.

The crime of conspiracy is committed when two or more people combine to commit a criminal act. The essential *actus reus* of conspiracy is the agreement to commit a criminal act, coupled with the commission of some overt act by one or more of the coconspirators that tends to implement the agreement. The prosecution can prove the existence of an unlawful agreement either expressly or inferentially. The crime of conspiracy is designed to protect society from group criminality. Organized groups bent on criminal activity pose a greater threat to the public than do the isolated acts of individuals. Conspiracy is a separate crime, and unlike attempt, does not merge into the completed substantive offense. Thus a person can be prosecuted both for murder and conspiracy to murder. If a member of the conspiracy wants to abandon the joint enterprise, he or she must notify every other coconspirator. Conspiracy is a powerful prosecutorial weapon.

The Racketeer Influenced and Corrupt Organization Act

In 1970, the federal government enacted a criminal statute called the Racketeer Influenced and Corrupt Organization Act (RICO). This statute and its state counterparts have been very important weapons in combating organized criminal activity such as drug trafficking, the theft and fencing of property, syndicated gambling, and extortion. A very broad statute, RICO applies to all people and organizations, whether public or private. It focuses on patterns of racketeering activity, the use of money obtained from racketeering to acquire legitimate businesses, and the collection of unlawful debt. The act defines

racketeering activity as involving eight state crimes and twenty-four federal offenses called the predicate acts. A person who has committed two or more of the predicate acts within a ten-year period has engaged in a pattern of racketeering activity. People convicted under RICO can be required to forfeit property acquired with money obtained through racketeering, and punished with fines, and up to twenty years' incarceration. Civil penalties, including the award of treble damages, can also be imposed.

INTERNET TIP

An interesting RICO case involving members of the Outlaws Motorcycle Club who allegedly participated in a drug distribution enterprise can be found on the textbook's website. The case of *U.S. v. Lawson* was decided in 2008 by the U.S. Court of Appeals for the Sixth Circuit.

Vicarious Liability

Criminal law recognizes two conditions under which individuals and groups can be held criminally liable for actions committed by other people. Employers can be held responsible for the acts of their employees that occur within the course and scope of employment. For example, if a bartender illegally sells liquor to minors, the bartender's employer (as well as the bartender) can be prosecuted. Vicarious liability helps to impress on employers the importance of insisting that employees comply with legal requirements. However, an employer can be held vicariously liable only for strict liability offenses. In addition, people convicted vicariously can only be subject to a fine or forfeiture.

Corporations can also be held vicariously responsible for criminal acts committed by authorized corporate employees who have acted on behalf of the company to enhance corporate profits. A corporate CEO, for example, who engages in criminal conduct can be prosecuted just like any other person. But additional charges can also be brought against the corporation itself in order to hold it vicariously liable for the CEO's criminal acts.

INTERNET TIP

Corporations can even be convicted of committing homicides. A trucking company was found guilty by a jury and convicted of the homicide of a police officer in a controversial 2006 Massachusetts case. The truck's driver, whose vehicle lacked a working backup alarm, struck an officer situated in the truck driver's "blind spot." The trucking company was charged with violating the state's vehicular homicide statute. The conviction was appealed to the state's highest court, which affirmed. The majority and dissenting opinions in the case of *Commonwealth vs. Todesca Corporation* can be read on the textbook's website.

Prosecutors usually bring criminal charges against corporations for reasons of deterrence. If a corporation's culture has become corrupted, merely prosecuting the individuals involved is sometimes not enough. Corporations have much to lose if prosecuted and convicted of criminal conduct. They risk public embarrassment, damage to the company's reputation and goodwill, and the risk of devaluation of its stock. The punishment options for corporations are limited, however. The law permits the imposition of fines but these are often inadequate in size, and it is obvious that corporations cannot go to jail.

Defenses

Because of the constitutional presumption of innocence, criminal defendants are not required to prove anything at trial. If the government cannot prove the defendant's guilt beyond a reasonable doubt with its own evidence, the law provides that the accused is not guilty.

One defense strategy is, therefore, to establish reasonable doubt exclusively through the use of the government's own witnesses. It is possible to challenge the credibility of prosecution witnesses on the grounds that their testimony is unbelievable. The

defense attorney, for example, may through cross-examination be able to show that a prosecution witness was too far away to have clearly seen what he/she testified to have observed, to be biased against the defendant, or to not really be certain as to the identity of the attacker as was suggested on direct examination. The defense can also challenge the way in which the police obtained evidence by alleging that the police did not comply with the requirements of *Miranda v. Arizona* when they interrogated the defendant, or violated the requirements of the Fourth Amendment when they conducted a search of the defendant's home. Where the prosecution's evidence is insufficient to establish elements of the crime, the defense attorney can move to dismiss, and it is always possible to defend by arguing that the level of *mens rea* required for conviction was not proven or that the prosecution in some other respect has failed its burden of proving the defendant's guilt beyond a reasonable doubt.

Sometimes an accused can call witnesses to testify that the defendant was somewhere other than at the scene of the crime on the date and time that the offense allegedly occurred—thereby raising an alibi defense. Rarely, an accused will present a good character defense. When this occurs, a defendant, for example, who is charged with a crime of violence could introduce reputation or opinion testimony that the defendant is nonviolent and peace loving. From this evidence the defense attorney could argue that the defendant's character is so sterling that he would never have committed the crime with which he was charged.

The law gradually began to recognize that in some situations it would be unfair to impose criminal responsibility on a criminal defendant because of the presence of factors that legitimately mitigated, justified, or excused the defendant's conduct. These special circumstances came to be known as affirmative defenses. The defendant always bears the burden of production with respect to affirmative defenses. Unless the defense affirmatively introduces some evidence tending to establish such a defense, the court will refuse to give the corresponding instruction. Because affirmative defenses do not negate any element of the crime(s) charged by the government, states are constitutionally permitted to decide for themselves whether the defendant should bear the burden of persuasion with respect to affirmative defenses. Some states require the prosecution to disprove affirmative defenses beyond a reasonable doubt. But many other jurisdictions refuse that burden and require that the defendant carry the burden of persuasion regarding such defenses. Jurisdictions differ as to the availability of particular defenses and as to their definitions. Affirmative defenses are often further subdivided into justification defenses and excuse defenses.

Justification Defenses Criminal laws are often written in general terms and without limitations and exceptions. It is understood that exceptions will be made, on a case-by-case basis, where it becomes apparent that a defendant was justified in his/her actions given the then-existing circumstances. Recognized justification defenses often include self-defense, defense of others, defense of property, necessity/choice of evils, and duress/coercion. In each of these defenses, the accused admits to having committed the act which is alleged by the prosecution; however, in each instance the accused claims to have acted correctly.

The law recognizes an individual is justified in defending his or her person and property and others. A person is entitled to use reasonable force in self-defense to protect him- or herself from death or serious bodily harm. Obviously the amount of force that can be used in defense depends on the type of force being used by the attacker. An attack that threatens neither death nor serious bodily harm does not warrant the use of deadly force in defense. When the attack has been repelled, the defender does not have the right to continue using force to obtain revenge. Although the common law required one to "retreat to the wall" before using deadly force in self-defense, the modern rule permits a person to remain on his or her property and to use reasonable force (including the reasonable use of deadly force in defense of others who are entitled to act in self-defense). However, as we saw in *Katko v. Briney*, in Chapter I, it is never

justifiable to use force that could cause death or serious bodily injury solely in defense of property. Necessity (also known as the choice of evils defense) traces its lineage to the English common law. Over time it became apparent that in some limited circumstances, committing a criminal act would actually result in a less harmful outcome than would occur were the accused to adhere strictly to the requirements of the law. To be successful with this defense, the accused must be able to establish that there was no reasonable, legal alternative to violating the law. That was the critical question addressed in the following case.

United States v. Juan Donaldo Perdomo-Espana
522 F.3d 983
United States Court of Appeals, Ninth Circuit
April 14, 2008.

Gould, Circuit Judge

Juan Perdomo-Espana ("Perdomo") appeals his jury conviction for one count of illegal entry into the United States as a deported alien in violation of 8 U.S.C. § 1326. In this opinion, we consider whether the defense of necessity that Perdomo advanced must be tested under an objective or subjective standard....

I

In the early morning hours of March 21, 2006, a United States border patrol officer found Perdomo and four others hiding in brush near the United States-Mexican border. Perdomo was wearing dark clothes. Upon discovery, Perdomo admitted that he is a Mexican citizen with no documents to allow him to enter or to remain in the United States. He was found with $598 (USD) and 155 Mexican pesos on his person. Perdomo was arrested and taken to a nearby border patrol station, where he was questioned and fingerprinted.... Immigration records revealed that he had twice previously been deported and had not subsequently applied for reentry.

At trial, Perdomo testified that he had illegally entered the United States for fear of his life. Perdomo stated that in 2000, while in a United States federal prison, he had a stroke precipitated by a high blood sugar level associated with Type 2 diabetes, and thereafter he was treated with insulin injections. Upon his release from prison, Perdomo was given a small insulin supply and was removed to Mexico on March 7, 2006, where his insulin supply soon ran out. While in Tijuana, Perdomo purchased varying kinds of replenishing insulin, but none of the insulin was sufficiently effective, and his blood sugar level began to rise.

According to Perdomo, shortly before the border patrol caught him, he tried to enter the United States via the pedestrian lane at a nearby port of entry, but was turned away despite telling the officers of his need for diabetic-related treatment. Perdomo claims that his blood sugar level soon thereafter rose to 480, the level it had reached when he suffered his diabetes-induced stroke. Perdomo asserted that he then attempted to cross clandestinely into the United States.

Perdomo testified that he entered the United States fearing for his life because of his high blood sugar levels, and did not intend to remain. He believed he was in desperate need of medical treatment which was unavailable in Mexico. Perdomo testified that he did not go to any hospital, church, or the police in Tijuana because he believed that he would not be able to secure the needed treatment in Tijuana, despite the money he carried. According to Perdomo, a person had to be dying on the street to gain medical attention there.

During questioning that took place about four to five hours after his initial capture, Perdomo told a border patrol agent for the first time that he is a Type 2 diabetic and that he had been hospitalized for two weeks in the last six months because of his diabetes....

After questioning, Perdomo was taken to an emergency room, where his blood sugar level was recorded as 340. The emergency room physician who treated Perdomo, Dr. Vincent Knauf, characterized this glucose level as a "severe elevation." However, Dr. Knauf concluded that, in his opinion, Perdomo was not facing serious or imminent risk of bodily harm at that time; although he needed longer-term care, Perdomo was classified as a "non-urgent" patient....

During pre-trial hearings, Perdomo requested to present a necessity defense, which the government moved to preclude. Reserving its final ruling until after the presentation of evidence at trial, the district court allowed Perdomo to testify before the jury about why he had entered the country.

At the conclusion of evidence, Perdomo again requested that the jury be instructed on his proffered defense of necessity. The district court declined to give the requested instruction, reasoning that Perdomo

showed no "threat of imminent harm," and that it was "incredulous to suggest that Mexico doesn't have clinics, doctors, [or] hospitals that could manage people who are in need of treatment," especially given that Perdomo "had $600 on him at the time." The district court, instead, instructed the jury that the "theory of the defense" was that Perdomo had come to the United States for medical care. After the jury found Perdomo guilty, Perdomo moved for a new trial, which the district court denied. Perdomo appeals the district court's denial of his request for a necessity defense jury instruction

II

… [W]e review de novo the legal question whether the necessity defense requires an objective inquiry. Once we have resolved that legal question, we review for abuse of discretion whether there is a sufficient factual basis for Perdomo's proffered jury instruction.

III

A defendant is entitled to have the jury instructed on his or her theory of defense, as long as that theory has support in the law and some foundation in the evidence…. A defendant "has the right to have a jury resolve disputed factual issues. However, where the evidence, even if believed, does not establish all of the elements of a defense, … the trial judge need not submit the defense to the jury." … ("[It] is well established that a criminal defendant is entitled to have a jury instruction on any defense which provides a legal defense to the charge against him and which has some foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. In the necessity context, the proper inquiry is whether the evidence offered by a defendant, if taken as true, is sufficient as a matter of law to support the defense." …

> "[T]he defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond [an] actor's control rendered illegal conduct the lesser of two evils." … In recent years, our case law has expanded the scope of the defense. We have held that a defendant may present a defense of necessity to the jury as long as the defendant "establish[es] that a reasonable jury could conclude: (1) that he was faced with a choice of evils and chose the lesser evil; (2) that he acted to prevent imminent harm; (3) that he reasonably anticipated a causal relation between his conduct and the harm to be avoided; and (4) that there were no other legal alternatives to violating the law."

A defendant must prove each of these elements to present a viable necessity defense….

Perdomo's principal argument is that these elements require a subjective analysis and that the relevant inquiry is thus into his state of mind — i.e., his allegedly genuine fear of the likely, dire medical consequences that he would have faced if he did not illegally reenter the United States. By contrast, the government asserts that the inquiry is an objective one. We agree with the government.

A careful reading of our cases on the subject reveals that we assess a defendant's proffered necessity defense through an objective framework…. In *United States v. Schoon*… (9th Cir.1992), we applied an objective standard in assessing the fourth element of a necessity defense…. We stated that "the law implies a reasonableness requirement in judging whether legal alternatives exist."…

Embedded in our recognition that a person who seeks to benefit from a justification defense must act reasonably is the principle that justification defenses necessarily must be analyzed objectively.

Schoon echoed this principle:

> "Necessity is, essentially, a utilitarian defense. It therefore justifies criminal acts taken to avert a greater harm, maximizing social welfare by allowing a crime to be committed where the social benefits of the crime outweigh the social costs of failing to commit the crime."

… We continued:

> "The law could not function were people allowed to rely on their *subjective* beliefs and value judgments in determining which harms justified the taking of criminal action."

… The latter statement follows logically from the former statement; after all, if the necessity defense were entirely subjective, then allowing a defendant to benefit from it would only advance the common good when the defendant's subjective beliefs were in alignment with an objective perspective.

More recently in *[United States v.] Arellano-Rivera,* we upheld the district court's preclusion of a defendant's proffered necessity defense, reasoning that the defendant had failed to show that he had no legal alternatives other than illegally reentering the United States…. We denied the defendant's appeal, notwithstanding his speculation that the Attorney General would have denied the defendant's application for reentry based on his advanced medical condition; the defendant's subjective belief that this legal

alternative was unavailable to him was insufficient to sustain his necessity defense….

We therefore hold that the test for entitlement to a defense of necessity is objective. The defendant must establish that a reasonable jury could conclude that (1) he was faced with a choice of evils and reasonably chose the lesser evil; (2) he reasonably acted to prevent imminent harm; (3) he reasonably anticipated a causal relation between his conduct and the harm to be avoided; and (4) he reasonably believed there were no other legal alternatives to violating the law…. It is not enough, as Perdomo argues, that the defendant had a subjective but unreasonable belief as to each of these elements. Instead, the defendant's belief must be reasonable, as judged from an objective point of view.

IV

Applying an objective standard to Perdomo's case, his argument that he was entitled to a jury instruction on the necessity defense fails on several bases. Dr. Knauf concluded that Perdomo was in no immediately dire medical condition when he was treated in the emergency room soon after crossing the border; thus Perdomo's crossing was not averting any objective, imminent harm, causing his defense to fail on the second element. Additionally, Dr. Knauf testified that there are multiple clinics in Tijuana where Perdomo could have obtained medical treatment, particularly with the money he had, and that, even assuming that his medical condition had been dire, a saline injection would have been the fastest effective means of bringing Perdomo's condition under control; thus there objectively were legal alternatives to violating the law, causing Perdomo's defense to fail on the fourth prong. Moreover, from an objective perspective, Perdomo's tactic of hiding in bushes, in dark clothing, and in a remote area, trying to escape border patrol's detection, likely thwarted rather than advanced the speedy receipt of medical treatment, meaning that the defense fails on the third prong as well.

Failure on any one of these three bases, let alone all three, was sufficient to support the district court's determination that Perdomo did not present adequate evidence to establish a prima facie case of the necessity defense. Our case law is clear that a trial judge may decline to allow evidence of a necessity defense where the defendant fails to present a prima facie case…. See, e.g., Arellano-Rivera,…("Where the evidence, even if believed, does not establish all of the elements of a defense, … the trial judge need not submit the defense to the jury." … All the more so, then, a trial court may preclude a jury instruction after having heard evidence at trial that collectively presents an insufficient factual foundation to establish the defense as a matter of law.

Perdomo was not entitled to a jury instruction regarding necessity in this case because the defense lacked a necessary foundation in evidence. Even if Perdomo's testimony were believed, he did not establish all of the elements of the defense of necessity…. The district court properly analyzed Perdomo's case under an objective framework and did not abuse its discretion when it denied Perdomo's requested jury instruction.

Affirmed.

Case Questions

1. What must a defendant do to be entitled to a jury instruction on the defense of necessity?
2. What is the difference between an objective and a subjective test? Why was that distinction important in this case?

Excuse Defenses In excuse defenses, the defendant admits to having acted unlawfully, but argues that no criminal responsibility should be imposed, given the particular circumstances accompanying the act. Examples of this type of affirmative defense include duress, insanity, and involuntary intoxication.

A person who commits a criminal act only because he or she was presently being threatened with death or serious bodily injury may assert the defense called duress/coercion. This defense is based on the theory that the person who committed the criminal act was not exercising free will. Most states do not allow the use of this defense in murder cases. In addition, coercion is difficult to establish. It fails, as we see in the next case, if there was a reasonable alternative to committing the crime, such as running away or contacting the police.

United States v. Scott

901 F.2d 871
U.S. Court of Appeals, Tenth Circuit
April 20, 1990

Seay, District Judge

Appellant, Bill Lee Scott, was found guilty by a jury and convicted of one count of conspiracy to manufacture methamphetamine in violation of 21 U.S.C. § 2, and one count of manufacturing methamphetamine in violation of 21 U.S.C. § 841(a)(1), and 18 U.S.C. § 2. Scott appeals his convictions contending that he was denied a fair trial when the district court refused to instruct the jury on the defense of coercion. We disagree, and therefore affirm the judgment of the district court.

I

Between the middle of August 1987, and the early part of January 1988, Scott made approximately six trips to Scientific Chemical, a chemical supply company in Humble, Texas. Scott made these trips at the request of co-defendant Mark Morrow. These trips resulted in Scott purchasing various quantities of precursor chemicals and laboratory paraphernalia from Scientific Chemical. Some trips resulted in Scott taking possession of the items purchased, other trips resulted in the items being shipped to designated points to be picked up and delivered at a future date. These chemicals and laboratory items were purchased to supply methamphetamine laboratories operated by Morrow in New Mexico with the assistance of Silas Rivera and co-defendants George Tannehill, Jerry Stokes, and Robert Stokes.

Scott first became acquainted with Morrow when Morrow helped him move from Portales, New Mexico, to Truth or Consequences, New Mexico, in late July or early August 1987.... Shortly thereafter, Morrow became aware that Scott was going to Houston, Texas, to sell some mercury and Morrow asked Scott if he could pick up some items from Scientific Chemical.... Scott made the trip to Scientific Chemical and purchased the items Morrow requested.... Scott subsequently made approximately five other trips to Scientific Chemical at Morrow's request to purchase various quantities of precursor chemicals and assorted labware.... During the course of one trip on August 31, 1987, Scott was stopped by Drug Enforcement Administration agents after he had purchased chemicals from Scientific Chemical.... The agents seized the chemicals Scott had purchased as well as $10,800 in U.S. currency and a fully loaded .38 Smith and Wesson.... Scott was not arrested at that time.... Scott, however, was subsequently indicted along with the codefendants after the seizure of large quantities of methamphetamine and precursor chemicals from a laboratory site in Portales in January 1988.

At trial Scott claimed that his purchase of the chemicals and labware on behalf of Morrow was the result of a well-established fear that Morrow would kill him or members of his family if he did not act as Morrow had directed. Scott further claimed that he did not have any reasonable opportunity to escape the harm threatened by Morrow. To support this defense of coercion Scott testified on his own behalf as to the nature and circumstances of the threats. Scott testified that approximately one month after the August 31, 1987, trip Morrow called him at his home in Truth or Consequences and talked him into a meeting in Houston to "get that straightened out." It was Scott's contention that Morrow might not have believed that the money and chemicals had been seized and that Morrow might have thought that he had merely kept the money....

After the trip to Houston and Scientific Chemical to confirm Scott's story about the seizure of the chemicals and cash, Morrow contacted Scott at Scott's daughter's house in Portales to have Scott make another trip to Scientific Chemical to make another purchase.... After Scott declined to make another trip, Morrow responded by stating that Scott would not want something to happen to his daughter or her house.... Scott thereafter made the trip for Morrow....

Approximately one week later, Morrow again came by Scott's daughter's house and wanted Scott to make another trip.... At some point during this discussion they decided to go for a ride in separate vehicles.... After traveling some distance, they both stopped their vehicles and pulled off to the side of the road.... Morrow pulled out a machine gun and two banana clips and emptied the clips at bottles and rocks.... Morrow stated "you wouldn't want to be in front of that thing would you?" and "you wouldn't want any of your family in front of that, would you?" ... Scott responded negatively to Morrow's statements and thereafter made another trip to Scientific Chemical for Morrow.... On another occasion, Scott testified that Morrow threatened him by stating that he had better haul the chemicals if he knew what was good for him....

Scott testified that Morrow not only knew his adult daughter living in Portales, but that he knew his wife and another daughter who were living in Truth or Consequences and that Morrow had been to the residence in Truth or Consequences…. Scott testified that he made these trips for Morrow because he feared for the safety of his family in light of the confrontations he had with Morrow…. Scott stated he had no doubt that Morrow would have carried out his threats…. Scott was aware of information linking Morrow to various murders…. Scott further testified that he did not go to the police with any of this information concerning Morrow because he had gone to them before on other matters and they did nothing…. Further, Scott believed that Morrow had been paying a DEA agent in Lubbock, Texas, for information regarding investigations….

On cross-examination Scott testified that all of Morrow's threats were verbal, … that he saw Morrow only a few times between August 1987 and January 1988, … that he had an acquaintance by the name of Bill King who was a retired California Highway Patrolman living in Truth or Consequences, … and that he could have found a law enforcement official to whom he could have reported the actions of Morrow….

II

A coercion or duress defense requires the establishment of three elements: (1) an immediate threat of death or serious bodily injury, (2) a well-grounded fear that the threat will be carried out, and (3) no reasonable opportunity to escape the threatened harm….

Scott proffered a coercion instruction to the district court in conformity with the above elements. Scott … contended that the testimony before the court concerning coercion was sufficient to raise an issue for the jury and that a coercion instruction should be given. The district court found that Scott had failed to meet his threshold burden as to all three elements of a coercion defense. Accordingly, the district court refused to give an instruction on the defense of coercion.

Scott contends that the district court committed reversible error by substituting its judgment as to the weight of his coercion defense rather than allowing the jury to decide the issue. Scott maintains that he presented sufficient evidence to place in issue the defense of coercion and that it was error for the district court to usurp the role of the jury in weighing the evidence. We disagree and find that the district court acted properly in requiring Scott to satisfy a threshold showing of a coercion defense, and in finding the evidence insufficient to warrant the giving of a coercion instruction. In doing so, we find the evidence clearly lacking as to the third element for a coercion defense—absence of any reasonable opportunity to escape the threatened harm.

Only after a defendant has properly raised a coercion defense is he entitled to an instruction requiring the prosecution to prove beyond a reasonable doubt that he was not acting under coercion when he performed the act or acts charged….

The evidence introduced must be sufficient as to *all* elements of the coercion defense before the court will instruct the jury as to such defense…. If the evidence is lacking as to any element of the coercion defense the trial court may properly disallow the defense as a matter of law and refuse to instruct the jury as to coercion…. Consequently, a defendant who fails to present sufficient evidence to raise a triable issue of fact concerning the absence of any reasonable opportunity to escape the threatened harm is not entitled to an instruction on the defense of coercion….

The evidence in this case as to Scott's ability to escape the threatened harm wholly failed to approach the level necessary for the giving of a coercion instruction. Scott's involvement with Morrow covered a period of time in excess of one hundred twenty-five days. Scott's personal contact with Morrow was extremely limited during this time. Scott had countless opportunities to contact law enforcement authorities or escape the perceived threats by Morrow during this time. Scott made no attempt to contact law enforcement officials regarding Morrow's activities. In fact, Scott even failed to take advantage of his acquaintance, King, a retired law enforcement official, to seek his assistance in connection with Morrow's threats and activities. Scott's failure to avail himself of the readily accessible alternative of contacting law enforcement officials is persuasive evidence of the hollow nature of Scott's claimed coercion defense…. Clearly, the record establishes that Scott had at his disposal a reasonable legal alternative to undertaking the acts on behalf of Morrow….

Morrow did not accompany Scott when he made the purchases nor was there any evidence that Scott was under surveillance by Morrow. In fact, Scott's contact with Morrow was limited and he admitted he saw Morrow only a few times during the course of his involvement on behalf of Morrow between August 1987 and January 1988. Based on all of these circumstances, the district court was correct in finding that Scott had failed to establish that he had no reasonable opportunity to escape the threatened harm by Morrow.

III

In conclusion, we find that Scott failed to present sufficient evidence to establish that he had no reasonable opportunity to escape the harm threatened by Morrow. Accordingly, the district court properly refused to instruct the jury as to the defense of coercion. We affirm the judgment of the district court.

Case Questions

1. What must a defendant do to be entitled to a jury instruction on the defense of coercion?
2. Given the facts of this case, why did the trial court refuse to give the instruction?

The law also recognizes that occasionally police officers induce innocent people to commit crimes. When this occurs, the person so induced can raise an affirmative defense called entrapment. If an officer provides a person who is previously disposed to commit a criminal act with the opportunity to do so, that is not entrapment. If, however, an officer placed the notion of criminal wrongdoing in the defendant's mind, and that person was previously indisposed to commit the act, entrapment has occurred, and the charges will be dismissed. In entrapment cases, the defendant admits to having committed a criminal act, but the law relieves him or her of criminal responsibility in order to deter police officers from resorting to this tactic in the future.

Intoxication is frequently recognized as a defense in limited circumstances. Most jurisdictions distinguish between voluntary and involuntary intoxication. Most do not recognize voluntary intoxication as a defense to general intent crimes, and some do not recognize it at all—Hawaii is one example. In many states, however, a person who commits a specific intent crime while voluntarily intoxicated may have a defense if the intoxication is quite severe. In those jurisdictions a defendant cannot be convicted of a specific intent crime if the intoxication was so severe that the person was incapable of forming specific intent. Involuntary intoxication, however, completely relieves a defendant of all criminal responsibility. This could occur, for example, when a defendant inadvertently ingests incompatible medicines.

Insanity is one of the least used and most controversial defenses. A defendant who claims insanity admits to having committed the act, but denies criminal responsibility for that act. Because insanity is a legal and not a medical term, jurisdictions use different tests to define insanity. The M'Naghten Rule specifies that a defendant is not guilty if he or she had a diseased mind at the time of the act and was unable to distinguish right from wrong or was unaware of the nature and quality of his or her act due to a diseased mind. The irresistible impulse test specifies that a defendant is not guilty if he or she knows that an act is wrong and is aware of the nature and quality of the act, but cannot refrain from committing the act. The Model Penal Code specifies that a defendant is not criminally responsible for his or her conduct due to either mental disease or defect and if the defendant lacked substantial capacity to understand its criminality or comply with legal requirements. The states of Idaho, Utah, and Montana do not recognize insanity as a defense.

CRIMINAL PROCEDURE

Criminal procedure is that area of the law that deals with the administration of criminal justice, from the initial investigation of a crime and the arrest of a suspect through trial, sentence, and release.

The goal of criminal justice is to protect society from antisocial activity without sacrificing individual rights, justice, and fair play. The procedures used to apprehend and prosecute alleged criminal offenders must comply with the requirements of the law. One objective of using an adversarial

system involving prosecutors and defense attorneys is to ensure that procedural justice is accorded the defendant. The judge umpires the confrontation between the litigants and tries to ensure that both parties receive a fair trial—one that accords with the requirements of the substantive and procedural law. The judge or jury determines the guilt or innocence of the accused by properly evaluating the facts presented in open court. Ideally, the truth emerges from adversarial proceedings conducted in a manner consistent with constitutional guarantees. (See Figure 8.3.)

The constitutional limitations on the way governmental officials procedurally go about investigating criminal offenses and prosecuting alleged criminal offenders are primarily contained in the very general statements of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution. The U.S. Supreme Court, as well as the other federal and state courts, have played a significant role in determining what these amendments actually mean in practice. Does the Constitution mandate that arrested persons who are indigent be provided a court-appointed attorney? Does the Constitution require that twelve-person juries be convened in criminal cases, or are six-person juries sufficient? Do defendants have a constitutional right to be convicted beyond a reasonable doubt by a unanimous jury, or can a guilty verdict be received that is supported by nine out of twelve jurors?

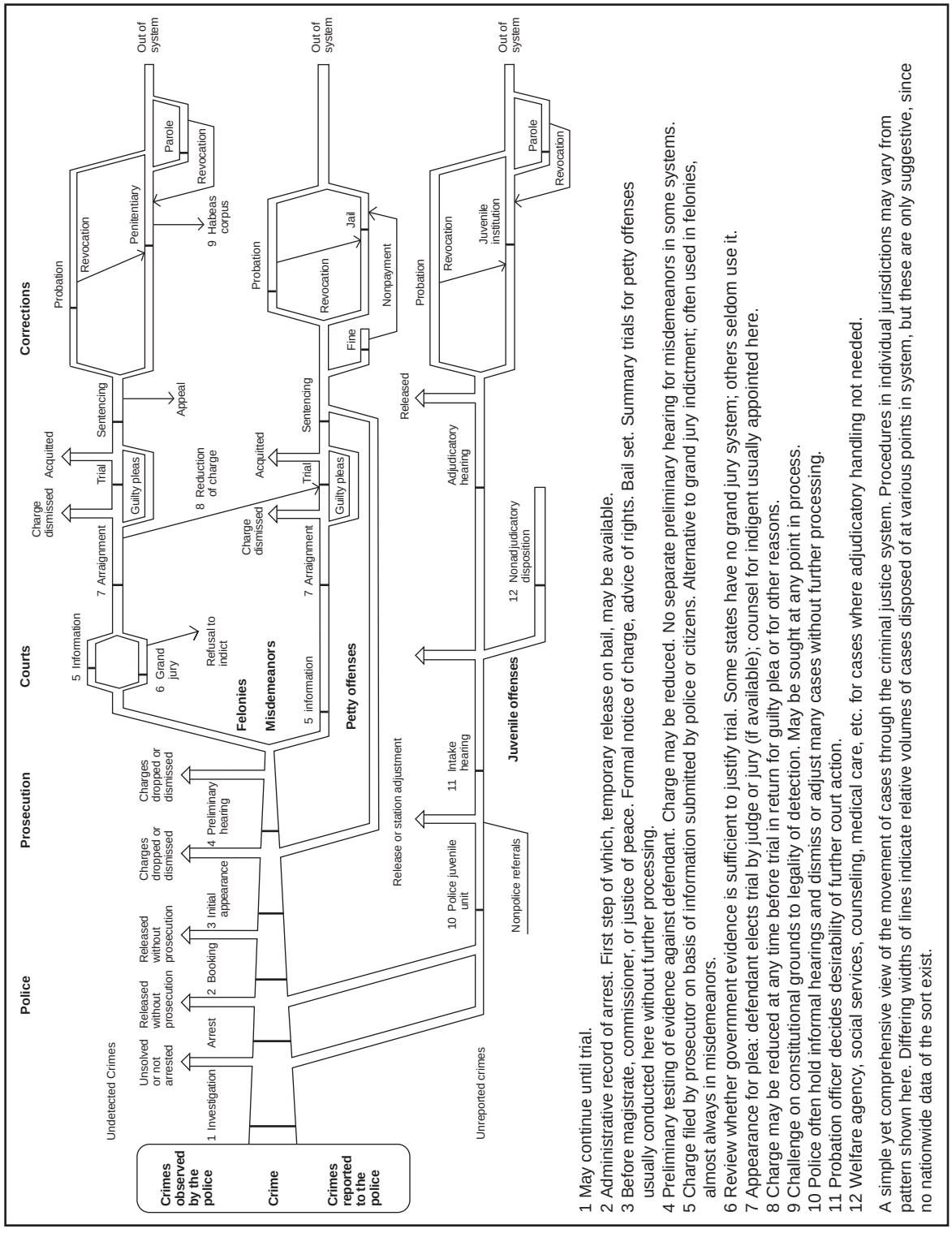
PROCEEDINGS PRIOR TO TRIAL

A criminal trial occurs only after several preliminary stages have been completed. Although there are some jurisdictional variations in the way these stages occur, some generalizations can be made. The "typical" criminal prosecution originates with a police investigation of a crime that has been either reported to officers or that officers have discovered through their own initiative. This investigation establishes if there really was a crime committed, and if so, determines the identity and whereabouts of the offender. In their investigations, officers are limited by federal and state constitutional and statutory law: (1) They are only permitted to make arrests if they have sufficient evidence to constitute probable cause; (2) they are also limited in conducting *searches* making seizures; and (3) they are limited in the way they conduct custodial interrogations and line-ups. The failure to follow correct procedures in the preliminary stages of a criminal case can result in the suppression of evidence and the dismissal of the charges filed against the accused. Violations of a defendant's constitutional rights can also result in a civil and/or criminal lawsuit against the responsible police officers.

Arrest

An arrest occurs when an officer takes someone into custody for the purpose of holding that person to answer a criminal charge. The arrest must be made in a reasonable manner, and the force employed must be reasonable in proportion to the circumstances and conduct of the party being arrested. The traditional rule was that police officers could make arrests in felonies based on probable cause, but officers were required to observe the commission of a misdemeanor offense in order to make a valid arrest. Today, many states have repealed the in-presence requirement and permit officers to make arrests for both misdemeanors and felonies based on probable cause. Probable cause means that the arresting officer has a well-grounded belief that the individual being arrested has committed, or is committing, an offense.

If police officers intend to make a routine felony arrest in a suspect's home, the U.S. Supreme Court has interpreted the U.S, Constitution as requiring that the officers first obtain an arrest warrant. An arrest warrant is an order issued by a judge, magistrate, or other judicial officer commanding the arresting officer to take an individual into custody and to bring the person before the court to answer criminal charges. Before the court will issue a warrant, a complaint containing the name of the accused, or a description of the accused, must be filed. The complaint must be supported by affidavits and contain a description of the offense and the



1 May continue until trial.
2 Administrative record of arrest. First step of which, temporary release on bail, may be available.
3 Before magistrate, commissioner, or justice of peace. Formal notice of charge, advice of rights. Bail set. Summary trials for petty offenses usually conducted here without further processing.
4 Preliminary testing of evidence against defendant. Charge may be reduced. No separate preliminary hearing for misdemeanors in some systems.
5 Charge filed by prosecutor on basis of information submitted by police or citizens. Alternative to grand jury indictment; often used in felonies, almost always in misdemeanors.
6 Review whether government evidence is sufficient to justify trial. Some states have no grand jury system; others seldom use it.
7 Appearance for plea: defendant elects trial by judge or jury (if available); counsel for indigent usually appointed here.
8 Charge may be reduced at any time before trial in return for guilty plea or for other reasons.
9 Challenge on constitutional grounds to legality of detection. May be sought at any point in process.
10 Police often hold informal hearings and dismiss or adjust many cases without further processing.
11 Probation officer decides desirability of further court action.
12 Welfare agency, social services, counseling, medical care, etc. for cases where adjudicatory handling not needed.

A simple yet comprehensive view of the movement of cases through the criminal justice system. Procedures in individual jurisdictions may vary from pattern shown here. Differing widths of lines indicate relative volumes of cases disposed of at various points in system, but these are only suggestive, since no nationwide data of the sort exist.

FIGURE 8.3 General View of the Criminal Justice System

surrounding circumstances. A warrant is then issued if the court magistrate decides that (1) the evidence supports the belief that (2) probable cause exists to believe that (3) a crime has been committed and that (4) the suspect is the probable culprit. Many times, the complaining party does not have first-hand information and is relying on hearsay. The warrant may still be issued if the court believes that there is substantial basis for crediting it.

Some policing agencies, such as the FBI, make a large number of arrests based on warrants. Most arrests, however, are made without a warrant, as illustrated in the following *Draper* case. This case also explains what constitutes probable cause to arrest.

Draper v. United States
358 U.S. 307
U.S. Supreme Court
January 26, 1959

Mr. Justice Whittaker delivered the opinion of the Court

The evidence offered at the hearing on the motion to suppress was not substantially disputed. It established that one Marsh, a federal narcotic agent with 29 years' experience, was stationed at Denver; that one Hereford had been engaged as a "special employee" of the Bureau of Narcotics at Denver for about six months, and from time to time gave information to Marsh regarding violations of the narcotic laws, for which Hereford was paid small sums of money, and that Marsh had always found the information given by Hereford to be accurate and reliable. On September 3, 1956, Hereford told Marsh that James Draper (petitioner) recently had taken up abode at a stated address in Denver and "was peddling narcotics to several addicts" in that city. Four days later, on September 7, Hereford told Marsh "that Draper had gone to Chicago the day before [September 6] by train [and] that he was going to bring back three ounces of heroin [and] that he would return to Denver either on the morning of the 8th of September or the morning of the 9th of September also by train." Hereford also gave Marsh a detailed physical description of Draper and of the clothing he was wearing, and said that he would be carrying "a tan zipper bag" and habitually "walked real fast."

On the morning of September 8, Marsh and a Denver police officer went to the Denver Union Station and kept watch over all incoming trains from Chicago, but they did not see anyone fitting the description that Hereford had given. Repeating the process on the morning of September 9, they saw a person, having the exact physical attributes and wearing the precise clothing described by Hereford, alight from an incoming Chicago train and start walking "fast" toward the exit. He was carrying a tan zipper bag in his right hand and the left was thrust in his raincoat pocket. Marsh, accompanied by the police officer, overtook, stopped and arrested him. They then searched him and found the two "envelopes containing heroin" clutched in his left hand in his raincoat pocket, and found the syringe in the tan zipper bag. Marsh then took him (petitioner) into custody. Hereford died four days after the arrest and therefore did not testify at the hearing on the motion.... [T]he Narcotic Control Act of 1956 ... provides in pertinent part:

> "The Commissioner ... and agents, of the Bureau of Narcotics ... may— ...
>
> "(2) Make arrests without warrant for violations of any law of the United States relating to narcotic drugs ... where the violation is committed in the presence of the person making the arrest or where such person had reasonable grounds to believe that the person to be arrested has committed or is committing such a violation."

The crucial question for us then is whether knowledge of the related facts and circumstances gave Marsh "probable cause" within the meaning of the Fourth Amendment, and "reasonable grounds" ... to believe that petitioner had committed or was committing a violation of the narcotic laws. If it did, the arrest, though without warrant, was lawful....

Petitioner ... contends (1) that the information given by Hereford to Marsh was "hearsay" and, because hearsay is not legally competent evidence in a criminal trial, could not legally have been considered, but should have been put out of mind by Marsh in assessing whether he had "probable cause" and "reasonable grounds" to arrest petitioner without a warrant, and (2) that, even if hearsay could lawfully have been considered, Marsh's information should be held insufficient to show "probable cause" and "reasonable grounds" to believe that petitioner had violated or

was violating the narcotic laws and to justify his arrest without a warrant.

Considering the first contention, we find petitioner entirely in error. *Brinegar v. United States*, 338 U.S. 160 … has settled the question the other way. There, in a similar situation, the convict contended "that the factors relating to inadmissibility of the evidence [for] *purposes of proving guilt at the trial*, deprive[d] the evidence as a whole of sufficiency to show probable cause for the search…." But this Court, rejecting that contention, said: "[T]he so-called distinction places a wholly unwarranted emphasis upon the criterion of admissibility in evidence, to prove the accused's guilt, of facts relied upon to show probable cause. The emphasis, we think, goes much too far in confusing and disregarding the difference between what is required to prove guilt in a criminal case and what is required to show probable cause for arrest or search. It approaches requiring (if it does not in practical effect require) proof sufficient to establish guilt in order to substantiate the existence of probable cause. There is a large difference between the two things to be proved [guilt and probable cause], as well as between the tribunals which determine them, and therefore a like difference in the *quanta* and modes of proof required to establish them." …

Nor can we agree with petitioner's second contention that Marsh's information was insufficient to show probable cause and reasonable grounds to believe that petitioner had violated or was violating the narcotic laws and to justify his arrest without a warrant. The information given to narcotic agent Marsh by "special employee" Hereford may have been hearsay to Marsh, but coming from one employed for that purpose and whose information had always been found accurate and reliable, it is clear that Marsh would have been derelict in his duties had he not pursued it. And when, in pursuing that information, he saw a man, having the exact physical attributes and wearing the precise clothing and carrying the tan zipper bag that Hereford had described, alight from one of the very trains from the very place stated by Hereford and start to walk at a "fast" pace toward the station exit, Marsh had personally verified every facet of the information given him by Hereford except whether the petitioner had accomplished his mission and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of Hereford's information being thus personally verified, Marsh had "reasonable grounds" to believe that the remaining unverified bit of Hereford's information—that Draper would have the heroin with him—was likewise true.

"In dealing with probable cause … as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*. Probable cause exists where "the facts and circumstances within … [the arresting officer's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed….

We believe that, under the facts and circumstances here, Marsh had probable cause and reasonable grounds to believe that petitioner was committing a violation of the laws of the United States relating to narcotic drugs at the time he arrested him. The arrest was therefore lawful, and the subsequent search and seizure, having been made incident to that lawful arrest, were likewise valid. It follows that petitioner's motion to suppress was properly denied and that the seized heroin was competent evidence lawfully received at the trial.

Affirmed.

Case Questions

1. Why did the Supreme Court allow hearsay evidence to be used to establish probable cause, when it would have been inadmissible at trial?
2. Do you believe that an officer who has time to obtain an arrest warrant should have to do so in lieu of making a warrantless arrest in a public place?

Custodial Interrogation

Part of the criminal investigative procedure involves questioning suspects with the aim of obtaining confessions and disclosures of crimes.

The privilege against self-incrimination applies to this questioning done outside the courtroom as well as at the trial. In general, only statements that are voluntarily made by a suspect are admissible.