

CHAPTER 4

EXTENDING CRIMINAL LIABILITY: INCHOATE OFFENSES AND PARTIES TO CRIME

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LECTURE OUTLINE

I. Introduction

Inchoate offenses are incomplete crimes. They are also referred to as anticipatory offenses. Included in this category of offenses include attempts, conspiracy, and solicitation. Discuss with students the fact that the criminal act in these situations goes beyond the mere thought process. This may be conveyed through examples since students were just exposed to the requirement for criminal liability, and are now told that an incomplete act will still result in criminal liability.

Also, in many jurisdictions, the level of culpability for the inchoate offense will be higher for the more extended degree of involvement toward completion of the criminal offense. For instance, the person who shoots and misses the intended victim will be treated more harshly than the person who sits in a tavern trying to hire the hit man to murder his wife. The greater degree of potential harm often affects the degree of the offense charged.

II. Criminal Attempt

A. The Act Requirement

Since criminal liability is dependent on the concurrence of a criminal mental state with the commission of a criminal act, the attempt to commit the criminal act may be sufficient. Discuss the substantial step made in furtherance of the commission of an offense, contrasted with the mere planning or preparation to commit the criminal offense. Explain why one may be the subject of criminal liability while the other is not.

B. Preparation

Last step test requires that the actor took the last step or performed the last act toward the commission of the offense that was intended. This test made it difficult to prevent the occurrence of the intended offense because it was nearly impossible to stop the completion of the intended crime.

The physical proximity test was the traditional test used at Common Law. Remote acts that led to the commission of the offense were not considered sufficient for an attempt. Instead, only those acts immediately connected with and sufficiently near the commission of the completed offense were considered as constituting an attempt.

The dangerous proximity test was developed through case law in an opinion authored by Justice Holmes. The test incorporates the physical proximity standard, but requires the conduct to be in dangerous proximity to succeeding at the commission of the intended offense.

Also discuss the indispensable element test, unequivocal test, and the probable desistance test. The Model Penal Code has adopted the substantial step test, which is used in most states and the federal courts. Whether or not the acts leading up to the intended commission of the completed offense constitutes the crime of attempt will depend upon the unique circumstances of each case.

C. Defenses

Two defenses generally exist for someone who is charged with an attempt to commit a criminal offense. These are abandonment and factual impossibility. Abandonment is a voluntary renunciation of the intention to commit the offense. As an affirmative defense, the accused must establish that there was the complete withdrawal of the intended course of action, and that such was not the mere result of delay, accident, disaster, or some other inability to continue toward the completion of the offense.

Impossibility can be either factual or legal impossibility. The first entails a claim by the accused that completion of the intended crime was factually impossible. For example, a person who offers to sell a controlled substance, which does not factually exist and cannot be obtained, may still be criminally responsible for a criminal offense of trafficking in drugs. Legal impossibility is based upon a claim that the attempted offense is really no offense at all. The examples are more

subtle but, for instance, a person cannot be prosecuted for attempted murder of a person he/she subjectively believes is alive but is actually already dead.

D. Completed Offense

An attempt to commit the intended offense is usually a lesser included offense, meaning the actor cannot commit the intended offense without also committing the attempt. In the criminal prosecution, the offenses merge into the completed offense and the accused is only sentenced on that charge.

E. Punishment

At Common Law, attempts were punished as misdemeanors. However, in most modern statutory sentencing provisions, an attempt is punished as one degree less than the intended offense. Discuss the legislative intent on why attempts are not punished the same since the intended harm is not completed.

III. Criminal Conspiracy

A conspiracy is an agreement between two or more persons to commit a crime. First formulated by the English Star Chamber, it is now a powerful tool for the prosecution to charge individuals who seemingly have only a tenuous connection to the crime that is being contemplated.

A. Doctrine of Complicity

Complicity means that the persons have acted in consort with each other, although modern law rarely requires that the participants know exactly who and how many persons may be involved in the conspiracy. Challenge students to provide examples from historical cases and movies where the parties have undertaken different measures in order to carry out their objectives.

B. Elements of the Crime

The elements of a criminal conspiracy are an agreement between two or more persons, to carry out a crime, with the culpable intent on the part of the parties to that agreement.

C. Plurality Requirement

The essence of the conspiracy is the agreement. It does not have to be in the nature of a contractual relationship, but only that express or implied agreement to carry out a criminal objective. The criticism that parties should not be punished

for what they think is rendered irrelevant when it is proven they acted in agreement with the necessary intent.

Wharton's rule is that there is no conspiracy when an insufficient number of persons required to commit the offense agree upon the criminal objective. That rule has not been adopted into the Model Penal Code.

D. Required Intent

The parties must have the intent to reach an agreement and carry out the criminal objective.

E. Parties to a Conspiracy

The parties do not need to know each other, how many others are involved, or even aware of the precise involvement of any others in the conspiracy. Discuss the wheel and chain conspiracies.

The co-conspirator rule hearsay rule applies to conspiracy cases in that the statements of conspirators made during planning in furtherance of the crime are admissible, even if the co-conspirator is not available to testify.

F. Duration of Conspiracy

The conspiracy continues until the criminal objective is completed or abandoned by all those involved. To constitute a withdrawal, the conspirator must communicate that to the other known co-conspirators, and notify law enforcement of the criminal objective before it occurs. This must be done voluntarily in order to constitute a defense.

G. Acts in Furtherance of the Conspiracy

All jurisdictions require that some act in furtherance of the conspiracy occur to satisfy the actus reus requirement

Pinkerton's Rule applies provides that conspirators are responsible for the acts of their co-conspirators that are taken in furtherance of the conspiracy. Explain to the students how it applies to overt acts.

IV. Criminal Solicitation

Students often confuse this with solicitation, a prostitution-related offense. Explain how the criminal act entails the solicitation of another through request, encouragement, or inducement to commit a criminal offense. Generally requires the

intent to induce another to commit an offense, but there is no requirement that the offense be committed or the other party agree. The harm is that, even if unsuccessful, the actor here will keep trying to procure someone to commit the offense until he is successful or apprehended. This is not a separate offense, but entails the solicitation to commit a separately defined crime.

V. Parties to Crime

Most modern day statutory criminal law has attempted to clarify the complex scheme involving principals and accessories. Explain these differences and how a principal in the second degree or accessory before the fact is now known as an accomplice. Accessories after the facts generally fall into the category of offenses that prohibit impeding the investigation of a crime, such as obstruction of justice.

A. Relationship of Complicity

Most modern day statutory criminal law makes no distinction between a principal in the second degree and accessory before the fact. One who aids and abets in the commission of the offense is usually treated as a principal offender, that is, the same as the person who actually is present and commits the offense.

B. Accomplice Liability

Accomplice liability is based upon a person who aids and abets the commission of an offense. This is done by the strengthening, assisting, encouraging, or providing the means for the commission of the offense. It is not necessary that the accomplice be present at the actual time of commission. However, merely being present at the crime scene does not render someone an accomplice.

C. Accessory

Although an accessory before the fact now falls into the category of an accomplice, the accessory after the fact was one who provided assistance to the individual who committed the offense to avoid detection and apprehension. Discuss the common law offense of misprision of a felony, the failure to report a known felony, which is not an offense in most jurisdictions. The person who actively aids the principal offender usually can be prosecuted under such statutorily defined offenses such as tampering with evidence, obstruction of justice, etc.

D. The Criminal Liability of Corporations

Under the Model Penal Code and in many modern statutes, the trend is to hold the corporation liable for the acts of the employee that were done in furtherance of the

corporations business. Courts have adopted a number of doctrines that enlarge the scope of corporate liability for employee misconduct, most notably that of the collective knowledge doctrine. Discuss examples, including the application of this concept to strict liability offenses and minor offenses that are regulatory in nature.

Corporate criminal liability has evolved to include all types of offenses, including traditional crimes against the person, such as battery and murder.

E. Vicarious Liability

This theory of fault imposes criminal liability upon a party for the criminal acts of another. Generally, this involves regulatory offenses and the most prevalent is the imposition of liability upon an employer for the criminal act of the employee.

Persons who are vicariously liable may be punished in the same manner and to the same extent as the individual who committed the act leading to liability.

RESEARCH PAPER TOPICS

1. When President Lincoln was assassinated in 1865, a number of persons were eventually, charged, tried, and convicted for their involvement. Research who these persons were, what they did, what were they charged with, and what happened to them?

STUDENT ACTIVITIES

1. In your state's criminal code, identify the following:
 - a. What is complicity called, what are the elements of the offense, and what is the degree of offense relative to the crime that is committed?
 - b. What is conspiracy called, what are the elements of that offense, is any other act required by anyone, and what is the degree of offense relative to the crime that is being planned?
 - c. What are the offenses that could be classified in the category of someone who gives aid to an offender after the commission of an offense?
 - d. Research the Pinkerton Doctrine. What is it? How did it originate? Discuss the merits, value and implications this doctrine has in a prosecution for conspiracy. Has your state adopted the doctrine as a theory of criminal liability?

REFERENCES AND RESOURCES

1. *The Pinkerton Doctrine and Murder*, Matthew A. Pauley, J.D., Ph.D., Harvard University, *Pierce Law Review*, Volume 4, No. 1.

