

Wednesday, January 11, 2017

Lecture One

Criminal Law

- Law: Legitimate exercise of state power
- Criminal Law: Legitimate exercise of state force against individual that engages liberty

Jurisdiction

- In Canada, criminal law is Federal Jurisdiction — *Constitution Act*, 1867 s. 91(27)
- *However* Provinces have legislative competence to put into place certain regulatory penalties with fairly severe consequences ss. 92 (13) (15) and (16)
- Both have certain prohibitions outside of *Criminal Code*

What is Crime and Who Decides?

- How is crime defined?
- How is criminal law deployed in government?
- Who benefits and how?
- What systems are engaged?
- How is the public involved?

Wednesday, January 18, 2017

Lecture Two

Foundational Concepts

- Presumption of Innocence
- Burden of Proof
- Beyond a Reasonable Doubt

Crime

- Any act or omission of an act that is prohibited and punishable by federal statute

Law Reform Commission of Canada

4 conditions must exist for an act to be considered a crime:

1. The act is considered wrong by society
2. Act causes harm to society in general or to those who need protection
3. The harm must be serious
4. The remedy must be handled by the criminal justice system

Criminal Law Definition

- The body of laws that prohibit and punish acts that injure individual people, property and the entire community

Criminal Code of Canada

- Federal statute that contains the majority of the criminal laws passed by Parliament
- Lists crimes, sentences and procedures to follow when trying those accused of crimes
- Amendments to the code are made when the values of Canadian society change

Change Over Time and Place

- Prostitution is legal in some European countries and legality has recently changed in Canada
- Adultery used to be a criminal offence in Canada

Changes Over Time and Place

- Possession of marijuana less serious today (and government is considering legalization)
- 1795: Twelve people hanged in Halifax for the crime of theft, one for stealing a few potatoes
- No longer capital punishment in Canada

Example: Sexual Abuse

- On October 18, 1999 Parliament passed Bill C-7 making records of pardoned sex offenders available for background checks
- Also, outdated laws can be revised or repealed
 - Ex. In 1976 sentencing option of capital punishment removed

History

- Canada's first Prime Minister, John A. MacDonald, strongly advocated having one set of criminal laws for the whole country
- So, in July 1882, Canadian Parliament passed a statute called the Criminal Code of Canada which combined a description of crimes and criminal law procedure into a single statute
- The code has been amended every year since

Today, there are approximately 850 sections. It is still difficult to include all crimes in the Code, so other federal laws now contain criminal offences that are not in the Code or in enough detail in the Code. These include:

- Controlled Drug and Substances Act
- Customs Act
- Youth Criminal Justice Act
- Competition Act
- Food and Drug Act
- Income Tax Act

*** Authority for administering the Criminal Justice System is shared between the federal and provincial governments

Quasi-Criminal Laws

- Technically, laws passed by provinces or municipalities are not considered criminal laws but **quasi-criminal laws**
- These are less serious offences and the usual punishment is paying a fine

Types of Offences

- Indictable
- Hybrid
- Summary

Actus Reus

- The illegal act

Elements of a Crime

- To convict a person of a criminal offence in Canada, the Crown must usually prove that two elements accosted at the time the offence was committed: the act itself and the intention to commit the act
- Actus Reus + Mens Rea = CRIME

Actus Reus

- “The guilty act”
- Demonstrates a voluntary action, omission or state of being that is prohibited by law

Mens Rea

- “The guilty mind”
- Demonstrates that the act was intentional, knowing, negligent, reckless or willfully blind

Actus Reus Overview

- Physical element of criminal offence

Actus Reus

- Latin for “guilty act”
- Physical component
- The act or omission (failure to act) that has been identified by Parliament as sufficiently harmful to warrant state intervention
- It is usually very easy to determine the actus reus of a crime by reading the Code

What is the Actus Reus of Homicide?

- Causing the death of a human being

Actus Reus Cont.

- The actus reus of an offence is not always so easy to determine
- This is where it is necessary for judges to interpret the law and apply precedents
- Actus reus must be committed voluntarily — it must be the conscious choice of an operating mind
- People are not held criminally responsible for actions they cannot control

To Ascertain Actus Reus (Any Offence)

- Determine through the Code and common law
- Read charging sections of the Code and ask whether common law elements such as voluntariness and causation must be proven

Exceptions to Actus Reus

- Being forced by another person
- Sleepwalking
- Reflex reaction (Ex. Epileptic seizure)

Challenging Issues

- Two most challenging issues for criminal law:
 - Omissions as actus reus
 - Principles of causation

Two Types of Incomplete Crimes

1. Attempt
2. Conspiracy

Attempt

- The intention to commit a crime, even when the crime is not completed
- The Crown only needs to prove obvious steps toward committing a crime

Conspiracy

- An agreement between 2 or more people to carry out an illegal act, even if that act does not actually occur

Act/Omission

- Can the offending conduct properly be characterized as an act or omission? (Ex. *Thornton*)
- Can the offence be committed by way of omission, either explicitly (read Code) or implicitly? (Ex. *Moore*)
- In an omissions offence, what is source of duty? (Compare *Instan*, *Urbanovich* and *Thornton*)
- Was duty breached? (Compare *Beardsley* and *Urbanovich*)

Voluntariness

- Criminally responsible for one's conscious/willed actions
- Like "sanity," "voluntariness" legally presumed: A bears burden of proving involuntariness on a balance of probabilities as per *Stone*
- Sources of involuntariness include physical blow, psychological blow, sleepwalking

Wednesday, January 25, 2017

Actus Reus

- Latin for "guilty act"
- Physical component
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Elements of a Crime

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Mens Rea

- Latin for "guilty mind"
- Mental component
- Moral guilt
- A person must be found to have had the necessary "state of mind" or mens rea for the offence before they can be found guilty
- It is irrelevant whether or not the person knew the act was illegal
 - Ignorance of the law is not an excuse

Objective Intent

- What a reasonable person would have understood, perceived or foreseen in a circumstance
- Less concerned with the actual knowledge of the accused
- A lower mens rea standard

Subjective Intent

- Accused state of mind at the time of the commission (court tries to determine what the accused was thinking at the time of the offence)
- Only actual intention or knowledge of effects are relevant
- Requisite Intention:
 - The mens rea that the Crown is requires to establish in order to convict an accused of an offence (the person intended to commit the crime)

Three Types of Subjective Intent

1. Direct Intent
2. Recklessness
3. Wilful Blindness

Direct Intent

- Where a person commits intentionally a forbidden act with the knowledge of all the wrongful circumstances which statute seeks to prohibit

Recklessness

- Accused may not intend the consequences of their actions
- If they understand the real risk of the consequences they will be deemed to have intent (a reasonable person ought to know)

Wilful Blindness

- Accused has suspicion of the consequences of action and fails to inquire because they do not want to know the answer, they will be deemed to have intent (to suspect and not question)

Remember***

- The accused may not intend the consequences of their actions
- If they understand the real risk of the consequences of their actions they will be deemed to have intent (recklessness)
- If the accused has suspicions of the consequences of actions and fails to inquire because they do not want to know the answer, they will also be deemed to have intent (wilful blindness)

Intent

- Knowledge (subjective/objective) of consequences in circumstances
- Intent is not motive

Categories of Mens Rea Offences

1. Mens Rea Offences
2. Strict Liability Offences
3. Absolute Liability Offences

Mens Rea Offences

- The Crown must prove actus reus and the direct intent beyond a reasonable doubt
- This category is for serious crimes that have a sentence of 10+ years

Strict Liability Offences

- The Crown must prove actus reus and subjective intent beyond a reasonable doubt
- The accused has an opportunity to prove DUE DILIGENCE
 - The accused did everything possible to prevent the crime from occurring

Absolute Liability Offences

- The Crown must prove actus reus beyond a reasonable doubt
- No mens rea necessary
- Actus Reus = Mens Rea
- This category is for summary offences

Different Standards

- Theoretically, mens rea is a necessary element to be present in order to be convicted of a crime
- *However*, many exceptions are made to this general rule:

- For some criminal/quasi-criminal laws, no mens rea needs to be proven at all (Ex. Absolute liability offences)

What is the Mens Rea of Different Degrees of Homicide?

- Mens rea differs for first degree, second degree and manslaughter
- As per Criminal Code

Thinking Through the Cases

- *Beaver and King* discuss the requirement for mens rea
- *Ladue* deals (not satisfactorily) with the situation where the intent of the individual does "match" the physical acts of the accused
- In *Droste* the intended victim and the actual victims differed

King SCC 1965

- Individual involuntarily impaired because of drugs administered at dental office
- He drove while impaired and had a collision
- Charged with driving while impaired
- *Mens rea* of driving while impaired applies to *driving* not necessarily to *impairment as well as driving*
- Here, accused did not intend to drive while impaired; was impaired through no fault of his own
- Appeal from conviction was allowed

Ladue 1965 YTCA

- Accused charged with interfering with a dead body, had intercourse with dead woman
- He claimed he didn't know she was dead
 - Crime designed to protect grave robbing or disrespect to a dead body
- He was charged (could have been charged with attempted rape)
- Defence was mistaken belief that she was alive, which negates mens rea for interfering with a dead body
 - Here, the accused possessed the mens rea for the more serious crime of attempted rape, but committed the actus reus for the less serious crime of interfering with a dead body
- Accused's argument, "you've charged me with the wrong crime, I had mens rea for rape."
- Court said the accused's mind was not innocent
- Conviction upheld
- This is considered the innocent mistake of fact doctrine

Regina v. Droste 1982

- Accused intended to kill wife
- She managed to escape car after he beat her and set it on fire but the couple's two children died of smoke asphyxiation in the back seat of the car
- Accused was convicted of first degree murder in deaths of children
- He appealed, saying intent was to kill wife

- Appeal was dismissed
- Mind is guilty, doesn't matter if it is the wrong victim who dies

R v. Creighton

- Deceased died of cardiac arrest after accused injected her with cocaine.
- Intent was not to kill the accused, but to inject cocaine into her was reckless and an unlawful act
- Manslaughter does not require subjective foresight
 - Need objective foreseeability of the risk of bodily harm which is neither trivial nor transitory
- Accused is guilty of manslaughter

Mens Rea Overview

- Does not mean that "there is no legal guilt without moral guilty"
 - Always a possibility of conflict between law and morals
- There is no single state of mind called "mens rea"
 - Different crimes have different states of mind
- Truth: The definition of most crimes contains not only an outward and visible element but a mental element which varies according to the different nature of different crimes
- Mens rea itself has no specific meaning

Wednesday, February 1, 2017

Lecture Four

To Determine Category...

- Subjective vs. objective test?
- Burden of proof?
- Forms:
 - Absolute liability
 - Strict liability
 - Negligence
 - Recklessness/wilful blindness
 - Knowledge/intention
 - Specific states of mind

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Absolute Liability

- Historically called "strict liability"

- Proof beyond a reasonable doubt required regarding actus reus
- No mens rea or “fault” element
- No defences, except defences going to actus reus
- Strict liability category of offences narrowed substantially by Sault Ste Marie and later by Motor Vehicle Reference

Charter Section 7

- Common law principle now constitutionalized through section 7 “principles of fundamental justice” or no punishment without moral culpability
- Identify mens rea using:
 - Code & statutory interpretation
 - Common law
 - Charter section 7
 - Actual practice

Sault Ste Marie (SCC 1978)

- Arguments for Absolute Liability:
 - Mere “civil” wrongs
 - Ensures high standards of compliance
 - Administratively necessary
 - Small penalties
 - No stigma
- Arguments vs. Absolute Liability:
 - Fundamental principles of penal liability
 - No empirical evidence
 - No severe burden if defence allowed
 - Penalties can be serious
 - Some stigma

Sault Ste Marie (SCC 1978)

- Creation of new category, “strict liability”
- Crown proves actus reus; defence must prove negligence or fault, on burden of proof, via due diligence, all reasonable steps to avoid, or reasonable mistake
- Test:
 - Is it a “true crime” requiring mens rea?
 - If not, presumptively public welfare, using strict liability
 - Only absolute liability if explicit language, small penalty, clear regulatory scheme

Reference Re: Section 94 (2) of the BC Motor Vehicles Act (SCC 1985)

- Provincial offence explicitly designated as absolute liability
- Violates section 7 to combine absolute liability with possibility of imprisonment because of risk of deprivation of liberty of the “morally innocent”
- Section 1: Administrative efficiency can only be used to justify section 7 violations in extreme situations such as natural disasters and war
- Possible future distinctions if offence/penalty differentiates between people/corporations

R v. Raham [2009] O.J. No. 3669 (O.C.J.)

- Dealt with challenge to s. 172 of Highway Traffic Act (stunt driving prohibition)
- Appeal from conviction for stunt driving by speed alone
- Allowed, and conviction set aside
- As there was no due diligence defence to a charge under s. 172, the provision was unconstitutional as it created an absolute liability offence for which one could be imprisoned for six months, contrary to s. 7 of the CCRF

Strict Liability

- Largest category of regulatory offences
- Judges now play very significant role in adjudicating “fault” of corporations because must assess what amounts to “due diligence” in each regulatory context
- New Charter challenges to using ss. 7 (Motor Vehicle Reference) and 11(d) (Oakes)

Outcome of Sault Ste. Marie Case

- There are exceptions to the general rule that crimes consist of an actus reus and mens rea
- A large number of crimes and quasi-crimes do not require a mens rea to be present for criminal liability to attach
- Before Sault Ste. Marie, these types of offences were referred to as either strict or absolute liability offences
- Subsequent to Sault Ste. Marie, public welfare offences were divided into two categories:

Absolute vs. Strict Liability

- Strict Liability Offences: Allow for a defence of due diligence or reasonable care, and
- Absolute Liability Offences: No defences are available once the actus reus is proven
- ***The old category of the “true crimes” remains the same
- The rationale for categorization of strict versus absolute liability offences is detailed quite clearly in the Sault Ste. Marie case

Strict Liability

- Many regulatory laws are federal or provincial statutes
- Rationale: meant to protect the public so mens rea does not need to be proven
- Less serious offences
- Laws do not include words like wilfully or with intent
- Ex. Traffic offences, workplace safety

Strict Liability Defence of Due Diligence

- The defence is that the accused took every reasonable precaution to avoid committing a particular offence

Consider...

- What is the distinction between strict and absolute liability offences?
- Do you think the distinction is a valid one?

- What are the policy reasons given in Sault Ste. Marie to justify the categories?
- Do you agree with them? What problems remain after the case?

Wednesday, February 8, 2017

Lecture Five

Attempted Murder

- Offence requires specific subjective intent to kill

R v. Root

- Attempts: When the mens rea of the full crime is present but the actus reus is somehow interrupted

R v. Ancio

- Mens rea for attempted murder is specific intent to kill

R v. Deutsch

- Key question is distinction between preparation and attempt
- "In my opinion the distinction between preparation and attempt is essentially a qualitative one, involving the relationship between the nature and quality of the act in question and the nature of the complete offence, although consideration must necessarily be given, in making that qualitative distinction, to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location and acts under the control of the accused remaining to be accomplished. I find that view to be compatible with what has been said about the actus reus of attempt in this court and in other Canadian decisions that should be treated as authoritative on this question...In my opinion, relative proximity may give an act which might otherwise appear to be mere preparation the quality of attempt"

R v. Sorrell and Bondett

- Attempted robbery – acquittal at trial
- Acquittal upheld: "We are of the view that where the accused's intention is otherwise proved, acts which on their face are equivocal, may none the less, be sufficiently proximate to constitute an attempt. Where, however, there is no extrinsic evidence of the intent with which accused's acts were done with the intent to commit the crime that the accused is alleged to have attempted to commit, and hence insufficient to establish the offence of attempt."

R v. Scott

- Attempted "pickpocket" (at YCC Stampede)
- But no money in pickpocket
- Conviction upheld — requisite intent to steal is there
- Crown did not have to prove there way money in the pocket

R v. Smith

- Liverpool case
- Conviction is for attempt to handle stolen goods (890 cartons of corned beef)
- Police had seized goods before accused could get to them
- Conviction quashed: "A straightforward example of class one attempts where the only reason why the full offence was not committed was that the accused broke off the course of events at some stage before the full details of the crime had been worked out. "

Counselling

- Counselling is an offence under section 464 of the Code which states that it is a crime when someone counsels another person to commit an offence and that person does not commit the counselled offence
- In situations where the person does commit the offence, the provisions relating to "parties to the offence" in section 21 or section 22 are then applicable; these provisions are looked at in section 6.3
- Requires persuasion to commit a crime

R v. McLeod

- "Georgia Strait" newspaper published an article about how to grow marijuana (Vancouver)
- Newspaper and journalist convicted at trial for counselling
- Journalist acquitted on appeal; conviction upheld for newspaper

Conspiracy

- Conspiracy is a separate offence as set out in section 465 of the Code
- Whereby it is an offence to conspire to commit murder, to commit an indictable offence other than murder, and to commit an offence punishable on summary conviction, and also to conspire to falsely prosecute someone

O'Brien

- Conspiracy = agreement + common design
- Purpose of conspiracy provision is to prevent the design from being carried out

Wednesday, March 1, 2017

Lecture Seven

Sentencing

- In general section 718 of Criminal Code

Goals of Sentencing

- Section 718 of the Criminal Code gives judges some discretion with sentencing
- Basic Idea: Appropriate sentencing promotes respect for law and the maintenance of a just, peaceful and safe society

Proportionality

- Along with those principles of sentencing set out in Criminal Code is the principle of proportionality
- Recognized repeatedly by the S.C.C.
- Constitutional aspect confirmed in *R v. Ipeelee*
 - Proportionality has Charter s. 12 and s. 7 implications

Protection of the Public

- Punishing offenders keeps the rest of society safe
- The main goal of sentencing is to protect the public
- This includes protection of their person, their property and their individual rights and freedoms

Retribution

- Concept of “an eye for an eye”
- Punishing an offender to avenge a crime or to satisfy the public that the offender paid for the crime

Deterrence

- Sentencing should deter people from breaking the law
- General Deterrence: Punishment to discourage people in general from offending
- Specific Deterrence: Punishment to discourage criminals from reoffending

Restitution/Reparation

- Payment for damages
- Punishment that requires the offender to pay society back for the harm or loss suffered

Rehabilitation

- Punishment combined with treatment and training to help offenders function in society
- Helps offenders to become law abiding citizens
- Many different programs are offered to support offenders and match their needs upon release
 - Some of these programs have been shown to reduce recidivism by 50%
 - ***Not all offenders have access to programs
- Recidivism: Returning to crime after release from prison

Segregation

- Purpose of sentencing is to segregate offenders from society as punishment for the crimes they have committed
- This is done in Canada only when needed — Canadian government has moved to reduce the number of offenders who are imprisoned

Sentencing an Offender

- Judges are not free to impose sentences outside certain guidelines

- Judges are directed to:
 - Sentence decisions using the max. and min. limits specified in the Criminal Code
 - Be sure the severity of the punishment reflects the harm committed
 - Consider precedents
 - Not impose consecutive sentences that are unduly long or harsh
 - Not deprive offenders of liberty if less restrictive options are available
 - Consider all other options other than imprisonment that are available
- Judges must also consider two circumstances: Mitigating circumstances and Aggravating circumstances

Mitigating Circumstances

- Circumstances that lessen the responsibility of the offender and may decrease the severity of the sentence
- These suggest that an offender can be rehabilitated and they do not pose a threat to society, or does not need strong deterrent measures

Aggravating Circumstances

- Circumstances that increase the responsibility of the offender and may increase the severity of the sentence
- These suggest that rehabilitation is unlikely or that a strong deterrent is necessary
- Parliament defines these circumstances as an offender's bias or hatred toward the victim; evidence that the offender abused a spouse or child, abused a position of trust or authority in relation to the victim, or committed the crime in association with a criminal organization

Sentencing an Offender Cont.

- A judge must consider many factors when sentencing an offender
- Sentencing can occur immediately after the accused has been found guilty or many weeks later (serious offences)
- The judge must consider 3 different perspectives in the sentencing process

Considering an Offender

- A judge may offer a pre-sentence report:
 - Describe the offender's situation
 - Includes information about their background, family, education, employment history, physical and mental health, social activities, potential ability, motivation and friends

Considering the Victim

- The Code requires the Court to consider any statement prepared by the victim of the offence (victim impact statement)
- The Victim Impact Statement:
 - Describes the harm or loss experienced by the victim or the victim's family
 - May be read before the offender
 - Being allowed to confront the offender can be significant for victims who have suffered physical and emotional damage

Considering Society

- It is the Crown's role to ensure that society's interests are protected when the offender is sentenced

Sentencing Hearing

- At a sentencing hearing the judge considers all the facts about the crime, the offender and the victim in order to determine the appropriate sentence
- Both lawyers present their recommendations to the judge

Critical Lenses on Sentencing

- Race, class, socioeconomic status
- Disproportionate numbers of Aboriginal people and otherwise radicalized people are in prison
- Marginalized people are disproportionately imprisoned

Mandatory Minimums

- R v. Nur [2015]

Wednesday, March 8, 2017

Lecture Eight

What is a Defence?

- A defence is a denial of, or a justification for, allegedly criminal behaviour
- The common defences are on the facts
- In other situations an accused may admit to the crime but has a legal defence to excuse or justify his or her actions
- Some legal defences are *partial* and some are *total*

Common Law Defences

- While offences are codified in Criminal Code, defences available at common law continue to apply

Alibi

- A defence was raised by the accused claiming that he or she was somewhere else when the offence was committed
- The burden is not the Crown, not the accused
- If the Crown can't prove that the accused was there when the offence was committed, then the accused must be acquitted

Duress

- An accused may be excused from committing an offence if it was done under **compulsion** or **duress**, that is, the accused person is forced by the threat of violence to commit a criminal act against his or her will
- It is not a defence in violent crimes!

Necessity

- **Necessity** is a defence used when the accused has no reasonable alternative to committing an illegal act
- For this defence to succeed, all of the following conditions must be met...
 1. The accused must show that the act was done to avoid a greater harm
 2. There was no reasonable opportunity for an alternative course of action
 3. The harm inflicted must be less than the harm avoided

Self-Defence

- **Self-defence** is the use of reasonable force to defend against an attack, provided the attack was unprovoked and the force used was no more than necessary to defend yourself
- If you kill someone while defending yourself, it is **justified** only if you reasonably feared that you would be killed or seriously harmed

Battered Woman Syndrome — Factual Basis for Self-Defence Finding

- A type of self-defence where the prolonged effects of spousal abuse led to the abusive spouse being killed by the victim
- The Supreme Court of Canada found that the jury should be instructed in such cases on three elements:
 1. Why an abused woman might stay in an abusive relationship
 2. The nature and extent of the violence that may exist in the battering relationship
 3. The defendant's ability to perceive danger from her abuser
- The syndrome is not a defence in itself
- It is a psychiatric explanation for the state of mind of an accused woman, which can therefore be used to justify self-defence

Defence of Property

- This is the extension of self-defence to a dwelling house
- A **dwelling house** is any building or other structure that is occupied on a permanent or temporary basis
- A person is allowed to defend his or her dwelling from unlawful entry and to remove a trespasser if he or she has entered
- The force used must be reasonable under the circumstances

Provocation

- Any act or insult that causes a reasonable person to lose self-control
- This defence only applies to murder
- To be successfully used, the defence must prove all four of these elements:
 1. A wrongful act or insult occurred
 2. This act or insult was sufficient to deprive an ordinary person of the power of self-control
 3. The person responded suddenly
 4. The person responded before there was time for passion to cool
- It is used to reduce murder to manslaughter (R v. Stone)

Mistakes of Law and Fact

- A **mistake of law** is simply ignorance of the law and generally can not be used as a defence
- The one exception is **officially induced error**, a defence that the accused relied on erroneous legal advice from official responsible for enforcing a particular law
- A **mistake of fact** is a defence that the accused made an honest mistake that led to the breaking of the law
- The accused would not have the mens rea or guilty mind

Double Jeopardy

- The legal doctrine that an accused person cannot be tried twice for the same offence
- Holds true, whether the accused has been convicted or acquitted
- The only exception is if the Crown appeals based on a mistake of law, and the appeals court orders a new trial or change in sentence

Entrapment

- A defence against conduct that illegally induced the defendant to commit a criminal act
- The burden is on the accused to prove entrapment
- Usually the result of police undercover work
- The police can present an opportunity to commit a crime but cannot harass, bribe or induce a person to break the law
- If the judge agrees to this defence, the judge will “stay” the proceedings or stop the trial

Wednesday, March 15, 2017

Lecture Nine

Justification vs. Excuse

- **Justifications** are pleas that the conduct of the defendant was acceptable, and thus necessarily lawful
- **Excuses** do not seek to defend the conduct of the defendant per se; but seek to say that, in the particular instance, the defendant ought not be blamed for what he or she did

Recall: What is a Defence?

- A **defence** is a detail of, or a justification for, allegedly criminal behaviour
- The most common defences are on the facts
- In other situations an accused may admit to the crime but has a **legal defence** to excuse or justify his or her actions
- Some legal defences are *partial* and some are *total*

Common Law Defences

- While offences are codified in Criminal Code, defences available at common law continue to apply

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Mistake of Fact

- Accused does not have mens rea for offence

- Misinterpretation of factual circumstances
- Must be *honest* (subjective) and *reasonable* (objective)
- ***Not available in absolute liability cases

Mistake of Fact

- Often raised, and not often effective, in narcotics cases

Mistake of Law

- Generally not a defence
- However, officially induced error of law is an exception

Section 19 of Criminal Code

- "Ignorance of the law is no excuse"

Wednesday, March 22, 2017

Lecture Ten

Defeating Entrapment

- How does the Government defeat the defence of entrapment at trial? By showing:
 - The Government made no inducement or its **inducement** was **mild**
 - The accused was **predisposed** to commit the offence

Mild Inducements

- Scheme underway
- Reasonable offer
- Single offer
- Appeals to unsympathetic motive
- Merely provides opportunity

Problematic Inducements

- Government hatches scheme
- Outrageous offer
- Excessively repeated offers
- Appeals to noble motive
- Violence
- Threats of violence

Not Entrapment

- Accused Predisposed:
 - Accused hatches scheme
 - Prior criminal history
 - Possession of instrumentalities
 - Criminal know-how
 - Ready acceptance
 - Proposes further crimes

Accused *Not* Predisposed

- No criminal record
- First offence
- Otherwise law-abiding
- Weak-willed, emotionally unstable, or otherwise easily influenced or vulnerable

Defeating Entrapment

- Mild inducement
- Accused predisposed
- Nature and seriousness of offence:
 - This crime endangers the community
 - This crime is on the increase
 - Lack of effective enforcement alternatives

Defeating Entrapment

- Mild inducement
- Accused predisposed
- Nature and seriousness of offence
- Threat posed by criminal:
 - This criminal endangers the community
 - This criminal isn't slowing down
 - Lack of effective enforcement alternatives to convict this criminal

Policy Defences in Charter

- Sections 7-14 of the Charter set out rights specifically relating to criminal justice

Section 7

Right to Life, Liberty and Security of the Person

- *Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice*
- Protects against:
 - Abuse of process by government, such as corruption or criminal conduct by state agents
 - Non-specific offences or nondisclosure of evidence
- Guarantees:
 - Accused must be given a chance to defend self
 - Have case decided by an independent and impartial tribunal
 - Right to remain silent, protected by this section

Section 8

Search and Seizure

- *Everyone has the right to be secure against unreasonable search or seizure*
- Ensures:
 - Reasonableness must be met before searching person or property, or intercepting private conversations by way of a wiretap or listening device

- Depending on the situation, and your expectation of privacy, the law sets out the threshold that the government must meet before being allowed to intrude
 - In the most serious scenarios, the police might have to obtain the approval of the courts before conducting a search or seizure, as they do with search warrants or wiretap authorizations
- Heavily contested issue in drug cases

Section 9

Detention

- *Everyone has the right to be be arbitrarily detained or imprisoned*
- Guarantees:
 - If the police stop to question you, they cannot do so randomly, or on a mere hunch
 - Car cannot be pulled over unless it is for the purpose of enforcing the Highway Traffic Act or drinking and driving laws
- Section 8 and 9 require that ht police do their homework before limiting the freedom of citizens

Section 10

Procedural Protections in Police Custody

- Section 10 requires police to afford accused certain procedural protections while in custody
- *Everyone has the right on arrest or detention*
 - (a) *to be informed promptly of the reasons therefor;*
 - (b) *to retain and instruct counsel without delay ant to be informed of that right*
- Heavily litigated in drinking and driving cases, and where the Crown is relying on confessions or incriminating statements***

Section 11

Fundamental Rights and Procedural Protections that Apply to the Accused

- *Any person charged with an offence has the right*
 - (a) *to be informed without unreasonable delay of the specific offence;*
 - (b) *to be tried within a reasonable time;*
 - (c) *not to be compelled to be a witness in proceeding against that person in respect of the offence;*
 - (d) *to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;*
 - (e) *not to be denied reasonable bail without just cause;*
 - (f) *except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;*
 - (g) *not to be found guilty on an account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;*
 - (h) *if finally acquitted of the offence, not to be tried for it against and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and*

- (i) *if found guilty of the offence and if the punishment for the offence has been violated between the time of commission and the time of sentencing, to the benefit of the lesser punishment*

Section 12

Cruel and Unusual Punishment

- *Everyone has the right not to be subjected to any cruel and unusual treatment or punishment*

Section 13

Self-Incrimination

- *A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence*

Section 14

Right to an Interpreter

- *A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter*

Automatism

- "Non-insane automatism" is defence available at common law (insanity is section 16 NCRMD)
- Total defence — excuse — result is acquittal
- Automatism is the "involuntary behaviour, the state of a person who, though capable of action is not conscious of what he is doing. It means an unconscious involuntary act where the mind does not go with what is being done."
- It is a state of consciousness where the person is capable of action, but has no voluntary control over the action