**Criminal Law Outline, Fall 2015**

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**Criminal Law Outline**

**Fall 2015, Kim Taylor-Thompson**

# Overview of Criminal Justice System

## A. Why do we have the Criminal Law?

1. To designate the line between permissible and impermissible conduct
2. To promote public safety
3. To prevent police and prosecutorial abuse
4. Primarily addresses two audiences: residents and the state:
	1. **State**: here are the constraints of what you can do in criminalizing and punishing behavior.
	2. **General Public**: here’s what you can and can’t do.

**Rule of Lenity:** If there are two possible constructions of a statute, the court should construe it most favorably to the accused.

* Concerns about Notice
* Preference for letting guilty person go free than for punishing innocent person

## B. What is the Criminal Law?

1. System of norms reflecting the choices of society
2. Explanation of the limitations on state power
3. Defines crime and lays out elements of the offense.
4. Establishes range of right punishment.

## C. What Can We Punish?

1. Harmful behavior that indicates a compelling state interest.
	1. Contra: *Lawrence v. Texas,* U.S. Supreme Court, 2003
		1. Statute made it illegal for two people of the same sex to engage in intimate sexual behavior.
			1. Limits of Punishment: act must conform to the Constitution.
			2. What substantive liberties are protected under Due Proccess.
		2. **Holding:** Statute is illegal (and court overturns previous decision in *Bowers)*: individuals have a right to engage in private activities in their bedroom that do not affect the state; 14th amendment protects the fundamental liberty interest to choose personal behavior.
2. Accidents if they result in preventable, negligent, harmful behavior.

D. Why Do We Punish?Theories of punishment provide theories of fairness, provide form of social control, exercises the morality of the community and state.

1. **Retribution**: designed to punish based on desert of the criminal; punish because the punishment fits the crime.
	1. Based on Correction of Past Crimes, Not Prevention of Future.
	2. **Purpose:** redress moral wrong and restore the victim, punishment should be just and proportional to the crime.
	3. **Focus:** address the injustice/harm felt by victims, satisfy our individual need to punish and gives us comfort that we don’t need to act as vigilantes to correct behavior. Designed to be more objective and categorical, with less of an opportunity for discrimination and abuse.
	4. Problems:
		1. Does nothing to limit state power; proportionality is still subjective
		2. Whose values are being enforced?
		3. Difficult to measure actual blameworthiness and desert of crime
		4. Disregarding future consequences
		5. Not considering systemic causes of crime
2. **Rehabilitation:** designed to correct or teach a criminal how to improve, then return them to society.
	1. Based on Prevention of Future Crimes.
	2. **Focus**: Assumes that society is the problem, not the individual, improving behavior of the individual and then allowing them to go back to their communities.
		1. **Carrot vs. the stick:** help people rather than hurt them.
	3. Problems:
		1. Abuse problems: how long will it take?
		2. Trying to make you look like what the state thinks is ideal.
		3. How do we know when you have reached the goal of rehabilitation?
		4. Is the criminal system the best place for teaching this type of behavior?
	4. **History**: Used to be popular, but fell into disfavor. Right: coddling; Left: focused too much on individuals.
3. **Incapacitation:** designed to physically restrain the offender from committing crime by removing from society.
	1. Based on Prevention of Future Crimes.
	2. **Focus:** Assumes that the individual is the problem, not society, locking people away so that they can’t cause problems anymore, based on an assumption that criminals, not society, are the problem.
	3. Problems:
		1. Assumes that individual removed from society will not be immediately replaced by others who will take his place.
		2. Has a natural end: if we don’t incapacitate forever, individuals eventually returned to society, and may now be even better at committing crimes.
		3. No guidelines about how long to keep someone:
			1. Significant social and financial costs
			2. Individuals removed from their social structure may become more of a danger to society.
			3. Criminals can become replaced with others
			4. No natural limits to how long
			5. Costly
4. **Deterrence:** designed to deter specific individuals or public at large from engaging in behavior of this kind.
	1. Based on Prevention of Future Crimes.
	2. **Focus:** send a message to this individual and other individuals about possible behavior for actions, change the analysis that occurs before the commission of a crime.
	3. Two types of Deterrence:
		1. Specific: to prevent this individual from engaging in that behavior again.
		2. General: to prevent others from engaging in the same type of behavior.
	4. Problems:
		1. Assumes that individuals engage in rational cost-benefit analysis before beginning proscribed activity.
		2. Assumes awareness of punishment.
		3. Assumes that all individuals have the same range of choices before beginning criminal activity.
		4. Potential for abuse: punish different groups differently or selectively.
		5. Could encourage disproportional punishments as super deterrent.
		6. Might merely encourage the commission of a crime in a way that will avoid getting caught, not avoiding doing it altogether.

## E. United States Criminal Justice System

1. World leader in incarceration percentage.
2. Today, punishment is based on a combination of all of the purposes described
3. Structure of U.S. System:
	1. State brings a cause of action and bears the burden of proof.
	2. Always must prove the crime “beyond a reasonable doubt.”
	3. Rights of the accused built into the system:
		1. Right to a jury (more opinions, community-based, selection of jury members, possibility of nullification)
		2. Requirement of unanimity of jury (except in Louisiana and Oregon)
		3. Entitled to counsel
	4. Discretion built into the system
		1. Prosecutors decide charges
		2. Judges decide sentences
		3. Police decide who to arrest
		4. Judge determines bail
		5. Defendant decides whether to plead or testify

## F. Proportionality of Punishment to the Crime

Limitations on culpability: when punishment doesn’t fit the crime. But rarely used by court, and only very recently being expanded based mostly on evidence about juvenile brain development.

When determining proportionality, courts can consider:

* **Gross Disproportionality**: comparing punishments of other offenders within jurisdiction and in other jurisdictions.
* **Categorical Analysis**: Nature of offense in relation to the characteristics of class of offenders
1. Categorical Approach to Proportionality
	1. *Graham v. Florida,* U.S. Supreme Court, 2010
		1. Juvenile convicted of armed robbery and sentenced to life in prison without the possibility of parole.
		2. Court uses **Categorical Approach:** this is a type of penalty (life without parole) that applies to a specific type of offender (juveniles) to determine Cruel and Unusual (8th Amendment).
		3. Considerations:
			1. Statistics on which jurisdictions allow these punishments
				1. No overwhelming consensus: many states allow for it.
			2. Actual state practices within those jurisdictions
				1. BUT, few jurisdictions actually impose this punishment
			3. Secondary Consideration: International Comparison:
				1. U.S. only country at the time with any sentence like this.
			4. **Holding:** Life without parole for juveniles for non-homicide offenses is categorically cruel and unusual so as a result there is not a purpose of punishment that is met by this punishment.
				1. Minors have less culpability than adults.
				2. Minors are more capable of change.
				3. Adolescents’ brains are not fully formed.
				4. **Sub-holding:** It is the “without parole” part that is problematic. Gives no opportunity for change. **(Life sentences are okay, as long as parole is an option).**
			5. If no purpose of punishment is served and
			6. **AND:** *Miller v. Alabama* (Bryan Stevenson case): AUTOMATIC sentence of life without parole for juveniles in homicide cases also illegal. (can be applied, but can not be an automatic requirement).
			7. **BUT:** Ewing v. California
2. Gross Disproportionality: Very Rarely Found
	1. *Ewing v. California,* U.S. Supreme Court, 2003
		1. As a result of California’s “Three Strikes Rule,” Ewing sentenced to 25 years for stealing three golf clubs while on parole.
		2. Analysis:
			1. Compare gravity of offense to severity of punishment
			2. Compare within the jurisdiction
			3. Compare between jurisdiction
		3. **Holding:** Except in very severe cases (death penalty for a traffic ticket), state legislatures are able to determine punishment and proportionality; this is not on its face cruel and unusual
			1. **Sub-Holding:** Defer to state’s choice; state has power to determine purpose of punishment, public safety issues.
			2. **BUT:** Graham v. Florida

**G. Mixed Theory of Punishment:** Alone, the theories themselves are probably not sufficient, but we have a mixed theory of punishment today.

# Elements of a Crime

## A. Criminal Equation

Actus Reus + Mens Rea + Circumstances + Causation + Result – Defenses = Crime

Actus Reus:

* Act, or
* Failure to Act when there is a duty to act (omission)

Mens Rea:

* State of mind of the defendant when committing the crime
* Guilty Mind is required (except in rare cases of strict liability)

Circumstances:

* Special factors that might be important to some but not all crimes.
* Factors that determine punishment (e.g. in breaking and entering statute, occupied vs. unoccupied)

Causation:

* Link between act and result

Result:

* Acts can be crimes even without negative results.
* Most acts require some harm to result from the conduct.

Defense:

* Circumstances which might excuse or justify the act (self defense, duress)
* Can be used even if state proves all required elements of the crime.

# Actus Reus

In general, the criminal law requires an act in order to punish. Even when there is not a strictly defined act, the criminal law maneuvers around the situation to explain absence.

We don’t punish thoughts alone. If we did, it would be:

* Difficult to prove
* Negation of

Conduct must be defined and voluntary.

Can be either **action** or **failure to act (**only when there is a duty to act/action is called for based on situation and relationship of individual to victim).

Often, act must cause **harmful consequence**, but not always.

The Actus Reus requires that the act is:

* Past (based on desert)
* Voluntary (conduct that is avoidable because we have concern about responsibility)
* Wrongful (not constitutionally protected conduct)
* Conduct (not thought or status, but may be omission if there was a notice of a legal duty)
* Committed within a jurisdiction (within that state)
* Specified (avoiding vagueness issues and arbitrary enforcement)
* In advance (notice, not retroactive. Courts can’t fundamentally change meaning of the statute, but they can change interpretation of common law crimes)
* By Statute (in the code, proscribed legislatively)

|  |  |
| --- | --- |
| Act Requirement | Illustrative Cases |
| Past | Proctor v. State; Papachristou v. Jacksonville; Chicago v. Morales; Status Crimes (Robinson v. California) |
| Voluntary | State v. Barger; Martin v. State; People v. Grant; People v. Decina; Johnson v. State; Status Crimes (Robinson v. California) |
| Wrongful or Potentially Harmful | State v. Barger; Lawrence v. Texas |
| Conduct | Proctor v. State; U.S. v. Maldonado; Martin v. State; Jones v. US; Robinson v. California; Chicago v. Morales |
| Committed within a Jurisdiction | Robinson v. California |
| Specified | Jones v. US; Keeler v. Superior Court; Chicago v. Morales; Papachristou v. Jacksonville |
| In Advance | Johnson v. State; Keeler v. Superior Court; Rogers v. Tennessee |
| By Statute | Ewing v. California; Keeler v. Superior Court |

## A. Culpable Conduct: Act must be OVERT and not merely THOUGHT or INTENTIONS

Line is often blurred though between ACT and MENS REA (especially in possession cases). Criminal law fudges this requirement sometimes to conform to social wishes (See: *Maldonado)*

1. Overt Act is Required
	1. *Proctor v. State,* Criminal Court of Appeals of Oklahoma, 1918
		1. Statute in Oklahoma criminalized the keeping of a place with an intention of manufacturing or furnishing alcohol.
		2. Proctor had no alcohol in his possession (and no ingredients needed to make alcohol) and had merely rented a house, but talked to people about intending to use the place unlawfully.
		3. **Actus Reus: Insufficient:** Keeping of house (is legal), no overt criminal act.
		4. **Mens Rea:** Intent to use for criminal purpose (culpable).
		5. **Purposes of Punishment:** People who have thoughts are not necessarily morally culpable; they can resist or exercise self control.
		6. **Holding:** Statute criminalizes a legal behavior (keeping of a house) without requiring a voluntary criminal act.
			1. **AND:** State v. Barger
			2. **BUT:** U.S v. Maldonado
2. **Constructive Possession: Act or Not?** Requires: **power** over thing possessed AND **intent** to control it. Relaxing of requirements for AR.
	1. *U.S. v. Maldonado,* United States Court of Appeals for the First Circuit, 1994
		1. Santos carrying drugs from Colombia to Puerto Rico, drugs meant for Palestino.
		2. At hotel in Puerto Rico, Santos met up with Maldonado. Maldonado tried calling Palestino to come to hotel.
		3. Eventually, men left cocaine in Maldonado’s room—Maldonado never touched drugs, but authorized them being left there.
		4. Court finds:
			1. Power: Maldonado had keys to room, had ability to return to get drugs.
			2. Intent: intended to facilitate the transfer, made calls to Palestino.
		5. **Actus Reus:** Constructive possession of drugs.
		6. **Mens Rea:** Intent to facilitate transfer.
		7. **Purposes of Punishment:** Drugs are harmful, so there’s a retributive element; deter you from engaging in constructive possession at all.
		8. **Holding:** In possession crimes, we are willing to fudge act requirement a bit: constructive possession (without actual possession) is sufficient when we think that there is actual contraband.
			1. **BUT:** State v. Barger, Proctor v. State
3. **Accessibility Does NOT Equal Possession:** Mere ability to exercise possession is not sufficient to prove act of possession.
	1. *State v. Barger,* Supreme Court of Oregon 2011
		1. Barger accused of possessing child pornography based on a perceived ability to save and manipulate images, but no actual evidence that images were used in this way.
		2. **State**: he navigated to the site, has control of the computer, can direct and bring the images up again.
		3. **Defense**: no evidence that he knew he could bring images up again, no evidence he actually did.
		4. **Rationale:** Like a person entering a museum; just because images are witnessed and present doesn’t imply desire or exercise of actual manipulation over them.
		5. **Actus Reus: Insufficient:** Mere ability to manipulate images is not enough without actual evidence of doing it.
		6. **Mens Rea:** Specific intent to manipulate/assert control over images.
		7. **Purposes of Punishment:** If applied, would be too broad, not deterrent.
		8. **Holding:** Simply accessing and viewing images does not correspond to control over images—not enough to prove Act.
			1. **AND:** Proctor v. State
			2. **BUT:** U.S. v. Maldonado

B. Voluntariness**:** only voluntary behavior (not forced or unconscious) can be criminalized.

1. Forced Behavior can’t be criminalized
	1. *Martin v. State,* Court of Appeals of Alabama, 1944
		1. Martin arrested for being drunk in a public place.
		2. He only entered the public place because the police forced him there; violation of the statute was not voluntary.
		3. **Actus Reus: Insufficient:** Martin did not complete act based on his own volition.
		4. **Mens Rea: Insufficient:** No intent to commit act.
		5. **Purposes of Punishment:** No possibility of deterrence, no action.
		6. **Holding:** Court reads “voluntariness” into the statute, even though the plain words of the statute do not require it.
			1. “Appear in a public place”
			2. “Manifests a drunken condition”
			3. Court concerned about the outcome if we did not find voluntariness here; assumes that voluntariness is a proxy for blameworthiness.
				1. You can open up the timeframe (*People v. Decina)* to read some voluntariness in.

Based on foreseeability: upon getting drunk, how likely was it that you would enter a public place?

* + - 1. **AND:** People v. Grant
			2. **BUT:** People v. Decina
1. Automatism=Involuntary Behavior
	1. *People v. Grant*, Appellate Court of Illinois, Fourth District, 1977
		1. Grant accused of aggravated battery and obstructing a police officer at a bar.
		2. Grant suffers from psychomotor epilepsy: question becomes whether or not he was having a psychomotor seizure at the time of the act.
		3. During psychomotor seizure, behavior is automatic—not voluntary or controlled by conscious mind.
		4. Jury instructions only talked about insanity, not automatism; if proven insane, Grant would be committed. If behavior was automatic and involuntary, no conviction.
		5. **Actus Reus:** If act was involuntary/during psychomotor seizure, Insufficient. BUT, if brought upon by some volitional activity, could still be charged.
		6. **Mens Rea:** If involuntary act, no intent or awareness.
		7. **Holding:** Jury must receive instructions on the possibility that the act was involuntary as a result of automatic behavior, NOT ONLY the possibility of insanity as a defense.
			1. **Sub-holding:** Even if involuntary behavior is found, time frame can be opened up enough to show some element of voluntary behavior (e.g. drinking/crowds are known to bring about this type of behavior).
			2. **AND:** Martin v. State
			3. **BUT:** *People v. Decina* (illustration of sub-holding).
2. Opening up of Time Frame Yields Culpability for Involuntary Act
	1. *People v. Decina,* New York Appellate Court, 1956
		1. Decina had seizure while driving, and subsequently lost control of car and killed three people.
		2. Seizure was involuntary, but court finds that he potentially could have foreseen this result when he made the active decision to get into a car.
		3. **Actus Reus:** Immediate act can be involuntary if it was preceded by voluntary act.
		4. **Mens Rea:** knowledge of conscious risk by getting into car.
		5. **Purposes of Punishment:** General deterrence, retributive.
		6. **Holding:** Decina volitionally took on risk of this act by getting into a car; though the seizure was not voluntarily, the decision to drive was, so he is culpable.
			1. Depends on time frame, knowledge of condition, frequency of seizures.
			2. Deterrence: exercise great caution if you know you have these types of conditions.
			3. **BUT:** Martin v. State, People v. Decina

C. Omission Crimes: Failure to Act but **ONLY WHEN** there is a duty to act

1. When is there a duty to act?

* 1. Statute requires duty to act
	2. Status of actor to the other party (e.g. parent to child)
	3. Duty imposed by contract
	4. Actor has voluntarily assumed care AND prevented others from rendering aid.
1. State must prove duty to act before criminalizing an omission
	1. *Jones v. United States,* United States Court of Appeals for the District of Columbia Circuit, 1962
		1. Jones convicted of involuntary manslaughter of child in her care, but state did not prove that she had a duty of care.
			1. Possibly contract-based duty?
			2. Possibly status-based duty?
		2. **Actus Reus:** Failure to provide care to child based on a mandate to provide care (based on duty).
		3. **Mens Rea:** Gross or ordinary negligence (depends on involuntary manslaughter statute/jurisdiction).
		4. Purposes of Punishment: Deterrence; Retributive
		5. **Holding:** There’s plenty of evidence of negligence here, but before criminalizing actor for not providing medical services, you must show that there was a duty to do so.
			1. Walking past a baby on street is not typically criminalized (MN and VT are only states with Good Samaritan Laws).
			2. Duty categories give people notice, ensures that punishment is appropriate, but also extremely limiting.

## D. Status Offenses

Punishment of a condition or status (way of being) is not okay; there must be a predicate act. (see *Lawrence*).

1. Status without Predicate Act
	1. *Robinson v. California,* U.S. Supreme Court, 1962
		1. Statute made it illegal to be addicted to the use of narcotics.
		2. Robinson convicted in California based on needle marks on arms and admissions to occasional use of drugs.
		3. No evidence of use or engagement in sales, no possession in the state.
			1. Voluntariness: Like *Martin*, no voluntary act or buying/using drugs.
			2. Possession: Like *Maldonado*, no possession of drugs.
				1. *Barger:* track marks (like computer history): not necessarily indicative of voluntary act.
			3. Can’t criminalize a disease: Like *Grant,* addiction (like automatism) is disease.
		4. **Actus Reus:** Insufficient: Being vs. Doing
		5. **Mens Rea:** Desire/Need to Do, but no evidence of actual doing.
		6. **Holding:** Laws that punish a status without accompanying act violate the 14th Amendment/8th Amendment (cruel and unusual) and have no purpose of punishment:
			1. **Deterrence:** Individual can’t control behavior.
			2. **Retribution:** This is a status, not necessarily causing harm.
			3. **AND:** Johnson v. State
			4. **BUT:** Powell v. Texas
2. Acts Deriving from Status can be Punished: Limitations on Barring of Status-Based Crimes
	1. *Powell v. Texas,* U.S. Supreme Court, 1968
		1. Texas statute criminalizes being found intoxicated in a public place.
		2. Unlike *Martin*, no element of forced behavior.
		3. **Defense:** argues that this criminalizes a status, being an alcoholic, which forced him to be in public without his own volition.
		4. **State:** Statute is punishing act of being found intoxicated, NOT status of being an alcoholic.
		5. **Actus Reus:** being in a public place while intoxicated, NOT simply being an alcoholic.
		6. **Mens Rea:** At least negligence.
		7. **Holding:** As long as statute doesn’t explicitly punish status, acts deriving from a status are okay.
			1. **Lines blurred:** are you always an alcoholic? What if you are homeless and status forces you to drink?
			2. **BUT:** Robinson v. California, Johnson v. State
3. When Criminalizing Status Offends Public Policy
	1. *Johnson v. State,* Supreme Court of Florida, 1992
		1. Johnson arrested for “delivering” controlled substance to baby after birth and before umbilical cord was severed (60-90 seconds).
		2. **Defense:** Physiologically, blood was not flowing from mother to child; legislation intended to help women seek help and keep families intact, this is an involuntary action; Criminalization of status (pregnant, mother, addict).
		3. **State:** Notice (previous baby had drugs in blood), ingestion was voluntary
		4. **Actus Reus:** Statute meant to criminalizing giving a child drugs, not involuntarily passing drugs from mother to child.
		5. **Mens Rea:** Not voluntary, but ingesting drugs during pregnancy could be negligence.
		6. **Purposes of Punishment:** If statute is broad or interpreted in an unfamiliar way, there’s no notice on what constitutes conduct.
		7. **Holding:** Statute not meant to punish delivery in this way; expanding the term “delivery” would deprive people of notice.
			1. Public Policy Concerns: we want to encourage mothers to seek help and prenatal care.
			2. Narrowing time frame to focus only on “delivery,” not ingestion: conscious choice on part of court. (**But See:** *Decina)*
			3. Issues of “personhood” and when a child becomes a child.
			4. Three Issues at Play:
				1. **Legislative Consent:** this is not what legislature intended.
				2. **Strict Construction:** The term “delivery” was not meant to cover this meaning.
				3. **Rule of Lenity:** Construe statute most favorably to accused; don’t open up or expand meaning.
			5. **Sub-Holding:** Even blameworthy conduct may not be criminalized (in some cases) if there are concerns about precedent or status; instead, punish for usage. Don’t elaborately manipulate statute in unusual interpretations to get someone.
			6. **BUT:** *Powell v. Texas*
			7. **AND:** *Keeler v. Superior Court*

## E. Legality of Punishment

There should be no crime or punishment without pre-existant law.

**Ex Post Facto Clause:** Individual should not be punished for something that wasn’t punishable at the time of the commission of the act.

* Punishment requires **notice** and **foreseeability.**
1. Statute must provide notice and can’t be expanded by court
	1. *Keeler v. Superior Court,* Supreme Court of California, 1970
		1. Keeler charged with murder for punching ex-wife’s stomach and causing her 8-month-old fetus to die.
		2. Statute criminalizes the killing of a “human being.”
		3. **Defense:** Meaning of “human being” does not correspond to a fetus in the womb, legislation did not intend for the statute to be interpreted in this way, fair warning did not exist.
		4. **State:** Large change that baby could have lived outside of the womb at that age.
		5. **Limitations on Court:** Court can not legislate: fine line between interpretation and enlarging of statute.
			1. *Roe v. Wade* came out three years later: fear of precedent.
		6. Over-deterrence: imposes a profound, chilling effect on behavior if you are so concerned that anything you do could be a crime.
		7. **Holding:** Criminalizing this behavior under the existing murder statute would be enlarging the meaning of “human being” in a way that is unusual, brings more people under the umbrella, and creating a new offense.
			1. **BUT:** *Martin v. State* (reads “voluntariness” into statute), *Rogers v. Tennessee*
			2. Spurred by **Due Process** and **Notice** issues: enlarging statute is form of retroactive legislation.
				1. **Ex Post Facto Laws:** Retroactively legislating. Possibility of power abuse, not foreseeable or clear how to conform behavior to law if law is new.
2. Court CAN Interpret and Change Common Law (Not Statutes)
	1. *Rogers v. Tennessee,* U.S. Supreme Court, 2001
		1. Rogers stabbed James Bowdery, who was in a coma then died of kidney failure 15 months later.
		2. Rogers argues that the “Year and a Day” rule was part of TN common law (though not part of statute) and abolishing the rule would violate Ex Post Facto Clause.
		3. **Holding:** It is within the court’s abilities to revise and update the common law, but not to change the interpretation or meaning of statutes.
			1. **Sub-Holding:** Redefinition/reinterpretation here is not unexpected or indefensible; medical advances make it certain what caused the death, most states have abolished this provision, and “Year and a Day” is not part of the statute itself.
			2. **BUT:** Keeler v. Superior Court

## F. Specificity (Void for Vagueness Doctrine)

Operational arm of the principle of legality: statute must be specific enough that punishment is legal.

Vague laws:

1. Deprive people of notice

2. Can lead to discriminatory or abusive enforcement

3. Encompass broad behavior

1. Due Process Requires Specific Statute For Notice
	1. *Chicago v. Morales,* U.S. Supreme Court, 1999
		1. Chicago statute makes it illegal to be a member of a criminal street gang and loiter and disobey officer’s order to disperse.
		2. Numerous Issues:
			1. Status: being a gang member
			2. Definitions: what is loitering? What does it mean to obey dispersal order?
			3. “No Apparent Purpose”: who is judging? What about an apparently perverse purpose?
			4. Freedom of Association
			5. Potential for abuse of police power
		3. **Legislative Intent**: Statute formed to curb gang action in Chicago.
		4. **Holding:** This statute is void for vagueness: too unclear what is being criminalized. While it’s okay to make loitering a crime, the definition of loitering here is too vague.
			1. **Sub-Holding:** Vagueness can invalidate a statute if it fails to provide notice or of it authorizes and encourages arbitrary and discriminatory enforcement.
			2. **AND:** Papachristou v. Jacksonville
	2. ***Papachristou v. Jacksonville***, U.S. Supreme Court, 1972
		1. Vagrancy statute: punishes a huge range of statuses (economically disadvantaged groups).
		2. Broadness of statute allows police to use this as a guise to scoop up anyone they wish.
		3. **Holding:** Statute is too broad, vague, and all-encompassing to be legal here, and makes numerous statuses illegal.
			1. **Sub-Holding:** If limited to a specific place (public restroom), loitering statutes are often upheld.
			2. **Loitering + Specific Act:** usually makes a statute okay.
				1. **Also, Loitering in a Proscribed Place + Purposeful Intent:** changes the character of the loitering, can be criminal. (e.g.
			3. **AND:** Chicago v. Morales
			4. **BUT:** *Proctor v. State:* in certain circumstances, because of prevailing competing goals, we may be willing sometimes to do something that feels like criminalization of intention. But must be narrow.

# Mens Rea

## A. Levels of Culpability

**The MPC has established efforts to create a systematic scheme of mental states.**

* Criminal responsibility typically requires a choice: voluntary act or omission.
* Thoughts alone may be insufficient, but mental state does have importance.
* Awareness of consequences is ordinarily required.
* State has the burden of proving the MPC beyond a reasonable doubt.
* Same evidence can be used to prove both the act and the mens rea.

**Negate Mens Rea:**

* Evidence of impairment or incapacity (maybe)
* Mistake of Fact (maybe)
* Mistake of Law (usually not: two exceptions are *Lambert* and *Twitchell)*

**MPC Formulation of Mens Rea:**

* Hierarchy of states of mind (if you prove the one on top, you can probably prove the one below).

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Statute Requirement** | **AR** | **MR** | **Definition** | **Intent Type** |
| **Purposely** | Light match | To burn the ship | Engaging in an action for the***intentional purpose of causing*** particular harmMotive is irrelevant (e.g. stealing bread to feed family) | Specific |
| **Knowingly** | Light match | To steal rum, knowing that ship would almost certainly burn as a result (but not wanting to do it) | Engaging in an act not to cause a particular harm but ***knowing almost certainly*** that the harm/result would occur. Willful blindness can substitute for knowledge (could have known but deliberately attempting to not know is functional equivalent of knowing). If in a position to know, avoiding knowing doesn’t relieve you of liability. | Specific |
| **Recklessly** | Light match | To steal rum, being aware of substantial risk of fire but consciously disregarding it | ***Conscious disregard*** of a known, substantial, and ***unjustified*** risk; ***aware*** of the risk (subjective fault)**Objective:** Nobody would do something so reckless given the risk involved.**Subjective:** Defendant acknowledges that what they did was reckless | General |
| **Negligently** | Light match | To steal rum; unaware of risk of fire, but should have known better (any reasonable person would have realized the risk) | ***Unaware of unjustified risk*** *that* ***reasonable person*** would be aware off; ***gross deviation from standard of care*** *of* a reasonable person; objective standard Was it reasonable for someone in that position to behave that way. | General |
| **Strict Liability** | Light match | Irrelevant, all that matters is he lit the match and ship caught on fire | **Not recognized by MPC** – strict liability crimes only require proof of actus reus, no mens rea | N/A |

**1. General Prohibition on Transfer of Intent:**

* ***Regina v. Faulkner****,* Court of Crown Cases Reserved Ireland, 1877
	+ Faulkner accused of setting fire to a ship. He was attempting to steal rum, and while the rum ran out of the cask, he lit a match to see better.
	+ **Result**: the ship caught on fire.
	+ **Holding:** Court says that intention to steal the rum can’t impute to an intention to burn the ship.
		- We can’t transfer mens rea from one crime to another crime that results.
		- **BUT:** Felony Murder (major exception).
	+ Also, strict liability would have violated the malum in se strict liability prohibition here (arson is a common law crime).
	+ **Takeaway:** Examine culpability with precision. There may be different levels of blameworthiness for each of several actions comprising a single transaction:
		- We can’t translate the mental state of one action to the other action. State must prove mental state in each individual action.
		- **When there is a mental state designated by a statute, you must demonstrate that mental state for every aspect of a crime.**
	+ **AR:** Lighting a match that burns the ship in an attempt to steal the rum.
	+ **MR:** Insufficient: can’t transfer intent to steal the rum to intent to burn the ship without proof of mens rea as it relates to burning the ship.

**2. Non-MPC Formulations:** Many states use non-MPC formulations.

* **Specific Intent:** Typically falls in Purposely/Knowingly
* **General Intent:** Typically falls in Recklessly/Negligently (mainly negligence)

## B. Strict Liability Offenses

There are some crimes that we consider so fundamental to the public welfare and safety that we punish without an accompanying mental state (mens rea).

* Typically, meant for relatively minor offenses punishable by fines or up to 1 year in jail.
* E.g.: weapons offenses, possession of unregistered weapons, traffic offenses.
	+ In these situations, intention or meaning is not a defense.
	+ The act in and of itself is sufficient.
* Types of Crimes: generally, public welfare offenses affecting the health and safety of the community:
	+ Weapons offenses
	+ Traffic
	+ In Washington D.C.: statutory rape (sex with someone under the age of 16).

**Malum in Se Crimes:**

* Wrongs in and of themselves (Commandments: e.g. killing, etc.)
* Typically require Act + Mental State

**Malum Prohibitum Crimes:**

* Acts that society has chosen to prohibit but that might not otherwise be wrongs in and of themselves (e.g. carrying loaded weapon in public).
* Sometimes arbitrary (e.g. speeding limits).
* Public welfare crimes
* Often, these crimes only require an Act (**Strict Liability).**

**1. Endangering the Public is a Strict Liability**

* ***People v. Dillard,*** California Court of Appeal, 1984
	+ Dillard was arrested while riding a bike with a rife.
	+ Officer found that the rifle was loaded, and arrested him.
	+ Dillard says that he did not think the rifle was loaded.
		- **Due Process argument:** If you don’t allow lack of knowledge to be presented as a defense, you remove the right to a defense.
	+ **Holding:** Legislative intent behind the statute: desire to make intent unnecessary.
		- Health and safety rationales: onus is on you to check if gun is loaded.
		- Problems of proof: it would become challenging to convict if knowledge was necessary.
		- Regulatory Offense: Common law allows for these types of offenses to be punishable without mental state.
	+ **AR:** carrying a gun that is loaded in public (**Malum Prohibitum).**
	+ **MR:** none required; strict liability
	+ **Purpose of Punishment:** Super-deterrent. Also, economic argument (reduce the bottle-neck and create a rule that requires limited proof).
	+ **BUT:** *Morissette*

**2. MPC: No Strict Liability.** Just a violation, not a crime.

* **Section 2.05**: only violation is allowed, not criminal sanction.
* Crime requires culpability: strict liability is not enough.
* The MPC has NOT been adopted anywhere in it’s entirety though—used only as a model, and some jurisdictions don’t use it at all.

## C. Proof of Intent

* Malum in Se crimes have traditionally required Mental State/Intent (common law offenses).

**1. Malum In Se Crimes Can’t Be Strict Liability**

* ***Morissette v. United States***, United States Supreme Court, 1952
	+ Junk dealer enters an air force practice bombing range and takes spent bomb casings that had been lying about for years.
	+ He is arrested for stealing government property.
	+ He claims that he thought the junk had been abandoned, and that it did not belong to anyone.
		- **Defense:** He did not intend to steal or deprive an owner of their property.
		- **State:** This is a strict liability offense; as long as we show he took government property and sold it, it is enough.
	+ **Holding:** Malum in Se crimes have **ALWAYS** required a mental state—stealing is a common law, malum in se crime. The state can’t remove this requirement and make an offense a strict liability without notice.
		- Strips defendant of a defense.
		- Creates an adverse impact on defendant.
		- **Sub Holding:** Court reads a mental element back into the statutes, since Congress would not ambiguously convert theft into a strict liability crime. This is not a condemnation of all strict liability offenses, but rather a distinction between this sort of crime and malum prohibitum crimes.
			* Even if no mental state is specified, that doesn’t mean that it is a strict liability crime. In cases where it is a malum in se crime that has always required a mental state, the court will read mental state into the statute. In cases where it’s a public welfare issue, legislature may be justified in leaving out mental state.
			* However, if the court had been explicit on the contrary about it’s desire to make theft a strict liability crime, that would have provided enough notice.
	+ **AR:** Stealing bomb casings.
	+ **MR:** Insufficient: no proof of knowledge/intent, and statute’s silence on intent does not make it a strict liability crime.
	+ **BUT:** *Dillard*

**2. When is Ignorance of the Law an Excuse? (answer: rarely)**

Ignorance of the Law can be an excuse but only in extremely rare situations:

1. Law criminalizes Wholly Passive Conduct & the law is not widely known (*Lambert)*
2. Reliance on an official interpretation of the law that turns out to be wrong
* ***Lambert v. California,*** United States Supreme Court, 1957
	+ California statute criminalizes being in CA and having been previously convicted of a felony and NOT registering as a felon in CA.
		- Lots of issues here:
			* Status (being in CA)
			* Status (being previously convicted of a felony, here or elsewhere)
			* Omission (legal duty?): failing to register as a felon in CA.
				+ Specified by statute.
			* Freedom of movement: entering CA.
	+ Lambert was arrested on suspicion of another crime, then charged with violating this law. She had lived in CA for 7 years, and had been previously charged with forgery.
	+ **Holding:** Lambert not guilty because:
		- This is a criminalization of entirely passive conduct that is not widely known or communicated.
		- Lambert had no reason to know this was the law, and was only given notice after she was guilty—no opportunity to comply.
		- Nothing about her conduct triggered a recognition that she had to act (compare with sex offender registration laws).
		- Also, this is not a public welfare argument (more about administrative ease than safety).
	+ **AR:** Not registering as a felon (Insufficient because: (1) wholly passive conduct; and (2) law not widely known.
	+ **MR:** Insufficient: no notice, wholly passive conduct (Strict Liability, but insufficient because no notice).
	+ **BUT:** *Dillard* (ignorance not an excuse)
		- Dillard was an act, and this was an act by omission—requires notice of duty, and there was no notice.
		- Wholly passive conduct + lack of knowledge.
		- Dillard: act itself should trigger heightened care; here, there is no act.

## D. Mistake of Fact

Not an excuse in a strict liability crime, like statutory rape (*Regina v. Prince)*, but in crimes requiring intent, can be an excuse if it disproves any element of the requisite mens rea.

**1. Mistake of Fact Not an Excuse in Strict Liability Crimes**

***Regina v. Prince,*** Court for Crown Cases Reserved, 1875

* Prince took Annie Phillips, a girl under the age of sixteen, against the will of her father.
* **Defense:** Says he didn’t know that she was 16: mistake of fact. Thought she was 18.
* **Holding:** There is clear evidence that Prince knew he was taking a girl away from her father; the age of the victim is a Strict Liability crime.
	+ Legislative Intent: the legislature wanted to make this a strict liability crime, designed to protect underage girls.
	+ Mental element relates to the taking of the girl away from her father: he knew that he didn’t have the father’s consent.
* **Purpose of punishment:** Super-deterrent: if you know that any time you take a young woman from her home you could be charged even if she looks older, you will exercise more care. Extreme caution.
	+ Demonstrates the role that morality and normative systems play on interpretation of the criminal law.
* **Not true of every state:** Some states apply a Negligence Standard. Most, like D.C., consider statutory rape a Strict Liability crime.
* **AR:** Taking a girl under the age of 16
* **MR:** Strict Liability; honest belief that she was 18 doesn’t negate crime.
* **BUT:** *People v. Ryan*

**2. Mistake of Fact Can Be Excuse if Every Mens Rea Element in a Crime is Not Proven Beyond a Reasonable Doubt**

* **Umbrella Hypo:** man takes an umbrella from an umbrella stand believing that it is his.
	+ **Statute:** Unlawfully appropriating property with intent to deprive owner of property.
		- If it was a real mistake (believed it was his) then not a crime. Mistake of fact can be a defense if brought up by the defendant.
* ***People v. Ryan***, Court of Appeals of New York, 1993
	+ Statute makes it a crime to “knowingly” possess 625 mg of a hallucinogen.
	+ Ryan acquired a certain quantity of hallucinogenic mushrooms, but there was no proof that he knew how much psilocybin (hallucinogen) they contained.
	+ **Holding:** When only one mental state is required in a statute, it applies to every material element of the crime. The state only proved that Ryan knowingly acquired the hallucinogens, but not the quantity.
		- To determine required mental state, look to:
			* **Plain meaning of statute**
			* **Rules of Statutory Construction:** “Knowingly” can be used for everything.
			* **Legislative Intent**: There was no evidence of a desire to make it a Strict Liability crime.
			* **Constructive Knowledge**: if State had shown sufficient evidence that Ryan knew the weight (negotiations about weight, potency, price, customary practice on how drugs are measured). But this wasn’t the case.
	+ **AR:** Possession of hallucinogens.
	+ **MR:** Knowingly possessing a certain quantity: not proven here.

## E. Mistake of Law

In almost all cases, mistake of the law is no excuse. However, there is a very small category of exceptions:

1. Law criminalizes (1) Wholly Passive Conduct AND (2) The law is not widely known (*Lambert)*
	1. *Lambert:* Omission crime requiring the prosecution to prove actual knowledge of the legal duty violated; there was no actual knowledge, so no crime.
2. Reasonable reliance on an official interpretation of the law (*Twitchell)*
	1. Requires that the interpretation was actually reasonable.

**MPC 2.04(1)(a):** Only a defense if the ignorance or mistake negatives the purpose, knowledge, belief, recklessness, or negligence required to establish a material element of the offense.

* We do not want to reward ignorance or create incentives for ignorance.
* But in very small categories, we will make an exception for ignorance of the law.
* General statement “mistake of the law is no excuse” means that once the state has proven the mental element of the offense, mistake of law is not an excuse.

**Rationale:**

* Generally, living in this society requires you to know and recognize that your behavior is wrong.
* Difficult to prove actual knowledge
* Purposes of punishment: we want to punish behavior that is culpable regardless of knowledge
* We don’t want to incentivize ignorance

**1. Mistake of Law NOT an Excuse:**

* ***United States v. Baker***, United States Court of Appeals for the Fifth Circuit, 1986
	+ Baker convicted for selling counterfeit watches.
	+ Previously, this was only a civil violation until the enactment of the Trademark Counterfeiting Act, and Baker claims he did not know that it was a criminal act.
	+ Statute: requires intentional trafficking and knowingly using a counterfeit mark.
	+ Baker met the mental states laid out in the statute, but just did not know that it was a crime.
		- If statute had required “knowledge that what he was doing was a crime,” then it would be different
	+ **Holding:** As long as the state proves the requisite mental states, knowledge that the act was a crime is not necessary to proving the crime.
		- This was not a notice issue: the act was always punishable, it just recently became punishable by larger degree.
	+ **Policy Challenges:** This case was simple (Baker clearly knew what he was doing), but there are times when there are legitimate notice issues.
		- **Discriminatory issues:** Who is most likely to know the law?
	+ **MR:** Selling counterfeit watches
	+ **AR:** Intentional trafficking and knowingly using a counterfeit mark: sufficient even if the crime is not known.
	+ **BUT:** *Lambert*: distinction between passive and active behavior and an assumption that the law would be widely known here.

**2. Reliance on Official Interpretation**

* ***Commonwealth v. Twitchell***, Supreme Judicial Court of Massachusetts, 1993
	+ Christian Scientist parents know that child was sick, but did not take him to the doctor because they believed in healing by spiritual treatment.
	+ During illness, they consulted with church employee who gave them a publication prepared by the church that noted that a child will not be deemed neglected if he is provided with spiritual rather than medical treatment.
		- Publication quoted the **Attorney General**.
		- Church official interpreted the Attorney General’s statement incorrectly.
	+ **Holding:** This matter can be presented to a jury because it is possible that the Twitchell’s relied on an official interpretation of the law. Though it turned out to be wrong, their interpretation was reasonable.
		- **AR:** Omission; involuntary manslaughter
		- **MR:** Negligence; gross negligence (BUT Insufficient if it can be proven that there was a reasonable reliance on an official interpretation of the law).
		- **Exception to the Rule:**
			* Official statement by a person with power.
			* We want to encourage this type of behavior (seeking advice and official statements).
			* Perhaps, sincere desire to find a way out of a difficult case there were were sincerely held religious beliefs. (**KTT: DC hospital story).**
		- Jury should be able to hear this and determine:
			* Was it reasonable for them to have interpreted the statements by the Attorney General in this way?
			* Was it too attenuated?
		- As a general rule, relying on an official interpretation of the law can be an exception to the prohibition against ignorance as an excuse.
		- **BUT:** *Baker.*

## F. Capacity for Mens Rea

* When can defense introduce evidence that shows that defendant could not form the requisite mens rea as a result of incapacity?
* There are jurisdictional differences regarding the admission of capacity evidence to negate the requisite mens rea. (for specific v. general intent).
* Ultimately, this is a Constitutional question, resolved differently by different states.
	+ Common for this type of mental impairment evidence to be barred in general intent cases.
* General v. Specific: Means different things in different places.
	+ Typically, General Intent is Negligence (sometimes Recklessness)
	+ In Colorado (*Hendershott)*: Recklessness

**Capacity Punishment Issues:**

* **Legal Insanity:** If you are not guilty be reasons of insanity, the result is **Civil Commitment.**
* **Acquittal:** If the state doesn’t prove that you are guilty (because of involuntary action—see *Grant)* or inability to form mens rea (capacity—see *Hendershott),* result is **Acquittal.**

**Policy Issues:**

* **Arguments for Inclusion of this Information (Pro-Defense):**
	+ **Punishment Differences:** Insanity (commitment) vs. Acquittal
* **Reasonable Person Presumption:** General Intent crimes assume that a reasonable person is the standard. If person has incapacity issue, how can we compare him to a reasonable person?
* **Purposes of Punishment:** No deterrence, no punishment theory under which this makes sense.
* **Arguments for Not Including (Pro-Prosecution):**
	+ - * + No negation of the offense
				+ Gross Deviation of what a reasonable person would do
				+ Protection of the public/community
				+ Retribution

**1. Colorado: Capacity Defenses Are Allowed for General Intent Crimes (Exception to General Rule)**

* ***Hendershott v. People,*** Supreme Court of Colorado, 1982
	+ Hendershott accused of assaulting victim.
	+ Statute requires that the defendant “knowingly” or “recklessly” caused bodily harm.
	+ **Defense:** He has adult minimum brain dysfunction which made him anxious and lack impulse control and made him unable to form the mens rea required.
	+ **Prosecution:** Impaired mental capacity evidence can only be introduced if the crime requires specific intent.
		- Proof issues
		- Legal sanity issues: should only be allowed for an insanity defense, not for the possibility of acquittal (community protection issues)
	+ **Holding:** Refusing to hear this defense would be a denial of due process. The defense deserves the ability to negate evidence of mens rea. Making a distinction between specific and general intent in this way is a violation of due process laws. This information must be allowed to be introduced as evidence for every crime.
		- **In Colorado:** This is true even of General Intent Crimes. (Exception to the General Rule).
		- **Previously, only allowable for Specific Intent Crimes.**
		- **Takeaway:** Not that legislatures can’t limit admissible evidence, but that this prohibition on what types of evidence can be used for different types of mens rea went too far.
		- **KTT:** Client accused of trespassing in a store because his invisible friend told him to go there; could only introduce this evidence for insanity plea.
	+ **AR:** Beating girlfriend
	+ **MR:** General Intent (recklessness); evidence on mental capacity can be introduced to negate.

**2. New Jersey: Capacity Defenses Not Allowed for General Intent Crimes**

**Allowed for Specific Intent Crimes But You Must Be VERY DRUNK**

* ***State v. Cameron*,** Supreme Court of New Jersey, 1986
	+ - * + Cameron convicted of second degree aggravated assault.
				+ She wants to use proof of voluntary intoxication to negate the mens rea.
				+ **Holding:** Jury instruction on voluntary intoxication should not be provided because a reasonable juror could never have felt that this negated the mens rea of specific intent. It COULD, theoretically, but the evidence did not rise to that level here.

**Voluntary consumption of alcohol:** Cameron assumed the risk when she started drinking.

Can’t be used to negate General Intent because getting drunk is itself reckless.

**Fear of Jury Mistake:** Jury should not be able to find that this negates the mens rea, but there is a fear that they would misexcuse the conduct.

* + - * + **Court’s Standard:** Intoxication evidence can be introduced but only if you are SO drunk that you can’t form Specific Intent.

Blood tests.

Foggy memories

Eyewitness and medical testimony

* + - * + **AR:** Physical assault
				+ **MR:** Specific Intent (drunkenness can be allowed to negate but only in extreme situations).

# Rape

**Conventional Definition of Rape:**

* Vaginal intercourse by force or threatened use of force.
	+ Force: typically defined as a function of non-consent
	+ Element of against will: focus on controversy.
* Debates on Non-Consent:
	+ Is injury necessary?
	+ Traditionally: womam must demonstrate that she resisted “to her utmost ability.”
		- **Super Problematic:** Women’s testimony viewed through a veil of mistrust.
	+ Today: swinging in other direction.
		- **Rape Shield Laws:** prevent defense from cross-examining women about sexual past in rape trials.

## A. Actus Reus

***People v. Barnes:*** Most Common Formulation

***In the Interest of MTS:*** Easing of Proof; furthest a jurisdiction has gone on the Prosecution side.

Recently, some movement towards ***Smith***formulation

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Case/Standard** | **Jurisdiction** | **Actus Reus** | **Mens Rea** | **Evidence** |
| *People v. Barnes* | California | Penetration & **Force or Threat of Force and Non-Consent** | Typically Negligence | --Forceful, violent act--Threat to use force |
| *State v. Smith* | Connecticut | Penetration & **Non Consent**  | Typically Negligence | --Statements of “No”--Force (as described above) |
| *In the Interest of MTS* | New Jersey | Penetration **Without Affirmative Consent** | Typically Negligence | --Freely given affirmative consent. --Silence/ambivalence not enough |
| **Statutory Rape** | Washington, D.C.  | Sex with someone **Under a Certain Age** | Strict Liability: no mental state necessary |  |

1. **No Resistance Necessary: *People v. Barnes,*** Supreme Court of California, 1986
	1. Complainant went to defendant’s house to smoke marijuana.
	2. She told him she wanted to leave, he continued his advances.
	3. Reared back as if to hit her, flexed his muscles, wouldn’t open the door for her.
	4. They had sex and exchanged kisses, then she left immediately after.
	5. **California Statute:** Does not require evidence of resistance to convict of rape.
	6. **Holding:** That statute is valid. State needed to prove:
		1. Use of force or fear of bodily injury on the person against the will of the complainant.
		2. Open up time frame: pattern of threatening behavior prior to the act.
		3. Fear of bodily injury throughout the entire circumstance.
	7. Resistance could be considered evidence of use of force or fear, but not necessary.
	8. **BUT: Physical Force is still required:** used to determine lack of consent.
	9. **Reasons behind shift:** Scientific evidence that some victims respond by freezing, don’t resist.
		1. Especially complicated when it is acquaintance rape.
2. **No Force or Resistance: Just Non-Consent**
	1. ***State v. Smith,*** Supreme Court of Connecticut, 1989
		1. Woman meets man at bar, goes back to his house.
		2. He requests a kiss, and she said she didn’t want to do anything else.
		3. She spit on him, he told her he “could make it hard on her, or she could make it easy on herself.”
		4. They had sex.
		5. **Statute:** Does not require evidence of force or threat of force.
		6. **Holding:** No express force requirement means that the only act necessary is non-consent.
			1. **Actual awareness of non-**consent is not necessary. If a reasonable person would have realized this is non-consent, it doesn’t matter what the defendant realizes.
		7. **KTT:** Even though this statute removes need for force, we still look to woman’s testimony for evidence: helps us to establish non-consent.
3. **Sex Without Consent**
	1. ***In the Interest of MTS***, New Jersey Supreme Court, 1992
		1. 15-year-old claims that 17-year-old living in her house raped her.
		2. **State:** Sexual conduct without affirmative consent is sufficient. Force necessary to achieve sexual intercourse is sufficient.
		3. **Defense:** Need evidence of physical force as well as force to engage in the act.
		4. **Holding:** Court borrows from Battery Statute: all that is necessary is the act without affirmative consent.
			1. **State looks for: Force OR Consent.**
			2. Court reads in an element of non-consent to the statute: force as it is defined exists where there is penetration in the absence of freely given consent.
		5. **Consent is Defined by:**
			1. Verbal/physical behavior of complainant
			2. Totality of circumstances
			3. Ambivalance or silence: likely not enough.
			4. Must be freely given.
		6. “Not saying Yes Means No.”

**Persistent Issues in Rape Laws**

* Onus is on the Complainant:
	+ Even when need to resist is removed, we look to complainant’s testimony to determine the presence of force/non-consent. (*Barnes)*
	+ Trend towards redefining force and consent, but we still look to the actions and response of the complainant as factors in proof. *(Smith)*
	+ In determination of consent: perceived consent/perceived force. Still looking to other person (*In the Interest of MTS).*
* Need for Objective Manifestations of Non-Consent
	+ Even when we remove Force as requirement, we need some evidence of non-consent (often flowing from response to force) to indicate that a reasonable person would have known there was non-consent.
* Comparison to other crimes
	+ We don’t require resistance or force in theft crimes. (*In the Interest of MTS:* looks at battery statute).
* Marital Exception?
	+ **MPC** has an exception for marital relationships.
		- An exception for marital relationships still exists in 24 states; only 15 states have completely abolished the distinction.
* **Policy Debates: How do we create a standard that does not implicitly put the burden on the victim?**
	+ **Estridge**: Eliminate force requirement altogether and create a negligence mens rea standard. That will take burden off victim.
	+ **Henderson**: Even if we look only at defendant’s mens rea, we are still looking to see what victim did or didn’t do to help us know what a reasonable person would have perceived.

## 2. Mens Rea

* Historically, strict liability in context of rape.
	+ *Regina v. Prince:* Gender-normative, woman as property.
* Now, most states use negligence standard🡪 allows for mistake of fact defense in most states, but not all.
* Negligence: would a reasonable person believe that victim consented?

**Mistake of Fact Defense NOT Allowed in Some Jurisdictions:**

* ***Commonwealth v. Fischer***, Superior Court of Pennsylvania, 1998
	+ Fischer claimed that complainant acted sexually aggressive during earlier sexual encounter that day.
	+ When they saw each other again, they had sex.
		- He claimed he thought it was consensual based on previous interaction.
		- She claimed it wasn’t.
	+ **Issue:** Can mistake of fact instruction go to jury?
	+ **Holding:** Court finds the argument compelling, but believes that precedent controls (Williams): mistake of fact not allowed as a defense in rape cases.
		- **Still based on negligence:** reasonable person would have read this situation differently.

# Homicide

|  |  |  |  |
| --- | --- | --- | --- |
| **Crime** | **Actus Reus** | **Mens Rea** | **Circumstances**  |
| **Involuntary Manslaughter** | **Unintentional** Killing that occurs during a lawful OR unlawful act.  | Typically, **gross negligence or recklessness**.Sometimes**, ordinary negligence** (WA) | Gross deviation from the care that a reasonable person would take.  |
| **Vehicular Manslaughter** | **Unintentional** Killing that occurs while operating a vehicle.  | Gross negligence or recklessness.  | Gross deviation from the care that a reasonable person would take.  |
| **Misdemeanor Manslaughter** | **Unintentional** Killing that occurs during the commission of an **inherently dangerous** misdemeanor.  | **No MR as it pertains to the killing;** state must prove the **MR for the misdemeanor.**  | Misdemeanor must be **proximate cause** of death (compare Florida church heart attack).  |
| **Voluntary Manslaughter** | **Intentional** Killing that occurs with adequate provocation | **Knowing or Purposeful** | 1. (1) Adequate Provocation + (2) Resulting Heat of Passion (in most jurisdictions)
2. **In MPC: (1)** Adequate provocation + (2) Extreme Emotional Disturbance
* No Social Utility for Act, but partial justification/partial excuse
* In many jurisdictions, **words alone are not enough.**
* Provocation is not required to come from the victim—can be from third party.
 |
| **Second Degree Murder (Express Malice)** | **Killing** without provocation that is **Impulsive** | Intentional: Knowing or Purposeful  | **Express Malice:** Deliberate intention to kill (**Intentional Killing)** and **Impulsive** |
| **Second Degree Murder (Implied Malice)**  | **Killing** without provocation based on recklessness  | Extreme Recklessness/Extreme Indifference to Human Life.If in a jurisdiction where **intent to cause serious bodily injury is enough**, major shortcut🡪 don’t need to prove other mens rea beyond intent to cause bodily injury. Can also involve **Vehicular Murder** if the vehicular behavior exceeds **negligence**, but still proving the same elements.  | **Implied Malice:** Extreme disregard for human life + Extreme Recklessness (**Unintentional Reckless Killing)** |
| **First Degree Murder (Premeditated)** | **Killing** | Intentional: Knowing or Purposeful | **1. Premeditation** (Evidence of Planning)**2. Deliberation** (Weighing the options, turning it over in your mind) |
| **First Degree Murder (Felony Murder)**  | Killing that occurs **during the course or immediate flight from a felony.** | Mens rea for the **Felony** plus a causal link.  | Short cut for Prosecution: no need to prove mens rea or intent towards felony.  |

|  |  |  |  |
| --- | --- | --- | --- |
| **Intent for killing** | **Level of Homicide** | **Circumstances** | **Case** |
| **INTENTIONAL KILLING** | First-Degree Murder | Premeditation and deliberation | *Watson**Austin****But*** *Healy****But*** *Gould* |
| Second-Degree Murder | EXPRESS MALICE (intentional killing w/o premeditation or deliberation or provocation)  | *Franklin* |
| Voluntary manslaughter | PROVOCATION and HEAT OF PASSION (was provoked and responded because of provocation) | *Walker**Rowland**Borcher**Bufarale**Berry**Wu* |
| **UNINTENTIONAL KILLING** | Felony murder (First-Degree Murder) | Legal/proximate cause of death during commission of dangerous FELONY | *Martin* *Stamp**Bracket**Hickman**Washington**Cabaltero**Ferlin**Gladman* |
| Second-Degree Murder | IMPLIED MALICE: Extreme recklessness/indifference to human life; lack of social utility of activity given extreme unreasonable risk to human life | *Malone**Protopappas**Davison**Dorazio**Watson* |
| Involuntary manslaughter | Negligence/gross negligence (**or ordinary negligence in WA)**Or recklessness causing death | *Williams**Porter* |
| Misdemeanor manslaughter | Proximate/legal cause of death during course of dangerous **misdemeanor**  | *Walker* (gun) |

**Overview:**

* **Homicide** (killing of a human being) divided into two categories: manslaughter and murder.
* Type of homicide depends on **level of intent** and in some cases **transfer of intent**.

## I. Involuntary Manslaughter

Involuntary Manslaughter is at the lowest end of homicide.

**Result:** Death

**Mens Rea:** Recklessness or gross negligence (typically. **BUT SEE:** *State v. Williams).*

**Statutory Constructions and Jurisdictional Differences**

* **Kansas**
	+ **Act:** Killing a human being
	+ **Circumstances:** In the commission of., or attempt to commit, or flight from a felony, or in the commission of or attempt to commit or flight from driving under the influence of alcohol or drugs.
	+ **Mens Rea:** Recklessly
* **Pennyslvania**
	+ **Act:** Killing while in the act of a lawful or unlawful act
	+ **Mens Rea:** Recklessness or gross negligence
* **Washington**
	+ **Act:** Killing a human being
	+ **Mens Rea:** Simple or ordinary negligence

**Involuntary Manslaughter Mens Rea Sometimes Simple Negligence**

* ***State v. Williams,*** Court of Appeals of Washington, 1971
	+ **Washington state has a simple or ordinary negligence mens rea for involuntary manslaughter.**
		- At common law, this was always a gross negligence crime, but statute supersedes.
	+ Parents lived on Native American reservation and did not take child to the doctor, he died as a result.
		- **Negligent Arguments:** Odor, knowledge that he was sick, had taken child to doctors in the past.
		- **Not Negligent Arguments:** Lacked education, fear that welfare people would take child away, you don’t need to take child to the doctor for everything.
	+ **Holding:** Parents had a duty of care and failed to act in accordance with that care; therefore, they were at least **ordinarily negligent** (not necessarily grossly negligent) by not taking the child to the doctor within the first five days of the illness.
	+ **Act:** Not taking child to doctor 🡪 death
	+ **Mens Rea:** Ordinary negligence
		- Ordinary negligence (simple negligence) opens up more subjective enforcement and criminalization of this behavior—lower burden on the state.
		- But, still, gross deviation from a standard of care (gross negligence) is vague enough that there still could have been a conviction here.
	+ **Purposes of Punishment:** Super deterrent (act immediately if you suspect child is ill), Retributive.
		- **But there are concerns about the purposes here: parents already lost their child.**
		- **KTT:** Punishment in this case may be light.
	+ **BUT:** *People v. Wu*

**Cultural Considerations in Establishing “Reasonableness” Standard**

* **Pro:**
	+ Need to take into account people with different backgrounds
	+ Gives benefit to the accused.
* **Con:**
	+ The purpose of negligence is to have a single standard🡪 defeating the purpose of it as an objective, not subjective standard.
	+ We need a standard for how to behave.

**Vehicular Manslaughter: Gross Negligence Standard**

* **Overview:** Subcategory of negligent homicide, gross deviation from standard of care.
* ***Porter v. State***, Supreme Court of Florida, 1956
	+ Car accident led to death of a person.
	+ Driver did not stop at a stop sign and was driving between 60 and 65 mph.
	+ He was driving somewhere he was not very familiar with.
	+ **Act:** Killing a human while operating a car.
	+ **Mens Rea:** Gross negligence
	+ **Holding:** Not guilty here; not enough to say that he was grossly negligent in his operation of the vehicle.
	+ **Court’s rationale:**
		- Not foreseeable (anything is possible, but not likely)
		- No real notice: weather wasn’t bad, not drunk.
		- Judge identified with Porter (at least more than judge in Williams).
		- This is common behavior: **momentary lapse in judgment.**
	+ **Purposes of punishment:** argument that this isn’t foreseeable/active, so not deterrable.

**Misdemeanor Manslaughter: Death that Occurs in the Commission of a Misdemeanor**

* ***U.S. v. Walker***, D.C. Superior Court, 1977
	+ Walker carried loaded pistol without a permit, and the gun fell in a staircase and killed someone.
	+ **The absence of a license:** No proof of training, no level of inspection that has been passed.
	+ **Holding:** All the state needs to show is that a death resulted while in the commission of a misdemeanor. **No Mens Rea Necessary.**
	+ **AR:** Carrying a gun without a license (misdemeanor)🡪 death
	+ **MR:** No need for an independent MR: violating an **inherently dangerous misdemeanor** serves as a substitute for gross negligence.
	+ **Short Cut:** In misdemeanor manslaughter crimes, court allows substitution of the **intent as it relates to the MISDEMEANOR** to be applied to **intent for the MANSLAUGHTER.**
		- Typically, the misdemeanor involved must require both an **AR + MR (**not strict liability misdemeanor).
		- **BUT:** *Regina v. Faulkner:* court would not apply intent for stealing the rum to intent to burn the ship.
			* **Rationale:** stealing rum is not inherently dangerous; we stretch and fudge when it comes to death🡪 simply more important.
* **Use Today:** Not used in many states today, and where it is, it typically would not be applied to strict liability misdemeanors.
	+ **Typically, only for Malum in Se (not Malum Prohibitum).**
	+ Misdemeanor must be the **proximate** cause of death:

## II. Voluntary Manslaughter

*Intentional Killing with provocation and heat of passion and extreme emotional disturbance.*

Two-Step Process:

1. Look at **decedent’s** behavior to determine if provocation was present.
	1. Was the individual **In Fact** provoked?
2. Look at **defendant’s** behavior to determine if response was reasonable in light of the circumstances.
	1. Was the individual’s response **Wholly Reasonable?**

**Rules for Assessing:**

**Three Different Frameworks for Assessing Provocation:**

1. In **most** jurisdictions, there are **two questions** to pose (both must be answered positively):
	1. **Was the individual provoked?**
		1. Put yourself in shoes of individual accused to determine if individual was provoked.
	2. **Was provocation adequate? Would a reasonable person in that situation have been provoked?**
		1. Does **Not** take background into account. The second prong question requires us to consider what a reasonable **ordinary** person would do.
2. Under the **MPC:** single pronged test based on whether the individual was actually provoked.
	1. Consider the reasonableness of such explanation or excuse that caused extreme mental or emotional disturbance from the “viewpoint of a person in the actor’s situation with the circumstances **as he believes them to be.”**
		1. **🡪** single pronged question.
	2. Huge flexibility/discretion given to the jury.
3. **Common Law:** Only fixed categories that are male-specific:
	1. Husband witnessing wife commit adultery
	2. Physical battery
	3. Father witnessing son be sodomized

**Statutory Construction:**

* **Kansas**
	+ **Act:** Killing a human being
	+ **Mens Rea:** Knowingly
	+ **Circumstances:** Upon a sudden quarrel or in the heat of passion or upon an unreasonable but honest belief that circumstances existed that justify deadly force.

**Overview:**

* Shifts the focus partially onto the behavior of the decedent (similar to rape conversation).
* Looking at decedent’s response to determine if adequate **provocation** existed and if conduct was **reasonable in response.**
* If adequate provocation exists, we make the argument that there is less culpability.

**What is Provocation?**

* ***People v. Walker***, Illinois Court of Appeals, 1965
	+ Stenneth approached house, demanded that the other men gamble with him, and pulled out a knife.
	+ Walker threw a brick which hit Stenneth and knocked him down, then stabbed him and killed him.
	+ **Holding:** The killing occurred in the course of a passionate fight, so therefore was provoked, and is not murder, but manslaughter.
	+ **Purposes of Punishment:**
		- Deterrence less applicable here: less reasoned calculation during the throes of passion.
	+ **AR:** Killing a person in the heat of passion without malice.
	+ **MR:** Specific intent (knowing/recklessness).
	+ **Circumstances:** In the course of a fight, passions brewing; **NO COOLING OFF PERIOD.**
		- **KTT:** This could be considered **imperfect self-defense:** hitting the brick might have been enough; but cutting takes it a step further.
			* **Only available if the provocation is an assault🡪** possible total acquittal if you stop at self-defensive act (throwing the brick)
* ***Rowland v. State***, Supreme Court of Mississippi, 1905
	+ Rowland goes to visit wife where she is staying, and sees another man’s horse hitched to the fence.
	+ As he approaches, he sees his wife and another man in the act of adultery; he shoots at John, misses, and kills his wife.
	+ **Court:** He will only be guilty if there was a deliberate design; here, the provocative facts disprove the presence of a deliberate design.
	+ **Holding:** The act of witnessing wife committing adultery was sufficient provocation.
	+ **AR:** Killing of wife while trying to kill John.
	+ **MR:** Intentional plan gone awry, committed in the heat of passion and adequately provoked.

**Provocation Can Occur Over Long Period of Time**

* ***People v. Berry***, Supreme Court of California, 1976
	+ Berry choked wife after she told him she was having an affair and might be pregnant with another man’s baby.
	+ When she returns from hospital, he strangled her to death.
	+ Court uses numerous rationales as precedent:
		- *Valentine:* Passion may be provoked by words.
		- *Borchers:* Passion may be provoked over long period of time.
		- Heat of passion can be fear or other intense emotion; **can’t be revenge.**
		- *Bufarale*: Leaving a lover for another is not enough, but if there’s more, it can be enough.
	+ **Evidence:** Court relies on psychiatric testimony of decedent, even though doctor never treated her while she was alive.
	+ **Holding:** Berry was provoked even though provocation was extended over a long period of time.
	+ **AR:** Killing wife by strangulation
	+ **MR:** Intentional, but mitigated since provoked by passion.
	+ **Circumstances:** Continuous provocation, sexual taunting.

**Provocation Does Not Have to Be Anger:** *But* can’t be revenge

* **People v. Borcher (CA 1958):**
	+ Heat and passion need not mean “rage” or “anger” but may be any “violent, intense, high-wrought or enthusiastic emotion.”
* **People v. Valentine (CA 1946):**
	+ Heat of passion must be such that would naturally be aroused in the mind of an ordinarily reasonable person and not for revenge
* **People v. Bufarale (CA 1961):**
	+ Cannot be killing for revenge
	+ Do circumstances show that the act is preceded by adequate provocative conduct?

**Use of Cultural Background to Prove Provocation**

* ***People v. Wu***, Court of Appeal of California, Fourth Appellate District, 1991
	+ Wu killed son after he told her that father’s girlfriend and father treated him badly.
	+ She attempted to kill herself, but failed.
	+ Mother was ill, and Wu was concerned that son would not be taken care of after she died.
	+ **Cultural issues:** Wu was from China, concerned about taking son back there because he was born out of wedlock.
		- **Claims she killed him to protect him, ensure entry to heaving.**
	+ **Defense:** This occurred after 10 years of stress and shame, plus recent incident of grandmother dying. Significant provocation + cultural background.
		- **Also, no opportunity for cooling off during those 10 years.**
		- Defense also argues that Wu was in an unconscious fugue state.
			* She was so distraught due to cultural background that she entered a fugue state and committed act while in that state.
	+ **State:** Provocation was words alone, and based on revenge rather than other emotion.
	+ **Holding:** Court allows Wu to give a jury instruction allowing for consideration of cultural background (1) mitigation due to provocation, and (2) unconscious/fugue state as a defense.
	+ **BUT:** *Williams* court did not allow cultural background evidence in.
		- Foreigner vs. domestic citizen.
		- Something about provocation that requires more of a subjective standard, vs. the ordinary negligence standard in *Williams.*
		- Also, impact would be different: In *Williams*🡪 acquittal. In Wu🡪 mitigation.
	+ **Cultural Evidence:** Would have explained relevant circumstances, motive as guilt rather than revenge, helps us understand the temporal proximity of provocation.
	+ **Possible Outcomes With New Jury Evidence:**
		- **If Unconscious🡪 Acquittal**
		- **If Cultural Background Supports Provocation 🡪 Mitigation**

**Cultural Arguments for Establishing Provocation**: see also **Reasonableness & Cultural Background**

* Typically, while we **may** allow cultural evidence to determine if the person in fact was provoked, we don’t allow it in to determine if a **reasonable person** would have been provoked (see *Williams and Wu).*
* **Pro: Desire for sensitivity:** Understanding cultural evidence might allow the jury to weigh information and make determination about if and how severely to punish.
* **Con: Desire for equitability:** If we blend objective + subjective, maybe we are losing a sense of predictability/undermining normative message.
	+ **But:** normative message is currently very gendered.

**History of Provocation:**

1. **Common Law:** Provocation was limited to specific and distinct categories, and **words alone were not enough**. Male-driven ideas of provocation.
	1. Physical battery
	2. Man seeing his wife commit adultery
	3. Father seeing his son being sodomized
2. **Modern View:** Reject fixed categories, and permits the fact finder to judge sufficiency of provocation. Concepts of provocation have broadened over time to include women.
	1. Some jurisdictions allow words to provoke: if they bring back fear, or if convey information that would have provoked the accused if seen (e.g. “I’m having an affair with your husband.”
	2. **Pros:** Flexibility, less arbitrariness, great leeway to defense.
	3. **Cons:** Result could vary a lot based on the jury members because of huge discretion, might make it harder to be on notice (less advanced warning).
3. **MPC:** Rejects old categories. Considers a person who is “under extreme mental or emotional disturbance.” **Adopted by at least 14 states.**
	1. From the “viewpoint of person in the actor’s situation with the circumstances as she believes them to be.”
	2. **Result:** Huge discretion given to jury.
4. **Considerations:**
	1. How immediate must it be with respect to the killing?
	2. When is response unreasonable?
	3. How flexible are we in defining the reasonable person?

**Provocation Hypos:**

1. Walker jumped in the car after using the brick; then returns and cuts decedent’s throat.
	1. **Probably Murder, not manslaughter:** cooling off period, active choice to return,
	2. One could still make the argument that there hasn’t been a break in the emotional reaction.
2. Walker hits Stenneth with brick, jumps in car, then changes mind and announces “I’m going to show him” before cutting his throat.
	1. **Murder:** clear thoughts, clear intention, clear reasoning
3. Woman raped, then the next day she sees the rapist and kills him.
	1. Possible adequate provocation: lost ability to reason, what is being said brings back fear of actual event. Open up time frame of provocation.
	2. However, words alone are not enough (in common law and many jurisdictions).

**Rationale for Mitigating Punishment for Provoked Killing:**

1. **Partial Justification:** Decedent provoked the killing, making the accused partially justified in reacting.
	1. If wholly justified, there is an element of social utility in the act of killing.
2. **Partial Excuse:** Provocation left the accused in an extreme emotional state that overcame reason.
	1. Less ability to control the act because of some circumstances; not utility, but deserving of some excuse anyway.

## III. Second Degree Murder

*Unlawful Killing + Express or Implied Malice*

**California Formulation**

**Act:** Killing a human being.

**Mens Rea:** Accused acted with **Malice.**

* **There are two types of malice:**
* **Express:** Deliberate intention to take a life; OR
* **Implied:** Showing an **“abandoned or malignant heart when there is no provocation”**

**Punishment:** Identical regardless of implied or express malice.

We use the term **Malice**, but it’s not really accurate:

* Not the way we consider it colloquially (evil).
* Instead, means a **deliberate intention to kill.**

**1. Express Malice**: deliberate intention to kill.

* State must prove that element (in addition to act) beyond a reasonable doubt.
* To prove intent to kill, look for:
	+ Relationship between defendant and decedent
	+ Purchase of a weapon
	+ A plan
	+ Location of wound
	+ Motive: does the accused benefit in some way from the killing?
	+ Lack of presence of another plausible intent
	+ Questions to consider:
		- Was a weapon used?
		- How many times was the person wounded?
		- What was the distance between the parties?
		- Animosity? Motive?
		- Angle/location of wound

**Notion of Transferred Intent**

* Individual can still be guilty of intentional killing if he intended to kill another person, shoots and missed, and kills someone else instead. **The intent to kill the first person transfers to his unintended killing of the decedent.**

**State MUST Prove Deliberate Intent to Kill in Express Malice 2nd Degree**

* ***Francis v. Franklin***, U.S. Supreme Court, 1985
	+ Franklin escaped from prison, took a hostage at the dentist’s office, stole a police offer’s gun, and killed a man at a house when he did not give him car keys.
	+ Bullet went off twice through the door of the house, and he claims it was involuntary from when the door slammed.
	+ **State’s argument:** Stole police officer’s gun, pointed gun at door, shot twice.
	+ **Defense:** Franklin was not dangerous or threatening towards others, the first bullet could have been involuntary.
	+ **Issue:** The state’s story is fully plausible and could have been proven, **BUT** the jury instructions were insufficient: there is a presumption of **Proof of Intent**, and the burden is on the defendant to prove that there was no intent.
	+ **Holding:** The state has the burden to prove **Every Element**, including **Intent to Kill**.
		- **Jury instructions that presume intent will not be allowed: concerns about Due Process Rights, Presumption of Innocence.**
		- **KTT:** State could have easily charged felony murder for escaping prison, but that doesn’t give you **Capital Murder, which is what the state was charging.**
	+ **AR:** Killing by shooting through closed door.
	+ **MR:** Intent to kill; **not proven by state, since instructions gave shortcut.**

**2. Implied Malice**

Intentional killing is considered more culpable than negligent killing, but Negligent Killing can become so reckless as to become the moral or legal equivalent.

* Based on **Extreme Disregard for Human Life + Extreme Recklessness.**
* **Or, in California:** Abandoned/Malignant Heart.

**Implied Malice:** Unintentional Killing

**How do you find implied malice?**

1. No social utility in the act—totally base purpose.
2. Pattern of behavior should put you on notice
3. Foreseeability
4. Intent to cause serious bodily harm (in some jurisdictions)

**Overview of Implied Malice Theory:**

* Does not require intent; applies to unintentional killings that are extremely reckless that conduct becomes the moral equivalent of an intentional killing
* **Rationale**:
	+ Actors conducting themselves in this way are a danger to society and as morally blameworthy as those who kill intentionally (*but* without premeditation/deliberation)
	+ Extreme Recklessness/Indifference
	+ Conduct that goes beyond negligence (fact-dependent inquiry)
* **Factors to consider:**
	+ Conscious disregard of harm
	+ Substantial risk
	+ Utility of conduct (is there a justification?)
	+ Pattern of conduct
	+ Personal characteristics
	+ Magnitude of result
* ***Look for a heightened awareness that suggests an indifference rather than just a deviation from the standard of care***

**Proving Extreme Disregard for Human Life + Extreme Recklessness**

* ***Commonwealth v. Malone***, Supreme Court of Pennsylvania, 1946
	+ Malone and Billy are playing Russian Poker: points gun at Billy and fires several times, killing him.
	+ **Defense:** Malone put the gun in such a place that he thought he had several free shots first.
		- Under Malone’s version: conduct would be negligent 🡪 Involuntary Manslaughter.
	+ **Holding:** This is beyond negligence and therefore enough to convict of Second Degree Murder under an Implied Malice theory (Extreme Disregard for Human Life + Extreme Recklessness):
		- Fired numerous times.
		- No social utility/lack of justification here: this is a **Game.**
		- Act was uncalled for.
		- Far beyond **Gross Negligence**
	+ **AND:** *People v. Dillard*
		- High standard for people holding and engaging with weapons: magnitude of risk is significant.
	+ **AR:** Firing gun three times and killing Billy
	+ **MR:**Extreme recklessness and extreme indifference to human life
		- Not necessary to find an **actual awareness that death would result**; instead, as long as actor should have reasonably anticipated death, even if this individual didn’t, you have Implied Malice.
			* **Objective, rather than subjective, awareness is enough if literally everyone should have known that this was dangerous.**

**Malone Hypos: What Is the Crime?**

1. Gun went off accidentally, misfired, and Malone had no way of knowing:
	1. **Involuntary Manslaughter:** Inherently dangerous object should have demanded a greater level of care.
		1. **Mens Rea:** Recklessness or Gross Negligence.Playing a game and pointing it at someone goes beyond standard of care.
	2. **Misdemeanor Manslaughter:** If no license for the gun, and there was a causal link.
2. Malone thought he put bullet in chamber to the right, but made a mistake.
	1. This is what is happening here.
	2. **Second Degree Murder Under Implied Malice Theory**
	3. Could have also been convicted of **Involuntary Manslaughter:** no intent to kill, but still constituting gross negligence or recklessness.
3. Put bullet in the chamber, but wasn’t aware of how the cylinder rotated.
	1. **Second Degree Murder with Implied Malice:** Don’t play a game with a gun if you don’t know how it works.
	2. **Involuntary Manslaughter:** At least gross negligence, but probably more (more culpable even than Malone).
4. Put bullet in third chamber, but lies and said he thought it was in another.
	1. **2nd degree murder, express malice:** Actual intent to kill. Express.

**Pattern of Behavior**

* ***People v. Protopappas,*** California Appellate Court, 1988
	+ Dentist and oral surgeon gave large doses of anesthesia to patients with medical issues, then failed to monitor condition after surgery and delegated care🡪 death of three people.
	+ **Holding:** This is not express malice, but there is implied malice there to justify Second Degree Murder:
		- **Huge risk and conscious disregard of the risk:** medical conditions of patients (awareness) + limited oversight.
		- **Acts done for base, anti-social purpose:** To see more patients and increase funds.
	+ There was a problem with the jury instruction: sounds more like negligence than recklessness: no acknowledgement of a substantial risk.
		- But court says that it’s oaky because there was enough evidence where a jury could infer that there was an **actual awareness of risk.**
	+ **Pattern of Conduct:** This is not a freak accident or one-time occurrence. Since it’s happened before, it is so egregious that there is a pattern.
		- **Pattern allows you to make out extreme indifference.**
	+ **AR:** Overdosing patients🡪 death
	+ **MR:** Extreme recklessness/extreme indifference to human life.

**Foreseeability of Harm**

* ***State v. Davidson*,** Kansas Supreme Court, 1999
	+ Davidson owend several Rottweilers who she trained in Schutzhund, a dog sport.
	+ They had previously gotten out and nipped at kids and escaped flimsy fense🡪 notice.
	+ The Schutzhund sport community advises specific care taking: totally ignored by Davidson.
	+ Dogs got out and killed little boy.
	+ **Holding:** There is Second Degree Murder under an Implied Malice theory here because of the notice, the foreseeability, and the fact that she disregarded instructions to keep dogs in a specific location.
		- **Extreme Recklessness/Extreme Indifference to Human Life:** Ignoring instructions, flimsy fence, improper training.
		- **Implied Malice:** Does not require a showing of Actual Subjective Awareness of the Risk, but rather an attitude of indifference.
	+ **AR:** Keeping dogs in unsafe environment/failure to train.
	+ **MR:** Recklessness/indifference to human life.

**Intent to Cause Serious Bodily Injury**

* ***Commonwealth v. Dorazio,*** Supreme Court of Pennsylvania, 1950
	+ Professional heavyweight boxer chases victim, beats him up, and continues to beat him while he is unconscious.
	+ Victim later dies from a hemorrhage.
	+ **State’s argument:** he was aware of powerful fists, chased three people, continued to beat man while unconscious.
	+ **Defense:** Voluntary manslaughter: heat of passion.
	+ **Holding:** Second Degree Murder under Intent to Cause Significant Bodily Injury.
		- Even if he only intended to cause significant bodily harm but not to cause death, that is enough in Pennsylvania.
		- Intent: to cause bodily harm, not to cause death.
		- **Result:** *Dorazio* establishes slightly **lower burden** on the prosecution.
		- **Here, not necessary for state to prove extreme indifference or extreme recklessness:** proving intent to cause serious bodily injury is enough.
			* Doesn’t matter how many times the punching happens: even punching once (less than what would constitute EXTREME indifference) could lead to conviction if it results in death.

**Vehicular Murder: Can be Second Degree Implied Malice if Accompanied by Recklessness**

* ***People v. Watson***, Supreme Court of California, 1981
	+ Watson consumed lots of alcohol, then drove away from bar and killed two people in another car when rushing through an intersection at extreme speed.
	+ **Holding:** The evidence supports a finding of implied malice, since conduct was done with the knowledge that there would be risk of death.
		- **Timing of awareness or risk:**
			* Starting to drink
				+ **State**: knew that he would be endangering people after leaving the bar.
				+ **Defense**: Could have intended to take a taxi, but alcohol affected his ability to make the decision.
			* Starting to drive
				+ **State**: Started to drive and had awareness that the alcohol was in his system. Knew that drinking and driving was dangerous. Should have realized when vision was blurred and he struggled to keep control that he was impaired.
				+ **Defense**: Alcohol impaired judgment, so he was not aware of risk.
			* Nearly missed the first car
				+ **State**: This provided him with notice; had to apply breaks and warned that driving was problematic.
				+ **Defense**: He was not indifference to human life: broke and prevented killing someone. This put him on notice so he became a better driver afterwards.
	+ **Purposes of Punishment:** Super deterrent argument for drunk driving. This goes beyond reckless driving (vehicular manslaughter) and feels more culpable.
		- Legislature explicitly added a Vehicular Murder charge after this so that there would be no question that this type of behavior fit within Second Degree-Implied Malice.
		- Even without **Vehicular Murder** charge though, this is not a notice issue: court is not enlarging the vehicular manslaughter charge, but is explicitly fitting Watson within 2nd degree murder.

**Gross Negligence vs. Extreme Recklessness: Not a Bright Line**

* **Gross Negligence:** Generally, the standard for Involuntary Manslaughter
* **Extreme Recklessness:** The standard for Second Degree Murder
	+ **CONSCIOUS disregard of substantial risk + extreme indifference to human life.**
* **Distinguishing Factors:**
	+ Actor’s awareness of the risk involved
	+ The act itself: is it inherently dangerous?
	+ Does the act have any social utility?
	+ **Hypos:**
		- **1:** Leave child in car but leave AC on, spends time in store and baby has died and AC has cut off when she returns.
			* **Either Second Degree or Involuntary Manslaughter**
		- **2:** Same situation except parent turns car off, doesn’t crack window, and baby dies.
			* **Second Degree Murder with Implied Malice.**
				+ Awareness of Risk: intended to be there for only 5 minutes, had AC on (knew it was super hot).

## IV. First Degree Premeditated Murder

*Intent to Kill + Premeditation AND Deliberation*

**Rules:**

* Distinguished from second degree murder in **two ways**:
	+ Evidence indicative of planning or preparation (**premeditation**), and
		- Some jurisdictions say seconds are enough (*Watson)*
	+ **Deliberation** (thinking about the act, actor turns over the act in her mind and makes the deliberate decision to kill).
* **Some jurisdictions use cold blood (1st degree) v. hot blood (2nd degree) distinction (*Austin)***
* Second Degree Murder: intentional, but impulsive/unplanned; First Degree: planning, formed purpose, decision and design to kill.
* Act: Killing
* Mens Rea: Not only intent to kill (purpose or knowing), but also **both** premeditation and deliberation.
* **State MUST prove Both Premeditation and Deliberation Separately**
* Some states identify specific behavior that can serve as a proxy for premeditation and deliberation:
	+ Lying in wait
	+ Torture
	+ Explosives
	+ Poison
	+ **In these jurisdictions, state must prove malice (deliberate intention to kill), but the enumerated behaviors, once proven, serve as a proxy for mens rea.**

**Evidence to Establish:**

1. **Premeditation:**
	1. Express statements
	2. Motive or reason that will allow the killer to benefit from the death.
	3. Manner of killing: poisoning or bomb take time to assemble and make
	4. Prior threat or evidence of hostility made to others
	5. Level of planning
	6. Type of weapon used and source of weapon
	7. Time lapse
	8. Other indications that there is a larger plan in play
	9. Origin of the weapon
2. **Deliberation:**
	1. Time lapse/time interval
	2. Choosing among options and arriving at a choice
	3. Evidence of internal conflict
	4. Awareness of consequences
	5. Behavior not provoked (in cold blood)

**Premeditation and Deliberation Can Happen in Seconds**

* ***U.S. v. Watson*,** District of Columbia Court of Appeals, 1985
	+ Watson is suspected of driving a stolen car, officers pull him over and he jumps out and runs.
	+ Watson enters apartment building, officer enters and threatens to shoot and curses at him.
	+ They fight for awhile, then Watson has officer pinned down while officer says “It wasn’t worth it.”
	+ He shoots, officer stumbles out, then dies.
	+ **Holding:** Conduct in the seconds prior to a fatal assault are sufficient to rise to the level of premeditation and deliberation for first degree murder. **There was sufficient evidence here for a jury to find Watson guilty of first degree murder.**
		- **Premeditation**: Time lapse between the two statements from the officer, girls were able to run away from scene, he was able to leave, waited for the officer to arrive as he sat in the apartment building thinking.
		- **Deliberation:** Pins down officer, officer makes plea for life, he had other options besides killing.
	+ **Defense:** There was sufficient provocation here to make this voluntary manslaughter instead.
		- **Provocation:** Cop entering apartment and aggressively threatening to blow his head off. No cooling off period.
			* **Counter argument:** He disarmed the officer, so the manslaughter defense becomes complicated, which could suggest cooling off period. Defense can still argue that the time period wasn’t sufficient.
		- Defense might also argue **Second Degree:** Impulsive murder.
	+ **Policy Issues around Police Officer Killing:**
		- Some suggest that there should be no voluntary manslaughter defense when the victim is a police officer. This is problematic:
			* **Denial of a defense**
			* **We don’t want to encourage police to engage in provocative behavior**
	+ **AR:** Killing police officer
	+ **MR:** Intent + Premeditation/Deliberation.

**Cold-Blood v. Hot-Blood**

* ***Watson*:** Distinguishes 1st Degree through Qualitative Methods:
	+ Extra thought
	+ Extra step (even if it happens in just seconds)
* ***Austin:*** Uses a qualitative distinction instead
	+ Cold Blood: First Degree
		- **State would say:** Officer was unarmed when killed (cooling off period), Watson was in control.
	+ Hot Blood: Second Degree
		- **Defense would say:** There’s heat here, escalation, yelling, and fightin. Tons of emotion, no cooling off period.

**Rationale for Treating First Degree Murder More Severely**

* If you make a calculation, you are more culpable/more likely to kill again
* Incapacitation theories: this is a malum in se crime, inherently evil

**Motive is Irrelevant (Even if Good):**

* ***Mrs. Healy Mercy Killing:*** Healy strangled husband who was severely ill, judge allows her to plead to voluntary manslaughter instead of 1st degree murder.
	+ **There was plenty here to prove first degree murder:**
		- **Premeditation:** Was planning to do this to release husband from pain, took time to kill and also to go get stocking.
		- **Deliberation:** Originally lies (recognizes it’s bad), has other options, takes a long time to strangle someone (deliberation throughout the act).
	+ **There was plenty here to prove second degree murder:**
		- Express Malice: deliberate intention to kill.
		- Also possibly Implied Malice: extreme indifference to human life.
	+ **Despite this, judge rules Voluntary Manslaughter:**
		- Possible that provocation was building (his illness, suffering, impending death🡪 if we expand the time frame (*People v. Berry).*
		- **KTT:** Judge and prosecutor are exercising discretion here; more leeway for judge to decide punishment, more empathy and sympathy.

**Can Use Incapacity Defenses to Attempt to Negate Mens Rea:**

* ***Commonwealth v. Gould,*** Massachusetts Supreme Court, 1980
	+ Gould was observing nursing home where girlfriend worked, then attacked and killed her as she was passing by.
	+ Gould was a **paranoid schizophrenic:** issue was if this evidence could be used by defense to show that he could not think deliberately to establish first degree murder.
	+ **Holding:** Jury is allowed to hear evidence on capacity that could potentially prevent defendant from forming the requisite premeditation and deliberation mens rea for a first degree conviction.
		- **If he can’t form those mental states, then he would be charged with second degree express malice instead.**
		- **Court says:** You can’t keep out information that would speak to or negate premeditation and deliberation capacity. The jury doesn’t have to credit it, but they should be able to hear it.
		- **Compare to Insanity:** At that time, MA defined insanity as an inability to recognize the wrongfulness of conduct; Gould did not qualify under that principle, so he could not win on an insanity defense.
		- **AND:** *Hendershott* but for lower mental states (general intent).
	+ **Intoxication:** Can also be used in a similar matter to capacity to negate requisite mental state.

## V. First Degree Felony Murder

|  |  |  |  |
| --- | --- | --- | --- |
| **Case** | **Jurisdiction** | **Definition of Felony Murder** | **Consequences** |
| ***State v. Martin*** | New Jersey | Intentional commission of a dangerous felony, and the death is caused by felony as a **foreseeable, probable consequence.**  | 1. Can be used by defendants who did not directly commit the fatal act or was unarmed. 2. Doesn’t automatically make an accomplice not culpable, but if not foreseeable to the accomplice, then no felony murder.  |
| N/A | HawaiiKentuckyMichigan | **No felony murder rule at all** | 1. Defendant would have to be charged separately with murder and with felony.  |
| *People v. Stamp* | California | Death is the **but-for proximate cause**. Essentially amounts to **strict liability.**  | 1. Killing does NOT have to be foreseeable or even occurring in the commission of the crime.  |
| *People v. Hickman* | Illinois | Even if killing is committed by another actor, if it is the **but-for cause**, there is felony murder.  | 1. Agency doesn’t matter here and foreseeability doesn’t matter either. 2. Based on idea of a series of events set in motion **by the felons that lead to death.**  |
| *People v. Washington* | California | **Killing must be committed by same person (or accomplice) who does felony.**  | 1. Accomplice can still be liable, but not if the victim does the killing.  |
| *People v. Gladman* | New York | Killing must occur in the **commission of or immediate flight from the felony.** | Time line of immediate flight is expanded to include subjective factors for a jury to consider.  |

**Rules:**

* If a killing occurs during the commission or immediate flight from an **inherently dangerous felony**, you have felony murder (first degree—life sentence).
* Almost always **First Degree Murder**, but in some states, there is a **second Degree Felony Murder category for less severe felonies (CA/MA).**
* **Felonies included:** Most states enumerate the **predicate** felony that the legislature has deemed to be inherently dangerous, including:
	+ Kidnapping
	+ Arson
	+ Rape
	+ Burglary
	+ Robbery
	+ Carjacking
		- **Inherently Dangerous Felony Rule (Some JX):** crime that by its very nature cannot be committed without creating a substantial risk that someone will be killed. Or an offense “carrying a high probability that death will result. (Dressler p 562)
		- **Dangerous Felony (Fact-Specific):** Circumstances of the felony are such that it was inherently dangerous in the manner in which it was committed.
		- **Note:** States may use a combination of these approaches.
* **Proof:** Most states require the state to prove **Only** the Predicate Felony Alone: if you find the accused guilty of the underlying felony, then you can proceed to homicide.
* Intent to commit the dangerous felony becomes the proxy for intent to commit murder.
	+ Some states: recklessness or negligence with regards to the felony.

**Purposes of Punishment and Criticisms:**

* **Strict Liability:** Some object to this formulation as making murder a strict liability crime.
	+ **NJ/MPC:** Attempts to do away with this formulation by establishing negligence standard based on reasonable foreseeability.
* **Deterrence:** Based on ideas that we should encourage people not to commit dangerous felonies, or at least to do so in a safer way. Not necessarily realistic though, given how few homicides happen in the course of felonies.
	+ **But, as in Hickman, even if there is an attempt to commit safe felony, you can still be liable if other person does something dangerous.**
* **Retribution:** We make a judgment that the dangerousness of the felony substitutes for the premeditation and deliberation of the killing.
	+ **Victim is completely innocent—**no provocation.
* **Mens Rea Fears:** There is concern that it is illogical to transfer intent from commission of unarmed burglary to malice aforethought of murder.

**Formulations of Felony Murder (for Exam):**

* **New Jersey (***State v. Martin,* arson in apartment building): Death must be probable consequence and reasonably foreseeable.
* **Illinois (***People v. Hickman,* officer shoots officer during pursuit of robbers): Foreseeability/agency doesn’t matter here: time frame is expanded to include this as commission of the felony.
* **Illinois (***People v. Brackett,* Rape and feeding tube): As long as death itself is foreseeable, doesn’t matter if the specific means of death is foreseeable.
* **New York (***People v. Gladman,* flight from felony still considered commission): Open up the time frame of “immediate flight” and “commission of felony.”
* **California (***People v. Stamp,* Honeyman’s heart attack): Death must be but-for consequence, felony must be proximate cause.
	+ **Note:** California Pattern Jury Instructions now require the felony to be a **substantial factor** in the death.
	+ **STAMP IS STRICT LIABILITY**

**Felony Murder Summaries:**

|  |  |
| --- | --- |
| **Felony Murder Found** | **No Felony Murder** |
| D + co-D commit A/R, V has heart attack: (*Stamp*) | D + co D commit arson, co D kills self in process (*Ferlin*) |
| D commits rape, V refuses to eat, chokes on feeding tube (*Brackett*) | D + co D commit A/R, V kills co-D (*Morris*, cited in Hickman) |
| D + co D commit burglary, cop kills cop (*Hickman*) | D commits bank robbery, teller pushes alarm and is electrocuted (*Martin*) |
| D + co D commit robbery, V kills innocent brother (*Payne*) |   |
| D + co D commit A/R, co-D kills co-D (*Cabaltero*) |   |
| D robs, during escape, D kills cop (*Gladman*) |   |

**Theories of Felony Murder:**

1. **Proximate Cause:** Dangerous felony creates a dangerous situation, and defendant is held liable for causing the felony that is the proximate cause of death.
	1. Felony is but-for cause of death, sets in motion a violent situation.
	2. D is liable for all deaths *which would not have happened if not for felony.*
	3. **Would apply for:** Super broad, could encompass **everything above.**
		1. **Limited by *Stamp* Reasonable Foreseeability Test.**
2. **Protected Person Theory:** It doesn’t matter who the killer is, as long as a protected person is killed, there will be felony murder. Protected people are:
	1. **Innocent/Bystander—but not co-defendant.**
	2. **Applies to all killings, even unforeseen and remote.**
	3. **Concerns:** undervalues criminal life, only protects certain people, doesn’t deter violence if the result is death of co-D.
	4. **Would apply for:** *Stamp, Brackett, Hickman, Payne, Gladman, Martin.*
3. **Agency Theory (*People v. Washington)*:** Felony murder only when the action furthers/perpetrates the felony, and not when non-defendant or accomplice does the killing. D liable only for her actions and accomplice’s actions.
	1. **Would apply for:** *Gladman*
	2. **Most common application: limited to essential purpose of Felony Murder.**

**General Burden on State:**

1. Jury must find that the defendant is guilty of the predicate felony.
2. If they find guilt, then they must determine if there was a causal link between the felony and the death.
3. If so, guilty of felony murder.

**Death Must Be Probable Consequence/Reasonably Foreseeable From Felony:**

* ***State v. Martin***, Supreme Court of New Jersey, 1990
	+ Martin was leaving a party and had a fight with some guests. As he was leaving, he lit a bag of trash on fire, and the fire spread, killing a guest who died of smoke inhalation while sleeping.
	+ **State says:** Fire spread by kerosene, not a bag of trash.
	+ **Defense says:** Martin only intended to burn the trash, and either had no mental state or **negligence**.
		- **Death was UNLIKELY.**
	+ **State says:** Lighting kerosene is at least reckless—gets you to implied malice (extreme recklessness).
	+ **If not for Felony Murder:** Guilty of either **Involuntary Manslaughter (negligence),** or **Second Degree-Implied Malice.**
	+ **HOLDING:** Jury was wrongly instructed. They were told that if the death happened, there was felony murder. But in New Jersey, the death must be reasonably foreseeable and a probable consequence—not too remote or accidental.
		- **NJ limits felony murder:** Not “but for” cause of death, but must be foreseeable using a negligence standard. Death can’t be too remote or accidental.
	+ **AR:** Committing arson that then causes death.
	+ **MR:** At least negligence; but death must have been foreseeable by an **average or reasonable person.**

**Proximate Cause/But-For Liability (No Foreseeability Requirement)**

* ***People v. Stamp***, California Appellate Court, 1969
	+ Defendants commit armed robbery, then after they leave, victim dies of a heart attack.
	+ Victim was obese and had heart disease prior to the robbery.
	+ **Holding:** Because the robbery was the but-for cause of death, the defendants are guilty of felony murder.
		- **KTT**: This is crazy because it would be really hard to get to either involuntary manslaughter or Second Degree murder on its own here.
		- Under this conception of Felony Murder, the death does not need to occur to carry out the felony (threat to kill carried out the felony, but not the death), and te death doesn’t have to be foreseeable.
		- If you engage in dangerous conduct, you are responsible for the outcomes of that conduct.
			* Under this theory, **Accomplice** would be liable for murder even if not present for the robbery.
* ***People v. Brackett***, Illinois Supreme Court, 1987
	+ D raped 85-year-old woman, she falls into depression and refuses to eat, then chokes to death on feeding tube.
	+ **Holding:** Conviction of felony murder upheld because death was foreseeable, even though the specific means of death was not.

**Felon Is Liable Even If Death Caused By Someone Else**

* ***People v. Hickman***, Appellate Court of Illinois, 1973
	+ Unarmed defendants running away from burglary and police, officer shoots another officer thinking that it is the burglar.
	+ **Holding:** Even though the death was caused by the officer, there is a but-for causation link that is satisfied there.
		- **This is true despite the fact that the words of the statute suggest that only “a person who kills” is liable.**
			* Court says: they are not bound by words of statute, can look to legislative history instead.
		- **Result:** This opens up the time frame of WHEN a felony is committed: the feeling from the felony counts as the continuation of felony.
	+ **Purposes of Punishment:**
		- **Retributive:** We are upset by death of police officer and don’t hold the actual police officer who killed liable.
		- **Deterrence:** Meant to deter people from committing felonies from making dangerous escapes or committing felony in the first place.
			* **Problematic:** How foreseeable, actually, if defendants not the ones who pulled trigger?
		- **KTT:** Notice issues: the court is reading the statute in a broader way than it suggests, but there is prior precedent:
			* ***People v. Payne:*** Armed robbers enter home of two brothers, and one brother shoots the other while trying to prevent robbery.

**But, Some Courts Contradict *Hickman:***

* ***People v. Washington,*** California Appellate Court, 1965
	+ D’s rob a gas station, then the victim of robbery pulls out gun and shoots an innocent man, thinking it is one of the robbers.
	+ **Holding:** Only killings that happen in the perpetration of the felony are liable for felony murder.
		- **This was not an act committed by the defendant or co-defendant.**
		- **This was not in furtherance of the commission of the crime.**
		- **No malice aforethought.**
			* We can’t attribute malice to the robber when killing is committed by the victim.
		- **Purposes of Punishment:**
			* **Deterrence:** We can’t deter someone from doing something that they didn’t actually do.
			* **Retributive:** We want to hold someone liable for the things they have done.

**Liability for Death of Co-Felon (in some Jurisdictions)**

* ***People v. Cabaltero***, California Appellate Court, 1939
	+ D’s committed a robbery, then one felon fired a shot at two workers, and in retaliation, another killed him.
	+ **Cabaletero: getaway driver. Not actually committing the felony or present for the killing.**
	+ **Holding:** The killing **does not** need to be committed in the commission of the felony, using a but-for rationale, D is liable for felony murder because he was engaged in a felony and a death happened in the course of the felony.
	+ **Rationale:**
		- Deterring felonies generally, and deterring dangerous felonies specifically.
		- Embracing a principle that all life, even felons, has value.
		- We are concerned about unpredictability in the course of a crime.

**Limitation on Liability: Liability Does Not Extend If Co-Felon Kills Self:**

* ***People v. Ferlin***
	+ Felons commit arson, and in the course of crime, Skala accidentally burns himself to death.
	+ **Holding:** If victim kills self, even if accidental, that is a limitation on liability for felony murder.

**Extending the Time Line of the Felony: Immediate Flight is Included**

* ***People v. Gladman***, Court of Appeals of New York, 1976
	+ Gladman robbed a store, left the area of the robbery, and then entered a parking lot and started to hide under a car when he saw a police car.
	+ Police officer tells him to get up, and he turns and kills him within 15 minutes of the robbery.
	+ **State must show:**
		- A robbery occurred.
		- There is a causal link between the robbery and the killing.
		- **Jury is permitted to transfer the intent from the robbery to the felony murder, but the question is how long that intent lasts.**
	+ **Holding:** A flight from a robbery can still count as the commission of the felony itself, creating liability for felony murder.
		- **Court considers the following criteria to determine if it was in “flight from a felony”:**
			* Geographic distance between felony and murder.
			* Interval of time between the two acts.
			* Whether culprits had fruits of felony
			* Whether police or others were in close pursuit
			* Whether criminals had reached a place of temporary safety
		- No single factor is controlling though: the jury should decide as long as there is NOT a clear and compelled inference that the actor was NOT in immediate flight as a matter of law.
			* If there’s any question, then we can bring it to a jury.

**Hypo:** Armed robbery, one robber sees someone unrelated who she is fighting with and shoots and kills. Is other robber guilty of felony murder?

* **Yes:**
	+ Happens in the course of the felony (*Hickman)*
	+ Armed robbery is inherently dangerous, so tis is reasonably foreseeable (*Martin)*
	+ But-for causation
	+ Felon is held liable for anything that happens during the course of the felony (*Cabaltero)*
	+ All killings are included (accidental, unforeseeable) (*Stamp)*
* **No:**
	+ Murder not in furtherance of or in immediate flight from (*Gladman)*
	+ Perhaps not necessarily but-for causation (*Washington)*

## VI. Capital Punishment

United States is in a small minority of countries imposing the death penalty, and worldwide about 3 countries per year abolish the death penalty.

**History:**

* **1972: *Furman v. Georgia***
	+ The Supreme Court struck down the death penalty as applied in a plurality opinion:
		- Brennan and Marshall death penalty is **incompatible with evolving concepts of human dignity, and the equivalent of barbaric punishment.**
		- Douglas/Stewart/White: As applied, the sentencing procedures used were constitutionally defective, discriminatory, and random.
	+ **1976: *Gregg v. Georgia:*** SCOTUS upheld a new jury guidance procedure for the death penalty (White switched sides).
		- **Understanding that there was a fear about arbitrariness as applied, not the idea of the death penalty.**
		- **Constitutionally proper death penalty scheme must have:**
			* Separate penalty phase
			* Rigorous appellate review to check inequity among sentences
			* Rational procedure to guide sentence in examining evidence at penalty phase.
			* Jury must be guided in that process (statutory listing of aggressive/mitigating factors).
	+ **1977: *Kroger v. Georgia:*** Death Penalty limited only to murder cases (previously could include rape, but had only been used for rape of black women).

**Post Furman v. Georgia Capital Procedures:**

1. **Guilt Phase (Merits Phase):**
	1. Trial on the merits of the case.
	2. Government must prove either First Degree Felony or First Degree Premeditated Murder.
	3. If there is a conviction, proceed to the penalty phase.
2. **Penalty Phase (Sentencing Phase):**
	1. Jury is asked to determine whether capital punishment is appropriate here:
		1. Jury must find aggravating factors unanimously and then agree unanimously that aggravating factors outweigh mitigating factors.
			1. **State must prove aggravating factors beyond a reasonable doubt.**
			2. **In most states, defendant can make a statement to the jury that is not subject to cross examination.**
	2. The jury does not need to agree on which factor tips the balance—just that it does.
	3. Some states hold that if the jury is split, there will be an automatic life sentence; otherwise retry on the penalty phase.

**Who Decides?**

* **Jury:** Must be a death-qualified jury.
	+ **During Voir Dire,** jurors are asked if they could impose the death penalty. Anyone who indicates that they could not will be struck for cause automatically.
* **Judge:** Some states (AL, FL, DE) allow the judge to override jury.

**What Counts as Aggravating?**

* Many states enumerate aggravating statues by statute to avoid unfettered jury discretion.
* But often, those factors are themselves quite subjective:
	+ “Heinous, Atrocious, or Cruel” Killing: quite subjective.

**Aggravating Factors MUST Clearly Outweigh Mitigating Factors:**

* ***Olsen v. State***, Supreme Court of Wyoming, 2003
	+ Olsen robs a bar, then shoots three people in the head one by one.
	+ Was intoxicated at the time, had taken drug to control seizures, and had brain damage since birth.
	+ Olsen convicted under BOTH felony murder and first degree murder theories, which is why felony murder can be an aggravating factor.
	+ Jury came out and asked if there was a possibility of parole; court responded about executive clemency, which was misleading since highly unlikely and also parole was not possible.
	+ **State:** Seeks to prove several aggravating factors:
		- Killing was especially atrocious or cruel
		- Felony Murder
		- Knowingly created a great risk of death to two or more people
		- Substantial or continuing threat of future dangerousness
		- Murders were committed for the purpose of avoiding or preventing lawful arrest.
	+ Jury finds all but “substantial or continuing risk of death.”
	+ **Holding:** The jury **improperly** found two aggravating factors:
		- **Great risk of death to two or more people:** The fact that there were multiple victims does not make this aggravating; this would only apply to spraying bullets randomly into a crowd.
		- **Especially atrocious or cruel:** This is not torture as contemplated by the statute.
		- **Court says:** Must be retried and jury must consider weight in light of these factors.

**What Factors Can Mitigate?**

* ***Lockett v. Ohio***, U.S. Supreme Court, 1978
	+ D was getaway driver for armed robbery, and tried to provide mitigating circumstances about her limited role in the crime.
	+ **Holding:** Defense should be able to provide any mitigating evidence about character, mental capacity, role in the crime, background, etc.
		- **Mixed concerns about enumerating mitigating factors:** Helpful to give jury/defense counsel guidance, but perhaps we make some enumerated factors appear more valuable than others that are catch-alls.
		- **Tensions in system between strict guidance for aggravating factors and flexible leeway for pro-defendant arguments.**
* ***Eddings v. Oklahoma***, U.S. Supreme Court, 1982
	+ D convicted of murdering highway patrol officer at age of 16. Defense wanted to provide information on childhood and background of abuse.
	+ **Holding:** Defense can be allowed to bring in any information on background or childhood that relates to the character of defendant, even if not to character of the crime itself.
* ***Skipper v. South Carolina:*** Testimony about good behavior in jail is an allowable **mitigating factor.**
* ***People v. Kuntu:*** State can’t reframe an enumerated mitigating factor as an **aggravating factor.**

**Categorical Limits on Death Penalty**

* ***Enmund v. Florida***
	+ Getaway driver did not have intent to kill, was not armed, and was not an active participation.
	+ **Holding:** A minor actor without a culpable state of mind to the murder should not receive the death penalty.
* **Mental Incapacity: *Atkins v. Virginia***, U.S. Supreme Court, 2002
	+ **Holding:** Death penalty can’t be applied to mentally retarded defendants.
		- Based on which states restrict, but also the fact that an increasing number of states were moving towards forbidding.
		- Also: less culpability for those with mental retardation.
		- Prior to decision, retardation was a mitigating factor, but not a limit: led to arbitrary sentencing.
		- **KTT:** Court punted a little bit; left definition of mental retardation up to states to define based on IQ level.
* **Youth: *Roper v. Simmons***, U.S. Supreme Court, 2005
	+ **Holding:** D’s who commit offense while under the age of 18 are ineligible for the death penalty.
		- **Cited in *Graham:*** No Life without Parole for Kids.
		- Based on lack of maturity, underdeveloped sense of responsibility, brain research, evolving standards of decency.

**Mens Rea Requirements for Captial Punishment:**

* ***Tison v. Arizona***, U.S. Supreme Court, 1987
	+ Defendants break father out of prison, during escape steal a car from a family.
	+ Father and his cellmate kill, while defendants get water by the car.
	+ All convicted of felony murder and sentenced to death.
	+ **Holding:** For accomplices who play a minor role, there must be at least a reckless indifference to human life for death penalty. The jury **must prove at least reckless indifference with respect to the death AND major role of defendants.**
		- **Note:** **This does not apply for the killer himself—no mens rea requirement there.**
		- If no felony murder, they would be guilty of Second Degree (implied malice) and underlying felonies🡪 not first degree, so no possibility of death.

**Racial Discrimination Globally Doesn’t Prove Individual Application**

* ***McCleskey v. Kemp***, U.S. Supreme Court, 1987
	+ Black D convicted and sentenced to death for killing white police officer.
	+ Cited to Baldus study: defendants charged with killing white people receive the death penalty more than those who kill blacks:
		- Imbalance based on race of defendant.
		- Major imbalance based on race of victim.
		- Prosecutorial discretion based on race.
	+ **Holding:** There is a degree of discretion already in the system, and this is not wantonly or freakishly imposed. AND, just because there may be discrimination in some instances, that doesn’t mean that there was in this individual case.
		- **What is unexplained is not necessarily invidious.**
		- **Complainant must show that discrimination was PURPOSEFUL.**
		- Baldus: statistics can’t show that it’s certain that race entered the process with McCleskey, but it’s likely.
			* **KTT**: Major concern here about redesigning the system, future claims by defendants about anything remotely discriminatory.

**Major Issues with Death Penalty**

* Based on the quality of the lawyer rather than anything substantive.
* Prosecutors get a ton of resources and funding, defense attorneys get nothing for support staff/investigation.
* Judges look to find the cheapest lawyer to take on the defense side🡪 incentivized to take short cuts.
* **Myths surrounding death penalty:**
	+ Fairly Applied
		- Race of victim is statistically significant.
		- Based on quality of the lawyer and the poverty of the defendant.
		- Race to the lowest price for defense attorneys.
	+ Innocent People Cannot Be Executed
		- Happens far too often—4.9 exonerations per year due to DNA testing.
		- Efforts to cut back on appeals leads to innocent people sitting on death row.
	+ There is a Non Barbaric Way to Impose this Penalty
		- Substantially painful, even lethal injection.

# Attempt Liability

|  |  |  |
| --- | --- | --- |
| **Case** | **Jurisdiction** | **Test: Definition** |
| N/A | MPC | **Substantial Step Test:** Act strongly corroborative of a criminal purpose: allows you to charge **earlier: action consistent with intent + non-act evidence.**  |
| *People v. Rizzo* | New York | **Dangerous Proximity Test:**  Happens later in the sequence of events. Nearness to accomplishment of act.  |

**Two major philosophical questions:**

1. Why punish attempts at all?
	1. There has been some harm: society has been threatened.
	2. **Deterrent**: we want to deter you from attempting too.
	3. Must exceed mere thoughts: actual manifestations of behavior and action.
	4. **Retributive:** Morally, those who attempt are indistinguishable from successful criminals.
2. Why punish attempts less than completed crimes?
	1. **Retributive:** But, at same time, the attempted crime causes less harm.
		1. Proportionality as limiting principle under Retributive theories.
	2. **Deterrence:** Build in incentives for not completing the final act.
	3. **Rehabilitation:** Easier to rehabilitate someone who hasn’t actually finished crime.
	4. Incentivizes stopping the crime, and provides basis for law intervention.

**Policy Concerns:**

* Highly subjective standards for what constitutes an act that is dangerously approximate or substantial.
* Often policy driven ideas of impossibility that defeat notice/predictability.

## I. Mens Rea/Actus Reus

**Overview:**

* General understanding that there must be an **act** beyond **mere preparation.**
* Attempt Crimes are Inchoate Crimes: Not yet completed.
* Historically, there are several steps for attempt:
	+ **Physical proximity:** act proximate to the completed crime.
	+ **Dangerous proximity:** nearness of danger and harm
	+ **Indispensable element:** anything indispensable to the crime not yet under the actor’s control acquits.
	+ **Probable desistance**: judgment in each case that actor reached a point that it was unlikely he would have desisted.
	+ **Abnormal step:** any step towards the commission of a crime is abnormal—different from what we would expect of a normal citizen.
	+ **Unequivocality:** not attempt until specific criminal purpose is evidence from conduct.
* **MPC Substantial Step Test:** Consolidates all steps into one: (1) Criminal Purpose + (2) An act that is a **Substantial Step.**
	+ **Act must strongly corroborate criminal purpose.**
	+ Abandonment is allowed under the **MPC**, but it must be complete and voluntary, prompted by circumstances not present or apparent at the inception of the actor’s course of conduct.
	+ **Substantial Step** lets you charge for attempt earlier.
		- Look for any action that is strongly corroborative of actor’s criminal purpose: any action consistent with intent and at least some non-act evidence of intent.

**Tests Used in Contemporary Practice:**

* Many states have substantial step test
* Remaining states have either dangerous proximity test or proximity to success test
	+ Proximity to Success: Close to success
	+ Dangerous Proximity: Weigh harm of crime in addition to proximity to success
* **Substantial Step (Adopted by MPC 5.01)**: attempt requires act (or omission) that is “strongly corroborative of criminal purpose,” such as:
	+ Lying in wait or searching for or following the victim
	+ Enticing/seeking to entice victim of the crime to go to place for its commission
	+ Reconnoitering the place contemplated for the commission of the crime
	+ Unlawful entry of a structure, vehicle or enclosure where crime is contemplated
	+ Possession of materials to be employed in commission of the crime of which are specifically designed for unlawful use or can serve no lawful purpose
	+ Possession, collection or fabrication of materials to be employed in the commission of the crime
	+ Soliciting an innocent agent to engage in conduct constituting an element of the crime
* **Dangerous Proximity (Adopted by Court in Rizzo):** attempt requires an act (or omission) that is close to completed crime that it is likely to happen.
	+ **Factors: nearness to danger, greatness of harm, degree of apprehension**
	+ Focus on proximity to actual crime and danger of crime

**Mens Rea for Attempt:**

* Typically, requires **specific intent to commit the completed crime.**
	+ **MPC:** specific intent.
	+ **Other Jurisdictions:** Purpose to commit completed crime.
	+ In general, negligence is not sufficient, even if it’s enough to complete the crime.
		- Also true with Strict Liability Crimes: even if the completed crime itself is an SL crime, there must be intent for the attempted crime.

|  |  |  |
| --- | --- | --- |
| **Step** | **Act** | **Attempt Liability?**  |
| **1** | D develops animosity towards enemy and tells others. | No: not specific enough to arson or to the statute. |
| **2** | D decides to burn enemy’s house and records decision in his diary. | No criminal act; private thoughts are okay.  |
| **3** | D buys gas, matches, gloves. | No: just thoughts, not sufficiently predictive of crime. --Perhaps corroborative of criminal purpose.  |
| **4** | D looks around outside the house/cases the place. | No. Maybe loitering, but not attempted arson. --But could be considered the “Substantial Step” |
| **5** | D approaches house wearing gloves, carrying gas and matches. | Likely sufficient for Substantial Step:  |
| **6** | D enters house. | Definitely Substantial Step |
| **7** | D shuts off sprinkler system | **Definitely Substantial Step** |
| **8** | D spreads gas | **A step beyond Substantial Step: Dangerous Proximity.**  |
| **9** | D throws lit match.  | **Indispensable Element Test.** **Dangerous Proximity****Last Step Test** |

**Indispensable Element:**

* ***People v. Murray***, Supreme Court of California, 1959
	+ Murray accused of attempting to contract an incestuous marriage with niece.
	+ Declared determination to contract, requested to get a witness, but magistrate hadn’t arrived yet.
	+ **Holding:** All of the previous activity was mere preparation until the indispensable element arrives.

**Dangerous Proximity:**

* ***People v. Rizzo***, Court of Appeals of New York, 1927
	+ D’s were waiting in car for victim to rob, were arrested for attempt even though they were not near the victim they were looking for.
	+ **Holding:** They were not proximately close enough to danger or success to be liable for attempted robbery.
		- **Proximate Success/Proximity to Danger test:** act must be so near the accomplishment of the crime that in all reasonable probability the act would have been committed but for a timely interference.
		- **Under the Substantial Step Test, we would be able to convict here: one of the factors is searching for victim.**

## II. Abandonment

**Rules:**

1. Abandonment can’t come after the acts satisfying attempt have already been completed (*Staples).*
2. But some jurisdictions will allow abandonment as long as it was voluntary.

**Abandonment is NOT a Defense if It Happens After Requisite Acts:**

* ***People v. Staples***, California Court of Appeals, 1970
	+ Mathematician drills holes in apartment above bank vault, leaves tools in a closet, then is arrested.
	+ He claims he abandoned the plan.
	+ **Defense:** He made the decision not to go through with crime, not just mere luck or interference.
		- This encapsulates the point of deterrence.
		- Something that feels less culpable about this behavior.
	+ **Holding:** Regardless of if the abandonment happens as the result of a change of heart (and not external circumstances), there can be no abandonment if the act already occurred to classify as attempt.
		- **Some jurisdictions allow abandonment, but in those jurisdictions, the prosecution has to prove beyond a reasonable doubt that the abansonment was INVOLUNTARY.**

**Rationale for Staples Holding:**

* Abandonment Defense is challenging because:
	+ Inconsistent with Substantial Step test.
	+ Difficult to prove—based on internal thoughts.
	+ We are already giving people lots of opportunities to back out before becoming liable for an attempt crime.

**Modern Trends to Change:**

* **Abandonment not recognized at common law, but:**
	+ Today, some attempts to recognize abandonment as a complete defense.
* Requires that abandonment occurs under circumstances indicating a **voluntary and complete renunciation of an occurrence.**
	+ Can’t be based on a desire to wait for another time, or fear of getting caught.
* **MPC:** Follows this methodology. Complete renunciation is a defense IF:
	+ **Complete and voluntary**
	+ **Abandonment is NOT based on fear of discovery or apprehension**

## III. Impossibility

There are theoretically **two types of impossibility:**

* **Legal Impossibility:** The full commission of the act would not constitute violating a crime.
	+ **No Attempt Liability, No Crime.**
* **Factual Impossibility:** While you intend to commit a crime, it is not possible to do so because of he factual circumstances.
	+ **There IS Attempt Liability and a Crime**

However, it is possible to reframe any situation as one or the other, so it’s not a helpful distinction.

* Shooting an empty bed
	+ Legal: Shooting an empty bed is not a crime.
	+ Factual: There’s no person there. The fact is unknown to the shooter, so it would otherwise be a crime.
* Shooting a stuffed deer out of season
	+ Legal: Not a crime to shoot a stuffed deer.
	+ Factual: Shooter thought he was shooting a real deal out of season, which is a crime.

In most jurisdictions:

* Reaching into an empty pocket would constitute **Attempt Robbery.**
* Sting operations: in most jurisdictions, no impossibility defense.
* 🡪 Ultimately, considering public policy rationales for when to allow and when not to allow impossibility defense.

**In an exam, go through what we would say for each: if this was a factual impossibility or a legal impossibility, and how we could make the argument for each.**

**Legal Impossibility Can Negate an Attempt Crime:**

* ***Booth v. State***, Court of Criminal Appeals of Oklahoma, 1964
	+ Stanford stole a coat, but it was recovered by officer when he was arrested.
	+ Booth tried to purchase the coat from Stanford, but it was technically no longer stolen since it was in the hands of the police officer.
	+ **Holding:** Booth is not liable because of **Legal Impossibility:** he was attempting to commit a crime that is not a crime, since the coat had lost its stolen character.
		- Even though Booth had the intent to buy a stolen coat (knew it was stolen), it doesn’t matter.
		- **Booth would be liable under the MPC.**

**MPC: No Impossibility:**

* Considers whether there would be liability “if the facts were as the actor **believed the circumstances to be.”**
	+ Looks only at **Mens Rea: no impossibility.**
	+ **Opens it up to the jury:** ultimately, jury decides if it meets the substantial test step.

# Complicity

**Complicity is NOT a crime: you can’t charge someone with Complicity, but rather with a substantive crime under an accomplice theory.**

* Complicity: a way of committing a crime, but not a crime itself.
* A way to hold someone liable.
* All actors are charged with the same offense (murder) and face the same sentence (for murder).
* Others can be charged even if primary actor manages to get away.
* **You can be an accomplice to any crime: attempt crime, completed crime, etc. You just need to make out the necessary pre-requisites.**

**History:**

1. **Under Common Law, we distinguished among actors in a crime:**
* **Primary Actor:** Actual Perpetrator
* **Principal in the Second Degree:** Person who was present and aided and abetted, provided assistance and encouraged the primary actor.
* **Other Accessories:** Before the fact, commanded/counseled, but not present.

**Required a specific order:** Primary actor had to be tried first, if not convicted, no one else could be convicted.

1. **Modern Statutes:** Major revisions.
	1. **Most categories of liability and procedural rules are swept away.**
	2. **Accessory after the fact still remains.**

## I. Actus Reus

**Actus Reus:** Evidence of encouragement, instigation to support a crime.

**Accomplice must perform some act that contributes to the principals’ commission of the crime.**

* Conduct must **bring about crime** or **make it more likely that it will occur.**

**Accomplice must Commit Some Act in Furtherance of Crime:**

* ***Gains v. State***, Florida Appellate Court, 1982
	+ Friends rob a bank, then D calmly drives them away from bank but not present or near the bank.
	+ Police car chases them, and the others lay down in vehicle and speak to him.
	+ **Holding:** No evidence to suggest D aided or encouraged or assisted the perpetrator or did any act in furtherance of the crime itself.
		- **He may have known about robbery, but only after the robbery happened.**
	+ **Court says:** If there were other factors (high speed, masks, money in their hands) then we might be able to convict as an accomplice, but there’s not enough here.
	+ **Ultimately:** Something more than mere presence must be established here.
		- **However, mere presence could be enough in some small circumstnaces:**
			* Time and place where you are unlikely to be.
			* Presence along with failure to engage in obligated duty.
			* If you are the look out.
		- **A molecule of action (less than is necessary for Actus Reus for Crime) might be sufficient for Accomplice Actus Reus.**

**Act Does NOT Need to Actually Be Proven to Support the Crime**

* ***State v. Tally***, Supreme Court of Alabama, 1894
	+ Men go off looking for Ross to kill him after he sleeps with their sister.
	+ Tally intervenes a telegraph, and tells telegraph operator not to let the message warning Ross get to him.
	+ **Holding:** The accomplice’s act does not need to be a but-for causation to the death as long as makes the crime more likely.
		- **Tally’s interference deprived Ross of an opportunity to get away.**
		- **Even though it’s very possible Tally would have been killed regardless, Tally still assisted.**
	+ **Even though there is no But For requirement,** the act DOES need to render the act easier to accomplish.
		- E.g. if act doesn’t actually render the crime more likely, no liability.
	+ **AR:** Standing watch outside office, and sending a message to prevent warning of victim.
	+ **MR:** Knowledge + Motive🡪 shared intent to commit the crime.
		- **Renunciation:** If Tally sent a second notice renouncing act: there may still be liability based on the continued delay.

**Renunciation as a Defense in Accomplice Crimes:**

* **MPC:** If person terminates his complicity by wholly depriving it of its effectiveness or gives timely warning to the law enforcement authorities, **no liability:**
	+ **Prevent the aid from happening, OR**
	+ **Deprive the act of its effectiveness OR**
	+ **Notify the police.**
* **New York Penal Code:** Defense of renunciation if D can show he engaged in substantial effort to prevent the offense. **New York: requires more substantial steps to prevent the actual commission of the crime, not just the aid that you render.**
	+ **In general, most jurisdictions require not just your OWN withdrawal, but acts that clearly establish the intention to prevent the crime or wholly deprive the crime of its effectiveness.**
* **In any jurisdiction:** You need to take additional steps to thwart/prevent/make sure your own aid is no longer effective, not just back out.
* **Mens Rea for Renunciation:**
	+ In comparison with Attempt, no need for there to be a change of heart.

## II. Mens Rea

**Mens Rea:**

* Based on **Community of Purpose**: accomplice must act **with an intent to assist principal in the conduct of the crime.**
	+ Conduct is linked in purpose with the person committing the offense.
	+ Doesn’t require direct communication, necessarily.
* Requires **TWO things:**
	+ **Knowledge** of the Principal’s Purpose (Knowledge with respect to principal’s intent)
	+ **Purpose** to commit the crime, to encourage it, or to facilitate its commission (Purpose with respect to the faciliative conduct).

**Accomplice must have Intent to Aid or Encourage the Crime:**

* ***People v. Beeman***, Supreme Court of California, 1984
	+ D helped robbers plan robbery of his sister in law’s house by:
		- Giving information about house (layout etc.)
		- Helping with the method and dress
		- Agreeing to sell loot
	+ **Defense:** Beeman did not think they would go through with the act, didn’t intend to help.
	+ **State:** Beeman knew of purpose, and committed voluntary act to help.
	+ **Holding:** **Jury MUST be instructed on need for intent to be established. Jury suggested that knowledge alone is sufficient.**
		- Mens rea requires Knowledge + Purpose.

**Rationale for Knowledge + Purpose:**

* Policy Reasons: We don’t want to draw the circle of liability so wide as to encompass people with mere knowledge.
	+ We don’t want to impose an obligation to intervene, necessarily.

**Assistance PLUS Shared Intent is Necessary for Accomplice Crime:**

* ***Wilson v. People***, Supreme Court of Colorado, 1939
	+ Wilson helped Pierce commit a robbery, and lifted him up so that he could break the glass to enter.
	+ He called the police to come catch Pierce, and said that he did it to set him up.
	+ **Holding:** Wilson committed the requisite act, but did not have the necessary mens rea: the actor needs a purpose to commit the crime.
		- **Note:**Not necessarily that Wilson is not guilty, but the jury instructions must require the jury to find **intent to commit the crime.**
		- **Not just a desire that the burglary occur, but also an intent to commit the crime.**

**Accomplice Liability Formulations:**

* **Majority** of jurisdictions follow the standard form of accomplice liability: Accomplice must commit act that aids or abets, must have knowledge of the larger act, and must have intent to support it.
* ***People v.* Brigham: Large minority** of jurisdictions follow this: Acts committed by the co-felon that are a probable consequence of act can be attributed to accomplice.
* ***Kessler:*** Accomplice is liable for crimes committed by the felon that are reasonably foreseeable.
	+ Smaller minority of jurisdictions follow this test.
	+ Not just felony murder contexts, also occurred for attempted murder.
* **Kessler and Brigham are ways to expand the accomplice liability requirements, but the traditional formulation (as seen in Diaz, where Diaz was charged with the possession of gun under Pinkerton but not under accomplice theory) is most common.**

**Discrepant Liability:**

**Othello marries Desdemona, Iago convinces Othello that Desdemona is sleeping with Cassio, Othelo kills Desdemona.**

* **Othello:** Can be guilty of:
	+ **Voluntary Manslaughter:** provocation, didn’t catch wife in act, but found evidence (handkerchief was planted).
		- Provoked.
		- State of heat of passion
		- Extreme emotional disturbance
	+ **First Degree Murder:** thought about it, had time to think about it, turned over in head.
		- Intent to kill + premeditation and deliberation.
			* Premeditation: thought about it
			* Intent to kill: conversations with Iago
			* Deliberation: had time to consider first.
	+ **Second Degree Murder:** express malice: intent to kill + impulsive.
* **Iago:** Can be guilty of:
	+ **Accomplice to Othello:** encourages, tells him how to kill, plants the handerchief
		- **Has knowledge of purpose and intent**
		- **Wants it to happen**
		- **Purposeful mental state with respect to homicide**
	+ Even if **Othello is only guilty of manslaughter:** Iago can get **First Degree Murder**
		- Deliberated
		- Had intent to kill
		- Motive (revenge)
		- Premeditation

**It is possible for Othello to get lower charge and Iago to get greater charge even though he is the accomplice, and Othello could also be found not guilty.**

* Common Law: required the same mens rea for both accomplice and primary actor.
* Today, mental state can be different.
* **Discrepancy in sentencing in overwhelming majority of states: doesn’t matter.**

# Conspiracy

|  |  |  |
| --- | --- | --- |
| **Step** | **Act** | **Liability** |
| 1 | D develops animosity towards E, decides to burn house. |  |
| 2 | D hires A, and A agrees to burn house. |  |
| 3 | A buys gas and matches. | **Conspiracy:** Agreement + Overt Act might start here. |
| 4 | A approaches house. | **Attempt Liability:** Substantial Step might start here. |
| 5 | A looks around and cases the house. | **Attempt Liability:** Substantial Step |
| 6 | A enters house | **Attempt Liability:** Substantial Step |
| 7 | A shuts off sprinkler system | **Attempt Liability:** Dangerous Proximity might start here |
| 8 | A spreads gas | **Attempt Liability:** Dangerous Proximity |
| 9 | A throws match | **Attempt Liability:** Dangerous Proximity |

**There are three key elements to conspiracy:**

1. **Inchoate Crime:** does not require objective to be completed
2. **Form of Group Criminality:** requires at least 2 participants.
3. **Instrument to Establish Wide Vicarious Liability**

**Policy Rationales:**

* Conspiracy provides an instrument to strike against the special danger of group activity.
* Fear of groups engaging in criminal conduct.
* Facilitates prosecution of group.
* Creates penalties for being part of a group.
* Fear of collective power and things happening in secret.
* We can punish earlier with conspiracy and group crimes.

**Unlike Accomplice Liability, Conspiracy itself is a crime.**

**Actus Reus:** State must establish:

1. **Agreement to Commit a Crime**
	1. Does not need to be signed or direct evidence of agreement.
2. **Overt Act** (most states require something additional to agreement)
	1. Operates a evidence that the conspiracy is in progress.
	2. Overt act happens much further back than the act required for Attempt.

**Overt Act:** Can be preparatory, and typically comes far before the type of act necessary to establish Attempt Liability.

* A single act is sufficient: not necessary to have one for each co-conspirator.
* Both mastermind and accomplice can be charged at the same time with attempt and conspiracy.

**Agreement:** State doesn’t need to offer direct proof of an actual agreement: can be inferred from action.

**History:**

* **Common Law:** No overt act needed. Agreement was sufficient.
* **Today:** Most jurisdictions require both agreement + overt act, but some fudge a bit:
	+ **Rhode Island: strong agreement is enough**
	+ **Some jurisdictions:** work backwards from act itself to infer agreement.
	+ **Minority of jurisdictions** (Ohio): require a **more substantial** overt act:
		- Must manifest the purpose that the object of the conspiracy be completed.

**Must Use Two Different Acts (One for Agreement and One for Overt Act):**

* ***State v. Verive***, Court of Appeals of Arizona, 1981
	+ D charged with both conspiracy to dissuade a witness and attempting to dissuade a witness: goes to victim’s house after he files false affidavit and beats him up.
	+ **Holding:** As long as the same act isn’t being used to prove both crimes, D an be charged with both.
		1. **Conspiracy**
			- **Agreement:** He announces that Woodall sent him.
			- **Overt Act:** Going to witness’s house.
		2. **Attempt to Dissuade Witness**
			- Beating witness up.
	+ **Two Convictions:**
		1. **Conspiracy to Dissuade:**
			- **MR:** Intent to Dissuade
			- **AR:** Overt Act + Agreement
		2. **Attempt to Dissuade:**
			- **MR:** Intent to dissuade
			- **AR:** Act beyond mere preparation: substantial step. Overt act that is pretty substantial.
* **Not all jurisdictions follow Verive Test:**
	+ **MPC and some states:** Find that attempt is a lesser included offense of conspiracy, and they merge: so you can’t find independent convictions of both.

**Multi-Act Test:**

1. **Tinghitella Test (Identical Elements Test):** After eliminating the evidence necessary to support one of the charges, the remaining evidence must be sufficient to support the other charge.
2. **Blockburger Test:** Where the same act constitutes a violation of two provisions, we must consider whether each provision requires proof of an additional fact which the other does not.
3. **Punishment Merging:** In some crimes (e.g. First Degree Murder and Felony Murder) you might be charged and convicted of both under the same act (by definition, they require the same act), but at the penalty phase, the convictions merge—you don’t get punished twice.

**This is important because of Double Jeopardy Clause in the Fifth Amendment and, in Verive, an Arizona statute that makes it illegal to be charged for the same crime twice.**

**Agreement Can Be Inferred From Action:**

* ***Griffin v. State***, Supreme Court of Arkansas, 1970
	+ Police respond to car overturned in ditch, then D’s attack them.
	+ **Holding:** No actual proof of an agreement is necessary to prove conspiracy; circumstantial evidence of action done in concert/coordinated in pursuit of a common criminal objective can be sufficient.
	+ **Consequences:**
		- Huge discretion to read into circumstances an agreement.
		- Feels broad.
		- No agreement **prior to the act** must be shown.
	+ **Griffin Test:**
		- There does not need to be an agreement that precedes the crime—agreement can happen at the time of the crime.
		- Construe facts of act to demonstrate an agreement.
		- **State still must prove an agreement, but it can be proven through indirect means.**
		- **Some jurisdictions allow Attempt to Conspire, but most don’t (it’s so preparatory, so no need).**

**There is no Impossibility in Conspiracy Crimes:**

* ***U.S. v. Recio***, U.S. Supreme Court, 2003
	+ During sting operation, D’s charged with conspiracy to possess and distribute drugs, even though it was a legal impossibility.
	+ **Holding:** A conspiracy doesn’t just end because it is impossible to achieve the goal.
		- **Based on what defendants thought at the time, not actual circumstances.**
		- As long as D’s believed the crime to be live, it is possible to do.
		- **Mens Rea:** Need intent to agree to the conspiracy.

**Mens Rea in Conspiracy Crimes:**

* ***People v. Lauria,*** California Court of Appeal, 1967
	+ Lauria runs answering service and knows that prostitutes use the service.
	+ Charged with conspiracy to commit prosecution.
	+ **Holding:** Knowledge of the criminal purposes is not enough, D must also have intent to promote the unlawful objective.
		- **Stake in the Venture Test:** If Lauria had a stake in the venture and has dought it out, then things would be different. Prove by looking at:
			* Seeking out unlawful users of product
			* Encouraging prostitutes to use business
			* Charging extra to specific people (implies knowledge of unlawful activity)
			* Business couldn’t function without unlawful use.
			* Disproportionate volume of unlawful users without legitimate purpose.
			* No other legitimate use for services.
	+ **MENS REA TEST FOR CONSPIRACY:**
		- Knowledge +
		- Intent to agree to conspiracy +
		- Intent to promote unlawful objective of conspiracy
		- **However: in some felonies that are serious enough, knowledge itself MIGHT be enough.**

**Transferring Act to Co-Conspirator:**

* ***U.S. v. Diaz***, U.S. Court of Appeals, Seventh Circuit, 1988
	+ Diaz present for drug deal, co-conspirator has firearm and he is charged with using and carrying the firearm even though he didn’t have it.
	+ **Holding:** Under the *Pinkerton* test: you can impute the crime from one conspiracy act to another if the offense is committed in furtherance of the conspiracy and foreseeable.
	+ **Elements of Conspiracy:**
		- **Agreement:** Multiple conversations, statements.
		- **Act:** Selling cocaine, Diaz supplies.
		- **Responsible for Firearm:**
			* Foreseeable for gun to be there.
			* In furtherance of conspiracy
			* Natural and foreseeable consequence of the drug trade.
	+ **No charge for firearm under accomplice theory here. You would need to show:**
		- Intent to assist with respect to possession of firearm.
		- Actions make it easier to use the firearm.
		- Under **Brigham** (probable consequence) or **Kessler (**reasonably foreseeable), you might be able to get accomplice liability here though.
		- **No evidence of this here. Conspiracy is the only route through which this is possible:**
			* **Bootstrapping crimes.**
			* **Crime still must be foreseeable as a necessary or natural consequence of the unlawful agreement.**

**Pinkerton Rule for Transferred Act in Conspiracy:**

1. Act must be **within the scope of conspiracy.**
2. Act must be **reasonably foreseeable as a consequence of the agreement.**
3. Act must be **in furtherance of the crime.**

**Rule for Transferred Act to an Accomplice:**

* Generally, requires much more direct volitional contact than Pinkerton, which is why conspiracy allows state to charge many more acts than they otherwise could:
	+ Act that is designed to aid and abet.
	+ Mens Rea: Knowledge + Intent to further the crime.
* Ultimately, conspiracy allows the extension of liability once the government establishes liability for the conspiracy.

**Withdrawal from a Conspiracy (easier than withdrawal as an accomplice):**

* A co-conspirator can withdraw from a conspiracy by:
	+ Informing co-conspirators that you no longer intend to participate, OR
		- Don’t need to notify all conspirators
	+ Engaging in acts that are inconsistent with object of the conspiracy.
* Regardless of which of the above, make it clear that you do not intend to be a part of the conspiracy anymore.
* After withdrawing, a conspirator is avoiding liability for subsequent crimes, but is still liable for previous crimes (including the conspiracy itself).

**Co-Conspirator Can Still Be Liable For Acts Committed While in Prison**

* Kayla and Claudia: engaged in counterfeit money scheme, then Kayla is arrested.
* Even while Kayla is in prison, she would likely be held liable if Claudia continues to print counterfeit money.
	+ Way to make out the defense: conspiracy ended after the first batch: was just for the first batch of money.

**Conspiracy vs. Attempt Liability:**

* Anais organizes conspiracy, hires Brent and Courtney to each rob a bank and hires David to steal car for robbery of Bank 1.
* **Anais:** Both accomplice and Pinkerton theory for conspiracy to rob and robbery.
* **Brent:** Liable under Pinkerton for Courtney’s robbery, but not an accomplice to Courtney’s robbery.
* **David:** Liable under Pinkerton for Bank 2 robbery, but not an accomplice.
* **David:** Liable for both Pinkerton and accomplice for bank 1 robbery.
* **Brent:** Liable under Pinkerton but not accomplice for David’s theft.
* **Courtney:** Liable under Pinkerton but not accomplice for David’s theft.

**Conspiracy Provides Short-Cuts and Benefits to Prosecutors:**

1. **Joint Trials:** makes it easier to get evidence out.
	1. Allows prosecution to shore up weaker bits of evidence against certain individuals in the conspiracy.
2. **Exception to Hearsay Prohibition:** Statements made by co-conspirators in furtherance of conspiracy are admissible in trials against other co-conspirators.
3. **Statute of Limitations:** Begins after the LAST overt act of the conspiracy.

**Types of Conspiracies:**

* **Single:** Government will favor one large single conspiracy if it stretches the nets of Pinkerton liability and increases high pressure advantages of a joint trial.
* **Multiple:** If government wants to rack up a large number of conspiracy accounts against the hub, favor multiple prosecutions.

**Establishing Knowledge of a Conspiracy:**

* Rimless Wheel: Separate conspiracies between the hub and each actor individually.
* Single Conspiracy: Requires a connection between all the actors and the hub.
	+ Prove by showing that each seller **KNEW OR SHOULD HAVE KNOWN** that there was a larger conspiracy.
		- Doesn’t require actual knowledge that each seller knew the other seller, but each seller has to know or should have known that there were other sellers. Prove by:
			* Interdependency
			* Statements
			* Observations
			* Repeated use of the same conspirators would draw suspicion🡪 implies there are more conspirators.
			* Proceeds of a single transaction seem insufficient to justify risk.
			* Interdependence: links in the chain.
* Today, with unilateral conspiracies, a conspirator can be found guilty even if co-conspirators are not found guilty.

# Defenses

**There are two types of defenses:**

1. **Justification for the Act**
2. **Excuse**
* These are both defenses that are used after the state has proven the elements of the offense.
* Distinct from defenses like mistaken identification or alibi, where the defendant is actually refuting the state’s case.

**Justification:** Actor commits a crime that advances some social interest.

* Self defense or defense of others.
	+ Assumes some social utility, which makes the conduct justified.
	+ There is an allowance for the human tendency to protect our own lives or the lives of others when threatened with imminent bodily harm and when fear of harm is reasonable.

**Excuse:** Actor commits crime but is not morally blameworthy.

* Insanity: stands out as an excuse defense.
* Actor did it and the act is not justified, but he is not morally blameworthy.

While there is a theoretical distinction between these defenses, the result is the same: acquittal of the accused.

**Defensive Force:**

|  |  |
| --- | --- |
| **Case** | **Standard for Defensive Force** |
| ***People v. LaVoie*** | **Two questions:**1. Did he believe he was in imminent danger of being harmed? (always subjective: based on this individual)2. Did he have reasonable grounds for so believing? (objective standard)* Both if the **belief** was reasonable, and if the **action** was reasonable.
 |
| ***People v. Leidholm*** | **Two questions:**1. Did D actually believe that he was in imminent harm?2. Did the accused reasonably believe that the circumstances existed permitting the use of defensive force?* MORE subjective standard (allows in psychological and physical characteristics), but not purely subjective: there still must be a reasonableness there, but the reasonable person we are thinking about is more sensitized.
* **Broader than Goetz in terms of what is allowed in:** psychological characteristics.
 |
| ***People v. Goetz*** | Same as above, but slightly tweaked:* Did he reasonably believe in light of the situation facing the defendant, including past actions, victim and assailant.
 |

* **Defendant must have reasonably grounds for believing or actually believe that he is in danger of being killed or seriously harmed (*People v. LaVoie)***
	+ Did he believe that he was in danger of being harmed?
	+ Was that harm imminent?
	+ Did he have reasonable grounds for believing that?
* ***People v. LaVoie***, Supreme Court of Colorado, 1964
	+ D’s car was bumped into from behind by another car.
	+ He got out with his gun, was threatened by the people in the other car, and then shot the other.
	+ **Holding:** LaVoie was justified in killing as long as he had reasonable grounds for believing he is in danger of being killed or gravely injured.
		- Court does not suggest that he has any obligation to retreat.
		- Court applies an OBJECTIVE person standard: would a reasonabley person have believed that the situation put him in imminent danger of being harmed?
		- **Possibility of Mitigation:** If he actually believed he was endangered but it was unreasonable to believe that, there may be an “**Imperfect Self Defense”** effect🡪 **Mitigation to Voluntary Manslaughter.**
* ***State v. Leidholm***, Supreme Court of North Dakota, 1983
	+ Leidholm and husband went to gun party, then returned home and he beat her up, wouldn’t let her call the police.
	+ He went to bed, and she stabbed him to death while he was asleep.
	+ **State:** He was asleep and not currently an imminent threat.
	+ **Defense:** Could have woken up at any moment, history of abuse, she felt in constant danger by his presence.
		- **Imminence is not based on immediacy.**
		- **Evidence of Battered Woman Syndrome:** makes her belief of harm and fear seem more believable and reasonable, helps us understand she has lost the ability to reason through her actions. **Psychological Dimension of fear.**
		- **Retreat:** The statute requires her to retreat (he lived in the same home as her), but it may not have been psychologically available to her.
	+ **Holding:** The jury should have used a subjective standard, NOT a “reasonably prudent person” standard and allow psychological evidence and individual characteristics in.
		- **This creates a more subjective standard, but it is NOT entirely subjective:** test reasonableness within the context of actor’s stuation, but still consider what is reasonable.
		- **Purely subjective:** Did this person think it was reasonable?
		- **Hybrid:** Would a reasonable person in this person’s shoes think it was reasonable?
		- **Defense wanted jury instruction on battered women’s syndrome, but court holds that it’s unnecessary:** redundant with the new subjective standard.
* ***People v. Goetz,*** Court of Appeals of New York, 1986
	+ Goetz indicted on attempted murder for shooting four young men on subway after they asked for money.
	+ Indictment was quashed because the prosecutor used an objective instead of subjective element in defense.
	+ **Holding:** The standard should NOT be what the defendant thought was reasonable, but rather whether it actually was reasonable from his standpoint.
		- **Determination of reasonableness:** includes consideration of circumstances, but does not mean an entirely subjective view.
		- **This is much closer to Leidholm.**
		- Court calls it objective, but it is very different from LaVoie.
		- **But there is a major difference between Goetz and Leidholm:**
			* **Goetz:** Generalized fear of being mugged.
			* **Leidholm:** Specific sense of fear with one individual.

**Summary:**

1. LaVoie: reasonably prudent/objective person. Just your average person.
	1. The circumstances that a reasonably prudent person in those circumstnaces would feel.
2. Leidholm/Goetz: start with the same initial question (you can’t move on if the person did not actually believe subjectively that he was endangered) and then the second question is not purely subjective, but it has more of a subjective component.
	1. Was it reasonable for someone in that circumstance and with his/her psychological situation to perceive what they did.

**Standards for the Defense of Others:**

* Parallel doctrine: there is a right to use defensive force in defense of others if the person believes that the mother is in danger of imminent harm.
* Requires that, if the other person was there, he would have been justified in using self defense.
* **Minority of jurisdictions:** Require that the D was factually correct in perceiving that defense was necessary.