**Criminal Law**

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# 1. Criminal Law Objectives

Consider **statute, problems** and **policy implications**

Law is neither neutral nor objective—highly dependent on context

Law embodies notions of reality—imposes norms of society

Speaks to two audience: general public and the State

Law must be specific enough to form a guide—provide notice

Law must satisfy constitutional objectives

Criminal law is concerned with **blameworthy conduct**

**Rule of Leniency**—if there is ambiguity / multiple interpretations of a statute, construe in favor of the accused

Crime = actus reus + mens rea + circumstance + causation + result – defense

**A crime requires a choice (act / omission) but choice alone is insufficient—generally there is some knowledge and it is crucial to know intent and state of mind**.

# 2. Punishment—Purposes

1. **Deterrence**—preventative. Prevent conduct specifically to individuals and generally to society through threats of punishment. Assumes rational actors. May risk abuse by law enforcement and punish disproportionately to the crime.
2. **Rehabilitation**—corrective. Focus on individual and future; trying to alter actor’s behavior; original goal of punishment. Promotes correction through separation, obedience, labor and education. Time uncertain.
3. **Incapacitation**—preventative. No assumptions about individual behavior; justification is prevention, taking criminals out of circulation. Problems: proportionality of sentence; numbers and proportionality of prisoners; safety of prisoners; eventual release into general population; trends/tendencies for those who fit pattern; high cost.
4. **Retribution**—corrective. Exacts suffering and focuses on the crime, intent of actor doesn't matter. Assumes criminals are rational. Limiting action—state takes control of punishment and dissuades individual retribution/vigilantism; focus on society and offense; satisfying with focus on just desserts and proportionality.
5. **Social Contract** – uphold the strict meaning of law and order

Sentencing Reform Act (1984): severity of offense + seriousness of prior criminal acts = sentence

* State guidelines take personal characteristics into account
* Fed guideline system more restrictive, distinguishing characteristics of offender are forbidden.

Our system is one of **mixed theory of punishment**.

Factors to consider:

Individual—mental state; mental capacity at time of the crime; background; cooperation with government. Consider human frailty.

Offense—severity; mitigating circumstances; societal costs; alternative options.

* **Individualization** in the system—reveals a lot of discretion in the system by various players (police, prosecutor, judge, defendant, defense counsel, executive, media):
1. Nature of the offense;
2. Representation;
3. Individualized factors (race / socio-economic context)
4. Decision-making throughout the case (plea offer, cooperation, etc.)

# 3. The Criminal Act / Voluntariness

1. **Actus Reus** – culpable conduct
	1. Punishment must be for →(1) past (2)voluntary (3) conduct [not a thought or status, but can be an omission] (4) committed within a jurisdiction (5) specified (6) in advance (7) by statute.
	2. *An overt act is required—act to connect to unlawful intent.*

### Proctor v. State (OK 1918)

 Δ convicted in violation of statute criminalizing “keeping a place” with intent to use for booze selling, production, distribution.

* 1. However, act requirement not so literal: sometimes intent is proxy for act that we consider blameworthy. **Blurring of mental state and act**. Ex:
	2. Constructive possession = power to control (drugs) + intention of exercising that power

### United State v. Maldonado (1st Cir. 1990)

Δ convicted of possessing w/ intent to distribute cocaine; connected w/ seller, left drugs in hotel room together—joint constructive possession.

**2. Voluntariness**

1. If the statute is silent, **may infer voluntariness**

### Martin v. State (AL 1944)

Δ home when police arrive, took him on a highway; convicted for drunkenness on public highway. Found no voluntariness, and therefore no intent.

1. **If there is not voluntary conduct, there is no intent**.

### People v. Grant (IL 1977)

Δ attacks police in bar fight; grand mal epileptic seizure; appeals conviction b/c no instruction on defense of involuntary conduct—but concern w/ faking. Original jury instructions didn't specify distinction between not understanding and understanding but not controlling actions. Case remanded. Sanity + involuntary conduct = not guilty

* 1. If the act is in some way involuntary (due to illness or mental condition), it may not be deterrable or morally blameworthy—is it something beyond the actor’s control? (*Grant*)

### People v. Decina (NY 1956)

Driver suffered an epileptic seizure = involuntary. Still criminally liable because he knew that his seizures could strike at any time, yet he risked driving. (Blurs line between act evidence/mental state evidence)

* 1. *But*: consider what actions the Δ did take (drinking, *Decina*: driving with epilepsy) and what the consequences may be as a result (even if Δ does not have control later on).
		1. **Anticipated Involuntariness**: did the actor have cause to think the involuntariness may happen? ⇨ **Foreseeability** (*Decina*)
1. **Commission of the act must be coupled with intent to commit the crime**
2. If statute is unclear in some way—courts break in favor of the accused. Leniency rule.
3. Court has discretion to open or narrow time period.
	1. Go back far enough and can find some voluntary act (drinking for both *Martin* & *Grant*)

# 4. Omissions and Status Offenses

## Omissions

1. **Omissions can be a crime in situations where there is a legal duty to act**.

### Jones v. United States (DC 1962)

Δ charged w/ care of infant, who dies of malnutrition; convicted of involuntary manslaughter. Court decides there was a contractual duty and that duty is an issue of fact for the jury.

1. Encompasses **wholly passive conduct**
2. **Situations where there is duty of care**:
	1. Law / statute imposes a duty of care
	2. In certain relationships (parent/child; husband/wife)
	3. In a contractual relationship that requires duty to care
	4. Voluntary assumption of duty to care for another and prevent care by others

## Status Offenses

1. **Cannot punish someone’s status**

### Robinson v. California (US 1962)

Δ convicted under Cal. law criminalizing being an addict based on track marks and his own admission. Unconstitutional to punish for a non-act.

*Lambert*

punishing Δ’s status as ex-con

### Johnson v. State (FL 1992)

punish Δ’s status as pregnant woman and drug addict. Charged with delivering in 60-90 sec between delivery and cutting cord.

1. **Violates 8th and 14th Amendments** prohibition on cruel and unusual punishment
2. Issues of fairness and notification (*Lambert, Johnson*s)
3. **Lacks act requirement**

### Powell v. Texas (US 1968)

Δ convicted of public drunkenness; appeal claiming alcoholism made public drunkenness an involuntary act that should not be punished—fails since there was an act of voluntarily going into public. Punishing for conduct occurring due to status is ok.

*Johnson*: involuntary act (‘delivery’ of cocaine to fetus). The leg wanted to deal with drug

dealings not mothers, if they wanted to address mothers they would have said so explicitly.

1. Eliminates possibility of rehabilitation

# 5. Proportionality, Legality, Specificity

## Proportionality:

*last class seems to have covered more of this than we did.*

1. **As long as there is a clear policy choice by the legislature, courts will not interfere**.

### Ewing v. California (US 2003)

Δ steals three golf clubs; under Cal’s 3-Strikes law, convicted and got 25-to-life. Court says the punishment is constitutional - because it's serving a penological purpose (incapacitation), then courts should defer to the leg to determine proportionality.

* 1. Sentences under 3-Strike laws are not grossly disproportionate—do not violate 8th Amendment (*Ewing*)
	2. Application of cruel & unusual punishment limited to DP cases—mandatory life does not violate 8th Amendment. (*Rummel v. Estelle*: Δ convicted of fraud 3x and sentenced to life in prison without possibility of parole.)
	3. Court has rejected the contention that only violent crimes merit life in prison. (*Rummel*)
1. Exception: in a non-violent case w/ non-violent offender, life in prison w/o possibility of parole reversed (*Solem v. Helm*: Δ convicted for writing bad checks 3x and sentenced to life in prison without the possibility of parole. SC reversed conviction)
	1. *Solem*: **Three criteria to consider under 8th Amendment:**
		1. Seriousness of the offense and harshness of the punishment
		2. Comparison to sentences imposed in that jurisdiction on other criminals
		3. Comparison to sentences imposed in other jurisdictions for same crime
2. **Deference to legislatures** to craft their laws (*Harmelin v. Michigan*: Δ convicted and sentenced to life in prison w/o parole for 1st-time offense; found with 672g of cocaine and beeper, address book, legal gun, and cash.)
	1. S.Ct. has established **Narrow Proportionality Principle**: **8th Amend does not command strict proportionality between crime and punishment**—it only forbids extreme sentences that are grossly disproportionate to the crime. **There is no such thing as strict proportionality**(*Harmelin* & *Ewing*)

## Legality

1. **There shall be no crime, without pre-existing law** (legislativity).
2. Primary basis for American law. **Cannot apply laws retroactively** (prospectivity).
	1. Ex post facto issues: lack of notice and due process (violate 14th Amendment)
		1. *Keeler v. Superior Court*: Δ charged with murder for death of fetus; said he would “shove the baby” out of his ex-wife; kneed/beat her pregnant stomach; child stillborn COD skull fracture.

## Specificity

1. Operational arm of legality.
2. Addresses vague laws: **any laws containing broad terms open to a number of meanings / interpretations may be challenged**.
3. **Void-for-vagueness**—unconstitutional to have a law/statute so vague that it:
	1. Fails to give reasonable notice
	2. Encourages arbitrary or discriminatory application of the law
	3. Does not give fair warning/notice and allow actor to conform behavior
	4. Violates other amendments (like 1st Amendment right to associate)

### Chicago v. Morales (US 1999)

Chicago pass ordinance prohibiting criminal street gang members from loitering with one another or others in public places; required police to reasonably believe subjects were gang members; subjects had to be loitering; police had to tell subjects to disperse; that order had to be disobeyed. Found: unconstitutionally vague, punished status crime and otherwise lawful behavior, violated 1st Amendment, etc.

### Papachristou v. Jacksonville (US 1972)

Jacksonville promulgated anti-vagrancy law that punished many classes of people. Found: unconstitutionally vague; punishes status and otherwise legal behavior.

**Act Requirement—punishment must be for:**

**(1) past**

**(2) voluntary (must be avoidable)**

**(3) conduct (omission but not thoughts or status)**

**(4) committed within a specific legal jurisdiction**

**(5) specified (specific language to avoid vagueness)**

**(6) in advance (legality: avoid retroactive application)**

**(7) by statute (legality)**

# 6. Mens Rea

1. **Criminal responsibility requires a choice**—a voluntary act or omission (actus reus)
2. **Attempt to assign a level of mental awareness**: actor’s mental state does have significance.

## a. Strict Liability

1. **Act alone is enough.** **Do not need to prove mental state**.
2. Addresses public welfare, health, safety concerns (minor offenses—not common law crimes)
	1. Penalties and stigma minor
	2. Holding actor liable outweighs concerns about mental state because safety issues trump
3. **Legislature is at liberty to remove intent element from crimes**

### People v. Dillard (CA 1984)

Δ convicted of misdemeanor of carrying a loaded weapon in public; Δ unaware that rifle was loaded and defense of this lack of knowledge not allowed at trial

1. For crimes that are inherently dangerous, public safety and health concerns may overrule.

## b. Proof of Intent

1. **May only interpret intent when statute is silent for traditional common law, *malum in* se crimes.**
2. Must give Δ opportunity to prove to the jury lack of intent for any case that is not strict liability, and thus requires proof of intent.

### Morrissette v. United States (US 1952)

 junk dealer who took old shell casings; violated rule about converting USG property. Statute is silent on intent: SC finds this is a common law crime (theft) where intent is read into the statute. Hold Congress must assume that court would know that intent was read into statutes. Distinguishes between malum in se and malum prohibitum crimes.

* 1. **Improper to interpret common law/intent-requiring crimes as strict liability crime** (and therefore not need to prove mental state): would deprive jury of finding mental state; grant too much power to government; deprive Δ of notice
1. **Malum in se**—wrongs in and of themselves (common law crimes— think10 commandments)
2. **Malum prohibitum**—acts that society has elected to prohibit but in and of themselves are not crimes (public welfare / regulatory crimes)

### Lambert v. California (US 1957)

Δ convicted of not registering as a felon in LA; conviction overturned. Wholly passive conduct; violation of 1st Amend, due process, notice. Exception to ignorance is not excuse:

**Strict liability is unconstitutional when**:

* + - * 1. **Legislature is punishing the exercise of a fundamental right**
				2. **When the punishment is not predicated on some voluntary act or omission**

## c. Culpability Categories

1. **Intent must be shown w/r/t each element of the crime** (MPC)—examine culpability w/ some precision
2. **General intent may be inferred—**
	1. Applies to reckless and negligent conduct;
	2. Transferable;
	3. Assumption that actor intended for the natural and probable results and legal consequences;
	4. Refers to broader question of blameworthiness or guilt, including mens rea and responsibility;
	5. Generally does not have lesser included crimes.
3. **Specific intent may not be inferred—**
	1. Applies to purposeful and knowing conduct;
	2. Not transferable;
	3. Mental element of any crime;
	4. Unexecuted intention to do some further act;
	5. This intention for act has specific consequences;
	6. Includes some lesser included offenses

**Categories of culpability**:

|  |  |
| --- | --- |
| **Culpability Level** | **Mental State** |
| **Purposely** | Intent/purpose to commit the crime in question *(specific intent)* |
| **Knowingly** | Almost certain (knowing) actions will induce consequences *(specific intent)* |
| **Recklessly** | Conscious disregard of substantial risk that action will induce consequences *(general intent)* |
| **Negligently** | Actor is not conscious of risk, though reasonable person would be; (grossly) deviating from a reasonable person’s standard of care *(general intent)* |
| **Strict Liability** | Act alone suffices; mental state irrelevant |

### Regina v. Faulkner (Ireland 1877)

Δ, while attempting to steal rum, lights match that burns down ship. Court finds Faulkner not guilty w/r/t arson, since he lacked the requisite intent to burn the ship):

**Culpability level Act Why**

Purposefully *light match to burn ship*

Knowingly *light match help steal rum*

Recklessly *light match to help steal rum[[1]](#footnote-1)*

Negligently  *light match gross deviation from standard of care*

Strict liability *light match nothing to prove*

**Supreme Court has said that due process requires mental intent must be proven, not assumed, but actor may be punished for unintended consequences**.

## d. Mistake of Fact

1. Mistake of Fact accepted as an affirmative defense
2. Do not want to punish someone without a culpable mental state.
3. **Mistake negates a necessary element of the offense (mens rea)**,
4. **Irrelevant for strict liability cases**

### Regina v. Prince (England 1875)

Δ took 14-year-old (looked 18) from the ‘care of her father’; found guilty. Δ claimed lack of guilty mind, but Court chooses not to read a mental state to be proved / read into the statute.

* 1. *Exception*:

### State v. Guest (Alaska 1978)

Δs had sex w/15-year-old (said she was 16 and looked it); charged with statutory rape, though statute did not specify intent required. Court holds that honest and reasonable belief that victim was under 16 is a permissible defense

* 1. **If statute conditioned on reasonableness, mens rea required is negligence**

Model Penal Code § 2.04: Ignorance or Mistake

 (1) Ignorance or mistake as to a matter of fact or law is a defense if:

 (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or

 (b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

(2) Although ignorance or mistake would otherwise provide a defense to the offense charged, the defense is not available if the defendant would be guilty of another offense had the situation been as supposed. In such case, however, the ignorance or mistake of the defendant shall reduce the grade and degree of the offense of which he may be convicted to those of the offense of which he would be guilty had the situation been as he supposed. (Can mitigate)

## e. Mistake of Law

1. **Ignorance is No Excuse**.
2. No statute says you have to know of the statute—do not want to award ignorance/discourage people from knowing the law, and want to discourage false defense claims
	1. No defense to say unaware of a statute

### United States v. Baker (5th Cir. 1986)

Δ selling counterfeit watches; claimed he did not know it was illegal; was on notice and had voluntary, not passive, conduct)

1. In rare situations can be a defense when there is reliance on official sources that fact-finder finds to be reasonable.

### Commonwealth v. Twitchell (MA 1993)

Δs convicted of involuntary manslaughter of their son; were Christian Scientists, and relied on publication from church that included information from Mass. AG on spiritual treatment of children. Allowed to present mistake of fact defense.

* 1. May also be a defense when there is wholly passive conduct, no notice, and law not widely known (*Lambert*).
	2. Assumption that people will know the law, and if they do not, their conduct will trigger a question, and if they are close to that line will seek advice.

## f. Capacity for Mens Rea

1. **May introduce evidence to negate intent for specific intent crimes**:
	1. Can introduce defense based on mental impairment to negate proof of requisite mental intent for specific intent cases (where must show purposeful/knowing)
		1. *Exception*: allowed in for general intent case—

### Hendershott v. People (CO 1982)

Δ assaulted girlfriend; assault = general intent; prevented at trial from presenting evidence that owing to mental illness, could not form the requisite intent, lacks blameworthiness—Court sets aside verdict and remands for new trial because denying the evidence would deny the defendant a defense and make the prosecution's evidence uncontestable. This case is the exception—*usually cannot raise this defense for general intent cases, only specific intent.*

* 1. Need to negate intent for each element in that defense
1. Some states do not allow evidence of intoxication as a defense (policy choice).
	1. If intoxication defense is raised, need to show that Δ was so inebriated (through quantity) that could not function (could not form intent)

### State v. Cameron (NJ 1986)

girlfriend flips shit while drunk; attacks people; found guilty of assault and resisting arrest; fails to prove intoxication defense because no evidence that she was too drunk to form the specific intent for her actions.

1. **Voluntary intoxication is a defense when it renders a person so incapable of forming the requisite intent and if the law recognizes proof of a lack of mental state**
	1. Intoxication defense can only be used when it negates a required element of the offense (specific intent crimes, but not for general intent crimes)
	2. MPC rejects allows consideration of evidence of intoxication only to negate specific levels of culpability

# 7. Rape

* Conventional definition: vaginal intercourse by force or threatened use of force; element of force typically defined as lack of consent
* Historically, burden on woman; required to resist to the utmost until attack finished—belief that she had to meet force with force. Corroboration requirements—women’s word was not enough
* After Women’s Movement, courts swung the other way: rape shield laws, abolished corroboration requirements. Complainant’s word against attacker’s; usually there is medical evidence
* Now the focus is on the actions of the complainant—look to mental state to see if there was a lack of consent. Balancing rights of complainant with rights of the accused
* **General mental state required = negligence**. Cannot be strict liability.

## a. Actus Reus

1. **Force + non-consent + negligence**

### People v. Barnes (CA 1986)

Vic goes to Δ’s house, smokes weed; she tries to leave but he prevents her; she takes off her clothes in fear of violence and he rapes her. Case removed resistance requirement.

* + 1. **Removed resistance requirement**: still focus on actions of complainant in part—some victims “freeze”; possibility of increasing bodily harm
	1. **Need to prove**:
		+ 1. Use of force or fear of immediate and unlawful bodily injury, and
			2. Such fears were reasonably grounded.
	2. **Use of force as proxy for non-consent—**can infer mens rea from force / threat of force
1. **Non-consent + negligence**

### State v. Smith (CT 1989)

Complainant goes home with Δ after bar; threatens her; she refused oral sex but went along with sex. No force requirement.

* 1. **Negligence Standard**: it was reasonable to interpret her conduct as non-consent
		1. Undisclosed non-consent does not suffice
		2. Objective manifestations of non-consent are enough
1. **Absence of affirmative consent**

### In the Interest of M.T.S. (NJ 1992)

17-year-old convicted of raping 15-year-old acquaintance; after earlier physical encounter, she awoke to having sex with him without consent. NJ-specific. Criminality depends on the absence of consent.

* 1. Force defined as penetration in absence of freely given consent—force requirement virtually eliminated
	2. **Act = sex without explicit approva**l
	3. **Mens rea is negligence**—need to establish an objective (“reasonableness”) standard—determine whether to a reasonable person victim consented
	4. Victim not required to resist or express non-consent (negligent conduct + lack of affirmative expression of intent)

**Continuum**:

**Resistance/Force - - - - - Force w/o consent - - - - - Non-consent - - - - - Affirmative manifestation of consent**

 (old standard) (*Barnes*) (*Smith*) (*MTS*)

 **Mens Rens Actus Reus:**

*Penetration plus:*

1. Intentional (purposeful) 1. Force & nonconsent

2. At least reckless 2. Nonconsent manifested by either verbal/physical

3. At lease negligent 3. Lack of affirmation or consent

4. Strict liability 4. Nonconsent (subjective)

* For prosecution, most beneficial is 3 (negligence) plus 4 (non-consent)
* For defense, is 1 (intentional) plus 1 (force and non-consent)

MPC § 213.1. Rape and Related Offenses

Rape is a usually a felony of the 2nd degree.

A male who has sexual intercourse with a female not his wife is guilty of rape if:

 (a) he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping to be inflicted upon anyone, or

 (b) he has substantially impaired her power to appraise or control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance; or
 (c) the female is unconscious

Rape is a felony in the **1st degree only if**:
 (a) actor inflicts serious bodily harm in the course thereof (force required!)
(b) victim was not a voluntary social companion of the actor...and had not previously permitted sexual liberties

Rape is a felony in the **3rd degree** if:
 (a) he compels her to submit by any threat that would prevent resistance by a women of ordinary resolution
 (b) he knows she suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct

## b. Rape Mens Rea

1. **Most common standard = negligence**
2. Mistake of Fact: can make defense of honest and reasonable mistake. Negligence standard: if Δ reasonably believed that there was consent, can put that to a jury.
3. Force has been redefined over the years—most states have “at least negligence” standard—allows defense of reasonable and honest mistake to be raised
	1. Most common form of resistance is verbal
4. Differences in Statutes:
	1. Only 15 states have eliminated the marital exemption for rape, some states treat marital rape as a less serious crime and some extend the exemption to couples living together.
5. **Rape shield laws** are information shields for victims—balancing process.
	1. History of victim generally *not* allowed in;
		* 1. However, past relationship with defendant is allowed in
	2. History of defendant generally: if there’s a signature element/pattern—can usually bring it in. But just to show propensity (he’s been charged or even convicted before), most jurisdictions wouldn’t let it in, b/c want jury to only focus on this specific incident. But if accused testifies, then can bring it in.

***Policy*:**

1. Consider rights of victims/complainant v. rights of accused
2. Issues of victim’s mental state/actions—difficult or impossible to totally remove victim from determination
3. Changes to conception of rape law and proof standards (elimination of corroboration, resistance requirement)

# 8. Homicide

*SEE CHEAT SHEET*

|  |  |  |
| --- | --- | --- |
| **Evidence Showing** | **Possible level of Homicide** | **If evidence shows…** |
| **Intentional Killing** | 1° murder | Premeditation and deliberation *(remember also felony murder)* |
| 2° murder | Impulsive act, unprovoked / without premeditation, and express or implied malice (no cooling off period) |
| Voluntary manslaughter | Adequate provocation and heat of passion with no cooling off period |
| **Unintentional Killing** | Felony Murder (1°) | Intent to commit an inherently dangerous felony (and death results) |
| 2° murder | Extreme recklessness → abandoned and malignant heart, intent to do serious bodily injury |
| Involuntary manslaughter | Negligence, gross negligence, or recklessness; Misdemeanor manslaughter |

# A. Manslaughter

1. Actus reus: unlawful act or simple unintentional killing
2. Mens rea: homicide without malice, no intent to kill
3. **Manslaughter**—**homicide without malice**; two types:
	1. **Voluntary**—intentional killing without malice; done in heat of passion after adequate provocation
	2. **Involuntary**—killing done recklessly or highly negligently (in some limited cases ordinary negligence), in course of felony or misdemeanor, or when doing a lawful act in an unlawful manner

## 1. Involuntary

### State v. Williams (WA, 1971)

Δs guilty of manslaughter; son died from tooth infection. Failed to supply their infant with necessary medical care. This particular statute only requires ordinary negligence – breach of duty owed – court says that such negligence is sufficient to support statutory manslaughter.

* 1. Involuntary manslaughter—breach has to be more than mere simple or ordinary negligence—common law standard is gross negligence.
	2. Here, affirmed convictions since there was a failure to exercise ordinary duty of care
	3. Use objective reasonable person standard—reasonable prudent parent would have sought medical attention
	4. Same as *Jones, Twitchell*
1. **Vehicular Manslaughter**—category that generally falls under negligent homicide; statutes generally require reckless indifference

### Porter v. State (FL 1956)

Δ driving the correct speed limit (no negligence), missed stop sign on an unfamiliar country road, kills victim.

* 1. Court reverses conviction because of insufficient evidence to establish gross negligence
	2. Gross negligence—negligence of such a gross and flagrant character it creates a gross disregard for human life
	3. Policy decision—sense of “we’ve all done this," don't want to criminalize common behavior.
	4. Different than *Williams*—different mens rea requirements (W = proof of ordinary negligence, P = proof of gross negligence)
1. **Misdemeanor Manslaughter**—commission of a misdemeanor creating a risk so serious that when death results, charge of misdemeanor manslaughter is warranted.
	1. State is attempting to capture conduct where the state of mind of the actor is not intentional or purposeful but **where the conduct exhibited gross negligence or a gross deviation from what a reasonable person would have done, and the result is death**.
	2. Category only exists in some states, and **usually limited to wrongs that are malum in se**
	3. **State would need to show that the commission of the misdemeanor proximately caused the death**
	4. No mental element w/r/t death, only with misdemeanor—**does not apply to strict liability crimes**
	5. Act can be lawful or unlawful
	6. Mental element for misdemeanor is negligence, gross negligence or recklessness

### United State v. Walker (DC 1977)

Δ drops unlicensed gun and kills someone; convicted of involuntary manslaughter (misdemeanor manslaughter)

Court found that **carrying an unlicensed gun (misdemeanor) dangerous enough to warrant manslaughter** charges when death proximately caused

All that needs to be shown is the act of carrying the unlicensed gun that has some causal relationship to the death

## 2. Voluntary Manslaughter

1. Notion that someone provoked into killing is differently culpable than unprovoked (negates the intentional design of murder)
2. Concept of “**heat of passion**”—can mitigate the killing; **imperfect self defense**
3. Doctrine is that if there is provocation and it is such that a reasonable person in the defendant’s situation would be tempted to kill—split the difference: not guilty of murder but manslaughter
4. Some states have a threshold question of provocation. Mixes subject and objective elements in considering the defendant: two questions—
	1. *Subjective*—Was the person provoked? Consider characteristics of the accused; jury to consider whether the person was provoked by the deceased, and given that, if his act in response was done in the heat of passion
	2. *Objective*—Would the reasonable person have been provoked to violence in that situation?
5. Not an attempt to excuse the conduct—mitigation
6. Consider timeframe, what is adequate provocation, immediacy
7. Words alone are generally not enough to prove provocation

### People v. Walker (Ill. 1965)

Δ with others, drunk aggressor approaches threatening to kill them if they don't gamble with him, Δ attacks aggressor, stabs him. Appeal murder conviction, arguing for manslaughter.

* 1. Intended to kill, but Court found there was no malice aforethought, sets aside murder conviction
	2. Not justified or excused—by stabbing, showing excess conduct
	3. Found there was adequate provocation

### Rowland v. State (Miss. 1904)

Δ finds wife with lover; “make haste!”; jury instructed on murder

* 1. Court found that murder inappropriate
	2. Found there was adequate provocation and no malice aforethought (no deliberate design). Although words are normally not enough, courts want to leave themselves wiggle room for situations like this.
	3. Usually mere words are not adequate provocation

### People v. Berry (Cal. 1976)

Wife repeatedly mocks Δ sexually over months; he first chokes her, and next day kills her; appeals murder conviction, seeking manslaughter.

* 1. Court finds that there need not be one type of provocation, does not define it narrowly, and that verbal provocation is enough. (Cal-specific)
	2. Words can be provocation if descriptive (if you saw it, would be adequately provocative)
	3. Provocation can be intense emotion, not just anger
	4. Provocation cannot be revenge
	5. Provocation may be built up over time, so long as there is no cooling off period and the motive is not vengeance
	6. Objective person standard

### People v. Wu (Cal., 1991)

Chinese immigrant kills son and tries to kill herself. Argued 10 years of provocation and a provocation in the moment. Sought cultural instruction for jury.

* 1. Court reverse because instructions did not include unconsciousness defense and cultural factors as they pertain to crimes charged. Allows for culturally-driven human frailty.
	2. Mere words allowed
	3. Victim (son) was not provocateur—words about his father are what spurred killing
		1. Consider this and *Williams* (Native Americans) case—considerations of culture

# B. Second Degree Murder

**Murder**—government must prove beyond a reasonable doubt that the defendant killed or caused to be killed another person, and that the defendant acted with malice.

**1° murder = killing + express malice + premeditation / deliberation**

**2° murder = killing + malice (express or implied)**

1. **Malice:**
* **Express Malice**—deliberate intention to take someone’s life
* **Implied Malice**—in absence of provocation, an act that reveals an abandoned and malignant heart, or an extreme indifference to human life

## 1. *Intent to Kill:*

**Express Malice Theory, deliberate intent to take human life**

### Francis v. Franklin (SC 1985)

Δ escapes from prison, obtains pistol, kidnaps woman, shoots man through closed door when demanding car keys. Convicted of murder.

* 1. Δ claims that shooting was a mistake and he lacked requisite intent
	2. SC finds that instructions given to the jury relieved State of burden of proving intent (by presuming intent upon showing there was a killing), and violated 14th Amend due process. State has prove intent – can use conduct, weapon used, nature of injury, possible animosity/motive.
	3. Any instructions that shift burden to defense are improper—burden on state
	4. Express malice case

**Intent to Kill**—philosophical unsound, but allowed: intending to kill someone but killing another is implied malice (lack malice towards someone who actually is killed). ***People v. Scott***: really recklessness because intent transfers. Intent is “transferred” to victim. Act would be considered extreme recklessness.

## 2. Extreme Recklessness

**Implied Malice Theory: act without provocation when circumstances show an "abandoned and malignant heart" – negligent act becomes reckless.**

Magnitude of risk pushes it out of negligence—deliberate disregard for the risk

### Commonwealth v. Malone (PA 1946)

Δ and young friend find gun; play Russian roulette and friend shot. Δ claims no intent to kill. "Oh Billy! Gee bad, I'm sorry!"

* 1. Court upheld 2° murder conviction—this was an act of gross recklessness displaying a wanton disregard of consequences that would follow.
	2. Magnitude of risk + low social utility of action involved justified pushing the act from gross negligence to recklessness
	3. Case of implied malice—disregarding a substantial risk, displayed an abandoned and malignant heart

### People v. Protopappas (CA 1988)

Dentist/oral surgeon Δ convicted of 2° murder for killing three patients whom he was aware had medical conditions but gave massive anesthesia OD.

* 1. Court upheld 2° murder, finding that this was a gross deviation from standard medical practice.
	2. Multiple murders indicated an extreme indifference to human life

### Berry v. Superior Court (CA 1989)

Δ convicted of 2° murder conviction after his pit bull mauled 2-yr-old to death; dog had been a trained fighting dog

* 1. Court upheld 2° murder
	2. Found that act was life-endangering enough—he was aware of the danger poised
	3. Court moving towards an indifference standard

### State v. Davidson (KS 1999)

Δ had two Rottweiler dogs inadequately contained by fences, one day escaped and mauled boy to death. Convicted of 2° murder.

* 1. Court found she had a conscious awareness of the risk from previous attacks
	2. Found guilty of extreme indifference to human life (extreme indifference murder)

### Commonwealth v. Dorazio (PA 1950)

Δ, former boxer, convicted of beating union-opposition to death; 2° murder.

* 1. 2° murder upheld
	2. Intent to do serious bodily harm (extreme recklessness) proxy for intent to do fatal injury (intent to kill)—lowest standard of implied malice
	3. Here, fists treated as ‘deadly weapons’

### People v. Watson (CA 1981)

Drunk driver Δ who got into one accident and then killed someone, convicted of 2° murder. CA amended their statute to permit 2° murder charge when circumstances show an implied malice.

* 1. Court upheld 2° murder
	2. Evidence confirmed implied malice (disregard for risk of his actions had)

# C. Aggravated Murder

## 1. First Degree

1. Different than 2°, 1° must reveal some evidence of planning, reflection, deliberation
2. State must prove a heightened mental state—not only formed intent to kill, but engaged in premeditation and deliberation
	1. Planning and Deliberation (P&D): bringing weapon, method of killing (actual act goes to deliberation), planning, time lapse, motive, hostility before the act
3. P&D can be formed within seconds—only need some appreciable time. (This can collapse the difference between 1° and 2° - and the MPC doesn't distinguish between the two).

**For 1° murder, must show:**

* + - 1. **premeditation plus**
			2. **deliberation plus**
			3. **express malice resulting in**
			4. **deaths**
1. Some jurisdictions have proxies that take the place of premeditation and deliberation—poison, explosives, torture, or lying in wait

### United States v. Watson (DC 1985)

Δ sited by police for stolen car, runs into apt., waits in kitchen; followed by PO shortly, fight between PO and Δ; Δ gets gun, shoots cop.

* 1. Court upholds 1° murder conviction, finding there was sufficient premeditation
	2. Found Δ decided to kill, had time before cop arrived, when reached for gun, and when cop pled for his life—not done in moment of passion
	3. **Some appreciable time must elapse (to form intent to kill**)
	4. Had a motive (escape)

### Austin v. United States (DC 1967)

* 1. Development of “hot-blooded” v. “cold-blooded”

### Healy (Mercy Killing)

Δ old woman killing dying husband

* 1. Court dropped to manslaughter for sympathy reasons, even though it is classic 1°
	2. Δ in extreme emotional distress

### Commonwealth v. Gould (MA 1980)

Δ schizophrenic with delusional belief system; waited for girlfriend and killed her because she was “impure.”

* 1. Court allowed **evidence of mental illness** in because even though he had an intent to kill, it **mitigated premeditation**
	2. Not unlike *Hendershott*, intoxication—evidence that someone cannot think deliberately or plan, preventing them from developing heightened mental state

## 2. Felony Murder

**Felony must be inherently dangerous**. Most states name specific felonies: kidnapping, arson, burglary, robbery, grand larceny, drug distribution.

1. Most jurisdictions establish a test that determines:
	1. Guilt on predicate felony first before proceeding to
	2. Consideration of felony murder
2. Purpose is deterrence and just dessert theories
3. Some states (KY, MI, and Hawaii) have eliminated felony murder entirely
4. Theories on liability for felony murder:
	1. **\* Proximate Cause Theory**—defendants are liable for all deaths caused (by the felony, the proximate cause of the death(s)). *Stamp*. **But for** standard.
		1. *Problem*: includes accidental conduct and conduct they have no control over; huge gap between moral culpability and criminal liability. Some states have this.
	2. **Protected Person Theory**—liability only extends to innocent people killed during the felony; don’t care if felons are killed; includes when cop kills victim. Also *Stamp*. Anti-*Cabalto*.
		1. *Problem*: privileging one class of people (‘innocents’) and retributive more than deterrent
		2. *Not the main test*. Use the other two.
	3. **\*Agency Theory**—Defendant only liable for actions of self and accomplices; does not apply when non-defendant does the killing. Only concerned with actions of defendants and co-defendants. Doesn’t differentiate between innocents / felons. Most states have this theory.

### State v. Martin (NJ 1990)

Δ burns down house while there at party; victim was sleeping upstairs.

* 1. Court reversed conviction, holding that the **death must be not too remote, accidental or dependent on another’s act** to have a bearing on Δ’s culpability, and that the jury should have been instructed on unforeseeable deaths for which defendant lack culpability ⇨ **Foreseeability requirement**
		1. NJ applies Agency Theory on felony murder liability—to find liability, **death has to be a probable or reasonable consequence of an inherently dangerous felony**
	2. Allows affirmative defense that if Δ is not the one who committed the directly fatal act and lacked reasonable grounds to believe that any co-defendants had weapons or would commit murder

### People v. Stamp (CA 1969)

Armed robbery; victim has heart attack afterwards

* 1. “But for” the robbery, victim would have not had heart attack—proximate cause of the death is the felony
	2. 1° murder conviction upheld based on a **strict liability standard** (any deaths resultant, Δ is liable—“**but for**”), rather than a foreseeability standard

### People v. Hickman (IL 1973)

Δ escaping burglary, police accidentally shoots another cop

* 1. Court uses **proximate cause / “but for” argument**
	2. Burglary was still in progress (had not escaped)
	3. Court finds **liability for chain of events Δ sets into motion**—does not necessarily need to commit the murder, just has to set things in motion

### People v. Gladman (NY 1976)

Δ robs bowling alley, escapes, kills cop little ways away; cop was searching for Δ.

* 1. Court finds felony murder usually question of fact for the jury, who must determine whether the murder took place in the immediate flight from the felony

**Test for linking felony and killing that allows transfer of intent**: Court looks to the following criteria—

* + 1. Same location
		2. Distance between sites of felony and killing
		3. Time lapse between the felony and killing
		4. Possession of loot from crime
		5. Whether a place of safety had been reached
		6. Police in close pursuit

### People v. Washington (CA 1965)

Δ tries to rob a gas station at closing time. The owner gets out his gun and mortally wounds Δ when he walks into his office. Shot and wounded a second accomplice after he didn't heed the owner's instruction to stop.

* 1. Felony murder doesn't apply to the killing of a co-conspirator - court imposes a limit on felony murder.
	2. Killing a coconspirator is not part of the criminal design and no deterrent effect from holding Δ liable for the acts of a victim.

### People v. Cabaltero (CA 1939)

Δs committing armed robbery, when Δ shoots another robber for shooting at bystanders

* 1. Court **does not limit application of felony murder based on status of victim**
	2. Felony murder rule should apply to anyone, regardless of the status of the victim.

### People v. Ferlin (CA 1928)

 Δ and co-arsonist in process of committing arson and co-arsonist kills himself in process of lighting fire.

* 1. Court does not rule this felony murder
	2. Killing was not part of the design—**foreseeability element**

|  |  |  |
| --- | --- | --- |
|  | **Act** | **Case Name** |
| **Felony Murder Found** | Δ and co-Δ commit armed robbery; victim has heart attack | Stamp (protective cause, protected person) |
| Δ and co-Δ commit burglary; cop kills cop | Hickman (proximate cause, protected person) |
| Δ and co-Δ commit felony; victim kills innocent | Payne (protected person, proximate cause) |
| Co-Δ kills co-Δ during armed robbery | Cabaltero (agency, proximate cause) |
| Δ robs, kills cop during escape | Gladman (agency, proximate cause, protected person) |
| **Felony Murder NOT found** | Co-Δ kills himself in process of committing arson | Ferlin (protected person) |
| Δ and co-Δ commit armed robbery; victim kills co-Δ | Washington (protected person) |
| Δ and co-Δ commit felony; cop kills victim | Hypo: Same as Hickman but different result |

##  3. Capital Murder/Death Penalty

* Critical component of guilt assessment is planning / premeditation / intent

### Furman v. Georgia (SC, 1972)

SC struck down the death penalty in a plurality. Brennan, Marshall thought DP was incompatible with evolving standards of decency and barbaric. Douglas, Stewart, White found sentencing procedures constitutionally defective; no meaningful way to distinguish between those cases in which DP applied and those where it was not.

### Gregg v. Georgia (SCOTUS 1976)

SC upheld Georgia DP statute. If discretion is guided, it can be applied fairly; emergence of penalty phase, appellate review, and rational procedure to guide sentencing. SC encouraged statutory listing of aggregating factors. Discretion of jury must be guided to avoid arbitrary imposition of death.

### Woodson v. North Carolina (SCOTUS 1976)

SC struck down mandatory death sentences; found they failed to provide standards that would effectively guide the jury. 8th Amend requires particular consideration of individual aspects of the case

Before 1977, imposition of DP not limited to 1° (think: black men raping white women); in ***Coker v. Georgia***, SC found that applying DP to rape cases excessive and unwarranted

**DP Procedure—bifurcated trial.**

1. **Guilt phase**: trial on the merits—put on 1° murder trial (premeditated or felony); shows act + mens rea + result – defense; if convict of 1° murder by unanimous decision, then proceed to penalty phase.
2. **Penalty phase**: choice is DP or life in prison / life w/o parole. Jury given a list of **aggravating** factors & they must be unanimous that those factors exist; on question of whether aggravating factors outweigh **mitigating** factors, jury does not have to be unanimous about which factors tip the balance.
	1. **Aggravating factors must be unanimous** (heinous, kills PO, for pecuniary gain)
	2. Mitigating factors (age, record, social value, impact on defendant’s family, etc..)
		1. Jury does not have to be unanimous about which aggravating factors outweigh the mitigating factors.
3. **Jury must be “death-eligible”**—established during voir dire. If someone indicates that they could not consider the death penalty, they are automatically struck for cause.
4. States have 2-20 aggravating factors in their DP statute to guide the jury; idea is to force jury to distinguish between 1° murder and DP offense—typically focus on the crime
5. Heinous, atrocious, cruel—beyond what we would normally expect

### Olsen v. State (WY, 2003)

Δ received DP for robbing a bar, killing three. Δ appeals, arguing jury instructions on mitigating circumstances and finding aggravating circumstances improper

* 1. At least one aggravating factor must be found
	2. Mitigating factors found then balance aggravating ones; **need to find agg. factors clearly outweigh mitigating factors**
	3. Found that
		1. Great risk does not mean the multiple murders, but risk to others;
		2. Main reason he killed was to avoid capture;
		3. This was not especially atrocious or cruel; and
		4. Felony murder allowed to be considered as an aggravating factor since killings occurred in course of felony
	4. Jury was concerned that if they did not give DP, Δ would get out—improperly instructed. DP sentence was vacated and remanded for a new sentencing hearing.

### Zant v. Stevens (US 1983)

* 1. **Non-statutory aggravating factors may be considered**
	2. **Jury must still find at least one statutory aggravating factor**, but then can consider non-statutory ones

### Payne v. Tennessee (SC, 1991)

 Δ convicted of murdering mother and child, and assaulting other child; given DP

* 1. **Victim-impact statements allowed**—not prohibited by 8th Amend
	2. Problem—may encourage juries to discriminate against victim’s based on ‘relative worth’

### Lockett v. Ohio (US 1978)

Getaway driver Δ received DP after conviction of aggravated murder and aggravated robbery

* 1. Scope of Mitigation—Ohio statute did not permit the individualized consideration of mitigating factors required by 8th and 14th Amendments
	2. Evidence on Δ’s background / childhood should have been allowed in

**Categorical limits**

1. Minor actor who lacked intent to kill is categorically limited from getting DP (*Enmund v. Florida – getaway driver Pg. 485*)
2. When DP rests on felony murder rather than premeditation, State must show some heightened mens rea to get DP

### Tison v. Arizona (US 1987)

Δs were two brothers who assisted father’s escape from prison; while escaping father kills family of four

1. Sufficient mens rea for receiving DP is reckless indifference for human life w/ substantial participation in the felony *Tison*
2. DP unconstitutional for mentally retarded criminals—violates 8th Amendment

### Atkins v. Virginia (US 2002)

1. Death elements must be pled in the indictment; DP has to be determined by a jury (*Ring*)
2. Failed to make an Equal Protection claim:

### McClesky v. Kemp (US 1987)

Black D kills a white cop. Racial statistics used to challenge the death penalty.

Court finds that evidence did not show that prosecutors did not have a specific discriminatory intent

***(Age Limits thru time Pg. 491)***

1. Unconstitutional to execute someone who committed the crime before they were 15 years old (*Thompson v. Oklahoma* 1988)
2. No bar to executing someone 16 years or older (*Standard v. Kentucky* 1989)
3. Unconstitutional to execute someone who committed their crime while less than 18 years old

### Roper v. Simmons (US 2005)

 Can't execute minor offenders.

* TX, LA, and FL count for more than half of the executions
* Imposition of DP depends largely on race; even though blacks & whites are victims in equal number of crimes, defendants of white victims get DP more
* Huge counsel problem—inexperience of defense lawyers often leading to affirmative harm

# 9. Attempt

1. Mens rea—specific intent—Liability must show mental culpability; usually intent to harm is required—have to show purposeful intent
	* 1. Generally, neither negligence nor strict liability are allowed to prove intent even when they are sufficient to prove the actual crime—can have disparate mens rea
2. Act—see Substantial Step & Dangerous Proximity. Trying to predict whether actual crime would occur. Mere preparation not sufficient.
3. MPC (different than most states) punishes attempt as equivalent to the highest grade of crime to be commissioned, except in case of 1° or capital murder, in which case it is treated as 2° murder. Most states punish a lesser amount.
	* 1. MPC finds a person guilty of attempt to commit some crime if, acting w/ the culpability required for the crime, he (1) purposely does some act or omission that constitutes a **substantial step** toward commission of the crime, and (2) the conduct strongly corroborates intent to commit the crime.
		2. Conduct that is particular indicative of intent includes: laying in wait; seeking to entice victim; conducting reconnaissance; unlawfully entering a structure; possessing materials specifically designed for illegal use; possessing materials at or near a place that serve no legal purpose; soliciting an innocent to commit the act
		3. Allows defense of abandonment—actor who completely and voluntarily their criminal purpose; cannot be out of fear of discovery / capture, and cannot be a temporary cessation. In reality, this defense is rare; exception is perjury—provision in NY that allows ∆ to correct the record during same proceeding; child snatching—MI provision about returning before 14 days
4. Tension—want to draw a line as early as possible to prevent the crime, but not so early that lawful acts are punished.
5. Goal is to identify those who are as morally culpable / blameworthy, and but for some interruption, would have committed the crime
6. Law compromises on punishing attempt by:
	* + 1. Punishing attempt crimes less than completed ones, and
			2. Preventing punishment for mere bad thoughts by stressing some sort of significant conduct short of actual harm
7. **Substantial Step Test**—from MPC: a substantial step in furtherance of the crime, strongly corroborates actor’s intent w/r/t crime—act must be accompanied by and confirm mens rea. This test includes some element of proximity and unequivocality.
8. **Dangerous Proximity**—the nearer to completion, the greater the gravity and consequences, and the greater the probability of a crime occurring; consider how close to success actor(s) is
	* 1. **Indispensable Elements Test**—anything indispensable to the crime that ∆ didn’t have can be grounds for acquittal
		2. **Abnormal Step Test**—attempt is step toward crime which goes beyond the point where normal person thinks better of conduct and stops

### People v. Murray (CA 1859)

 ∆ convicted of attempt to incestuously marry his niece.

* 1. Court finds that his actions indicate his intent, but need real manifestation of intent—overturned
	2. Until magistrate officiated the ceremony, actions were only preparation for the attempt (devising or arranging the means or measures necessary for the commission of the offense) and not attempt (direct movement towards the commission after preparations are made)
	3. **Abnormal Step Test:** eloping with niece is abnormal because normal citizen wouldn’t do it
	4. **Unequivocal Test:** actions that put actor at the point of no return. Here, he is not at the point of no return.

### McQuirter v. State (AL 1953)

∆, black man, walks by white woman on street; convicted of attempt to assault with intent to rape

* 1. Court finds there is enough evidence for a reasonable jury to find guilt (bad ruling)
	2. Would have to show intent (purposeful) w/r/t commit rape
	3. Shows equivocal act can be bumped up to attempt based on thoughts (his confession)
	4. Consider Abnormal Step Test—were his actions abnormal? Context
	5. **Usually, need to show that there was specific intent to commit the crime**

### People v. Rizzo (NY 1927)

∆ and others intent to rob payroll master; drive around looking for victim, police arrest before they can do anything. Convicted of attempted robbery.

* 1. Court overturns, saying until they caught sight of victim, it was **preparation for attempt**
	2. Dangerous proximity to success test—but for the arrest, they may have committed the crime
		1. Court doesn't want to punish bad thoughts
		2. Tell police to follow until the crime actually begins.
	3. Physical proximity important here—cannot rob someone from far away

## Abandonment

### People v. Staples (CA 1970)

∆ rents room above bank, buys tools to drill hole in ceiling above vault; landlord sees tools; ∆ charged w/ attempted burglary.

* 1. Court rejects abandonment argument, finding that the act of drilling holes in the ceiling constituted attempt sufficient to constitute a crime
	2. Went too far.
1. Common law traditionally denied any notions of abandonment; many courts still follow this
2. Modern trend has been towards allowing abandonment defenses in if:
	1. Voluntary
	2. Complete renunciation of the criminal purpose
3. Abandonment can't be because:
	1. Fear of discovery
	2. Postponement
	3. Malfunctioning equipment
4. Policy—why do we want to allow abandonment?
	1. Want to encourage people to abandon criminal enterprises.

## Impossibility

### Booth v. State (OK 1964)

 ∆ attorney received coat from client, who was working w/ police

* 1. Court finds that coat had been recovered prior to ∆’s receipt of it, and therefore it had lost its ‘stolen’ character
	2. It was legally impossible for ∆ to receive stolen goods, since coat was not ‘stolen’
1. **Legal Impossibility**—when, if act completed, it would not be criminal. Defendant found to have done this is not liable.
2. **Factual Impossibility**—where the substantive crime is impossible to complete, because of some physical or factual condition unknown to the defendant. Defendant found to have done this is liable for attempt.

# 10. Complicity

**Complicity is not a crime in and of itself**—it is another way at charging someone for the substantive crime, of linking individuals to the substantive crime. **Cannot charge complicity**.

**Charged with the substantive crime under an accomplice theory.**

|  |  |
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| MPC | Common Law |
| * Just have to attempt to aid
 | * Actually have to aid, have to have the same intent
 |

1. At common law, accessory could not be tried and convicted unless principal had already been found guilty; if principal not found guilty, could not go after accessory. Still the case in MD, NC, RI, TN.
	1. Principal in first degree: actual perpetrator
	2. Principal in second degree: present at scene, aided and abetted
	3. Accessory: before the fact/ after the fact
2. Today most categories are gone—still have accessory after the fact, but otherwise treated the same: same offense, same prosecution for offense
	1. Usually looking for an obstructive activity
3. Requires a **community of purpose**—shared purpose (mens rea) between principal and accomplice. Does not require direct communication; if you can otherwise establish mens rea, proof of communication not required.
	1. Modern trend is you are an accomplice even if you attempt to aid or if the aid misfires.
	2. As long as you designed and intended to help you are an accomplice.
4. Accomplice has to act with some intent to assist principal in some way: must perform some act (can be words or conduct) that helps bring about the crime or render it more likely to happen. Do not have to be at the scene of the crime.

### Gaines v. State (FL1982)

∆ drove car away after friends robbed bank; obeys traffic laws until cop tries to pull car over; then robbers shooting out of the car.

* 1. Court finds accomplice would need to be sufficiently near to lend assistance to actual perpetrators
	2. Court finds ∆ was merely in the car outside bank, and no evidence to suggest he was aware of friends’ intent to rob the bank (considering, too, action after robbery)
	3. Unclear if there is anything here beyond mere presence—required to show **presence with a purpose**

### State v. Tally (AL 1894)

∆ sends telegraph after Skeltons, family-in-law, went after man who was intimate with their sister; man caught by posse and killed

* 1. Court found no proof to show that he encouraged the Skeltons, or that the murder would not have occurred but for Tally’s telegraph. However, find they don't need to.
	2. Found that act was Tally being lookout at telegraph office and sent message to assist Skeltons. He intended to aid them in furtherance of their crime. Furtherance found because he deprived the victim of a chance. BROADENS THE DEFINITION OF ACCOMPLICE – NOW IT'S EVEN BROADER
	3. Found that everyone knew this was going on and Tally did not want anything to change situation (Skeltons having ridden off to find man to kill him)
	4. Not conspiracy because no agreement
	5. Could be aiding and abetting because he worked to help them but without their knowledge.

### People v. Beeman (CA 1984)

∆ gave friends information about sister-in-law’s, which they rob; ∆ caught with some of the loot from the robbery

* 1. Court finds there was no renunciation by ∆ (no steps to deprive information of its effectiveness)
	2. Reverses because there was no instruction on ∆’s intent re: aiding—knowledge that a crime will be committed is not the same as intent to commit the crime.
	3. Accomplice liability requires state to prove (1)∆ had knowledge of principal’s intent and (2) ∆’s acts were to facilitate a crime. Mere knowledge is not enough

### Wilson v. People (CO 1973)

∆ runs into man in café, they drink all night; decide to rob bank; while in the course of robbing the bank, ∆ calls police. Claims that his purpose was not to aid the robbery, but to have man caught.

* 1. Court requires that actor have the requisite mental intent—shared mens rea with principal
	2. Someone who fakes being an accomplice to have criminal caught is not liable (under statute)

Most states apply a **Reasonably Foreseeable Test** to determine accomplice liability:
Reasonably foreseeable that crime would occur because of ∆’s assistance, then ∆ can be liable as an accomplice

* 1. While this couldn’t be done at common law, modern law allows the principal and accomplice to have different mens rea. Accomplice must have at least mens rea of the principal, but can have higher one, too.

**Accomplice liability** established by proving:

* 1. **Some act of assistance (can be providing encouragement, being a lookout)**
	2. **Plus an intent to aid the principal**
	3. **Coupled with intent to commit the crime.**

# 11. Conspiracy

## a. Nature of Conspiracy

1. Three elements:
	1. Conspiracy is an inchoate crime—does not depend on whether the objective of the crime accomplished
	2. Form of group criminality—requires at least two participants
	3. Instrument to establish wide vicarious liability—aimed to strike against the special danger of group activity, and a basis for attributing to one person the crimes of another
2. Conspiracy is a distinct crime (unlike attempt)—it is not dependent on any other criminal conduct
3. To establish conspiracy, must have:
	1. **Agreement to commit a crime**. Does not require concrete evidence; can infer agreement from actions of the conspirators
	2. **Must prove at least one overt act**—manifestation of the conspiracy at work. Does not have to be an unlawful act, merely an act in furtherance of the objective(s) of the agreement
		1. Common law had not overt act requirement, just required evidence of the agreement.
		2. Modern statutes added act requirement, which serves as a presumptive proof requirement
4. **Act requirement**—**overt act** similar to Substantial Step test, only less required—can satisfy this requirement with acts that would be preparation under attempt
	1. Some states (Ohio, Maine) require act be more than just an act
	2. Most states require step to be relatively mild—basically **anything that could be shown to be in furtherance of the conspiracy** (buying a wig for a bank robbery conspiracy)
	3. Formation of the act does not satisfy the overt act requirement
	4. One act by one co-conspirator is sufficient for all co-conspirators
5. **Mens rea requirement**—need to show:
	1. **Intent to enter conspiracy** (may be inferred from conspirators’ actions), and
	2. **Level of purpose/knowledge/awareness w/r/t objectives of the conspiracy**

## b. Agreement

 **Don't need direct proof of an agreement, constructed agreement can be inferred from the coordinated actions of the alleged conspirators.**

### State v. Verive (AZ 1981)

∆ convicted of attempting to dissuade and conspiracy to dissuade a witness

* 1. Court found here there were steps beyond mere preparation (went to house, beat up victim, etc.)
	2. Court finds conspiracy supported by ∆ going to the victim’s house pursuant to agreement
	3. Conspiracy requires agreement, attempt requires an act beyond preparation—neither is a lesser-included offense—they are separate and distinct crimes

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|  | **Conspiracy to Dissuade** | **Attempt to Dissuade** |
| *Mens Rea* | intent to dissuade a witness  | intent to dissuade a witness |
| *Act* | agreement + overt act  | overt act in furtherance(to establish: sub step or dangerous proximity) |

* 1. Act required by attempt more than act requirement of conspiracy
	2. Both crimes are not the same but if evidence to prove attempt and conspiracy are the same, they merge under the *Blockburger* Test for sentencing—

**Identical Elements Test / Blockburgert Test**—after eliminating evidence to support one charge, there is sufficient evidence to support the other charge. So long as there is not perfect overlap between the two crime, they may both be charged.

### Unites States v. Recio (CA, SCOTUS 2003)

 ∆s show up to sting operation to pick up drugs.

* 1. Court found that because ∆s believed conspiracy was still alive, they were still liable—still had the intent and there was no evidence of renunciation
	2. Impossibility of success is not a bar to conviction
	3. In federal system, may raise an entrapment defense (government induced an individual to commit a crime he would not have otherwise)

### United States v. Moussaoui (2002)

* 1. can infer agreement from actions of co-conspirators
	2. can define scope of agreement broadly or narrowly and try to get conviction either way:
		1. broadly: acts of terrorism
		2. narrowly: hijack planes and attack on 9/11

## c. Mens Rea of Conspiracy

### People v. Lauria (CA 1967)

∆ ran telephone answering service; charged with conspiracy to commit prostitution because some of his clients were prostitutes (and he knew it)

* 1. Court finds there was an agreement to provide answering service, but found agreement to promote prostitution only insofar as he helped them carry it out
	2. ∆ had knowledge of the prostitution, but Court does not find intent to commit prostitution
	3. ∆ did not have a stake in the venture, prostitutes were not a high volume of his business—no profit motive
	4. Court makes distinction between knowledge of a misdemeanor and a felony—knowledge may be sufficient for a felony, but not enough for a misdemeanor (would need to show purpose)
1. Liability for supplier of goods or services—need to show:
	1. Supplier knows of crime and is participating in some way or has a stake in the crime (e.g., charging more to criminals)
	2. No legitimate purpose to the volume of goods being sold (drug co. oversupplying morphine)
	3. No legitimate use of goods / services supplied
	4. Need to show a mens rea of intent to agree to the conspiracy plus purpose to promote the unlawful objective of the conspiracy
		1. Remember ***US v. Falcone (mentioned in Lauria)*** (cannot be liable for providing lawful supplies of sugar and yeast to moonshiners) and ***US v. Direct Sales*** (selling high volume of prescription drugs, can establish a stake in the venture, promotion and cooperation in the illegal use of the goods)

## d. Incidents and Scope

### United State v. Diaz (7th Cir. 1988)

∆ charged with conspiracy to distribute cocaine, possession and distribution of cocaine, and use of a firearm in relation to the commission of a drug trafficking crime; ∆ was manager. ∆ found liable under *Pinkerton* of gun carried by co-conspirator—charged with possession under conspiracy

**Pinkerton—conspirators are liable for all the acts of their co-conspirators that are**:

* In furtherance of the conspiracy
* Within the scope of the conspiracy
* Reasonably foreseeable as a consequence of the agreement
1. Withdrawing from a conspiracy—less stringent requirement than accomplice liability—would have to:
	1. Notify one member of the conspiracy—do not need to notify all members;
	2. Make clear intent to withdraw—need to tell someone or make clear intent to withdraw; and,
	3. Engage in acts inconsistent with conspiracy—like thwarting conspiracy’s objectives, but may also make clear and stop participation.
		1. After withdrawal, individual is still liable for conspiracy (and all crimes associated with conspiracy) during the time he was a part of it, but not liable for subsequent crimes

Bank Hypo:

* A is organizer/ringleader of conspiracy to rob banks
* A hires B & C; B robs Bank 1 and C robs Bank 2
* Although B & C do not meet face-to-face, they are each aware they are members of a large conspiracy and each knows the other’s assignment
* At A’s instigation, D, knowing of conspiracy, steals car which for use in robberies
* B uses car from D in his robbery

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|  | **Conspiracy** | **Accomplice Theory** |
| A | Yes | Yes—designs plans, encourage others; intends to aid others and for acts to be committed |
| B (for C’s robbery of Bank 2) | Yes—in furtherance of common conspiracy and foreseeable | No (no act in assistance) |
| D (for C’s robbery of Bank 2) | Yes—act of stealing the car; knew of conspiracy, and here knowledge = intent | No act of assistance |
| D (for B’s robbery of Bank 1) | Yes—steals car; knew of conspiracy, and here knowledge = intent | Yes—stole car used in this robbery, an act of assistance |
| B (for D’s theft)C (for D’s theft) | Yes—Pinkerton; act = car stolen; knew of conspiracy, and here knowledge = intent | No—no acts in assitance |

1. Benefits of conspiracy—
	* + 1. Joint trials where government can better explain conspiracy with all rather than individually; spill-over benefits; jury often more willing to convict mastermind when presented in concert with other actors
			2. One ∆’s decision not to testify highlighted when other ∆s do testify
			3. Use of hearsay—co-conspirators’ statements to one another in furtherance of the conspiracy allowed in
			4. Statute of limitations—continuing conspiracy may be able to stretch SOL, which starts running from last overt act
	1. Withdrawal—starts SOL for that defendant
2. **Single Conspiracy**—must prove EITHER that conspirators have:
	1. **Knowledge of each other’s existence**—do not need to know specific co-conspirators, just that there are co-conspirators (put rim on spokes of the wheel)
	2. **Interdependence**—usually for business-like crimes or where there is profit motive (chain-link). Need to show:
		1. Success of one depends on success of all
		2. Even if ends of chain don’t know each other, show interdependence based on types of interactions.
			1. Negligence standard for links "should have known" or a "reasonable person should have known"
3. **Multiple Conspiracies**—when there are disconnected and distinct conspiracies. Less efficient (multiple trials)

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| **Attributions of Criminality** |
|  | **Act** | **Mens Rea** | **Withdrawal** |
| **Attempt** | Substantial Step or Dangerous Proximity | Specific intent for crime to be committed | Voluntary and complete renunciation |
| **Complicity** | Act in assistance | Knowledge of principal’s design and intent to assist | End assistance before commission and act to impede or terminate effectiveness of assistance or tell cops |
| **Conspiracy** | Overt act in furtherance of the objective of the conspiracy | Intent to agree and intent to promote the unlawful objective of the conspiracy | Must tell/make clear intent to withdraw, and act contrary to purpose of conspiracy |

# 12. Justification and Excuse

1. Two categories:
	1. **Justification** for the act—crime committed advanced some social utility; conduct that would otherwise be criminal that is able to be justified
	2. Conduct that creates the **excuse**—actor is not morally blameworthy; conduct is not justifiable, but we may excuse it nonetheless because the actor cannot conform his conduct.
		1. These are invoked after prosecution has proven mental state and act
		2. Theoretical distinctions but result the same for both
		3. Different from defenses like alibi and mistake (those appear when facts are in dispute)
2. Key Defenses:
	1. **Defense of Force** (self-defense or defense of others)/ Justification
	2. **Insanity** (cannot appreciate conduct or conform to the law)/Excuse
	3. **Necessity** (choice between evils)/Justification or Excuse
	4. **Duress** (committed crime because there was a gun to my head)/Excuse

## Defense of Force

### People v. La Voie (CO 1964)

∆ driving home; rear-ended by 4 drunk guys; he gets out w/ gun and after they menace him, he shoots one who did not stop.

* 1. Apply **objective standard of reasonable belief**:
		1. Did he believe that he was in danger of being harmed? (subj)
		2. Was it reasonable for him to believe this? (obj)
	2. Harm must be imminent
	3. Court finds grounds for acquittal in his defense claim; did not inquire whether it was his only option
	4. Even though he has the mens rea and act of 2° murder, he is allowed to raise self-defense defense by arguing that he was responding to a perceived threat and was acting reasonably.

**La Voie Two-Prong Test**:

* Was the actor in imminent harm? (subjective)
* Would a reasonably prudent person perceive the fear as the actor did? (objective)

### State v. Leidholm (ND 1983)

 ∆ stabbed husband while he slept after violent argument.

* 1. Battered woman syndrome—allowed by most jurisdictions.
	2. Consider: was the harm imminent?
		1. Introduces **Retreat Rule** (w/ reasonableness): if the actor reasonably believes that he could not safely retreat from a co-habitant’s attack, then there is no duty to retreat. This rule depends on jurisdiction.
	3. Rules a subjective standard should apply that takes into account such things as her knowledge of her husband, their history of violence, relevant sizes (her v. him), mental state of actor, gender, levels of intoxication
	4. Modifies test (and this is the prevailing standard):

**Test for self-defense:**

**First Prong**: does the person have a sincere belief in the need for force in order to protect herself? (subjective)

**Second Prong**: was that belief reasonable *given her circumstances and characteristics*? (objective softened by subjective considerations)

### People v. Goetz (NY 1986)

G on subway when 4 youths approach and ask for $5; he shoots them all. In past he had been mugged.

* 1. Like *Leidholm*, wants consideration of their past experiences, imminence, and reasonableness
		1. Differently, G feels more like revenge
	2. Court uses a Leidholm-like subjective and objective test for use of deadly force.

## Force and Law Enforcement

### Tennessee v. Gardner (US 1985)

 Cop shoots fleeing, unarmed 15 year old burglar who would not stop when told.

* 1. Court finds deadly force not justifiable in the situation.
	2. **Probable cause** standard not met here—no showing that burglar was dangerous
		1. Must show that officer had **probable cause (believes or has cause to believe)** that the fleeing suspect as committing a felony and posed a serious threat to the officer or others.

### People v. Ceballos (CA 1974)

 ∆ sets trap gun in garage which shoots kids breaking in.

* 1. Use of deadly force is not justified—there was no imminent threat of force
	2. Trap gun, unlike a person, cannot evaluate a situation and elect not to use force.
	3. **May use deadly force if the property is your dwelling, threat is imminent, and the force is necessary**.

**Self Defense requires:**

* Threat
* Imminence
* Potential for serious bodily injury
* Some jurisdictions require that the person using self-defense must not be the one who created the situation that requires its use.

## Necessity

### Queen v. Dudley and Stephens (Eng. 1884)

After shipwreck, D, S, another and a boy are stuck in a boat, and are nearly dead when D and S kill boy; they survive after eating his flesh. Ate the weakest member without consent.

* 1. Even given the circumstances, it was still murder
	2. Found guilty (sentence later commuted)
	3. Failed to demonstrate **necessity**: that life was saved by the killing (**lesser of two evils**); that there was social utility to the killing; ∆ did not create the necessitous situation; it was the only option to avoid a worse evil.

## Duress:

MPC:

1. Threat to personal safety not to property
2. Actors can't have placed themselves in the situation or was negligent in putting himself in the situation

### State v. Crawford (KS 1993)

 Guy commits a series of crimes because he owes money to his dealer. Says he did so because he feared what the dealer would do to his son.

* 1. Court holds the fear was not reasonable because he was not under direct control of dealer.
	2. Trial court was correct in saying that a threat of future injury is not enough to sustain a duress defense. Threat must be continuous without a chance for escape (not in the MPC)

### U.S. v Contento-Panchon (9th Cir. 1984)

Columbian taxi driver is told to be a drug mule or else his family would be harmed. He doesn't tell authorities in Columbia or Panama. He's x-rayed at the US airport and all the cocaine balloons are found.

* 1. Trial court doesn't allow duress defense
	2. Court of Appeals says duress should have been a question posed to the jury.

## Mental Illness

### People v. Serravo (Co 1992)

Man stabs wife because he needs to sever the marriage bond so he can build the sport arena complex God instructed him to build. Does try to hide his actions by blaming an intruder. Jury acquitted with not guilty by reason of insanity, this advisory opinion followed.

* 1. M'Naughten Rule: Traditional elements:
		1. A disease of the mind
		2. Cause a defect in reason
		3. Such that the defendant lack the ability at the time of his action to either
			1. Know the wrongfulness of his actions; OR
			2. Under the nature and quality of his actions.
	2. Colorado Statute:
		1. "a person who is so diseased or defective in mind at the time of the commission of that as to be incapable of distinguishing right from wrong with respect to that act is not accountable."
		2. Wrong = moral wrong

Hold that a defendant can be insane when their ability to distinguish right from wrong has been destroyed, including destroyed by a delusion that god decreed the act

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| **Justifications and Excuses** |
|  | Standard Used Most Often: | Other Standard: |
| Deadly Force to Protect Self(*La Voie, Leidholm, Goetz*) | Subjective Reasonableness- must show:Sincere belief she had to use force?Was the belief reasonable given her circumstances and characteristics? (e.g. gender and psychology) | Objective Reasonableness- must show:1. Did she believe she was in danger of imminent harm?
2. Was this belief reasonable?
 |
| Deadly Force by Law Enforcement (*Tennessee v. Gardner*) | Was there a probable cause to think that there was a harm to officer or others? Used to prevent crimes like kidnapping, murder, or rape | Non deadly force:Must be reasonable and necessary for the reason it was used |
| Deadly Force to Protect Another | 1. Was the person they were defending in danger of imminent harm?
2. Was the force necessary/reasonable to protect the other person?
 |  |
| Deadly Force to Protect Property (*People v. Ceballos*) | 1. Is the property for your habitation?
 | Non deadly force:During a trespass to an area like a garage/fence where there is an imminent danger of harm |
| Necessity(*Queen v. Dudley & Stephens*) | 1. Is the conduct justified?
2. Was there something socially desirable about it?
3. If not, is it nonetheless excusable?
4. Did he honestly believe harm was necessary to avoid worse harm?
5. Did the def create the necessitous situation?
 |  |
| Duress |  | MPC:1. Coerced by threat of force against person or person of another that a person of reasonable firmness would be unable to resist2. Not available if person put his/her self in that situation or was negligent3. Not a defense for a wife to act on husbands command. |

1. Substantial chance the match would burn the ship and he lit it anyway—consciously disregarded a substantial risk [↑](#footnote-ref-1)