

**COURSE: CRIMINAL LAW**  
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## **PROSECUTORIAL DISCRETION**

- The legislature passes all of the laws, but it cannot enforce them (separation of powers)
- Prosecutors have enormous discretion on what to charge, and the decision to charge at all
- ***Inmates of Attica Correctional Facility v. Rockefeller (2d Cir. 1973) (p. 1118)***
  - Plaintiff sought mandamus to compel prosecution; court refused: separation of powers, resource constraints, concerns about confidential information that might be released by court inquiry into prosecutors' files
- **Judicial oversight is minimal**
  - ***United States v. Armstrong (U.S. 1996) (p. 1126)***
    - Prosecutors are relatively more competent than courts to make prosecutorial decisions because they have greater knowledge of (p. 1127):
      - Strength of case
      - Prosecution's general deterrence value
      - Government enforcement priorities
      - Case's relationship to the Government's overall enforcement plan
    - **Selective-prosecution claim: defendants must prove that "the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose."** (p. 1127)
      - Claimant must show that similarly situated individuals of a different race/sex/etc. were not prosecuted (p. 1128)
        - How to define "similarly situated individuals"? *United States v. Lewis (1st Cir. 2008) (p. 1131)* defines it extremely narrowly: the narrower the pool, the more difficult proving selective-prosecution becomes (already highly difficult)
    - **Court would not even grant discovery**
      - It would place a large burden on the government to produce files for discovery etc.
        - Prosecutors' offices are already under-resourced
      - Deterrence problem of revealing government strategy to the public (i.e., if discovery reveals that the government strategy is to arrest persons carrying > 100g of cocaine)

## **PLEA BARGAINING**

- Saves government resources, "acceptance of responsibility"
- ***Brady v. United States (U.S. 1970) (p. 1133)***
  - Plea (waiver of constitutional rights) must be voluntary, knowing, intelligent with sufficient awareness of the relevant circumstances and likely consequences
    - Must not result from threats or promises *other than* those involved in any plea agreement
    - Privilege against self-incrimination, right to jury trial, and right to confront one's accusers are the three constitutional rights waived by the plea (p. 1137)
    - Relevant circumstances and likely consequences: inclusive of collateral consequences?
      - ***Padilla v. Kentucky (U.S. 2010) (p. 1137)***: defense attorneys must advise noncitizens of the potential for deportation before they plead guilty
        - Should defense attorneys be required to inform individuals of other collateral consequences?
  - **Plea is challengeable if** "induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)" (p. 1135)
- If the prosecution fails to honor commitments of the plea bargain, defendant must be allowed to withdraw the plea. *Santobello v. New York (U.S. 1971) (p. 1138)*

- Commitment fulfilled if the prosecution takes the action promised: could be recommending a sentence, which is honored if done, even if the judge imposes a different sentence from the one recommended
- ***Bordenkircher v. Hayes (U.S. 1978) (p. 1148)***
  - Prosecutor's decision to charge defendant under recidivism statute for refusing to plead guilty is allowed
    - Prosecutor could have brought the charge anyway; if the sentence is unfair, it is for the legislature to fix
  - The prosecution **can threaten anything against the defendant so long as it is supported by the evidence**
    - Cannot bring in **third parties**
      - Case discusses the dangers of threatening to charge third parties in inducing guilty pleas
        - Defendant cannot internalize the risk of a charge against a third person due to lack of information
          - Cannot assess the likelihood of third party's acquittal at trial
        - No limiting principle: prosecutor can threaten to bring charges against numerous other people

## JURY (P. 47-68)

- The entire system is built against the backdrop of jury trial as a check
  - If juries sort perfectly, there would be no problem with plea bargaining: only guilty defendants would plead guilty, and innocent defendants would go to trial and avoid (harsher) sentences altogether
- The right to a jury trial depends on the maximum sentence the defendant could face upon conviction (*See*
  - ***Duncan v. Louisiana (U.S. 1968) (p. 47)***
    - Defendant charged with simple battery carrying a maximum sentence of two years imprisonment; the fact that he was sentenced to only 60 days in jail has no bearing on his right to a jury
  - If the charge carries a sentence **greater than six months**, defendant has a right to jury trial. *Baldwin v. New York (U.S. 1970) (p. 51)*
- **Jury requirements**
  - "Venire" must reflect a fair cross section of the community. *Taylor v. Louisiana (U.S. 1975) (p. 51)*
    - Attorneys cannot use peremptory challenges to deliberately exclude potential jurors on grounds of race or gender. *Batson v. Kentucky (U.S. 1986); J.E.B. v. Alabama (U.S. 1994) (p. 51)*
      - Easy to circumvent because attorney just needs to provide a plausible race- and gender-neutral reason for using peremptory challenge
  - Must have at least **SIX** members. *Ballew v. Georgia (U.S. 1978) (p. 51n.37)*
    - Six-member jury must be unanimous. *Burch v. Louisiana (U.S. 1979) (p. 51n.38)*
  - Conviction requires a substantial majority; 10-2 is sufficient (9-3 may or may not be). *Apodaca v. Oregon (U.S. 1972) (p. 51)*
    - Federal prosecutions require unanimity. Rule 31(a) of the Federal Rules of Criminal Procedure (p. 51)
- **Nullification**
  - Jury nullification instruction is prohibited in the federal system and nearly all states. ***United States v. Dougherty (D.C. Cir. 1972) (p. 56)***
  - A juror can be removed if there is unambiguous evidence that the juror is refusing to listen to the judge's instructions. *United States v. Thomas (2d Cir. 1997) (p. 63)*
    - Must be no reasonable possibility that the juror is following the judge's instructions
    - Easily circumvented by providing a plausible reason for innocence: "something about that police officer's manner was questionable"
  - Judge may dismiss a potential juror who admits during voir dire that he believes in exercising nullification. *Merced v. McGrath (9th Cir. 2005) (p. 63)*

## PUNISHMENT (P. 89-124; 142-48)

- Arguments against punishment (p. 142):
  - 1. A free society should treat certain conduct as a matter of personal choice rather than seeking to prohibit it

- Vice crimes: e.g., drugs, prostitution
  - 2. Society has a legitimate interest in discouraging the conduct, but using the tools of the criminal law for that purpose produces more harm than good
    - Prohibition; arguably drug crimes
- **Retributive justice:** backward-looking; the only reason to punish is that the defendant deserves punishment (p. 90)
  - Harm-focused: punishment dependent on harm caused (retaliation rationale, not retributive)
  - Culpability-focused: punishment dependent on mens rea (MPC approach)
  - But could, under some circumstances, require punishments that, on balance, do more harm than good
- **Utilitarianism:** forward-looking; punishment is justified by the useful purposes that it serves (p. 90)
  - Deterrence (of the offender and others), incapacitation of the offender, rehabilitation of the offender
  - But could, under some circumstances, require punishment of the innocent or very severe punishment for minor crimes
- **“Classic” mixed theory:** a person can legitimately be punished only if he committed a crime, only in proportion to that crime, and only if doing so would produce a world with less crime (p. 107)

### **LEGALITY: *nulla poena sine lege*—no punishment without law (p. 152)**

- Retroactivity is prohibited (ex post facto clause)
  - Including unforeseeable judicial enlargement. *Bouie v. City of Columbia* (U.S. 1964) (p. 165)
    - Exception for alteration of common law doctrines: only prohibited “where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.” *Rogers v. Tennessee* (U.S. 2001) (p. 169)
- As a practical matter, crimes must be defined in statutes: “the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain a punishment.” *United States v. Wiltberger* (U.S. 1820) (p. 154)
- Statute must be understandable to reasonable law-abiding people
  - **Rule of lenity:** in criminal prosecutions ambiguities in the statute must be resolved in the defendant’s favor. (p. 159)
    - Old version: requires courts to adopt the narrowest plausible interpretation of a criminal statute (fallen out of favor) (p. 160)
    - Current approach: rule of lenity only comes into play as a last resort, when all other tools of interpretation fail to clarify the statute’s meaning. (p. 160)
- State must give notice: “it is reasonable that a fair warning should be given to the world in language that the common world will understand.” *McBoyle v. United States* (U.S. 1931) (p. 154)
  - Even if the defendant clearly knows his conduct is wrongful, as in *McBoyle* (stealing a plane), *Keeler* (p. 163) (killing fetus)
- **Vagueness:** *City of Chicago v. Morales* (U.S. 1999) (p. 171)
  - To succeed on a vagueness challenge, the statute must either
    - (a) Be so vague that an ordinary person would not know what is prohibited; or
      - Notice/fair warning issues
    - (b) Authorize arbitrary and discriminatory enforcement
      - The statute must give minimal guidelines to law enforcement
      - The Constitution requires “government by clearly defined laws, not government by the moment-to-moment opinions of a policeman on the beat.” *Cox v. Louisiana* (U.S. 1965) (p. 181)
  - Facial vagueness v. As applied vagueness (p. 173n.a)
    - Facial: language of the statute is unclear in all circumstances
    - As applied: unclear whether the language of the statute applies in the context of the particular case

### **ACTUS REUS (p. 205-07; 218-36; MPC § 2.01)**

- Culpable conduct must be voluntary. *Martin v. State* (Ala. App. 1944) (p. 205)

- Involuntary “unconsciousness,” “where the subject physically acts in fact but is not, at the time, conscious of acting” is a complete defense. *People v. Newton (Cal. App. 1970) (p. 207)*
  - **Omission as actus reus**
    - Liability is dependent on a legal duty to act, as distinct from a moral obligation. *Jones v. United States (D.C. Cir. 1962) (p. 218)*
      - **If a statute defines the persons with duties, it should control.** *Pope v. State (Md. 1979) (p. 219)*
        - If the court draws a new exception, it would usurp the legislative role and challenge the supremacy of the statutory law
      - If the statute does not specify classes of persons with a legal duty, typical common law categories are (*Jones (p. 218)*):
        - 1. Statute imposes a duty
          - Pro: criminal law imposes a negative moral judgment, and we should impose it on monstrous omissions in addition to monstrous acts. David Cash Las Vegas case
          - Con: infringes upon personal liberty
        - 2. Status relationship
          - Master/apprentice; shipmaster/crew; innkeeper/inebriated customers (p. 218n.9)
          - Family members: spouse, parent
            - Possibility for expansion: *People v. Carroll (N.Y. 1999) (p. 229) (stepmother)*: “A person who acts as the functional equivalent of a parent in a familial or household setting is legally responsible for a child’s care.”
              - But moving away from formal categories risks making the criminal law amorphous
        - 3. Contractual duty to care for another
        - 4. Voluntarily assuming care that forecloses person from seeking help from another
          - E.g., baby or elderly
        - 5. Defendant creates the peril
          - E.g., bump child into pool
- **Possession as actus reus**
  - MPC § 2.01: possession sufficient only when the accused “was aware of his control of the thing possessed for a sufficient period to have been able to terminate his possession.”
  - *State v. Bradshaw (Wash. 2004) (p. 235)* upheld conviction for possession of illegal drugs despite no awareness

## **MENS REA (p. 241-329; MPC §§ 2.02, 2.04, 2.05)**

- Mens rea has common law terms of art; e.g., malice meaning foresight of the prohibited consequence. *Regina v. Cunningham (1957) (p. 243)*
  - Absent clear indications to the contrary, courts will interpret “malice” (and other vague or ambiguous mens rea language) to require that the defendant was aware his actions posed a substantial risk of causing the prohibited harm (p. 247)
- Common law: specific intent v. general intent (p. 247):
  - Specific: actions that must be done with some specified further purpose in mind
    - E.g., burglary (with intent to commit a felony therein)
  - General: requires only intentional action
    - E.g., trespass (requiring only intentional action)
- **MPC § 2.02 (p. 1202):**
  - **Kinds of culpability:**
    - **Purpose:**
      - Conduct: conscious object to engage in conduct of that nature
      - Attendant circumstances: aware of such circumstances or believes/hopes that they exist
      - Result: conscious object to cause such a result

- **Knowledge:**
  - Conduct: aware that his conduct is of that nature
  - Attendant circumstances: aware that such circumstances exist
  - Result: aware that it is practically certain that his conduct will cause such a result
- **Recklessness:** defendant consciously disregards a substantial and unjustifiable risk; his disregard involves a gross deviation from a law-abiding citizen
  - Substantial and unjustifiable risk does not need to be > 50% chance. *People v. Hall (Col. 2000) (p. 469)* (skier, reckless manslaughter)
  - Whether the risk is substantial can be determined objectively or subjectively
    - Objectively: defendant must be aware of the risk, jury decides whether that risk is substantial *Hall (p. 469)* (skier, aware of risk, did not think the risk was substantial subjectively)
    - Subjectively: defendant must be aware of the risk, and that it was a substantial risk
  - Whether a risk is justifiable is an objective question (near universal)
- **Negligence:** defendant should be aware of a substantial and unjustifiable risk
  - Criminal: failure to perceive the risk involves a gross deviation from a reasonable person
    - Required by MPC
  - Civil: tort liability: deviation from a standard of reasonable care. *State v. Hazelwood (Alaska 1997) (p. 250)*
- **Minimum culpability required:**
  - No mens rea term: minimum is recklessness
  - Single mens rea term: applies to all material elements unless a contrary purpose plainly appears
- **Knowledge and willful ignorance and the ostrich instruction**
  - **MPC § 2.02(7):** “knowledge is established if a person is aware of a high probability of a fact’s existence, unless he actually believes that it does not exist.”
  - **Jewell (p. 260):** “if the defendant was not actually aware ... his ignorance in that regard was *solely* and *entirely* a result of ... a conscious purpose to avoid learning the truth.” *United States v. Jewell (9th Cir. 1976) (p. 261)*
    - Knowledge not required
  - **Posner (via Giovanetti (p. 263)):** requires deliberate active avoidance of knowledge
  - **Most jurisdictions today require:** defendant is subjectively aware of a high probability of the illegal conduct, and purposely contrives to avoid learning of it
- **Mistake**
  - **Mistake of Fact**
    - **Common law:**
      - “Moral wrong” theory: “the act forbidden is wrong in itself.” *Regina v. Prince (1875) (p. 266)*
        - If the defendant’s conduct is immoral even under the facts as he believes them to be
      - “Legal wrong” (“lesser-crime”) theory: if the defendant’s conduct is illegal even under the facts as he believes them to be. *Prince (dissent) (p. 267)*
        - Defendant runs the risk of conviction for a greater crime as he is already legally culpable
          - *State v. Benniefeld (Minn. 2004) (p. 271):* defendant convicted of selling drugs in a school zone; no requirement that defendant knew he was near a school
    - **MPC § 2.04 (p. 1203):**
      - (1) Ignorance is a defense if:
        - (a) negates the mens rea required to establish a material element of the offense
        - (b) law provides that mistake is a defense
      - (2) Ignorance that satisfies “legal wrong” theory still reduces the grade of the offense to the offense chargeable under the facts as the defendant believes them to be

- “The more serious the offence, the greater is the weight to be attached to the presumption [requiring proof of mens rea], because the more severe is the punishment and the graver the stigma which accompany a conviction.” *B (a Minor) v. Director of Public Prosecutions (England 2000)* (p. 277)
- “The reasonableness or unreasonableness of the defendant’s belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned ... is irrelevant.” *B* (p. 277)
- **Strict liability:**
  - **MPC § 2.05 (p. 1204):**
    - Notwithstanding any other provision of law, if strict liability is imposed, the offense constitutes a violation which may result only in civil penalties (fine, forfeiture, etc.)
  - Statutory rape is generally a strict liability crime. *People v. Olsen (Cal. 1984)* (p. 272)
    - “Strong public policy to protect children of tender years.” *Olsen* (p. 274)
      - But *United States v. X-Citement Video, Inc. (U.S. 1994)* (p. 291) required knowledge that the visual depiction was a minor (contrary to most grammatical reading), and also contrary to strict liability for statutory rape
        - Strict liability would cast a wide net on otherwise innocent conduct: Congress cannot have intended to impose liability on *all* these people
    - MPC:
      - < 10 years old = strict liability
      - > 10 years old = mistake of fact is an affirmative defense
  - Penalty: greater penalty increases need for mens rea
  - Potential for harm: greater potential for harm, higher likelihood of strict liability
    - *United States v. Balint (U.S. 1922)* (p. 282): conviction for selling opium derivatives and coca leaves without required order form (upheld)
    - *United States v. Dotterweich (U.S. 1943)* (p. 283): “In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger.” (quoting *Balint*); also involved drugs (mislabeled)
  - Crime v. regulation: common-law/traditional crimes are more likely to require mens rea; public welfare offenses and new (not malum in se) offenses are less likely to require mens rea
    - **Public welfare offenses:**
      - Low penalties
        - *Staples v. United States (U.S. 1994)* (p. 288): 10-year penalty for violation of National Firearms Act (SCOTUS reversed conviction, required knowledge of violation)
          - “Absent a clear statement from Congress that mens rea is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with mens rea.” *Staples* (p. 290)
      - Low social stigma
      - New crime (v. traditional crime)
        - “Congressional silence to mental elements in an Act merely adopting into federal statutory law a concept of crime already so well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition courts have no guidance except the Act.” *Morisette v. United States (U.S. 1952)* (p. 287)

- Wide distribution that could result in substantial harm
      - Defendant stands in a position to prevent the harm “with no more care than society might reasonably expect and no more exertion than it might reasonably expect from one who assumed his responsibilities.” *Morisette* (p. 286)
        - “responsible relation to a public danger” *Dotterweich* (p. 289)
  - **Why isn’t reasonable care a defense?** Evidentiary problems (torts) resulting in under-enforcement
  - **Cannot shift an essential element of an offense to the defendant:**
    - “Where laws proscribe conduct that is neither inherently dangerous nor likely to be regulated, [they] require proof of *mens rea* in order to avoid criminalizing ‘a broad range of apparently innocent conduct’” *Shelton v. Sec’y, Dept. of Corrections* (M.D. Fla. 2011) (p. 299)
      - Case removed knowledge of illicit nature of controlled substances from element of crime, and made lack of knowledge an affirmative defense:
        - “The State cannot shift the burden of proof to a Defendant on an essential element of an offense. To do so would dispense with the fundamental precept underlying the American system of justice—the ‘presumption of innocence.’” *Shelton* (p. 300)
- **Mistake of Law**
  - Allowed where the mistake negates a *mens rea* requirement in a statute: e.g., *People v. Weiss* (N.Y. 1938) (p. 304): kidnapping required “intent, without authority of law, to confine or imprison another”; defendants believed that a law enforcement officer had authorized them to seize a murder suspect; thus, their mistake of law negated the intent, without authority of law, *mens rea* requirement
    - *See also Regina v. Smith* (p. 311): defendant smashed property believing it was his own; statute required “without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property.”
      - Court reversed conviction, holding that a genuine belief that the property belonged to defendant negates mens rea
  - **MPC also allows mistake of law if it negates mens rea. § 2.04**
    - **Further exceptions if defendant acts in reasonable reliance on an official statement of the law, afterward determined to be invalid or erroneous, contained in**
      - (i) a statute or other enactment;
      - (ii) a judicial decision, opinion or judgment;
        - Rejected by Supreme Court as required by due process. *United States v. Rodgers* (U.S. 1984) (p. 320)
          - Perhaps not the case if there is not a circuit split: “the existence of conflicting cases from other Courts of Appeals made review of that issue by this Court and against the position of the respondent reasonably foreseeable.”
      - (iii) an administrative order or grant of permission; or
      - (iv) an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense
      - **Due process:** “entrapment by estoppel” convicting a defendant for conduct that governmental representatives, in their official capacity, had earlier stated was lawful is a violation of due process. *Raley v. Ohio* (U.S. 1959) (p. 319)
  - In some cases, if willfulness (specific intent) is an element, mistake can be a defense:
    - Willfulness: “voluntary, intentional violation of a **known legal duty**” *Cheek v. United States* (U.S. 1991) (p. 313)

- Involved tax laws, which are highly complicated
- The belief does not need to be objectively reasonable. *Cheek (p. 314)*
  - However, an unreasonable belief might suggest that the belief was not actually held (for the jury to decide)
- How to determine whether willfulness requires knowledge of the law or simply knowledge of the facts:
  - If the conduct involved would put the defendant on notice that he is in a highly regulated area (e.g., corrosive liquids, *United States v. International Minerals & Chemical Corp. (U.S. 1971) (p. 316)*), knowledge of facts is more likely to be sufficient
    - *Cf. Liparota v. United States (U.S. 1985) (p. 316)*: involving food stamps; Court held that knowledge of the actual regulation and its meaning required
- An erroneous, even if reasonable, belief is not exempted. *People v. Marrero (N.Y. 1987) (p. 304)*
  - Case involved federal prison guard who believed he was exempted from statute prohibiting possession of a loaded firearm
  - If erroneous belief was a defense, it would “foster[] lawlessness”
- If a broad mistake of law defense were allowed, it would incentivize ignorance of the law when we want people to know and obey it
  - Conversely, it would perhaps provide too much leeway for abuse, as with the New Jersey mistake of law statute (p. 309): if defendant receives advice from a lawyer and relies, would he be liable?
- *Lambert v. California (U.S. 1957) (p. 321)*:
  - Act requiring felons to register if they are in Los Angeles requires knowledge of the duty to register (no knowledge = violation of due process)
    - Drew a distinction between (1) omissions and acts: defendant’s conduct was wholly passive
    - And (2) sophisticated actors: to draw a distinction between regulatory crimes that impose duties on passive conduct
    - Need **both passive conduct and unsophisticated actor** to require knowledge of duty
  - *Cf. State v. Bryant (N.C. 2005) (p. 324)*: upholding sex offender registration law, even if no knowledge, “because all states now have some sort of sex offender registration scheme, the case was ‘overflowing with circumstances’ that should have moved Bryant to inquire about the need to register.”

## HOMICIDE

- **For a distinction to exist between homicides, there must be a statute**
  - Distinctions between first- and second-degree murder and manslaughter are statutorily based
- **INTENTIONAL KILLINGS**
  - **Common law:**
    - Murder (intentional killings): “unlawful killing with ‘malice aforethought.’”
      - **First-** (intentional with malice aforethought) and **second-degree** (intentional without malice aforethought, or mitigated)
        - If **intentional killing, but adequate provocation**, murder mitigated to **manslaughter**
      - Malice aforethought is a term of art: “intentional, willful, deliberate and premeditated.” *Commonwealth v. Carroll (Pa. 1963) (p. 430)*
        - Malice indicates awareness of consequences
        - Aforethought can be instantaneous
          - “No time is too short for a wicked man to frame in his mind the scheme of murder.” *Carroll (p. 430)*
            - Defendant, five minutes after argument with his wife, grabbed a loaded pistol and shot her twice in the back of the head



- **Other courts require “some period between the formation of the intent to kill and the actual killing, which indicates an opportunity for some reflection on the intention to kill after it is formed.” *State v. Guthrie (W. Va. 1995) (p. 434)***
    - Relevant evidence for determining premeditation, *People v. Anderson (Cal. 1968) (p. 435)*:
      - “Planning” activity
      - Motive
      - *Manner* of killing; “preconceived design”
        - The more makeshift the weapon, the stronger the argument *against* premeditation is (why would you use a pen/hammer/etc. if you were planning to kill someone?)
- **MPC Article 210 (p. 1232):**
  - § 210.2: Murder
    - (1)(a) committed purposely or knowingly;
    - (1)(b) committed recklessly under circumstances manifesting **extreme indifference to the value of human life.**
      - **FELONY MURDER:** Assumed if committed during/fleeing from: robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape
        - Rebuttable presumption that serves as the MPC’s **felony murder rule**
      - *See Depraved-heart killings*
      - Whether defendant exhibited extreme indifference is “left directly to the trier of fact under instructions which make it clear that recklessness that can fairly be assimilated to purpose or knowledge should be treated as murder and that less extreme recklessness should be punished as manslaughter.” MPC Commentaries (p. 484)
      - MPC “makes clear that inadvertent risk creation, however extravagant and unjustified, cannot be punished as murder.” MPC Commentaries (p. 488)
        - *But see State v. Dufield (N.H. 1988) (p. 489) (Souter, J.):* “‘circumstances manifesting extreme indifference’ is to establish, not a subjective state of mind, but a degree of divergence from the norm of acceptable behavior even greater than the ‘gross deviation’ from the law-abiding norm, by which reckless conduct is defined.”
  - § 210.3: Manslaughter
    - (1)(b): would be murder but committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. Reasonableness is determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.
      - “acted under the influence of extreme emotional disturbance” is **subjective**
        - **EED is not hot blood** (can have EED without hot blood)
      - “reasonable explanation or excuse” is **objective**
      - Determination made by viewing the subjective, internal situation in which the defendant found himself and the external circumstances as he perceived them at the time, however inaccurate that perception may have been, and assessing from that standpoint whether the explanation or excuse was reasonable. *People v Casassa (N.Y. 1980) (p. 455)*
        - What comes into situation? (p. 459)
          - Blindness, shock from traumatic injury, extreme grief “easily read in”
          - Idiosyncratic moral values do not come in
          - “Situation” deliberately ambiguous so courts can decide the in-between
            - Should culture come in? p. 460 and 327

- Mental disorders (short of legal insanity) are generally disfavored
      - *State v. Klimas* (Wis. Ct. App. 1979) (p. 461): severe depression
      - *People v. Steele* (Cal. 4th 2002) (p. 461): traumatized Vietnam veteran
    - *D.P.P. v. Camplin* (p. 461): allows age (15 years old) to come in
  - Under *Camplin* (p. 461), defendant's personal characteristics must be considered in assessing the gravity of the provocation but cannot be considered (except with respect to age and gender) in assessing the expected degree of self-control
  - **MPC allows cooling off period.** *State v. White* (Utah 2011) (p. 457): EED defense may be based on “a significant mental trauma that has affected the defendant’s mind for a substantial period of time, simmering in the unknowing subconscious and then inexplicably coming to the fore.”
- **Mitigation to Manslaughter (p. 437): is mitigation a justification or an excuse?** The weight of legal scholarship says it is some form of **excuse**
  - If justification, misdirected reaction is not entitled to a manslaughter instruction; if excuse, the misdirected reaction should be entitled to one (p. 452)
  - **MPC: see § 210.3(1)(b)**
  - “For provocation to be ‘adequate,’ it must be ‘calculated to inflame the passion of a reasonable man and tend to cause him to act for the moment from passion rather than reason.’” *Girouard v. State* (Md. 1991) (p. 438) (**Girouard’s wife said, “you’re a lousy fuck and you remind me of my dad”**)
    - *Girouard* says words alone cannot be adequate provocation
      - Evidentiary issues: in many cases, there will be no one to refute defendant’s claim of what was said
      - Softened by an exception in many jurisdictions for words that disclose facts that could be sufficient if the defendant had observed them directly (p. 443)
    - What circumstances come in to the “reasonableness” analysis?
      - Courts are all over the place in terms of what characteristics come in
        - Generally, physical attributes (blind, cripple) have a strong argument for coming in
        - Especially prone to anger? Unlikely to come in
        - Quick-tempered because of medication? More likely to come in than an inherent trait
        - *D.P.P. v. Camplin* (p. 461): allows age (15 years old) to come in
  - **Common-law mitigations, *Girouard* (p. 438):**
    - Extreme assault or battery upon the defendant
    - Mutual combat
    - Defendant’s illegal arrest
    - Injury or serious abuse of a close relative of the defendant’s
    - Sudden discovery of a spouse’s adultery
      - Boundaries are very narrow: must be married and catch the victim in the act (p. 449)
    - ***Maher v. People* (Mich. 1862) (p. 439) (Maher’s wife having sex in woods, Maher shoots lover in saloon):** allowed expansion of these categories and said that whether provocation was adequate is essentially a jury question; *cf. Girouard*, which presumably makes provocation a question of law (whether the provocation fits into certain predefined categories)
  - **Cooling time:** lapse of time renders provocation inadequate (no longer hot blood)
    - Some jurisdictions allow “rekindling” where an event immediately preceding the homicide rekindles an earlier provocation

- Many courts are unwilling to allow “rekindling” (p. 450)
    - *People v. Berry* (Cal. 1976) (p. 451): allowed manslaughter instruction despite 20 hour wait based on a theory that “defendant’s heat of passion resulted from a long-smoldering prior course of provocative conduct by the victim, the passage of time serving to aggravate rather than cool defendant’s agitation.”
    - **Misdirected reaction (p. 451)**
  - **FELONY MURDER: see MPC § 210.2(1)(b)**
    - **Must be in furtherance of the felony**
      - **Agency theory:** “felony murder rule does not extend to a killing, although growing out of the commission of the felony, if directly attributable to the act of one other than the defendant or those associated with him in the unlawful enterprise.” *State v. Canola* (N.J. 1977) (p. 518) (jewelry store owner resisting robbery killed co-felon)
        - Adopted by the *Canola* court: defendants not liable for co-felon’s death
        - Distinguished by “shield” cases where defendants use victims as shields: “The conduct of the defendants in [shield cases] is said to reflect ‘express malice,’ justifying a murder conviction.” (p. 519)
        - Under agency theory, who did the killing is the central issue
      - **Proximate cause theory:** “would attach liability under the felony-murder rule for any death proximately resulting from the unlawful activity—even the death of a co-felon—notwithstanding the killing was by one resisting the crime.” *Canola* (p. 518)
        - Under proximate cause theory, whether the killing is within the foreseeable risk in committing the felony is the central issue
          - N.J. legislature responded to *Canola* by enacting legislation that adopted proximate cause theory
            - Provided affirmative defense for felons who can show that they had no reason to anticipate the use of deadly force (same as N.Y.)
            - *Canola* remains influential outside New Jersey
        - “The lives of criminals **are not completely worthless.**” *United States v. Martinez* (7th Cir. 1994) (p. 523) (Posner, J.) (holding defendant liable under felony murder for co-felon’s death)
      - *People v. Gillis* (Mich. 2006) (p. 516): upheld felony murder conviction for vehicular homicide 10-15 minutes after burglary
      - *People v. Cabalero* (Cal. App. 1939) (p. 517): leader of group shoots lookout; all participants convicted of felony-murder “on the ground that shooting helped ensure the success of the ongoing robbery.”
    - Which felonies are covered? If a statute is silent, some courts apply to all felonies; other courts limit it to inherently dangerous felonies
      - Still others make inherently dangerous felonies qualify for first-degree murder, and nondesignated felonies qualify for second-degree murder (e.g., Cal.) (p. 500)
    - Not limited to foreseeable deaths: a felon is held strictly liable for all killings committed by him or his accomplices in the course of the felony. *People v. Stamp* (Cal. App. 1969) (p. 493) (victim suffered heart attack after being robbed at gunpoint)
      - Generally accepted view in American jurisdictions; however, judicial reform has started to require *some* culpability (p. 501):
        - *People v. Aaron* (Mich. 1980): read felony murder statute to require proving murder (malice), and simply elevating felony murder to first-degree (as the statute did); thus the murder being committed during a felony is treated similar to premeditation in that it makes the murder first-degree rather than second-
        - *State v. Ortega* (N.M. 1991): for first-degree felony murder statute, requires intent to kill or conscious disregard for life
        - *Commonwealth v. Matchett* (Mass. 1982): for second-degree murder for nondesignated felonies, prosecution must prove conscious disregard for the risk to human life
    - **Felony murder still requires actus reus and causation**
      - **Causation:**

- Factual causation: but-for the felony, the death would not have occurred
  - Some jurisdictions do not require proximate causation (e.g., *Stamp* (p. 493))
- Proximate causation (*see Causation*):
  - Must at least make the death more likely to occur: e.g., *King v. Commonwealth* (Va. Ct. App. 1988) (p. 494) drug smugglers transporting marijuana via plane got lost in fog and crashed into a mountain. King’s copilot died. King cannot be charged with felony murder because the crash was not made more likely by the fact that the plane’s cargo was contraband.
    - However, if flying especially low to avoid detection, better argument for felony murder
  - **Misdemeanor manslaughter:** misdemeanor resulting in death can provide a basis for involuntary manslaughter conviction without proof of recklessness or negligence
    - Also limited by actus reus and causation requirements:
      - E.g., *Commonwealth v. Williams* (Pa. Super. 1938) (p. 499): defendant did not renew driver’s license, death resulted from another driver’s carelessness. Court reversed conviction “holding that the expiration of the license had no causal connection to the accident.”
- **UNINTENTIONAL KILLINGS**
  - Contributory negligence by the victim is not a defense, but it may bear on whether the defendant’s conduct was a proximate cause of victim’s death (p. 468)
  - **Depraved-heart killings:** defendant is aware of a substantial risk to human life and simply does not care
    - E.g., Russian roulette, *Commonwealth v. Malone* (Pa. 1946) (p. 482), throwing a grenade into a crowd, etc.
      - Easiest to claim for activities that serve no purpose (Russian roulette)
      - If voluntary drunkenness renders defendant unable to appreciate a substantial risk, such drunkenness does not serve as a defense. MPC § 2.08(2); *United States v. Fleming* (4th Cir. 1984) (p. 486) (defendant convicted of second-degree murder for vehicular homicide with .315 BAC)
        - *People v. Watson* (Cal. 1981) (p. 488) found sufficient “knowledge” simply because defendant had driven to the bar, and “must have known that he would have to drive it later”
          - Dissent argued that the reasoning would be sufficient to convict in almost all drunk driving cases that result in death
  - **Common law:**
    - *Commonwealth v. Welansky* (Mass. 1944) (p. 464): defendant’s nightclub had blocked emergency exits, etc., fire killed many patrons; Welansky owns the corporation
      - “Wanton or reckless conduct” (essentially negligence): grave danger to others either realized by the defendant (even if an ordinary man wouldn’t realize it) **or** realized by ordinary man (even if not realized by defendant)
        - Seemingly conflates the MPC reckless and negligence standards
  - **MPC Article 210 (p. 1232):**
    - § 210.3: Manslaughter
      - (1)(a) committed recklessly. *See also MENS REA*
    - § 210.4: Negligent Homicide
      - (1) committed negligently. *See also MENS REA*
        - Culture/race excluded in reasonable person analysis. *State v. Williams* (Wash. App. 1971) (p. 472) (Indian parents negligently do not get medical treatment for baby)
          - Frame the question differently: not “what would an Indian parent do?”; instead “would a parent consider the very real risk of losing their child to social services?”
            - Increase likelihood of coming in—perhaps answers the “unjustifiable” question

- “The heredity, intelligence or temperament of the actor would not be held material in judging negligence, and could not be without depriving the criterion of all its objectivity.” (p. 480); *See also* p. 460, 327
      - Religion is not typically a defense to homicide: the First Amendment does not provide a constitutional defense. *See Walker v. Superior Court (Cal. 1988) (p. 481)* (sustaining conviction for parent who refused to get medical treatment for daughter that later died of meningitis)
    - Some negligence cases will be strict liability cases; in such scenarios, the criminal law cannot be concerning itself with retributivist ideals—it must be utilitarian (incapacitation being the apparent main objective)
- **CAUSATION: \*\*\*element of any offense whenever there is a result element of the statute**
  - **MPC § 2.03 (p. 1203)**
    - (1) conduct is the cause of a result when:
      - (a) but-for
      - (b) relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or law defining the offense
    - (2) when **purposely or knowingly** causing result is required, **requires actual result to be within purpose or contemplation** of the actor unless:
      - (a) different victim/property than intended or the result is less serious than intended
      - (b) actual result involves same kind of injury as designed/contemplated and is not too remote or accidental in its occurrence
    - (3) when **recklessly or negligently** causing result is required, requires awareness of risk (reckless) or should be aware of risk (negligent), unless:
      - (a) actual result differs from probable result via different victim/property or the result is less serious than the probable injury
      - (b) actual result involves same kind of injury as probable and is not too remote or accidental in its occurrence
    - (4) **strict liability**: requires actual result is a probable consequence of actor’s conduct
  - **Factual causation**: but-for the defendant’s wrongful act, the relevant harm would not have occurred
    - Chance of survival cases: prosecution must prove *beyond a reasonable doubt* that defendant’s failure to get medical help caused victim’s death, e.g., *State v. Montoya (N.M. 2002) (p. 576)*; *State v. Muro (Neb. 2005) (p. 576)*
      - But can prosecution present evidence that medical attention would have extended victim’s life by any amount of time instead under the theory that defendant’s conduct shortened victim’s life (and is therefore criminal homicide)?
  - **Proximate causation**:
    - ***People v. Acosta (Cal. App. 1991) (p. 574)***: “highly extraordinary result” standard: highly broad foreseeability standard (two helicopters crashing into each other during police chase)
      - ***People v. Brady (Cal. App. 2005) (p. 575)***: similar to *Acosta*, upheld conviction for defendant who recklessly caused intense fire that required firefighting planes; two planes crashed into each other
    - ***People v. Arzon (N.Y. Sup. 1978) (p. 577)***: “an individual is criminally liable if his conduct was a sufficiently direct cause of the death, and the ultimate harm is something which should have been foreseen as being reasonably related to his acts.”
      - If defendant’s act puts the victim in a position where he is particularly vulnerable to a separate and independent force, the defendant can be convicted
      - Arzon set a fire and firefighters were killed by an independent fire
        - Arzon’s fire blocked some of the access routes
      - *See also People v. Kibbe (N.Y. 1974) (p. 577)*: defendants abandoned intoxicated victim on the side of the road, victim was killed by a truck, conviction sustained; *People v. Stewart (N.Y. 1976) (p. 578)*: defendant stabbed victim, doctor performed unrelated surgery that resulted in victim’s death, conviction overruled
    - **Doctrine of transferred intent**: if defendant intends to kill A, but accidentally kills B, he may be held liable for murdering B (even though he didn’t intend to kill B); *see also* MPC § 2.03(a)(a)

- **Intervening human actor:**
  - Free, knowing, intelligent, intentional, voluntary decision breaks the causal chain, eliminating liability
    - E.g., **Suicides:**
      - *People v. Campbell (Mich. App. 1983) (p. 586)*: defendant provided victim with gun and rounds, victim committed suicide; defendant not liable for murder
        - *Campbell* is the prototypical example where victim made his own call, which absolves defendant even though the result (death) was 100% foreseeable
        - However, a defendant might be liable for negligently or recklessly committing homicide: murder requires intent, and a defendant cannot use another as an instrumentality (as the other has free will), but with negligence/recklessness, the defendant need only have created a substantial and unjustifiable risk. *People v. Kevorkian (Mich. 1994) (p. 588n70)*
          - **However, just as most states reject liability for murder, most reject the possibility of a manslaughter or negligent homicide conviction, provided the deceased's actions were fully voluntary.**
            - Most states now have assisted suicide statutes
        - “When suicide follows a wound inflicted by the defendant his act is homicidal, if deceased was **rendered irresponsible by the wound and as a natural result of it.**” *Stephenson v. State (Ind. 1932) (p. 594)* (Grand Dragon)
          - “Wound” not limited to physical—includes mental wounds
          - Stephenson’s conduct “rendered the deceased distracted and mentally irresponsible, and that such was the natural and probable consequence of such unlawful and criminal treatment, and that the appellant was guilty of murder.”
  - Prosecutor will try to maintain the chain by arguing the intervening action was not free, knowing, intelligent, intentional, or voluntary
    - *Regina v. Blaue (1975) (p. 597)*: defendant stabbed a Jehovah’s Witness; victim refused a blood transfusion that would have saved her life; defendant held liable as the refusal of the blood transfusion was not a voluntary choice
  - **Reckless subsequent actions**
    - Intervening actor no longer intended the intervening action (and therefore did not exercise free will breaking the causal chain)
    - *People v. Kern (N.Y. App. 1989) (p. 600)*: white teenagers wielding bats chased black men, threatening to kill them, victim tried to escape by running across a highway and was struck by a car and killed, conviction sustained
    - *Commonwealth v. Root (Pa. 1961) (p. 601)*: drag-racing, competitor “recklessly and suicidally swerv[ed] his car to the left lane of a 2-lane highway into the path of an oncoming truck was not forced upon him by any act of the defendant”
      - Unlawful or reckless conduct charged to the defendant must be the *direct* cause of the death
      - Root would probably be liable under accomplice or conspiracy liability
      - *Contra. State v. McFadden (Iowa 1982) (p. 603)*: drag-racer liable for competitor’s death because recklessness and foreseeability
    - *Commonwealth v. Atencio (Mass. 1963) (p. 605)*: Russian roulette: distinguishes drag-racing cases on the ground that in drag-racing, much is left to skill, whereas in Russian roulette, it is purely luck
      - “There could be found to be mutual encouragement in a joint enterprise ... There was a duty on [defendants’] part not to cooperate or join with [victim] in the ‘game.’” (p. 606)

## RAPE

- **Mens rea:**
    - Should mistake of fact regarding consent be a defense? “No American court of last resort recognizes mistake of fact, without consideration of its reasonableness, as a defense.” *Commonwealth v. Sherry (Mass. 1982) (p. 389) (defendant doctors took nurse to Rockport and each had sex with her)*
      - **Strict liability:** *Commonwealth v. Simcock (Mass. 1991) (p. 395)*: “a belief that the victim consented would not be a defense even if reasonable.” Affirmed on the basis that it is in line with strict liability for statutory rape.
        - **What is the culpable conduct if defendant is not even negligent?** In statutory rape cases, there is the countervailing consideration of protecting children of “tender years”
          - **Massachusetts requires force so there is still culpable conduct.** *Commonwealth v. Lopez (Mass. 2001) (p. 396)*
          - **The weight of American authority is against strict liability for consent**
      - In jurisdictions that have dispensed with force as a requirement, a stronger argument can be made for requiring a higher mens rea since, without force, the defendant’s only culpability is the mens rea (e.g., *Reynolds v. State (Alaska 1983) (p. 397)* requires recklessness since the statute no longer has a force requirement)
        - Without force, the actus reus, sex, is a completely lawful activity between consenting adults
      - Argument for negligence: easier to apply (do not need to consider defendant’s subjective intent), closer to societal norms, effect greater deterrence, the harm (rape) of negligent conduct is significant (similar to homicide)
    - Most American jurisdictions permit a mistake defense when the defendant’s error is honest and reasonable. (p. 396) Thus, most states apply a **negligence standard for mistake of consent**
      - **See Mistake of Fact (MENS REA)**
- **The FORCE requirement (p. 352):** in most jurisdictions, the required force is “physical compulsion, or a threat of physical compulsion, that causes the victim to submit to the sexual penetration against his or her will.”
  - Where the statute has a force requirement, intimidation, fear, or apprehension may be insufficient
    - E.g., *State v. Thompson (Mont. 1990) (p. 355)*: principal threatened to prevent high school student from graduating, statute defined “without consent” as “compelled to submit by force or by threat of imminent death, bodily injury, or kidnapping”, court affirmed dismissal of sexual assault charges, essentially indicating that its hands were tied by the statute
    - *Commonwealth v. Mlinarich (Pa. 1988) (p. 356)*: defendant assumed custody of 14-year-old girl who had been committed to a juvenile detention center, threatened to send her back if she didn’t have sex with him, court reversed rape conviction indicating “force” historically meant physical force or violence
- **Resistance (p. 352):** utmost resistance (one state), earnest resistance (some), reasonable resistance (half)
  - The remainder require no resistance, but consider it highly probative or implicitly read it into the statute
  - “Any resistance is enough when it demonstrates that her lack of consent is ‘honest and real.’” *Commonwealth v. Sherry (Mass. 1982) (p. 390)*
  - “Reasonable” resistance question can be displaced by the question whether the victim “reasonably” feared serious bodily harm—so that the “reasonable” amount of resistance, under the circumstances, was no resistance at all. (p. 354)
- ***State v. Rusk (Md. 1981) (p. 343)***: “majority of jurisdictions have required that the victim’s fear be reasonably grounded in order to obviate the need for either proof of actual force on the part of the assailant or physical resistance on the part of the victim.” (p. 345)
- **Psychological pressure:**
  - *State v. Burke (R.I. 1987) (p. 349)*: police officer forced victim to perform oral sex; court specifically noted the unique factual situation in that the police officer was in a position of authority and that the victim reasonably believed that resistance would be useless
    - *Contra State v. DiPetrillo (R.I. 2007) (p. 348)*: boss to employee: court unwilling to extend *Burke* analysis to situation where “the implied threat arose solely in the context of an employment relationship.”

- Psychological force could open the floodgates: “if you don’t have sex with me, I’m not taking you to the movies.”
  - Pennsylvania statute: “compulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied”
    - Conviction sustained in case where “the victim had an adolescent crush on the defendant and the defendant was aware of her feelings for him.” *Commonwealth v. Meadows (Pa. 1989) (p. 359)*
  - N.H. statute: by “threatening to retaliate against the victim”
    - Conviction sustained where defendant threatened to stop paying victim’s rent, to kick him out of defendant’s home, and to fire him. *State v. Lovely (N.H. 1984) (p. 359)*
- **Intoxication:**
  - Two-thirds of states impose restrictions where the victim “voluntarily ingested intoxicating substances through [her] own actions.” *State v. Haddock (N.C. 2008) (p. 381)*
  - Focus should be on “the effect of the intoxicants on the victim’s powers of judgment rather than on the victim’s powers of resistance.” *People v. Giardino (Cal. 2000) (p. 382)*
    - “Even a poor judgment is a reasonable judgment so long as the woman is able to understand and weigh the physical nature of the act, its moral character, and probable consequences.” *People v. Smith (Cal. 2010) (p. 382)*
- **Deception:**
  - *Boro v. Superior Court (Cal. 1985) (p. 386): fraud in the factum v. fraud in the inducement:*
    - **Fraud in the factum:** fraud in the act itself, i.e., fraud about the sexual intercourse
      - E.g., in *Boro*, defendant told the victim that she had a disease and that the cure was to have sex with him; thus, she believed that the sexual intercourse was in fact a cure, and was therefore defrauded in the factum
    - **Fraud in the inducement:** fraud inducing consent is effective consent
      - E.g., “I’m a doctor”
- **MPC § 213.1**
  - (1) Rape: male + not his wife
    - (a) by force or threat of imminent death, serious bodily injury, extreme pain or kidnapping
    - (b) impaired her power to control her conduct by administering or employing without her knowledge drugs, intoxicants or other means for the purpose of preventing resistance
    - (c) unconscious
    - (d) < 10 years old
  - (2) Gross sexual imposition: male + not his wife
    - (a) compels submission by threat that would prevent resistance by a woman of ordinary resolution
    - (b) knows she suffers from a mental disease/defect making her incapable of apprising the nature of her conduct
    - (c) knows she is unaware of the sex act or she submits thinking he is her husband

## BLACKMAIL (P. 1070-79)

- **Most jurisdictions (including MPC) require extortion of PROPERTY, but some (e.g., Vt.) allow extortion for “intent to compel the person so threatened to do an ACT against his will” (p. 1071)**
- **MPC § 223.4 (p. 1244): Obtains PROPERTY via threat to:**
  - (1) inflict bodily injury on anyone or commit any other criminal offense
  - (2) accuse anyone of a criminal offense
  - (3) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute
  - (4) take or withhold action as an official, or cause an official to take or withhold action
  - (5) bring about/continue a strike if the property is not demanded/received for the benefit of the group
  - (6) testify or withhold testimony with respect to another’s case
  - (7) inflict any other harm which would not benefit the actor
  - Affirmative defense to (2),(3),(4) if the property obtained is honestly claimed as restitution or indemnification for harm done
    - Most jurisdictions do not adopt a similar defense: we would rather have people go through the proper channels (bring an official court proceeding)



- E.g., *People v. Fichtner* (N.Y. 1953) (p. 1074): defendants believed victim had stolen \$50 worth of goods from their employer, threatened him with crime unless he paid \$25 to the store (defendants did not even personally benefit)
  - “Defendants may properly be convicted even though they believed the complainant was guilty of the theft of their employer’s goods ... Nor is defendants’ good faith in thus enforcing payment of the money alleged to be due to their employer a defense.” (p. 1076)

## ATTEMPTS

- **Mens rea**
  - **Conduct elements**
    - Defendant must have purposely engaged in the conduct
  - **Result elements**
    - Specific intent to cause the result, **even when recklessness or lesser mens rea would suffice for conviction of the completed offense**; e.g., “the required intent in the crimes of assault with intent to murder and attempted murder is the specific intent *to murder*.” *Smallwood v. State* (Md. 1996) (p. 611) (**defendant with AIDS raped three women without using condoms**)
      - *Contra* Colorado, which allows attempted reckless manslaughter. *People v. Thomas* (Colo. 1986) (p. 614)
    - “It is permissible to infer that ‘one intends the natural and probable consequences of his act.’” *Smallwood* (p. 612) **discussing Raines (defendant fired gun at driver-side window, permitting inference of intent to kill)**
      - For cases like *Smallwood*, need conduct plus something more, as in *Hinkhouse* (Or. 1996) (p. 612): defendant actively concealed his HIV, and had said if he were HIV-positive, he would spread the virus to other people
      - To argue intent to kill from conduct alone, must make the conduct as close to firing a loaded gun (*Raines*) as possible
    - **Attempted felony-murder is NOT a crime (p. 615); attempted manslaughter IS a crime (p. 615) (mitigated murder)**
  - **Attendant circumstances:** same mens rea as commission of the crime
    - E.g., *Commonwealth v. Dunne* (Mass. 1985) (p. 616): attempted statutory rape conviction sustained
- **Actus reus/preparation**
  - Competing considerations of:
    - (1) locus penitentiae: an opportunity to repent, to change one’s mind: would the defendant really have committed the crime?
    - v. (2) allowing police to intervene earlier to prevent crimes: do we really want the victim to have to be dangerously proximate to the victim? (or worse, res ipsa, last act)
  - **Tests**
    - **Dangerous proximity (*Rizzo* (p. 618))**
      - “So near to its accomplishment that in all reasonable probability the crime itself would have been committed, but for timely interference ... There must be dangerous proximity to success.” *People v. Rizzo* (N.Y. 1927) (p. 619)
        - Armed defendants drove around looking for the man they were trying to rob, but had not found him, convictions overturned as they were not dangerously proximate to success
      - *Commonwealth v. Bell* (Mass. 2009) (p. 620): defendant, promised he would be allowed to have sex with a 4-year-old, followed undercover police officer out of a parking lot and was subsequently arrested, conviction overturned because not dangerously proximate
      - *United States v. Harper* (9th Cir. 1994) (p. 634): defendants set a bill trap; “Making an appointment with a potential victim is not of itself such a commitment to an intended crime as to constitute an attempt, even though it may make a later attempt possible.”
    - **Substantial step (MPC): strongly corroborative of criminal purpose**

- “Shifts the emphasis from what remains to be done ... to what the actor *has already done*.” MPC Comments to § 5.01
- Defendant will offer innocent explanations of conduct to argue it was not strongly corroborative
- **Last act and res ipsa have fallen out of favor:**
  - **Last act**
  - **Res ipsa (equivocality):** the act must be unequivocally criminal: “A criminal’s attempt is an act which shows criminal intent on the face of it ... res ipsa loquitur” *King v. Barker (1924)* (p. 625)
    - “No one could say with certainty whether defendant had come [to carry out his crime]” *People v. Miller (Cal. 1935)* (p. 625) (reversing conviction of defendant who had threatened to kill Jeans, and had brought a loaded gun into a field where Jeans was located, but had not take aim at any time before he was disarmed).
- **Abandonment:** renunciation must be voluntary
  - Victim convinces defendant not to rape, opposite decisions:
    - *People v. McNeal (Mich. 1986)* (p. 622) (sustaining conviction)
    - *Ross v. State (Miss. 1992)* (p. 622) (found abandonment as a matter of law and reversed the conviction for attempted rape)
- **MPC § 5.01 (p. 1219)**
  - (1) A person is guilty of attempt if, acting with the culpability required for commission of the crime, he:
    - (a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
    - (b) for result element, does/omits something with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or
    - (c) purposely does/omits something which, under the circumstances as he believes them to be, is a **substantial step: strongly corroborative of the actor’s criminal purpose**
  - (2) The following, if strongly corroborative, **shall not be held insufficient as a matter of law:**
    - (a) lying in wait, searching for or following the contemplated victim
    - (b) enticing or seeking to entice the contemplated victim to go to the place contemplated for commission of the crime
    - (c) reconnoitering the place contemplated for the crime
    - (d) unlawful entry of a place where it is contemplated the crime will be committed
    - (e) possession of materials which are specially designed for the crime and can serve no lawful purpose of the actor under the circumstances
    - (f) possession, collection or fabrication of materials that serve no lawful purpose under the circumstances near the contemplated crime place
    - (g) soliciting an innocent agent to engage in conduct constituting an element of the crime
  - (3) Attempt: a person who attempts to aid another, satisfying § 2.06 (complicity), is guilty of attempt to commit the crime even if the crime is not committed or attempted by the other person.
  - (4) **Affirmative defense for renunciation of criminal purpose:** abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose
    - Invalid if motivated by increased probability of detection

## COMPLICITY

- Vicarious liability (without actus reus and mens rea) resulting in criminal punishment (imprisonment) is prohibited by due process. *State v. Guminga (Minn. 1986)* (p. 292) (rejecting vicarious liability for restaurant owner whose employee sold alcohol to a minor)
  - **However, courts will uphold convictions where possible sanctions are limited to fines (p. 294)**
    - Additionally, some courts uphold convictions where *possible* sanctions include imprisonment if the *actual* sanction is only a fine. *State v. Beaudry (Wis. 1985)* (p. 294) (possible sanction of 90-day jail sentence, but actual sanction only \$200 fine)
  - Courts are similarly reluctant to allow vicarious parental liability (p. 295)

- **Jurisdictions are split as to whether accomplice liability requires the principal to be convicted of the crime**
- Victims are not accomplices
- For accomplice liability, the analysis is of the **defendant's mens rea and actus reus**
- **Actus reus**
  - Absolutely minimal. *Wilcox v. Jeffrey (1951) (p. 687)* (defendant clapped at concert)
  - Need not be a but-for cause. *State ex rel. Attorney General v. Tally, Judge (Ala. 1894) (p. 689)* (telegram case)
    - If defendant's conduct aided/abetted/encouraged *at all*, the defendant is guilty
    - In all cases of accomplice liability, the underlying crime must have been committed
      - ***State v. Hayes (Mo. 1891) (p. 693)***: defendant entrapped by Hill burglarizing Hill's general store, Hill entered the store and did the actual "burglary," but because Hill was not committing a crime (did not have intent to steal), Hayes could not be aiding/abetting a crime
        - Allowing criminal liability based on entrapper's conduct would allow the entrapper to manipulate charges as in *Vaden*
          - Potential for abuse by law enforcement
        - *Vaden v. State (Alaska 1989) (p. 694)*: sustains convictions for defendant who aided and abetted undercover officer (Snell) that shot four foxes, Snell **actually committed the crime** (but had a justification)
          - Snell's excuse ("public authority justification defense") personal to Snell, and therefore does not avail Vaden
            - Other defenses, such as diplomatic immunity, *Farnsworth v. Zerbst (5th Cir. 1938) (p. 699)*, and entrapment, *United States v. Azadian (9th Cir. 1971) (p. 699)*, are also personal and thus would not avail the accomplice
            - The fact that defendant's accomplice was acquitted does not avail defendant. *United States v. Standefer (U.S. 1980) (p. 700)*
        - **Entrapment (MPC § 2.13)**: only available as a defense if the defendant was not "predisposed" to commit the offense, and was induced by a government agent
          - Very difficult to succeed
      - **Accomplice's charge is limited to principal's crime.** *Regina v. Richards (1974) (p. 701)* (defendant hired thugs to beat up her husband, she intended serious harm, they only intended harm, she could not be convicted of the greater offense)
        - **But, where principal's culpability is lessened by a defense, that defense is not transferable to defendant.** *People v. McCoy (Cal. 2001) (p. 702)* (principal shot and killed victim, had unreasonable but good-faith self-defense claim, not transferable to accomplice)
      - **Principal's crime can be greater than accomplice's.** *Moore v. Lowe (W. Va. 1935) (p. 703)* ("The instigator may act in hot blood, in which case he will be guilty only of manslaughter, while the perpetrator may act coolly, and thus be guilty of murder.")
        - **Common law**: there must be **actual aid**
        - **MPC**: attempts to aid are just as culpable as actual aid, and thus the defendant would be guilty as an accomplice even if no actual aid was rendered
          - **If the underlying crime was not committed, defendant is not guilty as an accomplice, but may nonetheless be guilty of attempt**
    - **Innocent agent doctrine (MPC § 2.06(2)(a))**: "A person is legally accountable for the conduct of another person when ... acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct." (p. 698)
      - Some statutes require that the crime be committed by designated classes of persons (e.g., bank officer); if a defendant dupes a bank officer into committing the crime, the innocent agent doctrine wouldn't solve this issue, as the defendant cannot commit the crime (he is not a bank officer)

- To solve, federal statute 18 U.S.C. § 2(b): “Whoever willfully causes an act to be done which if directly performed by him *or another* would be an offense against the United States, is punishable as a principal.” (p. 699)
- **Mens rea**
  - **Conduct elements**
    - Specific intent is generally required to hold a person liable as an accomplice (p. 661)
      - Defendant must actually intend his action to further the criminal *action* of the principal
        - Even if defendant’s conduct **actually** facilitates the crime, he is **not liable** unless he also **intends** to facilitate the crime. ***Hicks v. United States (U.S. 1893) (p. 661) (Hicks’ words may have encouraged Rowe to shoot victim, but Hicks did not intend to encourage Rowe)***
        - Even if defendant has extremely unworthy motive. *Wilson v. People (Colo. 1939) (p. 696)* (trying to frame friend, did not have intent to permanently deprive drugstore owner of goods, conviction for larceny reversed)
      - The defendant must engage in **purposive** conduct; e.g., in drug sales “there is no aiding and abetting unless one in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.” *State v. Gladstone (Wash. 1970) (p. 664)* (defendant sent drug solicitor to a dealer, charged with aiding and abetting the sale of drugs)
        - **More than knowledge is required—need intent to aid or encourage**
          - Essentially the defendant must **want** the crime to occur
            - Thus, knowledge plus is sufficient, as in knowledge plus a stake in the venture: e.g., seller who inflates prices when selling to criminals
          - **SCOTUS says for 18 U.S.C. § 924(c)** (carrying gun during violent/drug crime), **the defendant must intend the accomplice to carry a gun, but intent can be inferred by active participation in the underlying violent/drug crime plus knowledge of the circumstances**
            - Knowledge must be sufficiently in advance to have some “realistic opportunity to quit the crime.” *Rosemond v. United States*
              - Gives the defendant an opportunity to make the relevant moral choice: if he knows in advance and continues with the crime, he is culpable
        - For **major crimes, knowledge can be sufficient.** *United States v. Fountain (7th Cir. 1985) (p. 669) (Posner, J.)* (defendant prisoner allowed another prisoner to take a knife from his waistband, which was subsequently used to kill a guard, knowledge held sufficient to sustain conviction)
        - **Community of purpose**
          - ***People v. Russell (N.Y. 1998) (p. 680)***: defendants were engaged in a shootout in a public area, third-party killed by a stray bullet, unable to identify which defendant shot the bullet
            - “The fact that defendants set out to injure or kill one another does not rationally preclude a finding that they intentionally aided each other to engage in the mutual combat that caused [victim’s] death.”
              - The defendants obviously did not have the *purpose* of being shot at
              - However, defendants had **“acknowledged and accepted each other’s challenge to engage in a deadly battle on a public concourse.”**
    - **Results and attendant circumstances**
      - Require the same mens rea as the substantive offense (do not require purpose)
        - ***State v. McVay (R.I. 1926) (p. 674)***: defendant directed people to operate a boiler negligently, conviction for manslaughter (requiring criminal negligence) sustained
          - Defendant intended the underlying conduct (operation of the boiler), and negligence is sufficient for the result element
        - ***Commonwealth v. Roebuck (Pa. 2011) (p. 675)***: sustaining conviction for third-degree murder; defendant intended to aid/abet the underlying conduct (ambushing victim), and was reckless as to his death (result) as required by manslaughter conviction

- Strict liability:
  - Gun crimes (p. 678)
  - Statutory rape (p. 679)
- **Additional crimes committed by accomplice**
  - **MPC:** entire complicity analysis must be satisfied to charge for “additional” crime (thus, not truly *additional*, as defendant would be independently liable for that crime)
    - **Rejects *Luparello* liability**
  - ***People v. Luparello (Cal. 1987) (p. 682):*** Luparello enlisted several friends to find out where his ex-wife was from Martin, one friend, waiting in a car, shot and killed Martin, Luparello charged with first-degree murder (lying in wait)
    - Luparello obviously did not intend to facilitate the murder (was contrary to his purpose of obtaining the information about his ex-wife’s whereabouts)
      - Did not encourage/facilitate a murder, *maybe* a battery or some lesser crime
    - **“He is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets.”**
      - **Very broad**
      - Rejected by most jurisdictions (proportionality concerns)
    - Even of the jurisdictions that follow *Luparello*, most use **“natural and probable”** rather than “reasonably foreseeable”
      - “An accessory is liable for any criminal act which in the ordinary course of things was the natural and probable consequence of the crime that he advised or commanded, although such consequence may not have been intended by him.” *Roy v. United States (D.C. Cir. 1995) (p. 685)*
        - **“In the ordinary course of things’ refers to what **may reasonably ensue from the planned events, not to what might conceivably happen**, and in particular suggests the absence of intervening factors.” *Roy (p. 685)***
- **MPC § 2.06 (p. 1204)**
  - (2) A person is legally accountable for the conduct of another person when:
    - (a) acting with required culpability for commission of the offense he causes an innocent/irresponsible person to engage in such conduct
    - (c) he is an accomplice
  - (3) A person is an **accomplice** if:
    - (a) with the purpose of promoting or facilitating, he:
      - (i) **solicits** person to commit
      - (ii) **aids or agrees or attempts to aid** in planning or committing
      - (iii) having a legal duty to prevent, **fails to make proper effort so to do**
    - (b) his conduct is expressly declared by law to establish his complicity
  - (4) **Result element requires the same culpability as the substantive offense**
  - (6) Unless otherwise provided by the Code or law defining the offense, a person is not an accomplice if:
    - (a) he is a victim of the offense
    - (b) the offense is so defined that his conduct is inevitably incident to its commission
    - (c) he **terminates his complicity** prior to the commission of the offense **and**
      - (i) wholly deprives it of effectiveness in the commission of the offense; or
      - (ii) gives timely warning to law enforcement or otherwise makes proper effort to prevent the crime
  - (7) A person can be convicted via complicity even though the person who committed the crime has not been convicted.

## CONSPIRACY

- **Policy:** Conspiracy poses a significant threat because “combination in crime makes more likely the commission of other crimes” and “decreases the probability that the individuals involved will depart from their path of criminality.” *Callanan v. United States (U.S. 1961) (p. 737)*
- Separate offense and form of accessory liability

- In some jurisdictions, the conspiracy charge results in a longer sentence than the substantive crime
- In a conspiracy to commit a single crime, the **MPC** does not allow conviction for two crimes (the substantive crime and the conspiracy). MPC § 1.07(1)(b) (p. 739)
  - However, if the conspiracy is to achieve various criminal objectives, conspiracy can be charged in addition to the substantive crimes.
- Agreement by two or more persons to commit a crime
- **Actus reus:** the agreement itself
  - At common law, no “overt act” necessary: “the very plot is an act in itself.” *Mulcahy v. The Queen* (1868)
    - However, American jurisdictions typically add an overt-act requirement. (p. 711); e.g., “one or more [conspirers] do any act to effect the object of the conspiracy.” 18 U.S.C. § 371
      - In most jurisdictions, overt act can be satisfied by acts that would be equivocal or merely preparatory in the law of attempts. (p. 712)
  - Actual, express agreement is not necessary. A tacit agreement reached without communication is sufficient. *Interstate Circuit, Inc. v. United States* (U.S. 1939) (p. 709)
    - Some courts have expressed limits: “An inference of an agreement is permissible **only when the nature of the acts would logically require coordination and planning** ... A general practice of supporting one another in fights does not constitute the type of illegal objective that can form the predicate for a conspiracy charge.” *United States v. Garcia* (9th Cir. 1998) (p. 710) (gang shooting)
    - **MPC:** agreement is sufficient for first- and second-degree felonies; all other crimes require an overt act
- **Mens rea:** generally requires purpose, except in serious crimes → knowledge is sufficient
  - Purpose can be inferred from knowledge if, *People v. Lauria* (Cal. App. 1967) (p. 713) (**prostitutes using Lauria’s phone service**):
    - (a) Aggravated nature of the crime itself (e.g., murder)
    - (b) Supplier has a special interest in the activity because, *Lauria* (p. 713):
      - 1. Purveyor of legal goods for illegal use has acquired a stake in the venture (e.g., charges increased price for the services, *United States v. Morse* (11th Cir. 1988) (p. 720))
      - 2. No legitimate use for the goods or services exist (e.g., publishing a directory of prostitutes)
      - 3. Volume of business with the buyer is grossly disproportionate to any legitimate demand, or sales for illegal use amount to a high proportion of the seller’s total business
        - E.g., sale of narcotics to a rural physician in quantities 300 times greater than normal use would require. *Direct Sales v. United States* (p. 716) (grossly disproportionate)
        - E.g., if in *Lauria*, prostitutes made up an unusual volume of his business (high proportion)
  - Some jurisdictions require a “corrupt” motive. *People v. Powell* (N.Y. 1875) (p. 720)
    - If two people agree to do something that they do not know is criminal, they are not guilty of conspiracy
    - *Powell* has been widely criticized, as it effectively makes mistake of law a defense. (p. 721)
- Duration of conspiracy:
  - The basic rule is that once formed, a conspiracy remains in effect until its objective have either been achieved or abandoned. *United States v. Kissel* (U.S. 1910) (p. 735)
    - Most courts refuse to infer an implicit agreement to cover up the crime once the conspiracy is completed. *Grunewald v. United States* (U.S. 1957) (p. 735)
    - A conspiracy is abandoned when none of the conspirators are engaging in any action to further the conspiratorial objectives. (p. 738)
    - To withdraw, a defendant must either disclose the scheme to law enforcement or communicate his withdrawal to his co-conspirators. (p. 738)
      - “The communication must be unambiguous and effective.” *United States v. Randall* (10th Cir. 2011) (p. 738)
  - At common law, you could not withdraw from the crime of conspiracy—once you agree to commit the crime, you’re guilty of conspiracy



- Ease of application—let prosecutorial discretion sort out which corporations should/not be charged
    - Some jurisdictions use “supervisory agent”
  - (2) within the scope of employment
    - Corporation is liable even if agent’s actions are contrary to general corporate policy and express instructions. *United States v. Hilton Hotels (9th Cir. 1972) (p. 783)*
  - (3) with the intent to benefit the company
    - Corporation need not actually benefit—what matters is the perpetrator’s intent, a jury question. *United States v. Sun-Diamond Growers of California (D.C. Cir. 1997) (p. 786)*
- **Collective knowledge doctrine:** Only applicable if there is a statute authorizing collective knowledge: No individual agent is guilty of the crime, but by combining knowledge and acts of various agents, the collective corporation is deemed responsible
- **MPC § 2.07 (p. 1205):**
  - **Liability for violations:** Any agent if legislative purpose to impose liability plainly appears
  - **Liability for true crimes:** Authorized, requested, commanded, performed or recklessly tolerated by the board or a high managerial agent acting in behalf of the corporation within the scope of his employment
    - **High managerial agent:** agent having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation
      - “Corporation has placed the agent in a position where he has enough authority and responsibility to act for and in behalf of the corporation in handling the particular corporate business, operation or project in which he was engaged at the time he committed the criminal act.” *Commonwealth v. Beneficial Finance Co. (Mass. 1971) (p. 793)*
- **LIABILITY OF CORPORATE AGENTS**
  - Knowledge of agents in a partnership cannot be imputed to the partners, but can be imputed to the partnership as an entity itself
  - **Responsible corporate officer doctrine:** by reason of position in a company, the person has authority or responsibility over the conduct
    - Corporate officer must “stand in some responsible relationship to the issue”
    - Has a duty of the highest standard of foresight and vigilance, but does not require what is objectively impossible
      - Even cuts into strict liability offenses!
    - Look at required **mens rea** (e.g., *United States v. Park (U.S. 1975) (p. 806)* (strict liability offense, upholding liability) v. *Gordon v. United States (U.S. 1954) (p. 805)* (willfully, rejecting liability))
      - If knowledge is required, “a mere showing of official responsibility ... is not an adequate substitute for direct or circumstantial proof of knowledge.” *United States v. MacDonald & Watson Waste Oil Co. (1st Cir. 1991) (p. 814)*
    - **Actus reus** is the omission or failure to fulfill a duty: personal culpability via omission of duty (NOT vicarious liability)

## DEFENSES: JUSTIFICATIONS

- **SELF-DEFENSE:**
  - **Policy:**
    - **Imminence:**
      - **Pro:** easy to apply; let prosecutorial discretion sort who should be charged and who shouldn’t; without imminence, the defendant could have gone to get help; the victim might have changed his mind; prevent pre-emptive self-defense because the state is supposed to have a monopoly on punishment; would increase murders that could later be justified by sympathetic victims and questionable stories (especially considering the demanding beyond a reasonable doubt requirement)
      - **Con:** we should just use a necessity standard, if it really is necessary why should imminence be required? Imminence is really just evidentially relevant to necessity



- **Common law:**
  - Most jurisdictions use an objective standard that incorporates some subjective elements: the jury must judge the defendant by the standards of a reasonable person in the “situation”
  - Non-deadly force: defendant must *reasonably* believe that such force is necessary to protect himself from imminent unlawful force
  - **Deadly force:** defendant must *reasonably* believe that such force is necessary to protect himself against imminent deadly force
    - **Deadly force:** force likely to cause death or great bodily harm
    - **Retreat:** More than half of jurisdictions have stand your ground laws permitting persons to stand their ground when faced with deadly force
    - **Imperfect self-defense:** Defendant honestly, but unreasonably, believed that deadly force was necessary
      - Reduces charge from murder to manslaughter
  - **Third parties:** at common law, a valid self-defense claim served as a bar to prosecution for injuries to third parties (e.g., p. 861)
- **MPC § 3.04 (p. 1209):**
  - Non-deadly force: defendant must believe that such force is immediately necessary to protect himself against the unlawful use of force by other person
  - **Deadly force:** defendant must believe that such force is immediately necessary to protect himself against death, serious bodily harm, kidnapping or sexual intercourse by force or threat
    - **Exceptions:**
      - (i) defendant, with purpose of causing death or serious bodily harm, provoked the use of force by the victim in the same encounter
      - (ii) retreat requirement if complete safety
        - (1) not required to retreat from dwelling or work, unless defendant is the initial aggressor or attacked at work by co-worker
  - **§ 3.09 (p. 1214):**
    - If the defendant is reckless/negligent in having belief, he can still be liable for crimes that only require recklessness/negligence (e.g., manslaughter, negligent homicide)
      - Honest, unreasonable belief = negligent homicide
    - If defendant recklessly/negligently injures an innocent bystander, self-defense is unavailable in a prosecution for recklessness/negligence toward bystander
- **“Free from fault” requirement:** Defendant must have clean hands (varying degrees, from cannot commit a crime provoking the deadly force to cannot have committed any crime, including unlicensed possession of handgun, although that possession had causal connection to death [murder weapon]) (p. 871)
- **Initial aggressor limitation:**
  - At common law, the initial aggressor could not claim self-defense
  - **MPC:** permits self-defense for force above and beyond what the initial aggressor used (but initial aggressor still liable for initial force)
- **BWS [Expert Testimony]:**
  - Most jurisdictions allow the testimony can come in to show:
    - Defendant honestly believed the victim was using deadly force
    - Why defendant didn’t leave victim
    - But, CANNOT come in for the reasonableness inquiry (whether the belief was reasonable)
- **Third party defense:** follows the same rules as self-defense
- **RETREAT:**
  - NEVER have to retreat rather than use **non-deadly force**
  - Minority of jurisdictions require retreat, and those that do only require it only if the defendant knows it can be done with complete safety
    - **MPC** is in accord
  - **Castle exception:** defendant does not need to retreat from his own home
    - Guests: a few states require homeowners to retreat from guests (most do not)

- Co-occupants: some courts require retreat from co-occupants (most do not)
- **DEFENSE OF PROPERTY:**
  - **Cannot set deadly traps:** even if, if the person were present, the force would be legal, it is not, because it's possible no one is present (so no danger), and if the person is there, he can use his judgment, e.g., it could be a firefighter—traps have no judgment
  - **MPC:** permits the use of deadly force to prevent the commission of a crime that would expose the actor to substantial danger of serious bodily harm
  - Many states permit deadly force to prevent or terminate *any* felonious entry or even any unlawful entry (p. 876)
- **“CHOICE OF EVILS” [NECESSITY]**
  - 1. Requires choice of evils + defendant chooses lesser evil
  - 2. Preventing/avoiding imminent harm
    - **MPC** does not require imminence; some jurisdictions in accord
  - 3. Defendant must reasonably anticipate that there is a direct causal relationship between the crime defendant commits and the harm it seeks to avoid
    - Necessity is inapplicable to indirect civil disobedience cases (e.g., splashing blood on IRS computers to keep tax money out of El Salvador)
  - 4. No other legal alternatives
  - 5. Legislature did not anticipate the scenario (implicitly or explicitly) (e.g., legislature prohibits distribution of hypodermic needles, needle exchange program to combat AIDS not protected by necessity)
  - 6. Defendant cannot contribute to the emergency in the first place
  - 7. Not allowed in homicide cases
    - **MPC** allows in homicide cases
  - 8. No economic necessity
  - 9. At common law, situation must be created by natural phenomena, not a person (which would be duress)
  - **MPC:**
    - Actor believes necessary to avoid evil
      - Evil sought to be avoided is greater than that sought to be prevented by the law
      - Legislative purpose to exclude the justification does not plainly appear
    - If reckless/negligent in bringing about the circumstances requiring the choice, can still be prosecuted for crimes requiring only recklessness/negligence

## DEFENSES: EXCUSES

- Involuntary actions
- Cognitive deficiencies
- Volitional deficiencies
- **LEGAL INSANITY**
  - Insanity: mental state existing at the time of the criminal offense
  - Incompetence: mental state at the time of a legal proceeding
    - A person who lacks sufficient mental capacity to understand or participate in the relevant legal proceeding is deemed incompetent
    - **MPC:** as a result of mental disease or defect lacks capacity to understand the proceedings or to assist in his own defense
  - **Civil commitment:** requires clear and convincing evidence of mental illness and dangerousness
  - All states create a presumption of legal sanity
    - Various degrees of evidence to eliminate the presumption
    - Jurisdictions vary on who has the burden for insanity:
      - Some jurisdictions use what was once the majority rule: prosecution must disprove insanity beyond a reasonable doubt
      - Federal: defendant has burden of proof by clear and convincing evidence
  - ***M’Naghten’s Case (1843) (p. 968): Insanity requires:***
    - At the time the act was committed:
      - Defendant, because of mental disease or defect,

- Does not realize the nature/quality of the act, or if he does know the nature/quality, does not know it is wrong
      - E.g., believed he was cutting a turkey, was really killing someone (nature/quality of act)
      - E.g., killed children because deity told him to (did not know it was wrong)
    - **FEDERAL:** is the same as M’Naghten’s except it uses the language severe mental disease or defect
  - **MPC:** defendant at the time the crime was committed, because of mental disease or defect, lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct
    - Wrongfulness prong (like M’Naghten’s)
    - Volitional prong
      - Widely rejected: no objective basis for determining between offenders who were undeterrable and those who were merely undeterred
- **ADDICTIONS AND INVOLUNTARY ACTIONS**
  - Criminalizing status is prohibited (e.g., common cold, being an addict)
    - But criminalizing conduct “compelled” by addiction is not (e.g., drinking, carrying drugs)
- **DURESS**
  - Imminent threat from a human being
    - Not all jurisdictions require imminence (e.g., **MPC**), but those that do not consider it probative of whether a person of reasonable firmness would be unable to resist
  - Threat must be of serious bodily harm or death (to defendant or another)
    - **MPC** requires simply physical force
  - Man of ordinary fortitude and courage might justly yield (reasonable person standard)
    - No reasonable opportunity to escape
  - **MPC:**
    - Affirmative defense if coerced to act by use of, or threat of, unlawful physical force against person or person of another, which a person of reasonable firmness in his situation would have been unable to resist
      - Defense is unavailable if the defendant recklessly placed himself in a situation in which it was probable he would be subjected to duress. The defense is also unavailable if negligent, if crime only requires negligence
    - Can be claimed even if defendant did not choose the lesser evil
  - **Contributory fault:** where a defendant voluntarily, and with knowledge of its nature, joined a criminal organization or gang which he knew might bring pressure on him to commit an offense and was an active member when he was put under such pressure, eh cannot avail himself of the defense of duress.

## SENTENCING

- Should serve the goals of punishment:
  - Retribution
  - Deterrence (utilitarian)
  - Incapacitation
  - Rehabilitation
- **Policy:**
  - If sentencing is too discretionary, the sentence becomes uncertain and loses deterrence value (especially if possibility of no punishment)
    - Taking discretion away from judges simply gives more to prosecutors
- Courts take a very deferential view of legislatively determined sentences
  - Let prosecutorial discretion and the clemency power counteract unduly harsh sentences
- What should courts consider?
  - Age: Posner incapacitation argument (crime decreases with age)
  - Letters: to get a full picture of the defendant
    - Utilitarian: if the person has positive effects on others, imprisoning them can have a net negative effect

- Rehabilitation: community connections may suggest that the defendant is more likely to be successfully rehabilitated
  - Retributive justice: ???
  - Incapacitation: increased likelihood of rehabilitation may mean that the defendant does not need to be incapacitated as long, as he is less likely to commit crime once released
  - But discriminates against people who have no one to advocate for them (who are already disadvantaged)
  - May give good-looking, charismatic people a break: we may be bad at making judgments about how “good” a person is
    - Could result in biases against people of color (already disadvantaged in criminal justice system)
- Fashioning punishments:
  - 18 U.S.C. § 3553: any conditions the court considers appropriate so long as they are “reasonably related to the nature and circumstances of the offense and the history and characteristics of the defendant”
    - Must be both “reasonably related” and satisfy the goals of punishment
- Alternative punishments (*Gementera*) need to be sufficiently linked to crime committed and have a rehabilitative/expressive goal
- DISCRETIONARY SYSTEM (*Williams v. NY*): judge has complete discretion to set sentence, can look at pre-sentence report, take in all relevant factors
  - Abrogated for death penalty cases (*Gardner v. FL*)
- MANDATORY MINIMUMS: shift discretion from judge to prosecutor in deciding which charge to bring (*Vazquez*)
  - Declared unconstitutional because they’re offense elements that must be proven at trial (*Booker*) – now only advisory
- PROCEDURE
  - (1) Judge looks at guidelines, locates punishment range
  - (2) Is the case “outside the heartland” of cases considered by Commission?
    - Prior to 2005, analysis stopped here
  - (3) Even if a “heartland case,” is it okay to depart because the suggested punishment would not serve the aims of punishment laid out in § 3353:
    - The court should impose a sentence sufficient, but not greater than necessary, that:
      - (a) Reflects the seriousness of the offense, to promote justice for the law, and to provide just punishment for the offense [RETRIBUTIVE]
      - (b) To afford adequate deterrence to criminal conduct [UTILITARIAN]
      - (c) To protect the public from further crimes of the defendant [INCAPACITATION]
      - (d) To provide the defendant with needed educational or vocational training...[REHABILITATIVE]
    - Standard of appellate review of step 3 is “substantive reasonableness”
- PROPORTIONALITY
  - **As-applied challenge:** “The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only *extreme* sentences that are ‘*grossly disproportionate*’ to the crime” (*Harmelin*, quoted in *Ewing v. CA*)
    - Threshold inquiry: does state have a reasonable basis for believing that this sentence will serve a goal of punishment (deterrence, retribution, incapacitation, rehabilitation)
      - If yes, court upholds sentence (*Ewing*)
    - If get past *Harmelin*: compare offense to other more serious offenses with shorter prison terms, to other jurisdictions
  - **Categorical challenge (*Graham v. FL*):** skips *Harmelin* threshold inquiry, proceeds straight to phase two
    - (1) Objective indicia of society’s standards (legislation, actual sentencing practices)
    - (2) Court’s independent judgment
      - Culpability of the offender *class* (juveniles, mental retardation)
      - Level of the *offense* (murder, rape)
      - Nature of the *punishment* (life without parole, life sentence)
      - Does sentence serve penal goals? (incapacitation can’t trump everything else)

- Role of international law