

## Actus reus

(need one)

- **Voluntary act**
  - Not voluntary: *MPC 2.01(2)* – reflex or convulsion; bodily movement; conduct from hypnosis
- **Omission (failure to act) + duty**
  - Sources of duty: statute; status relationships; contractual duty to care; vol'y assumed care and secluded helpless person; created the peril
  - If uncertain there is a duty, make policy arguments.
    - Morally blameworthy (**Pope**); worth resources; bystander effect; slippery slope problems

## Statutory interpretation

- **Legislative history:** what did the drafters want to prevent?
- **Moral wrong theory:** what is the element that makes the act immoral?
- **Lesser crime:** is the act itself a crime, and does the AC aggravate it?
  - Utilitarians support b/c you should not have been doing bad thing in first place
  - Retributivists oppose b/c you are not as blameworthy
- **Public welfare violation?**
  - **Rule:** **Statutory silence** regarding mens rea can only be **interpreted as strict liability** standard after **considering** following **factors**: (1) How wide is **distribution of harm** (wider harm -> SL); (2) Is the **injury the same** regardless of intent (yes -> SL); (3) “**New offenses**” (mass production, post-IR products) vs common law offenses (new offenses -> SL); (4) **Type of punishment** (small penalty w/ little/no stigma -> SL; this one is **particularly influential**); (5) Could defendant have stopped the crime from occurring?
  - Pro: Protect uneducated consumers; place burden on companies to exercise highest possible level of care in manufacturing, marketing & distributing products; ease of prosecution
    - **Balint:** selling derivatives of opium & coca despite no knowledge; **injustice** of punishing innocent seller **outweighed** by evil of exposing public to drug
    - **Dotterwich:** pharm middleman copied misleading labels; penalties used as a means of **regulation**
  - Con: Legislative intent can be argued for either side (don’t disturb OR clearly didn’t intend); don’t want to chill productive activity
    - **Morissette:** Overturning conviction for “knowingly converting” govt property by taking discarded bomb casings under honest assumption that they were abandoned. Mala in prohibitum crimes need mens rea.
    - **Staples:** Not guilty for possession of automatic weapon where D honestly didn’t know weapon was altered b/c **statutory silence ≠ SL for gun possession, some indication of legislative intent (express or implied) is needed to get rid of mens rea** (no public welfare issue here)
    - **X-Citement Video:** Overturning conviction for distributing child porn b/c **statute was not intended to be read as SL even though “most natural grammatical reading” finds SL**
- **Position of mens rea term in the statute**
- **Punctuation**
- **Rule of lenity (constitutional arg.)** *Morales*—loitering law was too vague in “to remain in a place with no apparent purpose”

## Mens rea- common law & MPC

Make prosecutor's checklist and attach mens rea to each element

### (for each element)

- **Intentionally (R) – 2.02(2)(a)**
    - Conscious object to cause the harm or aware/hopes/believes circumstances exist
    - Virtually certain it was going to occur
  - **Knowledge (AC) – can infer intent/purpose from this – 2.02(2)(b)**
    - Aware of the fact (the attendant circumstance) or the conduct
    - Correctly believes it exists
    - Willful blindness (*Jewell*—marijuana in trunk case) – **2.02(8)**
  - **Recklessness – 2.02(2)(c)**
    - Consciously disregards a substantial and unjustifiable risk
      - Awareness (choose one)
        - The risk itself is substantial and unjustifiable
        - Aware she was taking a risk, and jury decides if the risk was substantial/unjustifiable
      - Substantial and unjustifiable
        - Look at probability of harm, gravity of harm, reason for the conduct
  - **Criminal negligence – 2.02(2)(d)**
    - Reasonable person standard;  $\Delta$  was not aware but should have been that the risk was substantial and unjustifiable
      - Exam issue: what is reasonable person?
        - Always: shock from traumatic injury; blindness
        - Others are debatable
    - **Santillanes**: man who slashed his son's throat in a fight; because of **moral condemnation** attached to a crime, you need at least criminal negligence (not civil)
    - **Hazelwood**: Exxon Valdez captain; **civil negligence** is needed because it aims at assuring that criminal penalties will be imposed only when the conduct can be reasonably deterred by society
  - **Strict liability**
- 2.02(3)** when no term at all default is reckless  
**2.02(4)** mens rea term carries throughout unless contrary purpose  
**2.05** no strict liability unless for violation

## Mistake of law

Mistake of law is not a defense (**Marrero**: good faith mistaken belief as to the meaning of a statute is not a defense; public policy is to give an incentive for knowledge)

### **Exceptions**

1. MPC §2.04(1)(a) Δ **mistake negates the *mens rea*** of a material element; can be reasonable **or** unreasonable belief

2. **Crime requires awareness that you are breaking the law**

a. Debate – what type of awareness?

A. **Favor A most: must be aware of specific statute**

**Liparota**: Overturning conviction for knowing **misuse of food stamps**; **policy**: don't want to "criminalize a broad range of apparently innocent conduct"

**Cheek**: Overturning conviction of tax evasion; **tax evasion has "willful" mens rea** attached b/c tax law is very complicated, so falls under §2.09

Contrast **Intl Minerals**: Upholding conviction of trucking company for "knowingly violating" by knowingly carrying corrosive liquids w/o **knowledge of statute**; justification: **public policy violation**

B. **Only need general awareness that act is unlawful**

**Bryan**: Upholding convic. for "willful" firearms dealing b/c he knew conduct was illegal even w/o **knowledge of statute**; used straw purchasers and sawed serial numbers off guns

C. **Favor A least: mere awareness of the facts**

**Overholt**: Upholding conviction under Safe Drinking Water Act for "wilfull" violation w/o access to defense of mistake of law b/c is **strict liability crime**.

### 3. Statutory exceptions/official interpretations

MPC §2.04(3): Δ is **not guilty** of a criminal offense if at the time of the offense

**(need both)**

- He reasonably relied on an official statement of the law, later determined to be erroneous; **AND**
- Obtained from a person or public body with responsibility for the interpretation, administration, or enforcement of the law defining the offense

**Hopkins** – Δ did not have defense for mistake of law just because a **lawyer** gave him wrong legal advice

**Albertini** – protestor who **relied on a Supreme Court decision** to do the act could not be convicted just because subsequently the Supreme Court reversed its own decision

### 4. The statute is unconstitutional in punishing a Δ for a crime of which Δ was unaware at the time of the conduct

a. **Lambert**: LA law required ex-felons to register; Δ was unaware of this law

b. When does it look unconstitutional?

- Punishes omission
- **Notice** issue: crime is not likely to be known AND statute does not give notice somehow
- Duty to act is based on a status ("mere presence" enough to trigger the duty)
- Conduct is considered "wrong" because it is prohibited by a statute (otherwise, it is not illegal)

## Mistake of attendant circumstance

2.04(1)(a) ignorance of fact is a defense if it negates the mens rea of a material element, or the statute gives a defense

Exception 2.04(2) if Δ would be guilty of a lesser offense if the facts were as she believed → **no** mistake of fact defense, but can get reduced grading

## Causation

Actual cause ("BUT FOR")

### COMMON LAW & MPC

1. Identify the relevant acts committed by Δ.
2. "But for" the Δ's voluntary acts, would the social harm have occurred **when it did?** CL & MPC §2.03(1)(a) (If no -> actual cause exists)

### **Special case: If multiple causes & INDEPENDENT actors**

- a. If multiple actual causes exist, analyze D1 and D2 separately, asking if each *accelerated* the death.
- b. If multiple **sufficient** causes exist, use tests below (ex: D1 hits heart; D2 hits head; either could have killed V)
  - i. CL: was D1's behavior a "substantial factor" in the resulting harm? D2? Etc.
  - ii. MPC: state the result with more specificity (resulting harm is death by bullet to head and heart)

Proximate Cause

### COMMON LAW

#### 1. Is there proximate cause? ISSUE: foreseeability

- a. **Dependent act occurring in response to Δ's act: was the act abnormal or bizarre?** If no → Δ is liable – usually you will get this. (Ex: grossly negligent medical treatment after stabbing)
  - Not foreseeable: victim has reached safety but doesn't take it (**Preslar**—wife reached father's home and stayed outside, where she froze to death, instead of going in)
- b. **Independent act of Δ's act: was the act foreseeable?** If yes → Δ is liable. (**Kibbe**: Δ left drunk V on the street, naked and confused → hit by trunk → yes foreseeable)

### **Break chain of causation?**

1. Intervening human action **breaking the chain of causation** (Human action is free, deliberate, informed, and intentional → likely yes, chain broken)

### DEBATE

- **Intentional = free-will**  
**Campbell**: drunk Basnow said he wanted to kill himself; Δ provides gun and Basnow shoots himself → relieved Δ  
**Kevorkian**: victims independently activated suicide machine
- **Intentional ≠ free will**  
**Stephenson**: victim was "rendered irresponsible" or that Δ was still exercising control over the victim  
**Blaue**: Jehovah's Witness victim died b/c she refused treatment; those who use violence **take their victims as they find them**

Subsequent human actions that recklessly risk the result (no break → **Kern**; **Atencio**; yes break in chain → **Root**)

- **Kern**: white men guilty of manslaughter when they chased black men, who ran into highway and hit by a car; **public policy** demands bad conduct be punished & **not fair to blame victim** for "choosing wrong escape route"
- **Atencio**: Russian roulette; element of **luck** involved in death; **public policy** interest in deterring reckless conduct
- **McFadden**: drag-racing; **upholding** conviction for involuntary manslaughter where other racer lost control, killing 2 b/c death was **foreseeable consequence of reckless decision** to race (compare to **Root**: drag-racing; victim's decision to swerve was **intervening act**)
- **Matos**: fleeing burglar who fled across rooftops where cop chasing him fell down air shaft and died; officer's **death was foreseeable** result of burglary & flight

### MODEL PENAL CODE

1. What is the *mens rea* for the offense?
  - a. MPC §2.03(2)(b) purposely/knowingly
  - b. MPC §2.03(3)(b) reckless/negligent
2. Did Δ [insert mens rea] cause a particular result, which occurred in an odd/unexpected manner? (If yes → Δ is liable)  
 \*\*If actual result too remote to have a [just] bearing on the actor's liability or on the gravity of the offense → Δ is not liable.

## Homicide – common law

\*\*shows malice

### 1. Was the killing intentional or unintentional?

- a. **Intentional** = the conscious object of the killer to take the life of another (purpose standard).
  - i. If you can only prove that the killer subjectively knew the death was going to happen (knowledge standard)
  - ii. You can infer purpose from knowledge sometimes (ex: natural/probable consequences; use of deadly weapon)
- b. **Otherwise killing is unintentional.**

### 2. Intentional killings

- a. **Murder** (with intent to kill a human being\* or inflict grievous bodily injury\*)
- b. Unless adequate provocation + imperfect self-defense = **voluntary manslaughter** (no malice aforethought)

#### Arguments for grading down

##### Adequate provocation

- i. **Traditional common law** = see sexual intercourse from partner during adultery, mutual combat, resistance to illegal arrest, or witness to injury by relatives
- a. **Words alone are never enough**, no matter how insulting
  - i. Could make **rekindling** argument
- b. **Giroud**: provocation must be that it might “inflame the passion of a *reasonable man* and tend to cause him to act for the moment from passion rather than reason”
  - i. **What is reasonable?**
- c. **Maher**: provocation must be such that “it might render ordinary men, of fair average disposition, liable to act rashly or without due deliberation or reflection, and from passion, rather than judgment”

**State of passion** – cannot be “cooled down” (but think **rekindling**)

**Suddenness** – the **reasonable** time elapsed cannot have allowed cooling down

**Causation** – decision to kill must be because of the provocation

### 3. Unintentional killings

- a. **Depraved heart murder** (if  $\Delta$  consciously takes a substantial and unjustifiable foreseeable risk of causing human death = manifested an extreme indifference to human life\*)
  - ✓ **Malone**: Russian Roulette
  - ✓ **State**: Shooting into a moving train for no apparent reason but to cause mischief
- b. **Felony murder** (if the killing happened during a felony or attempted felony)
  1. **Rule: any death in a felony = felony murder (Stamp)**
  2. **Possible Limitations**
    - a. **Felony must be inherently dangerous (Serné)**  
(diverging views)
      - Felony is dangerous in the abstract
      - Facts-of-the-case: felony is not dangerous in the abstract, but dangerous in light of the factual circumstances – probably should try for **depraved heart murder**
    - b. **Killing must be done “in furtherance” of the felony**
      - If killing is by non-felon  $\rightarrow$  argue either agency theory (if you are  $\Delta$ ) or proximate-cause theory (if you are  $\pi$ )
   
(diverging views)
        - **Agency**: killing needs to be done by co-felon (**unless human shield case**  $\rightarrow$  felon is responsible)
        - **Proximate-cause**: if it was a **foreseeable risk** in the commission of the felony  $\rightarrow$  felon is responsible for killing
  - c. **Involuntary manslaughter** (if the conduct was merely reckless or criminally negligent + no presence of malice aforethought)
    - \*\* Actor can be guilty through **advertent or inadvertent** risk-taking

## "Willful, deliberate, pre-meditated"

1. Willful
  - a. Equal to the common law = intentional
  - b. Otherwise killing is unintentional.

2. Deliberate
  - a. Treat it as = to pre-meditated.

3. **Main exam issue: Pre-meditated (diverging theories)**

- a. **Carroll**: "no time is too short"; if the killing was intentional, willful, deliberate, and premeditated, it doesn't matter how little time passed between the premeditation and the fatal act)
- b. **Guthrie**: "some evidence Δ considered and weighed his decision to kill"

**Evidence of premeditation:** 1. Planning activity (place or weapon), 2. Status of D's prior relationship with victim and current condition (might give evidence of motive), 3. Evidence regarding nature or manner of killing which indicate deliberate intent

**Anderson**: man who **butchered 10-year-old girl** b/c **no evidence of premeditation** or discernable motive whatsoever; decision has been **criticized**

## Homicide – MPC

### MURDER – no degrees

1. **210.2(1)(a) Purposely or knowingly killing**
2. **210.2(1)(b) Recklessly under circumstances manifesting extreme indifference to human life**
  - a. **Includes intent to inflict bodily injury** (from CL)
  - b. Requires **explicit proof of risk-taking**, AND that the risk taken was **unjustifiable and substantial**

If person has committed a felony in a MPC jurisdiction (robbery, arson, burglary, kidnapping, felonious escape, or rape or deviate sexual intercourse by force or threat of force) →

210.2(1)(b) allows presumption of reckless indifference to human life → **murder**

- Rebuttable presumption: Δ can present evidence that she did **not** commit the felony with an extreme indifference to human life

### UNLESS MANSLAUGHTER

1. **210.3(1)(a) Recklessly but NOT under circumstances manifesting extreme indifference**
  - a. Requires proof that actor is aware she is taking a unjustifiable and substantial risk (**cannot be inadvertent risk-taking**)
    - i. **Same debate about awareness**
2. **210.3(1)(b) Killing under extreme mental or emotional disturbance**
  - a. Requires **reasonable** explanation for the **EMED**; **Cassasa**: reasonableness is determined from the perspective of person in Δ's situation as he believes them to be
  - b. Make **policy arguments** for including certain traits
    - i. What always counts as reasonable: blindness, grief, shock from traumatic injury
    - ii. **Retributive**: allow as EED; Δ killing in **anger** was done **from insults**; less morally **blameworthy** than cold blood
    - iii. **Utilitarian**: don't allow as EED; less deterrence; need to obey certain laws; **violate equal protection**
  - c. **"Words alone" can qualify**
  - d. **Provocation or cooling off NOT necessary**

**Rape**

- **Policy arguments:** mens rea requirement be for defendant?
  - **Knowledge** – Defendant will argue that **sexual situations are complicated, easy to misread, so to protect innocent men**, is important to force prosecution to prove that D knew he was acting w/o consent
  - **Recklessness** – Defendant will argue that **everyone has sex, so it's easier to make mistakes**, so should have to prove conscious disregard of risk, **otherwise would end up indicting too many people**
  - **Negligence** – Prosecution will argue that **b/c everyone has sex, it is extra important to have people be cautious**, ask first and not make assumptions (assume she doesn't rather than she does); **rape is serious**, this gives maximum **incentive** for people to **prevent misunderstandings**

**Issue: level of resistance required**

- Traditional: female must **physically resist** “to the utmost”
- Modern: **resisting can be dangerous**; some respond by **freezing up**

**Level of force**

- Use or threaten force that would cause a **reasonable female to fear grievous injury**
- **Rusk:** Upholding 2<sup>nd</sup> degree rape conviction where victim perceived threat of force but D said no force threatened b/c jury found victim's **fear was reasonable**; mens rea = reckless
  - Lack of consent can be established by proof of resistance or proof of failure to resist because of genuine, reasonable fear
  - She doesn't run, blow horn, seek help, remains in apt. after he leaves, removes his pants
  - The look on his face scared her, took her keys, **lightly choked her**

**Issue: type of force**

- **Traditional:** if she were to resist; only **physical force** is acknowledged
  - **Thompson:** court decides that **force has to be physical** b/c of the companion **statutory language about imminent death, bodily injury, kidnapping**
- **Modern:** other types of force (psychological, emotional, moral) is valid; more inclusive idea of how people can be pressured into unwilling submission, but remember **reasonableness requirement**
  - **MTS:** **very low level** of force; all that is needed is the **force inherent in the sexual act**
  - **Griffin:** force needs to be **substantially different** or greater than physical force inherent in sex

**Issue: consent**

- **Mistake of consent is not a defense**
  - **Sherry:** Uphold convictions for rape for three docs who raped nurse b/c **mistake of consent not a defense** to rape; **mens rea = negligence** (D asked for knowledge)
    - Jury must consider entire sequence objectively
  - **Fischer:** Uphold conviction for involuntary deviate sexual intercourse for oral sex w/o consent for college student b/c **mistake of consent not a defense (mens rea = negligence)**
- **Consent obtained by fraud or trickery is still consent**
  - **Evans:** **no conviction** for man lied that he was a journalist and lured woman into apartment; “I could kill you. I could rape you. I could hurt you physically” could be interpreted as a **real threat OR a statement of fact concerning a stranger that was not Δ**
  - **Boro:** Overturning rape conviction for man who convinced woman sex w/ him was vital part of medical treatment to save her life

**MPC §213.1**

§213.1(1) – **Rape** – Vaginal, anal or oral sex b/w man & woman not his wife (any penetration counts, no ejaculation required) where: (a) he compels her to submit by **force** or by **threat** of imminent death, serious bodily injury, extreme pain or kidnapping of her or others; (b) he **drugged** her w/o her knowledge; (c) she is **unconscious**; (d) she is **less than 10 yrs old**

- 2<sup>nd</sup> degree felony EXCEPT is 1<sup>st</sup> **degree felony if:** (i) he inflicts **serious bodily injury** upon anyone; or (ii) victim **not "voluntary social companion"** & had **not "previously permitted him sexual liberties"**

§213.1(2) – **Gross Sexual Imposition** – Vaginal, anal or oral sex b/w man & woman not his wife (any penetration counts, no ejaculation required) where: (a) he compels her to submit by **“any threat that would prevent resistance by a woman of ordinary resolution”**; (b) he **knows that she suffers from mental disease/defect** which renders her incapable of appraising her conduct; or (c) he **knows that she is unaware** that she is having sex OR submits b/c she thinks he is her husband

- **Mens Rea** – Most jurisdictions use **negligence** standard – **belief in consent must be honest & reasonable**

**Blackmail** – non-violent threat to take away property

**Ask:**

What is the **benefit to the Δ?**

What did the **Δ threaten to do?** (own property doesn't count)

Did you **meet mens rea** according to the statute?

### **Statutory Scheme – could be broader than property; interpret!!!**

**Harrington**—lawyer representing wife wrote a letter that he would divulge incriminating info to IRS and release pictures of her husband with a prostitute, unless he gets settlement money

- Not a defense: Whatever you are threatening to expose can be TRUE, but that doesn't mean you can blackmail someone. (If you don't give me money back, I'm going to tell them how bad your product is)
  - Why: You are becoming complicit in the crime by a failure to report; it subverts the criminal justice system for your benefit. Extra-legal market for what is a crime/not a crime (worry about private system of crime, but there are certain crimes concerning with domestic matters might want to be kept out of the system). But it could be too easily abused.
- Better idea: statement of intent – here is a list of facts, now it is your move (invite offers)
  - Response: that is an implicit threat (depends on mens rea)

### **MPC 223.4 Theft by Extortion – limited to threats to get property**

**223.4(2)** Accuse anyone of a **criminal offense**

**223.4(3)** expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute

**223.4(4)** take or withhold action as an **official** or to cause official to take/withhold action

**223.4(5)** threaten **strike or boycott**

**223.4(6)** testify or provide/withhold **info** with respect to another's **legal claim**

**223.4(7)** inflict any other harm that would not benefit the actor – **CATCH-ALL**

**Affirmative defense:** for crimes (2) or exposing a secret (3), or official action (4) – what I got for the offense, it was **honestly claimed as restitution/indegnification** for the harm done

- Could be a fair exchange, but there might be unequal bargaining power

**Pro- Blackmail Policy: Discourage vigilantism** (people won't have incentive to go out looking for secrets; won't have inefficient overinvestment to protect privacy), **protect from coercion, not simply a bargain** b/c of sham consideration (illegal immigrants)

**Fichtner: Upholding** conviction for extortion for store manager & asst manager who forced shoplifter to sign confession & pay back \$ in installments in exchange for not reporting to police b/c **cannot collect debt**, even if valid debt, **by threatening** to accuse debtor of crime (**vigilantism** is bad)

**Anti-Blackmail Policy:** consumers need all the bargaining leverage they can get; worry about criminalizing otherwise innocent behavior

Attempt – common law

### Actus reus

1. **Last step test (Eagleton)** – most A friendly
  - Person performed **all of the acts that she believed were necessary** for the target offense.

2. **Dangerous proximity test**

(look at all three)

- ? nearness of the danger
- ? substantiality of the harm
- ? degree of apprehension felt

Hydraulic: more serious the offense, the less close the actor must come to completing the offense

Rizzo—failed DP test, despite the fact Δs who drove around looking for the victim, who never appeared

3. **Unequivocality test – the silent movie**

- Conduct, standing alone, must demonstrate criminal intent.

McQuirter: could have been innocent under this test; black man accused of rape

### Mens rea

1. Result crimes:

(need both)

- Intentionally (purposely) commit the *actus reus* of the attempt.** (Cannot be charged with attempt for a reckless or negligent crime)
- Intend the specific result.**

Smallwood: Δ intentionally had unwanted sex with his victims. He was not guilty of attempted murder because prosecution could not show that he intentionally wanted to kill his victims with HIV.

2. Attendant circumstance:

(divergent rules)

- A person can be convicted of attempt if he is **reckless with regard to the AC**.
- A person is culpable based on the **mens rea of the target crime**.

### Defenses

(can characterize both ways)

**Factual impossibility = not a valid defense in CL.**

- If the circumstances were as Δ believes them to be, would it still constitute a crime? If yes → guilty.

**Pure legal impossibility = valid defense in CL.**

- One who thinks he is committing a crime but is actually not is not guilty of an attempt.

## Attempt – MPC

## **Actus reus**

**Substantial step (MPC)** –only incomplete attempts; what has already been done?

- §5.01(1)(c) “act or omission constitutes a **substantial step**
    - §5.01(2) Substantial step must be “**strongly corroborative** of the actor’s criminal purpose.”

The following should not be held insufficient as a matter of law. If true, case must go to the jury.

**Jackson**—had certain weapons in his possession that could not serve any lawful purpose

## **MENTION RELEVANT ONES ONLY**

(a) **lying in wait, searching for or following the contemplated victim** of the crime; (b) **enticing or seeking to entice the contemplated victim of the crime to go to the place** contemplated for its commission; (c) **reconnoitering the place** contemplated for the commission of the crime; (d) **unlawful entry of a structure, vehicle or enclosure** in which it is contemplated that the crime will be committed; (e) **possession of materials to be employed** in the commission of the crime, **that are specially designed for such unlawful use or that can serve no lawful purpose** of the actor under the circumstances; (f) **possession, collection or fabrication of materials** to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances; (g) **soliciting an innocent agent to engage in conduct** constituting an element of the crime.

## Mens Rea

## 1. Complete attempts

### *Prohibited conduct*

**§5.01(1)(a) *Purposely*** engages in conduct that would constitute the crime, if circumstances were as  $\Delta$  believes them to be  
*Prohibited result*

§5.01(1)(b) Act with a ***purpose*** of causing or with the ***belief*** it will cause the **criminal result**

## 2. Incomplete attempts

§ 5.01(1)(c) **Purposely** does an act constituting a **substantial step in furtherance** of the offense, **in circumstances as he believed them to be**

### **3. Attendant circumstances**

§5.01(1) Person is guilty if she acts with kind of **culpability** otherwise required for target crime.

## Defenses

**Impossibility** (all about the subjective state of mind)

**§5.01(1)(a)** *Purposely* engages in conduct that would constitute the crime, if circumstances were as Δ believes them to be

- ✗ Factual impossibility: voodoo doll person → guilty
  - ✓ Legal impossibility voodoo doll person → not guilty

## Abandonment

**§5.01(4)** Even actions are a substantial step in the offense, she is not guilty if  
(need both)

- Abandons effort** to commit the crime **or prevents** it from being committed
  - Conduct manifests a **complete and voluntary renunciation** of criminal purpose

## Accomplice Liability – not a separate analysis, just another way of committing substantive offense!!

### Analyze the PRINCIPAL CRIMES FIRST SO HELP ME

#### Inferring purpose from knowledge

- ✓ Δ knows of the crime, **AND** one of these below:
- ✓ **EITHER:** intends to participate (has the purpose the crime will occur), **OR**
- ✓ Crime is very serious, **OR**

#### (all alternative theories below)

- Charges criminals **above market price** / receives **kickbacks; stake in the venture; bulk of his profits** from supplying criminal; no legitimate **use** for the goods supplied; no legitimate purpose for the **volume** of supplied goods; **evaluative comments** about the goods; **connects buyer and seller**
- ✗ Mere knowledge (renting apartment to prostitutes)

### Common Law

#### ACTUS REUS

##### **Did Δ actually render assistance? Did the crime actually occur?**

- ✓ Trivial assistance; verbal encouragement
- ✗ Mere presence

##### **(Omissions) Did Δ have a duty to act? Did Δ fail to act to prevent the crime?**

#### MENS REA

- **Conduct** elements – purposely (specific intent) \*\* *infer purpose from knowledge*
- **Result** elements – same as for principal according to substantive crime
- **Attendant Circumstances** – unclear (argue policy – statutory interpretation)

If charged with crime, are you in a **Luparello jurisdiction?**

Δ is guilty of any *additional* crimes **reasonably foreseeable** to have been committed by P (**negligence** standard)

#### IF PRINCIPAL IS ACQUITTED

P did **not commit a crime** → no accomplice liability

P acquitted on **justification** → no accomplice liability b/c no crime committed

P acquitted on **excuse** → can still have accomplice liability **b/c excuse was personal** to the principal

#### DEFENSE

Legislative exemption: Δ cannot be an accomplice to her own victimization -> no crime occurred (ex: 14-year-old cannot be accomplice to statutory rape)

### MPC

#### ACTUS REUS

##### **§2.06(3)(a) Did the Δ solicit the offense, aid, agree to aid, or attempt to aid in the commission of the offense?**

\*\*Unlike common law: can simply agree or attempt to aid; does not have to actually aid

##### **(Omissions) §2.06(3)(a) Did Δ have a duty to act? Did Δ fail to act to prevent the crime?**

#### MENS REA

Conduct elements – **purposely** (specific intent) (§2.06(3)(a)) \*\* *infer purpose from knowledge*

Result elements – same as for principal according to substantive crime (§2.06(4))

- So if crime is reckless homicide, you have to *intend* to help but only be *reckless* regarding the possibility of death
- Furthermore, **can charge w/ higher level crime** if have requisite mens rea (§2.06(7))
  - E.g., if you want person C killed so hire B to do it, but then B gets excited and commits crime in heat of passion, B gets manslaughter, but you get murder

Attendant Circumstances – unclear (argue policy – statutory interpretation)

#### IF PRINCIPAL IS ACQUITTED

##### **MPC §2.06(7): justification/excuse**

- P is acquitted on justification → no offense → **no** accomplice liability
- P is acquitted on excuse → offense still exists → check for accomplice liability
- P is convicted of a different offense or degree of offense → still can charge for diff./higher offense → check for accomplice liability

**MPC §5.01(3): attempt – not derivative; Δ charged with substantive offense**

- P is acquitted of an attempt/does not actually attempt → Δ can still be guilty of attempt

#### SPECIAL DEFENSES

##### **§2.06(6)(a) Legislative exemption**

**§2.06(6)(b) Inevitable incidence:** if the Δ's conduct is an inevitable incident to the commission of the offense (EX: prostitution)

##### **§2.06(6)(c) Abandonment (need both)**

- Terminates her participation before the crime is committed
- Either neutralizes her assistance, gives timely warning to police, **OR** in some other manner prevents the crime from being committed

## Conspiracy

**COMMON LAW** – Can have 1+ conspiracy charges

### ACTUS REUS

Was there an agreement to commit an unlawful act?

### MENS REA

1. Did  $\Delta$  have **intent** to agree?
2. Did  $\Delta$  have the **intent** that the underlying offense be committed? (more than mere parallel action) \*\* *infer purpose from knowledge*

**Interstate Circuit:** distributors were all involved in a **conspiracy** with movie theater chains based on several factors: **letter** sent had **names of 8 others; strong motive for concerted actions** b/c one rogue element would undercut all competition; **large number** meant it was less likely that it was just coincidence)

**Moussaoui**—jurors found that **he did not know enough** of the terrorist attacks despite parallel action like attending **flight school**, joining a **gym**, purchasing **knives short** enough to pass through airport security → **maybe he was trying to imitate them**)

**MODEL PENAL CODE** - Only 1 conspiracy charge

**§1.07(1)(b) Merger: if actual crime is committed -> no conspiracy can be charged, unless continuing course of conduct for additional offenses not yet committed or attempted**

- A and B conspire to rob Bank V1, V2, and V3. They rob V1 but are arrested. They can be convicted for conspiracy **and** robbery.

### ACTUS REUS

1. §5.03(1) Was there agreement to engage in conduct that constitutes a **crime**, or an attempt or solicitation to commit such a **crime**? (not just unlawful act)
2. §5.03(5) Was there an **overt act**? (doesn't take much to satisfy this requirement)
  - a. 1<sup>st</sup>/2<sup>nd</sup> degree felony does **not require overt act**

### MENS REA

1. §5.03(1) Did  $\Delta$  make agreement with the **purpose** of promoting or facilitating the commission of conduct that constitutes a **crime**? \*\* *infer purpose from knowledge*

**SUBSTANTIVE OFFENCE CHARGE - PINKERTON JURISDICTION – USE FOR FEDERAL / NOT MPC**

1. If you are in *Pinkerton* → could be liable for additional offenses other than offense you intended to facilitate;
2. Rule: Are the **other** offenses **in furtherance of the conspiracy** and **reasonably foreseeable**? (1-2 sentences)
  - a. Minority limitation on *Pinkerton*: are you a minor player in the conspiracy? (*Alvarez*)

## Holding Corporations Responsible

**Hilton Rule (“respondeat superior”)** – majority standard; used in federal court

A corporation is responsible for the agents' acts if the

1. **Agent commits a criminal act,**
  - Agent must have acted with the **specific intent under the statute**
  - Not necessary to prove a specific person, only *some* agent
2. **Within the scope of his employment, and**
  - **Even if the conduct is contrary** to the corporation's stated policies
  - **Narrower definition:** conduct that is **authorized, explicitly or implicitly**, by the principal or that is similar or incidental to the authorized conduct
  - **Broader definition:** any act that occurred while the employee was carrying out a **job-related activity**
3. **With intent to benefit the corporation (does not have to actually benefit).**
  - For example, increased profits
  - *Sun Diamond:* the agent defrauded his employer, Sun Diamond, to provide funds for the sec'y of agriculture. The company was still held liable because it could have **benefited incidentally** from a better relationship with this candidate.

## Policy arguments supporting rule

*Hilton* – violation of the Sherman Anti-trust Act

- Commercial offenses are usually motivated by a **desire to increase profits** → deterrence effect of the Act is **low**; people will try to increase profits if they do not think they will be caught
- Commonly involve **complex transactions** characterized by decentralization and **delegation of authority** → this makes it **difficult to identify specific agents** responsible for the Anti-trust violations
- Therefore, we should **hold the company responsible to increase the incentive** for them to **monitor** and prevent illegal agent conduct

**MPC §2.07(1)– more Δ friendly; minority standard; not used in federal court**

(1) Corporation may be convicted of an offense

- (a) **(for violations only)** if there is a **statute** with clear legislative purpose to impose liability on corporations for acts by agents; **or**
- (b) **omission** of a duty; **or**
- (c) commission of the offense was **authorized, requested, commanded, performed or recklessly tolerated** by the board of directors or by a **high managerial agent** acting on behalf of the corporation within the scope of his office or employment

**2.07(4)(a)(c)** a **high managerial agent** is an officer of a corporation **having duties** of such responsibility that his conduct may fairly be assumed to **represent the policy of the corporation**

### Defense:

2.07(5) **Due diligence:** the managerial agent made efforts to make sure no offense was being committed; **cannot** be used for SL

**Beneficial Rule** – no “high managerial agent” limitation like the MPC

Corporation can be convicted if agent

1. Had enough power, duty, responsibility, and authority to act for and in behalf of the corporation at the time of the criminal act,
2. Power of decision as to what he would do or not do for the corporation, **and**
3. He was acting to **benefit** the *particular* corporate business, operation, or project.

## Policy arguments supporting rule:

- Corporations delegate out to many people, but not every agent with significant power has a title or office
  - **Title does not tell you anything**
- Those who are **lower in rank** often control **everyday operations**

## Holding Officers Liable

**Gordon:** just because employees had “willfulness” does NOT mean that the individual business **owners also had “willfulness”**; only time mens rea transfers is for SL public welfare offenses

- However, *A&P Trucking* said you can still find the partnership as a whole guilty (but not charging the partners individually)

## **Rule: responsible corporate officer doctrine**

**Park:** conviction upheld for owner w/ rats in food warehouse violations; **small penalty** might have informed court choice;

- Δ, by reason of his position, had responsibility or authority to prevent in the first place, the violation, but he failed to do so

**impossibility defense:** for officers, not corporations

(two interpretations)

#1: **factual rebuttal** – Δ was powerless to prevent or correct the violation

#2: **affirmative defense** – Δ exercised “extraordinary care” and was still unable to prevent violations (**more Δ friendly**)

## **Limitation to responsible corporate officer doctrine**

- high position ≠ knowledge; need to prove actual knowledge

**MacDonald & Watson Waste:** conviction overturned for a transport of hazardous waste without a permit; the statute had knowingly in the language and the **very high felony penalty**

## Justification: Self-Defense – Common Law – Objective standard

1. Was the force **deadly?** **Proportionate** to the force confronting Δ? Was the force **imminent?**
  2. Was the Δ an aggressor? Person commits an **unlawful act reasonably calculated** to produce an affray **foreboding injurious or fatal consequences**
  - **Losing aggressor status?**
    - **Peterson**—the victim was the initial aggressor, but he lost this status and **had a “clean slate” when got into car and tried to leave**
  3. Did the Δ have a reasonable belief? (if incorrect, still can count if r'able)
    - ✓ Physical limitations (blindness)
    - ✗ Mental illness (see insanity defense below)
    - ? Prior, relevant experiences (**Goetz**—subway shooter of 4 AA teens; he had been **violently robbed before**)
    - ? Battered women syndrome ((**Norman** – found guilty; women shot abusive husband while he was **passed out drunk; but also note that every avenue of help had been in vain** prior to killing))
    - ? Race/social class (risk of paternalism)
  4. Retreat requirement?
    - a. **Majority:** no retreat requirement for non-aggressors
    - b. **Minority:** retreat requirement
      - i. If non-aggressor knows of a completely safe place to retreat → duty to retreat.
      - ii. **“Castle” exception:** no duty to retreat from own home for outsider attackers
        1. Co-occupants: majority - no duty to retreat; minority – duty to retreat
  5. Cannot defend against lawful uses of force
- 

## Justifications: Self-Defense – MPC – subjective standard

**First: is Δ the aggressor?** If yes → no deadly force is permitted.

MPC §3.04(2)(b)(i) aggressor = one who “provokes” the use of force against herself “in the same encounter” for the “purpose of causing death or serious bodily injury”

### Second: Δ's belief

§3.04(1) person is justified in using deadly force when: actor **believes** that deadly force is **immediately necessary** to protect herself against unlawful, deadly force, force likely to cause **serious bodily harm, kidnapping, or sexual intercourse compelled by force or threat**

- Belief: §3.09(2) imperfect self-defense if Δ's **subjective belief is reckless or negligent** → charge **manslaughter or negligent homicide**.
- **Immediately necessary:** person can use deadly force even if aggressor will not use deadly force immediately; “now or never” feeling (“I am going to get a steak knife and come back to kill you”) **\*\*more sympathetic than CL**

### Third: retreat required?

MPC §3.04(2)(b)(ii) retreat requirement

Δ must retreat only if she **knows** she can do so in **complete safety**.

MPC §3.04(2)(b)(ii)(1) exception to retreat

Δ **does not** have to **retreat** from own home, even if co-occupant attacker

### Fourth: other non-necessity circumstances

§3.04(2)(b)(ii) Cannot use deadly force when

- Δ can **surrender possession of a thing** to the person asserting a claim of right, **OR**
- **Complying with a demand** that he abstain from any action **that he has no duty to take**

## Justifications: Defense of Property

### (1) Common Law – protect non-home objects – objective standard

- Deadly force for protecting objects → never justified.

(non-deadly force)

- Is Δ must in lawful possession of the property?
  - a. NO force AT ALL to recapture property unless ND-force is used in “fresh pursuit”
  - b. Possession does NOT mean title to property (ex: repair mechanic and someone’s car)
- Did Δ have reasonable belief that such force is necessary to prevent the imminent, unlawful dispossession of her property?
- Some jurisdictions – Δ should request that V stop before using ND-force
  - a. Exception – no request if it would be futile or dangerous

### (2) Common Law – protect home – objective standard

1. Person can use deadly force to protect right to live in her home in privacy and security.

2. Broader rule interpretation: Δ reasonably believes that

(need all)

- V intends unlawfully and imminently to enter Δ’s dwelling
  - V intends to commit any felony, or cause any level of bodily injury to any occupant
  - Deadly force is necessary
3. Narrower rule interpretation:
    - a. (same) V intends unlawfully and imminently to enter Δ’s dwelling
    - b. V intends to commit a violent felony, or cause any level of bodily injury to any occupant
    - c. (same) Deadly force is necessary

### MPC – property/habitation - subjective standard

1. MPC §3.09 Δ’s subjective belief is reckless or negligent, then Δ may be convicted of an offense based on recklessness (manslaughter) or negligence (negligent homicide).
2. MPC §3.06(3)(d) deadly force is allowed if
  - ✓ Δ believes that victim intends to dispossess Δ of his dwelling other than under a claim-of-right to possession
  - ✓ Intends to commit arson, burglary, robbery, or felonious theft inside
  - ✓ Attacker has employed or threatened deadly force against or in the presence of Δ
  - ✓ Δ’s use of non-deadly force would expose Δ or another to substantial risk of serious bodily harm

### MPC § 3.06(5) Use of spring guns are not allowed

Bar the use of deadly mechanical devices b/c cannot distinguish b/w the innocent and guilty & = unreasonable, excessive force as matter of law (*Ceballos*)

## Insanity

### 1. M'Naghten rule:

Person was acting under a **defect of reason**, arising from a disease of the mind, that she (1) **did not know the nature and quality of the act** that she was doing; or (2) if she did know it, she **did not know what she was doing was wrong**

-**knowing**: knowing **what** you were **literally doing**, or **knowing that it was wrong**

-**wrong** is not knowing **legal or moral wrong, according to societal standards**

-some has deific decree exception: so “**God told me**” defense will pass even if person knows it was morally or legally wrong

**Critique: no degrees of incapacity; disregards** mental illnesses that affect **volition**; if a person knows what she is doing but cannot control conduct, she is **undeterable**, therefore punishment is ineffectual; it is **morally wrong** to punish a person who lacks sufficient free will to control her conduct

### 2. Guilty but mentally ill

“**irresistible impulse**” (encompasses *M'Naghten* + third element of impulse)

(statute) “**lost the power to choose**”

“acted from an **irresistible and uncontrollable impulse**”

**Critique: slippery slope** – if we allow people to be excused for their urges, then it should excuse in more situations beyond mental illness

**Lack of reliable means for measuring self-control**

### 3. §4.01 MPC:

a person is not responsible for her criminal conduct if, at the time of the conduct, as the result of a mental disease or defect, she lacked **substantial capacity** to (1) **appreciate** the criminality (or “moral wrongfulness”) of her conduct; or (2) **to conform her conduct** to the requirements of the law.

-**substantial capacity**: allows for degrees of capacity

-**appreciate**: less strict than “**knowing**” in M'Naghten

**Critique:** volitional prong in 2<sup>nd</sup> part cannot be backed up by reliable data

### 4. Federal standard:

person proves by **clear and convincing evidence** that at the time of the offense, as a result of a **severe** mental disease or defect, she was **unable to appreciate** (1) the nature and quality of her conduct; or (2) the wrongfulness of her conduct

-cognitive incapacity is on/off switch