

Criminal Law
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Grade: A-

❖ **Purposes of Punishment**

- Retributivism – you punish moral wrongs because they are moral wrongs
- Deterrence
- Incapacitation
- Rehabilitation

❖ **MPC 2.02 Mental States**

- Purpose: “conscious object”
 - AC: believes or hopes they exist
- Knowledge: practical certainty
- Recklessness: conscious disregard of a substantial and unjustifiable risk
- Negligence: lack of awareness of a substantial and unjustifiable risk amounting to a gross deviation in standard of care a reasonable person would observe in actor’s situation
- *Lauria*: Some courts infer purpose from knowledge in the merchant setting when supported by evidence of: stake in the venture, no legitimate use for the services, nature of product (dangerous/restricted products), volume that is grossly disproportionate to legitimate demand, high proportion of the business total

❖ **Statutory Interpretation**

- Identify the elements
- Identify and resolve ambiguous terms
- Identify and resolve MR for each element
 - If one is listed, presume it applies to all elements unless “a contrary legislative purpose plainly appears”
 - If none listed, presume MPC default of “recklessness”
 - Be very aware of all scenarios captured
- Apply statute as interpreted

❖ **Omissions**

- Every crime requires actus reus
- Some omissions are punishable if there is a duty to act
- Categories of actors who will be liable for an omission
 - Status imposes duty of care
 - Status in relation to another (parents)
 - Assume contractual duty
 - Voluntarily assumed care & secluded to prevent others from aiding
 - If you create the peril
- MPC 2.01(3)

❖ **Attempt theory of liability**

- Two types of attempt
 - Incomplete
 - Missing element

- Mens Rea = purpose
 - MPC: purpose for conduct and result, same as underlying offense for AC taking them as Δ believes them to be
 - *Smallwood*: HIV positive rapist knew he might infect victims but no evidence of purpose to kill. Insufficient MR for assault with the intent to murder.
- Actus Reus – Passing the “Post” of Liability
 - **Dangerous Proximity Test**
 - *Rizzo*: Robbers scouting out bank; clearly have purpose to rob but apprehended before the victim arrives on the scene; have not passed the post of liability despite being almost the last step
 - Last step
 - **Substantial Step (*Jackson*)**
 - An act or omission constituting a substantial step
 - Must be an act strongly corroborative of criminal purpose
 - **Equivocality Test**
 - Evidence of ample purpose is not sufficient for conviction absent acts that directly bespeak of the purpose
 - Lighting a match in a hay barn
- **MPC 5.01**
 - (1) A person is guilty of an attempt to commit a crime if, acting the with kind of culpability otherwise required for commission of the crime he:
 - (a) Purposefully engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
 - (b) When causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the believe that it will cause such result without further conduct on his part; or
 - (c) Purposefully does or omits to do anything which under the circumstances as he believes them to be, is an act or omission constituting a **substantial step** in a course of conduct planned to culminate in his commission of the crime
 - Examples of substantial steps: lying in wait, searching or following, enticing, reconnoitering the place contemplated for commission, possession of materials to be employed in the commission of the crime
- “With intent to” = CL for attempt
- Renunciation = affirmative defense
 - Abandoning the effort to commit or otherwise prevented its commission
 - “Complete and voluntary”

MPC SCHEME of Mens Rea

Theory	Act	AC	Result
Attempt	Purpose/belief	Same as underlying offense	Purpose/belief
Accomplice	Purpose (MPC)(see exceptions)	Policy punt	Same as underlying offense*
Conspiracy	Purpose	Policy punt	Purpose, basically

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*What the aider is trying to aid

- ❖ **Complicity Theory of Liability** (accomplice, aiding and abetting, accessory)
 - CL: aider could not be found liable unless principal was and only up to principal's charge
 - **MPC 2.06(7)**: principal does not have to be convicted for accomplice to be liable; can be liable for different offenses or degrees
 - *Hicks*: Need a culpability mindset and an act. Neither alone is sufficient.
 - MR: purpose for act, policy punt for AC's, same as underlying for result
 - Policy punt on AC: "policy of the substantive offense should control"; often should be arguably higher for the accomplice
 - *McVay*: negligently running a steamer too hard which leads to death; purposefully aiding in the running of the steamer with a mental state of negligence toward the result of death
 - Common Law Variations
 - Lowering MR to knowledge, particularly for serious crimes
 - Knowledge plus a materiality requirement in the AR
 - Separate crime all together—criminal facilitation
 - AR: some act to aid but presence alone can suffice (very minimal)
 - *Wilcox*: jazz musician case, being in the audience accidentally would not have sufficed but being there and clapping was sufficient
 - *Tally*: interfering with the telegram warning, aided either by decreasing victim's chances for evasion or by emboldening the killers, the latter not found due to no evidence of **preconcert***, deprivation of a "single chance of life"
 - *A finding of preconcert may be critical to establish emboldening aid
 - **MPC 2.06(3)** equivocates aiding, agreeing to aid (emboldening), attempting to aid
 - Renunciation = affirmative defense
 - Have to terminate complicity and
 - Wholly deprive it of effectiveness or
 - Give timely warning to law enforcement
 - Natural and Probable Consequences (rejected by MPC)
 - *Luparello*: Guilty not only of the offense he intended to facilitate but also of any reasonably foreseeable consequences of that crime
 - Guy enlists someone to find out where his ex is "at any cost". Enlistee ends up killing potential informant.
 - Luparello guilty of first degree murder. Luparello was probably criminally negligent re: risk of death → MR for involuntary manslaughter but guilty of first degree murder
 - Proportionality & moral culpability concerns
 - *Roy*: can't just be conceivable or possible has to be natural and probable

❖ **Attempts to Aid**

- If the aider furnishes aid but the principal does not end up committing a crime (neither a complete offense nor an attempt)
 - CL: no harm, no liability
 - MPC: liable for aiding attempted crime
 - **MPC 5.01(3)**: if you engage in conduct designed to aid and the principal backs out, still liable for aiding the crime
- What if the aider tried and failed to give aid (victim changed number) but the theft went through?
 - CL: no crime
 - **MPC 2.06(3)**: Guilty of aiding a crime if you tried to provide aid and the aid failed for whatever reason
- What if the aid was thwarted and the principal does not end up committing the crime?
 - CL: no crime
 - MPC: liable for aiding and abetting attempted crime

	A&A Aids (executed or communicated)	A&A aid thwarted, incomplete, not received
Principal commits crime (including a complete ATTEMPT)	CL: liability for commission of crime MPC: the same, citing to 2.06	CL: no crime MPC: Liable for the crime as contemplated by the aider and abettor 2.06(3)(a)(ii), 2.06(7) [attempted] aiding and abetting of the crime
Principal does not commit crime (does nothing or falls short of attempt)	CL: no crime MPC: 2.06 + 5.01(3) Liability for aiding and abetting attempted crime	CL: no crime MPC: 2.06(3)(a)(ii) + 5.01(3) [attempted] aiding and abetting attempted crime (Trying to aid and abet a crime that didn't happen)

❖ **Conspiracy**, substantive crime

- MPC: when a principal commits a crime and all the aider did was agree or encourage, better treated as conspiracy
- Dis-incentivizing group activity
- AR = agreement

- Does not have to be formal, explicit or simultaneous
- *Interstate Circuit*: movie theater distributors case, court drawing an inference of agreement
- Drivers on freeway example
- Overt Act requirement
 - Renders agreement alone insufficient
 - Does not have to be illegal, unanimous or obvious (buying the team T shirt)
 - If statute is silent, may not be read in as a matter of federal law
- MPC 5.03: requires overt act except for conspiracy to commit a felony
 - Merely talking about a serious crime is heavy
- MR = purpose
 - MPC requires purpose but some courts lower to knowledge for serious crimes
 - *Lauria*: knew some of his phone service clients were prostitutes but did not have the purpose to conspire to commit prostitution
 - Some courts infer purpose from knowledge in the merchant setting when supported by evidence of: stake in the venture, no legitimate use for the services, nature of product (dangerous/restricted products), volume that is grossly disproportionate to legitimate demand, high proportion of the business total
- *Pinkerton* Liability (rejected by MPC)
 - Rule: a co-conspirator is liable for any substantive acts committed in furtherance of the conspiracy
 - Brothers had moonshine operation (agreement), one goes to jail but is still held liable for his brother's acts because he never made a move to leave the conspiracy
 - Transfers the AR & MR of entering the conspiracy onto the substantive crimes
 - Prosecutors use *Pinkerton* to get lower level guys to flip on the insulate top dogs
- *Bridges* (rejected by MPC)
 - If you're in a conspiracy to commit crime A and crime B is a natural and probable consequence, then you're also in a conspiracy to commit crime B regardless if B was not within the scope of the conspiracy
 - *Luparello* for conspiracy
 - Rejected by MPC
- Abandonment
 - No members engage in conspiratorial activity for a period equivalent to the statute of limitations then the conspiracy is considered dead
- Withdrawal
 - MPC: requires that you advise the conspirators of your abandonment or you go to the cops
 - CL: sometimes adds additional requirement of thwarting
 - Demarcates what *Pinkerton* you are liable for—liable for the *Pinkerton* that occurred prior to withdrawal but not for the *Pinkerton* that occurred after
- Renunciation of criminal purpose (MPC): complete and voluntary and must thwart the success

- Complete defense to conspiracy
- CL: traditionally no renunciation doctrine but move to embrace it

❖ CL divides culpability for homicide into murder and manslaughter, relativity

❖ **Murder**

- MR = malice aforethought, depraved heart
- *Carroll* = “no time is too short for premeditation”, equating intent to kill with premeditation
- *Guthrie*: defines premeditation differently, requires some reflection of which time may be one factor
- *Anderson* evidence of premeditation: planning activity prior to killing, motive, manner of killing so particular or exacting to suggest preconceived design
- **MPC 210.0 – 2**
- Mandatory minimum ~30-40 years → capital punishment

❖ **Intentional Manslaughter**

- Categorical CL approach: 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 spousal adultery
 - Strict cooling time
 - *Girouard*: words alone are insufficient for reasonable provocation
 - Exception for intense descriptions not just mere insults
- Flexible CL approach
 - (1) Under the heat of passion (factual determination)
 - (2) Produced by an adequate or reasonable provocation
 - Judge = gatekeeper; if the evidence admits any reasonable doubt whether it might not have had such a tendency then goes to the jury
 - (3) Before reasonable time has passed for the blood to cool
 - CL: strict cooling off period
 - Rekindling: you acquire the provocative knowledge and you don’t act on it immediately but then later something happens to rekindle that provocation and you might have a provocation
 - Smoldering: notion that a provocation can simmer and then boil over at some point
 - (4) Result of temporary excitement rather than cruelty or recklessness of disposition
 - Reasoning: less deter-able, maybe less morally culpable, less in need of incapacitation because the temper flair up is not likely, more susceptible to rehabilitation as less inherently wicked
- **MPC 210.3** EED standard (alternative to provocation)
 - (1) Under the influence of EED (wholly subjective)
 - (2) For which there is a reasonable explanation or excuse as determined from the viewpoint of a person in the defendant’s situation under the circumstances as he believes them to be (subjective & objective)

- Immutable characteristics: Handicaps, blindness, extreme grief, trauma
- Disallows “idiosyncratic moral values”
- *Casassa*: rejected guy kills girl, excuse “so peculiar to him” it failed
- Leaves to the jury determinations about what is in the middle

❖ Unintentional Murder

➤ Extreme Recklessness

- AKA depraved indifference, extreme indifference
- *Malone*: Russian Roulette case, no purpose or knowledge that he was going to kill, but imputing malice from the extremity of the unjustifiability and extremity of the substantiality of the risk, nature of the thrill
- **MPC 210.2** extreme recklessness = unintentional murder

➤ Felony Murder

- Transfer the intent for the felony and use it to create a fictional intent to kill (effectively removing causation)
- Must be in furtherance of the felony
- Which felonies qualify?
 - Enumerated statutes: the enumerate crimes are required for felony murder only in that degree (can apply the below to other degrees of murder)
 - *Philips*: felonies that are inherently dangerous on the elements
 - *Hines*: felonies that are inherently dangerous as committed
 - So many felonies today that no one would accept the position of “all felonies”
- Parallel doctrine of **misdemeanor manslaughter**

❖ Unintentional Manslaughter

➤ CL involuntary manslaughter = ordinary recklessness

➤ Reckless Manslaughter

- **MPC 210.3** Manslaughter = homicide committed recklessly (or mitigated by EED)
- *Hall*: skier charged with felony reckless manslaughter, requiring awareness of a substantial and unjustifiable risk
- Weigh substantiality of the risk against the unjustifiability from the viewpoint of reasonable person in the actor’s situation

➤ Negligent Homicide

- **MPC 210.4** Negligent Homicide = homicide committed negligently
- *Williams*: what factors inform the “viewpoint”, Native American parents case, purposes of punishment, court counted education, financial & physical capacity, largely objective standard

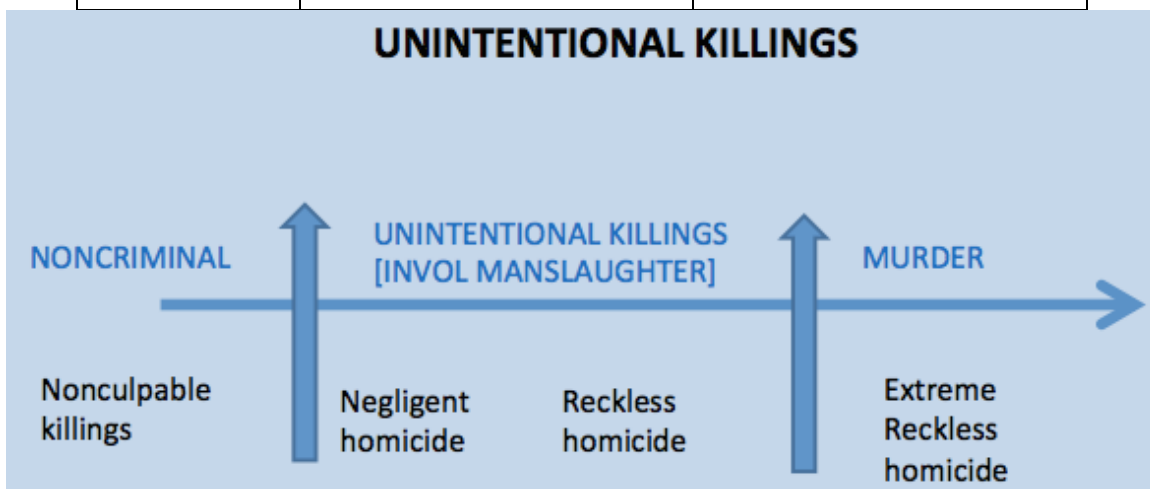
➤ Analytical Approach to Distinguish Negligent/Reckless Manslaughter

- Was this in fact a substantial and unjustifiable risk as to the result (death)?
- If yes, then what was the defendant’s aware of that risk?
 - If not aware, negligence
 - Remember this is *criminal negligence* = a gross deviation from standard of care
- If was aware and consciously avoided, then recklessness land

❖ **Factors to consider in Unintentional Homicides**

- Capacity to defend the risk and avert it
- Degree to which the failure or inability to comprehend the risk is the defendant's fault
- Magnitude of the risk (including probability of death)
- Lack of justification for engaging in risk
- Defendant's subjective awareness of risk

	Intentional	Unintentional
Murder	Premeditated Impulsive	Extreme Recklessness (aka depraved indifference) Felony Murder
Manslaughter	Provocation (categorical or flexible) EED	Reckless Negligent Homicide



Rape

- ❖ AR: force, resistance, non-consent
- ❖ MR: as the force requirement decreases, MR [as regards consent] increases
- ❖ *Rusk*: in the absence of physical force, could a jury find that there was reasonably grounded fear to obviate the need to show resistance? Held: Yes, due to coercive force. (Nevertheless, court views resistance as nonexistent, because it is unwilling to recognize her soft no's as nonconsent)
 - Fear sufficient to obviate showing of resistance = fear of death or SBI or a fear so extreme as to preclude resistance
 - Fear must be *reasonably grounded*
- ❖ **Resistance**
 - Some jxdns abandoned the requirement.

- One still requires “utmost resistance”. Traditional kicking and screaming standard.
- Earnest Resistance
- Reasonable Resistance
- Both earnest and reasonable would honor a “no” — or at least, would allow a jury to consider whether the verbal “no” was in fact resistance. I think of them as pretty akin to one another; if anything maybe earnest is more demanding, but I think of them as fairly interchangeable
- ❖ *DiPetrillo*: refuses to extend the *Burke* doctrine, which considers power imbalances and authority from the uniformed cop situation (implied threat in being armed and able to arrest someone) to the **employer**
 - **Prison**: Illegal for a guard to have sex with a prisoner even if there is consent. The context precludes consent. Relationships of Authority & Trust
 - **Psychiatrist** is the universally recognized one.
- ❖ *M.T.S.*: Removes the force requirement by equating the act of penetration itself with force; requirement of affirmative consent. No prosecutors have brought charges under this standard.
- ❖ **Consent**
 - **Presumed consent v. presumed nonconsent**
 - Spectrum of consent
 - Resisting conduct **plus** a verbal no.
 - Resisting conduct alone (no verbal no)
 - Verbal no alone (no resisting conduct).
 - Passivity.
 - Consenting conduct, even if no verbal no.
 - Verbal yes alone, even if otherwise passive.
 - Consenting conduct **plus** verbal yes.
 - Purely mental (external manifestation irrelevant, even if seems “consenting”)
- ❖ **Intoxication**
 - Most jxdns find liability if you sleep with someone unconscious from drugs you administered. If someone else administered them and the victim isn’t totally unconscious, rape statutes don’t impose liability.
 - **MPC**: (1) defendant administered (2) without victim’s knowledge (3) for purpose of preventing resistance
 - High barrier to liability if victim is intoxicated due to alcohol she voluntarily consumed. Some states allow that intoxication, even voluntary, can negate consent

Causation

- ❖ Only applies to crimes that have result elements
- ❖ *Stamp*: you take your victim as they are
- ❖ **But for** the Δ ’s act would the injury have occurred? (always required)
 - *King*: plane crash would have happened regardless of drug cargo
- ❖ **Proximate cause**: objective foreseeability
 - *Accosta* test: the **helicopter crash**, but for cause satisfied and so was proximate cause because the helicopter crashing was not deemed “highly extraordinary”
 - Excludes “highly extraordinary results”

- **MPC**: exclude “too remote or accidental in its occurrence to have a [just] bearing on the actor’s liability or the gravity of his offense”
- *Root*: the drag race case, the Δ agreeing to engage in the drag race was not a sufficiently direct cause of death although clearly the but for cause
- *Stephenson*: grand dragon held liable for woman’s suicide, arguing that her volitionally taking the pills was a *superseding cause*, clearly the but for cause but this is really broad definition of proximate to allow criminals to be liable for the suicides of their victims
- *Arzon*: two fires in one building, only one attributed to the Δ’s arson and the other is an indispensable cause, but still held liable
- ❖ Effectively thrown away in the **felony murder** context
- ❖ **Medical Malpractice**: ordinary negligence does not break the causal chain though gross negligence might

Self Defense (Justification)

- ❖ Draw a timeline for SD
- ❖ Execution of another person without due process
- ❖ **Elements**
 - Reasonable and honestly held belief
 - That deadly defensive force
 - Immediately
 - Necessary to protect self
 - Against death or SBI
- ❖ *Goetz* subjective/objective hybrid: the Δ’s fear and degree of defensive force must be that of a reasonable man in the Δ’s circumstances
 - Subjective elements considered: Δ’s prior experiences, physical attributes of all parties, relevant knowledge the Δ had about the other person(s)
- ❖ **MPC 3.04** subjective standard
 - The use of deadly force...justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against death, SBH, kidnapping or sexual intercourse compelled by force or threat”
 - In threat of robbery, it is a defense of property not self-defense, which has stricter limitations
- ❖ **Imperfect SD**
 - Prevailing view = if you fail on reasonability → convicted of crime
 - Some jurisdictions downgrade to voluntary manslaughter or involuntary manslaughter
 - **MPC 3.09**: But if a defendant uses deadly force under a mistaken belief that was recklessly or negligently formed then he can be charged for lower grade of homicide that requires a negligent or reckless MR
- ❖ **Killing Innocent 3rd Parties**
 - If you have a valid claim of SD, it applies to any harm that results from that justified use of force (same idea of transferred intent the underlies felony murder)
 - **MPC** if you recklessly or negligently harm an innocent party then can be liable for reckless/negligent crime
- ❖ **Duty to Retreat**

- **MPC:** deadly force is not justifiable if the actors *knows* that he can avoid the necessity of using such force with *complete safety* by retreating. Exceptions: homes and places of work.
- CL: some jxdns accept, some apply true man rule
- “Castle” Exception: home intrusions (all jxdns exempt), guests (most jxdns), co-occupants (many say no duty to retreat; complex for DV)
- The duty arises *only when* Δ resorts to deadly force in SD.
 - Not the nature of the force defended against but rather the nature of the force which the accused employed in his defense which raises the issue of retreat
 - If he does not resort to deadly force, one who is assailed may hold his ground whether the attack upon him be of deadly force or some lesser character
- ❖ **Defense of Others**
 - CL: stand in the shoes of the would-be victim. If they have a SD claim then defender does.
 - Modern/MPC: if in the shoes of the would-be victim he would have a SD claim under the circumstances as the intervener’s perceives them to be
 - No duty to retreat unless you can bring the other person with you
 - If Clark knows it’s an undercover and Lois doesn’t
 - Norman thought that killing was the only way out but the bodyguard she hires knows there are other options
 - If the defender knows that defense is not necessary even if the victim would have had a claim, then defender doesn’t have the claim
- ❖ **First Aggressor Doctrine**
 - One who is the aggressor in a conflict culminating in death cannot invoke the necessities of self-preservation.
 - Only in the event that he communicates to his adversary his intent to withdraw and in good faith attempts to do so is he restored to his right of SD
 - First aggressor does not have to be the first to initiate physical violence
 - What counts as first aggression?
 - Affirmative **unlawful act reasonably calculated** to produce an affray foreboding injurious or fatal consequences is an aggression which, unless renounced, nullifies the right of homicidal self-defense
 - SD may not be claimed by one who deliberately places himself in a position where he was reason to believe his **presence will provoke trouble** regardless of whether he intends to cause or was confronted with death/SBI
 - Non-deadly aggressor, person responds with DEADLY, non-deadly aggressor can have SD even though technically first?
 - CL: Depends on jxdn
 - MPC: right to SD regained but still liable for initial assault or whatever it was
 - MPC 3.11(2) merely producing a weapon to create apprehension of use of deadly force is not in itself deadly force
- ❖ **Analytical Timeline**
 - What level of SD is being used?
 - If non-deadly, no duty to retreat and probably fewer first aggressor issues
 - If deadly...
 - Reasonable for the person to feel they are in peril?

- Is the peril SBI or death?
- Was the peril immanent?
- Is there a duty to retreat in jxdn and if so, could they have retreated with complete safety and did they know that?
- Do you have any issue with first aggressor?
 - First aggressors non-deadly
 - Or deadly first aggressor who retreated
 - Or defendant himself was first aggressor—first aggression is broad, low threshold
 - Some jxdns hold that mere words are insufficient yet presence alone can be sufficient

Insanity (Excuse)

- ❖ Little real world application; matters little which standard applied as juries tend to what they want with insanity
- ❖ Conflict between incapacitation and minimal deterrence capability
- ❖ **Competence**: ability of a person to stand trial. Ability to understand the proceeding and to aid in their defense
- ❖ **Civil commitment**: the state can force you to be committed for treatment, out/in patient. No criminal finding necessary. Often indefinite.
- ❖ **Insanity**: whether you are legally responsible for your criminal behavior at the time of the crime.
- ❖ **M’Naughten Test**
 - **COGNITIVE COMPONENT**: Whether at the time of the act in question Δ did not know the nature and the quality of the act OR
 - Due to mental illness, I don’t know that bullets pierce skin
 - **MORAL COMPONENT**: Whether at the time of act in question Δ did not know what he was doing was right or wrong
 - Due to mental illness, I believe that I am acting in self defense
 - Not a direct correlation with knowledge of illegality. Have to know it's a moral wrong with maybe a little legal patina
- ❖ Consequences of NGI
 - Simple acquittal
 - Presumptive civil commitment
 - Guilty but Mentally Ill” verdicts (incarceration + treatment); actually puts a cap on what may otherwise be an indefinite commitment
- ❖ **The Davis Standard**
 - M’Naughten components plus
 - The VOLITIONAL COMPONENT aka “Irresistible Impulse”
 - I can’t help myself; deprivation of will
 - Under the Davis “total” standard, the evidence would have to show that Δ’s will was completely destroyed by his mental illness.
- ❖ **MPC 4.01** M’Naughten components + volitional but modified to substantiality for all three

	Total	Substantial
Cognitive/moral	M’Naughten	Lyons

	Feds	
Cognitive, moral & Volitional	Davis	Blake/MPC