**FALL 2015 BARKOW CRIMINAL LAW OUTLINE**

**Grade: A**

**Theories of Punishment:**

What to Punish?

* criminal punishment may be **inappropriate** because
  + society should treat certain conduct as matter of personal choice
    - vice, victimless crimes (drugs, prostitution)
    - society shouldn’t criminalize actions because they’re considered immoral
  + society has interest in discouraging certain behavior but using criminal law may do more harm than good
    - deters resources, contributes to large/organized crime (better to tax alcohol/drugs?)

Why Punish?

* Purposes of criminal punishment:
  + deterrence
  + rehabilitation
  + incapacitation
* **Utilitarian View:** forward-looking; **punishment is justified by the useful purposes it serves for the future**
  + deterrence (of both specific offender & people generally); judges social policy by costs & benefits
  + to be true utilitarianism 🡪 should focus **on *net* crime reduction** (including collateral effects)
  + **incapacitation** (take criminal off the streets) & **rehabilitation** (make person safe to return to streets) are both utilitarian theories
  + criticism: assumes criminals make cost-benefit analysis before committing crimes
* **Retributive View**: backward-looking; **punishment is justified only if defendant deserves punishment because of his prior behavior**
  + **culpability-focused** (blameworthiness) or **harm-based** (based on result that occurred)
  + criticism: application may lead to bizarre results (may require punishments that do more harm than good)
* Theories of criminal punishment can come in at any point in criminal justice process
  + legislature deciding what to criminalize
  + prosecutors deciding who to charge
  + judges deciding what sentences to give out

View all this against a backdrop of mass incarceration, presumptions of guilty if poor or minority, overburdened legal system (poor defense counsel), elected prosecutors (political bias)

**Prosecutorial Discretion:**

**Decision to Charge:** rules of professional conduct (ABA) allow prosecutors to file charges whenever they have “probable cause”

* prosecutors can decide: (a) whether to bring charges, (b) against whom, (c) what charges to bring
* **standard of discretion for prosecutors is broad and unstructured**
  + little oversight, limited resources
  + can decide *not* to charge
    - ***Inmates of Attica v. Rockefeller*:** inmates of prison tried to compel prosecution of corrections officers for mistreatment after uprising
      * **compelling prosecution is against separation of powers doctrine** (judicial vs. executive)
        + unless statute specifically compels prosecution of certain crime, **prosecutors cannot be forced to bring charges**
      * policy considerations: resource constraints, concerns of confidential info that may be released by courts’ inquiries, political bias (elected prosecutors)
* legislature purposely makes broad laws, with expectation that prosecutors will use discretion
* federal vs. state prosecution: most federal crimes can also be charged as state crimes (federal crimes usually have much higher penalties)
* almost **no additional mechanisms to police prosecutorial overreaching** other than trial process
  + minimum sentencing requirements sometimes limit judges’ ability to mitigate via sentencing (giving prosecutor even more power)

**Selective Prosecution:** defendant’s safeguard against prosecutorial discretion

* prosecutors **can’t make charging decisions based on discriminatory factors**
  + if defendant can prove discrimination 🡪 has basis for selective prosecution claim
    - **very high standard to prevail on prosecutorial discretion claim**
      * ***United States v. Armstrong*:** plaintiffs indicted in federal court on drug & firearm charges, claimed that they were selectively prosecuted in federal court & tried to get discovery order to prove it
        + to prevail in prosecutorial discretion claim, defendant must show **discriminatory purpose**(not just effect)
        + court set standard for *discovery* very high 🡪 **must be able to show that similarly situated individuals (of different race, sex, etc.) were not prosecuted**

“similarly situated” = very narrow standard

**Plea Bargaining:** waiver of constitutional right to jury trial in exchange for lower charge/prosecutor recommending lower sentence (95% of felony convictions obtained by guilty plea)

* policy considerations: state encourages guilty pleas at every step of criminal law process because
  + saves resources (utilitarian)
  + can be advantageous to both defendant & prosecutor
  + defendant shows remorse (deserves lower sentence) (retributive)
* must weigh lower guilty plea sentence vs. sentence you may get a trial (biggest to none)
  + statutory sentences are higher today under backdrop of existence of plea bargaining
* if prosecution fails to honor commitment of plea bargain, defendant must be allowed to withdraw plea
  + plea doesn’t guarantee defendant will get sentence they expect b/c prosecutors’ promises are often non-binding (will *recommend* lower sentence)
* judge must approve plea
* Guilty plea must be:
  + **(a) knowing & intelligent choice + (b) voluntary** 
    - sufficient awareness of relevant circumstances + direct consequences
      * why not collateral consequences (deportation, job loss, etc.)?
    - ***Brady v. United States*:** Brady was charged with kidnapping & prosecutor said that in exchange for guilty plea, will not pursue death penalty (victim wasn’t unharmed, so death penalty could be brought; accepted plea, sentenced to 30-year prison sentence, later said he only agreed to guilty plea because was afraid of death penalty (thus wasn’t voluntary)
* guilty plea is not involuntary just because it was entered to avoid death penalty
  + - * guilty pleas are **often motivated by defendant’s desire to accept probability or certainty of lower sentence** than face a wider range of possibilities at trial
        + Brady’s plea was **voluntary + knowing & intelligent choice**:

had competent counsel, had full opportunity to assess advantages & disadvantages of plea, was not incompetent

* Guilty plea CANNOT be produced by:
  + actual/threatened physical harm
  + mental coercion overbearing will of defendant
  + threatening a charge there is **no evidence of** (but can threaten any charge there *is* evidence of)
    - ***Bordenkircher v. Hayes*:** H was charged with writing forged check (punishable by 2-10 years in prison), but already had 2 prior felony convictions; **prosecution proposed plea agreement**: plead guilty 🡪 will recommend 5 year sentence; don’t plead guilty 🡪 will file new indictment under statute that requires mandatory life sentence (because has 2 prior felonies); H chose not to plead guilty, prosecution filed new indictment
      * **prosecution can threaten any charge against defendant** (no matter how exceedingly high) **as long as evidence supports the charges**
      * no such thing as punishment or retaliation in plea bargaining **as long as defendant is free to accept or reject prosecution’s offer**
      * separation of powers: up to legislature to fix if sentence is unfair
      * *Dissent:* prosecutor admitted sole reason for other indictment was to encourage guilty plea (vindictive by definition); implementation of strategy solely to deter exercise of constitutional rights is not constitutionally permissible act of discretion
  + making promises not related to defendant’s case
  + misrepresentation (unfulfilled or unfulfillable promises)

**Role of the Jury:**

right to jury trial **depends on maximum sentence** you get upon conviction

* ***Duncan v. Louisiana:***Defendant was convicted of simple battery, sought trial by jury but state denied because wasn’t a serious offense
* **Constitution grants right to trial by jury in all serious criminal cases**
  + - NY trial by jury = 6 month+ possible prison sentence
* **14th amendment guarantees a right to jury trial in all criminal cases which if tried in federal court would come within 6th amendment jury trial guarantee**
* policy: America has deep commitment to jury trials

Policy Considerations: (+): at least 6 people vs. just one judge; jury is randomly selected vs. judge is appointed or elected (sensitive to political concerns); jury is anonymous vs. judge isn’t; jury doesn’t act in government capacity vs. judge does; vehicle for public participation; not jaded like judge; (-): expensive; don’t have professional legal training to understand the law; may not follow instructions

**Scope of Jury Trial:**

* Jury is trier of fact (judge still decides the law)
  + **Jury isn’t told potential sentence** of crime so that it doesn’t influence their deciding of facts

idea that telling jury potential sentence invited jury nullification

* Federal = 12 jurors, State = at least 6 (if only 6, decision must be unanimous)

unanimity not always required (states can set own majority regulations); federal prosecutions require unanimity

**Representative Jury:**

* Panel of potential jurors must reflect “fair cross section of community”
  + no requirement that final jury must reflect community
* Jury pool assembled 🡪 jurors who know anyone participating in the trial removed “for cause” 🡪 attorneys allowed **“peremptory challenge”** (allowed to remove certain # of jurors without giving any reason)
  + CANNOT use peremptory challenge to deliberately excluded jurors on basis or sex or gender, but this is hard to enforce because all attorney has to show is some other plausible reason for removing juror

**Jury Nullification:** Jury verdict **based on something other than the law or credibility issues** (e.g. feel bad for defendant, think drug laws are unfair, etc.)

* **Court doesn’t recognize *right* to jury nullification but concedes that juries have the *power* to do it**
  + ***United States v. Dougherty***: judges don’t have to inform jurors of their power to jury nullification and defendants can’t bring it up at trial
    - policy: allowing would invite anarchy; assigns jury the burdens of legislator/judge; would make punishment decision based on personal factors
    - court assume juries already know about right so don’t need extra instruction (is this true?)
* Jury doesn’t have to give reason for acquittal
  + If outwardly say invoking right to nullify (not follow judge’s instructions on the law), will be struck from jury, but if acquit without mentioning, OK
    - ***United States v. Thomas:*** to be struck, must be unambiguous evidence that juror is refusing to follow judge’s instructions; can also be struck if mention you want to nullify
* Court’s biggest check on jury nullification: only **evidence relevant to the case** is allowed to be brought into trial (no information about personal history, home situation, etc. is allowed if not relevant)
* mitigating evidence only allowed in capital cases
* otherwise this info only comes in at sentencing and judge may be more lenient

**BUILDING BLOCKS OF CRIMINAL LAW**

**Legality:**

* nulla peona (“no punishment without law”)
* requirement of **clear notice of what behavior is crimina**l
* policy: **provides notice** to citizens of what is criminal; **controls discretion** of prosecutors & police (can’t charge for nonexistent crime); **limits judges** so (a) can’t make new laws & (b) are limited in their interpretation of statutes (uniformity)

**Ex Post Facto Clause:**

* no retroactive application of the law (can’t prosecute something that wasn’t criminal at the time it was committed)
  + ***Keeler v. Superior Court:*** not enough notice that fetus is a human being, would be ex post facto if were to enlarge the meaning of the statute (not enough fair warning)
    - up to legislature to make statutory change
* **Ex Post Facto only applies to statutes** (legislature can’t make changes in language or create new statute & apply retroactively), not common law
  + ***Commonwealth v. Mochan***: D was making obscene phone calls; not a crime under any specific statute, but could be **prosecuted under common law** (interpreted broad statute about act being injurious to public)
    - **up to judges to interpret statutes**; can make criminal under common law based on new interpretation
  + ***Rogers v. Tennesse*:** D stabbed man who as a result went into cardiac arrest and died 15 months later, was convicted of murder. Appealed because state at the time had common-law that homicide could only be murder if victim dies within 1 year and a day of D’s act
    - **common law can be changed retroactively as long as change doesn’t violate Due Process** (change can’t be “**unexpected and indefensible** by regard to the law which had been expressed prior to the conduct”)
    - *Dissent:* violates “no punishment without law” principle

Policy: controls discretion of prosecutors & law enforcement (makes sure not charging on ad hoc basis), up to legislature to define what’s criminal (not judges)

**Vagueness:**

crime is defined by statute, but up to **courts to interpret statutory language**

* **Rule of Lenity**: requirement that in all criminal prosecutions, ambiguities in statute must be resolved in defendant’s favor (concern about notice & enforcement discretion)
  + note: **MPC does not have rule of lenity**; default rules to fill in gaps instead
* Arguments:
* Defense: make all arguments of why conduct doesn’t fit in statute and then argue rule of lenity when statute is unclear in context of specific case
* Prosecution: argue rule of lenity doesn’t apply because (a) statute is clear in application & (b) D is on notice because knew conduct in general is probably criminal
* **Two Potential Issues of Vagueness:** 
  + **(1)** **Statutory: statute is clear, but unsure how to interpret in particular context (vague as applied)**
* ***McBoyle v. United States*:** D convicted of transporting stolen airplane in violation of National Motor Vehicle Theft Act. D appealed because “airplane” shouldn’t be considered vehicle under statute
  + **statute must give fair warning, to do so, must be clear**
    - “vehicle” doesn’t call into mind airplane
  + **rule of lenity** requires statute being read as not including airplane
* ***Keeler v. Superior Court:*** D beat up ex-wife & killed fetus, charged with murder. Does “fetus” fall under definition of human being under CA statute?
  + **legislative history helps determine meaning of statute (legislative intent)**
    - if meant to include fetus would have written
    - **broad judicial interpretation can lead to more issues** (abortion)
* Interpretation Arguments: language of statute; rule of lenity; “separation of powers” (up to legislature to change law, up to judge to interpret current law); no ex post facto crime creation
* **(2)** **Constitutional: is statute unconstitutionally vague any way it’s interpreted (vague on its face)**
  + ***City of Chicago v. Morales*:** Chicago enacted statute against gang congregation; determined to be unconstitutionally vague
    - **to succeed on constitutional vagueness challenge, statute must either:**
      * **(a) be so vague that it fails to prove the kind of notice that would enable ordinary person to understand what conduct it prohibits, or**
      * **(b) authorize or encourage arbitrary and discriminatory enforcement**
      * *Dissent:* if make statute too narrow, gives room for loopholes
    - terms like “fraud”, “bribery”, “loitering” are imprecise but people are able to grasp meaning
* **Vagueness Arguments to Make:**
  + rule of lenity for ambiguity (*McBoyle*)
  + unconstitutionally vague (*Morales*)
  + fair warning (notice) + clarity in order to give fair warning (*McBoyle, Keeler*)
  + slippery slope of broad judicial interpretation (*Keeler*)
  + is common law change unexpected (*Rogers*)
  + legislature vs. judicial separation of powers concern (up to legislature to change law)
  + ex post facto clause – if legislature did this would be considered retroactive change

**CULPABILITY & ELEMENTS OF THE OFFENSE**

**Actus Reus (MPC § 2.01):** conduct being criminalized (when you do this, we are going to punish you)

**Culpable Choice:** must always be an **affirmative, voluntary action**

* policy: can’t deter non-voluntary behavior (utilitarian); no culpability if not voluntary (retributive)
* ***Martin v. State*:** man was convicted of public drunkenness after police officers took him out of his home and brought him to highway
  + **voluntariness is presupposed in actus reus of statute** (even if statute doesn’t say it, assumed it’s required)
    - here, was involuntarily taken to public place (core element that made conduct criminal)
* **MPC § 2.01(1)**: person is not guilty of offense unless his liability is based on conduct which includes a **voluntary act or omission to perform act of which he is physically capable**
  + not voluntary: reflex, bodily movement while unconscious, etc.

**Omissions:** to be criminal, must (a) have **legal duty** + (b) breach that duty

* ***Jones v. United States*:** D was charged with involuntary manslaughter for failing to feed and provide medical care for child (not hers)
  + five situations where failure to act (omission) constitutes breach of legal duty**:**
    - * + **statute imposes duty of care** (legislature creates)
        + **one stands in certain status relationship to another** (common law)

***Pope v. State*:** D took mother & child into home. Mother went crazy and beat & killed child, D didn’t stop abuse or call police

**status relationships that impose legal duty are either specified by statute or determined by common law**

usually parent/child, spouse/spouse, master/apprentice, etc.

sibling/sibling, child/parent usually don’t have legal duty

**courts could expand** status relationship legal duties:

***People v. Carroll***: step-mother = legal duty; function equivalent of parent in household is responsible for child’s care

***Beardsley:*** courts have expanded legal duty from formal marriages to informal relationships

policy considerations of expanding status relationships: (-): could lead to slipper slope/notice problems/too much prosecutorial discretion; (+): proper notice/serves principles of punishment to hold certain people responsible

* + - * + **one has assumed contractual duty to care for another**
        + **one has voluntarily assumed care of another so secluded them as to prevent others from rendering aid**
        + **one created the peril of another**
  + finding whether legal duty exists is factual question for jury to determine
  + duty is not to actually save life, just to do what is reasonable
    - * **MPC § 2.01(3):** liability for the commission of an offense may not be based on an omission unaccompanied by action, unless**: (a) omission is expressly made sufficient by the law defining the offense,** or **(b) a duty to perform the omitted act is otherwise imposed by law** (same analysis as above)

**Possession:**

* + - * most courts require D to be **aware of possession** of thing they are being charged with possessing (but drug possession sometimes strict liability standard)
      * **MPC § 2.01(4):** possession is sufficient actus reus only when accused was aware of his control of the thing possessed for a sufficient period of time to have been able to terminate his possession

**Mens Rea (MPC § 2.02, 2.04, 2.05):** mental state; type of awareness and intention that must accompany prohibited act

**transferred intent:** in both MPC & CL if you have mens rea w/ respect to one person, but accidentally do act toward another person, mens rea is still satisfied

**Men’s Rea Requirements:**

**Common Law Framework:**

* ***Regina v. Cunningham:*** man ripped gas meter off the wall to steal money. Gas seeped through wall of adjoining house and endangered life of old neighbor.
* **“malice” = foresight of consequences** (recklessness in MPC) need:
  + **(a) actual intention to do the particular harm that was done, *or***
  + **(b) foreseeing that harm may occur and still doing the act** *(subjective)*
* absent clear language to contrary, courts will interpret “malice” & other vague/ambiguous mens rea language to require **awareness of substantial risk** (recklessness)
* ***Regina v. Faulkner:*** sailor went to steal some rum, lit a match to see, accidentally set fire to ship
* **crime that occurs as a result of another crime must in itself be malicious**
  + need mens rea for each crime (no transfer of intent)
    - need to meet the *Cunningham* recklessness standard for setting fire to ship (didn’t meet it)
* **Specific vs. General Intent**
* specific intent crime: actions must be done w/ specific purpose in mind
* general intent crime: just action itself must be intentional
* **Negligence:** does it require ordinary or gross deviation from reasonable standard of care?
* ***State v. Hazelwood:*** ran ship into reef and caused oil to be spilled into ocean
  + **negligence doesn’t have to mean gross negligence for criminal liability** (must be deviation from reasonable standard of care)
    - utilitarian justification in encouraging reasonable care when conduct at issue is something society can expect to deter
  + *Dissent:* notions of fundamental fairness require gross deviation from standard of care for criminal liability
* ***Santillanes v.*** ***New Mexico:*** defendant cut child’s neck with knife during altercation, was charged under child abuse negligence statute
  + **criminal negligence must be gross deviation from standard of care** (*grossly* unreasonable, substantial and unjustifiable risk)
    - retributive justice requires moral culpability

**MPC Framework:** focuses on subjective blameworthiness (retributive)

**MPC 2.02:** there are 4 types of mental states for culpability, and once must be met for each **material element** (conduct, attendant circumstance, result) of the offense (unless crime is SL)

* 1. Purposefully (2.02(2)(a)):
     + if material element is nature of conduct or result: it is defendant’s **conscious objective** to engage in such conduct or cause such result
     + if material element is attendant circumstance: defendant is **aware of existence** of circumstances or **hopes they exist**
  2. Knowingly (2.02(2)(b)):
     + if material element is nature of conduct or attendant circumstance: defendant is **aware** that his conduct is of such nature or such circumstances exist
     + if material element is result: **almost certain** that his conduct will cause such result
     + can also be shown via *willful blindness* (see below MPC 2.02(7))
     + **“willful” = knowingly** (MPC 2.02(8))
  3. Recklessly (2.02(2)(c)):
     + defendant **consciously disregards** substantial (subjective) and unjustifiable (objective) risk that material element exists or will result from conduct
  4. Negligently (2.02(2)(d)):
     + defendant **should be aware**of substantial and unjustifiable risk that material element exists or will result from conduct
       - note: MPC requires **criminal negligence** (gross deviation)

Recklessness vs. Knowledge = **probability of result** occurring (substantial vs. almost certain) & **actual belief that result will occur** (necessary for knowledge, not for recklessness)

Recklessness vs. Negligence = subjective (particular person) vs. objective (reasonable person)

**MPC 2.02(5)**: if one element suffices to establish liability, then can also establish via any of the stricter elements (e.g. recklessness can be shown through knowledge or purpose)

**When Mens Rea is Unclear:**

* **MPC 2.02(4):** if there is a mens rea requirement in the statute, but unclear which element it applies to 🡪 applies to each element unless contrary purpose appears
* contrary purpose: if made to look like purposefully separate element (set off by commas, etc.); if not mentioned in beginning of statute but next to a later element
* **MPC 2.02(3):** if contrary purpose appears 🡪 apply recklessly to elements with unclear mens rea requirement; if no mens rea term at all 🡪 apply recklessly, unless strict liability (*see below*)

**Applying Mens Rea Requirements:**

1. Determine Material Elements of Offense (conduct, result, attendant circumstance)
   1. Determine Mens Rea Required for Each Material Element of Offense
      * MPC
        + If there is a mens rea but not sure to which element it applies 🡪 applies to all elements unless contrary purpose (MPC 2.02(4))
          - If contrary purpose 🡪 recklessly (MPC 2.02(3))
        + If there is no mens rea in the statute at all 🡪 recklessly for all elements (MPC 2.02(3)) unless statute is strict liability (only if violation or explicitly says so) (*see below*)
      * Common Law
        + look to case law to determine what elements mean (MPC definitions can help)
        + if no mens rea element 🡪 see if strict liability (*see below*)

**Willful Blindness:** another avenue to get to **“knowingly”**

* any statute that requires “knowingly”, ask: (a) is positive knowledge required, or (b) does willful blindness satisfy?

**Common Law Framework**: do you need to take **deliberate action** to avoid learning the truth?

* **Majority:** 
  + ***Global Tech* Test** defendant must **(a) awareness of high probability + (b) take deliberate action to avoid learning of that fact**
    - * ***Giovanetti*** (man rented home to illegal gamblers) says must take deliberate action to avoid learning
* **Minority:**
  + ***United States v. Jewell:*** defendant driving with 100lbs of weed in car. Didn’t know about weed but knew there was secret compartment and knew facts indicating it contained weed. Purposefully avoided positive knowledge to avoid liability
    - * willful blindness = knowledge when: **(a) awareness of high probability + (b) sole reason for lack of positive knowledge was conscious purpose to avoid learning the truth**

**MPC Framework**:

* **MPC 2.02(7):** when knowledge of the existence of a particular fact is an element of the offense, such knowledge is established if a person is **aware of a high probability of its existence**, unless he actually believes that it doesn’t exist
  + **affirmative defense** if defendant *doesn’t actually believe* fact exists
  + no need for deliberate action (agrees w/ *Jewell*)

**Mistake of Fact:** to see if mistake of fact is a defense, see if the **element of the crime is strict liability**

**Common Law Framework**:

* ***Regina v. Prince:*** defendant unlawfully “took” underage girl from possession of her parents without their consent; thought she was older
  + **moral wrong approach** (majority):is the conduct (even under the facts as defendant believed them to be) still morally wrong? If yes 🡪 conduct is a strict liability issue and mens rea doesn’t factor in
  + **legal wrong approach** (minority) (but more often used today): if conduct (even under facts as defendant believed them to be) is still a crime, then defendant is taking the risk of that conduct being an even greater crime than he thinks it is
    - ***State v. Benniefiled:*** defendant convicted of selling drugs in school zone; no requirement for him to know that he was in school zone under “legal wrong” theory
* ***People v. Olsen:*** defendant sexually harassed underage girl, but thought she was old enough; mistake of fact was not a defense
  + **structure of statute shows legislative intent** was to make crime strict liability (had probation provision for those who made mistake in fact)
  + **supports public policy** of protecting children
  + **punishment is more severe** for those who commit crimes against children
    - *compare to dissent:*high punishment = mens rea is even more important (courts agree w/ this)
  + **statutory rape is usually a strict liability crime**
    - ***Garnett v. State:*** mentally retarded man had sex w/ 13-year-old girl; she told him she was 16.
      * + Strict liability crime, so guilty of second degree rape
* note: why not use negligence requirement (reasonable person standard)?
* don’t want to subject victim to trial (undercuts public policy of protecting young people)

**MPC Framework**:

* **MPC 2.04:** ignorance of fact or law is a defense **if it negates the mens rea required to establish a material element of the offense**, or the **statute provides it as a defense**. Defense is **not available** if defendant (under facts as he believes them to be) **would still be guilty of a crime**, but will be charged under offense that would’ve been under facts as he believed them to be
  + takes *Prince* legal wrong approach
  + mistake of fact is a defense if the crime is not a strict liability crime

**Strict Liability:** when liability is imposed regardless of mens rea

policy considerations: how is someone culpable if no mens rea (retributive); possible to make harm-based retributive argument for SL; greater deterrence and incentive to act more carefully (utilitarian)

**Common Law Framework**: what factors to look for to determine whether statute’s silence on mens rea is meant to require strict liability?

* ***Morissette v. United States:*** junk dealer entered Air Force & took discarded bomb casings; thought they were abandoned; statute was silent but court said mens rea is required here
  + statutes based on common law (**traditional crimes**) **require mens rea** even if statute is silent (like in this case)
    - mens rea is implicit in traditional crimes even if not stated (e.g. theft)
  + statutes based on “public welfare”/regulatory offenses (**new crimes**) are **usually strict liability** if statute is silent on mens rea
    - **regulatory offenses:**
      * **regulatory offenses usually have lower penalties/lower stigma**
        + *Olsen* dissent strong 🡪 higher penalties = higher degree of culpability needed
      * **regulatory offenses affect public on a large scale**
        + government has incentive to make prosecution easier in these cases

negligence defense would be difficult to disprove

* + - * + incentive to manufacturers of public goods to be extra careful
      * ***United States v. Balint:*** not knowing drug is prohibited from sale not a defense; statute is strict liability
        + possible injustice of one innocent seller penalized < innocent ppl exposed to dangerous drug
      * ***United States v.*** ***Dotterweich:*** not knowing product is mislabeled not a defense; statute is strict liability
* ***United States v.*** ***Freed:*** D was convicted of having unregistered hand grenade; strict liability because having grenade is **inherently dangerous**
* *compare to* ***Staples v. United States:*** defendant charged for possession of unregistered firearm; didn’t know his weapon counted as firearm; court read mens rea requirement into statute
  + although statute relates to potentially harmful items/public danger, gun ownership is widespread tradition in US
    - court is careful not to construe statute as dispensing of mens rea requirement if doing so would **criminalize a broad range of apparently innocent conduct**
    - **crime was a felony 🡪** hints that court **wouldn’t want to give such high punishment without mens rea requirement** (*Olsen* dissent)

**MPC Framework**:

* **MPC 2.05:** motivated by retributive justice; don’t like idea of strict liability
  + (1) for crimes that are **violations** (only a fine), statutory silence can imply strict liability
    - (2) otherwise, silence is insufficient to create strict liability crime unless language explicitly says so

**Determining Mens Rea When Statute/Element of Statute is Silent:**

**MPC:**

Is there a mens rea requirement in the statute at all?

* + Yes 🡪 is there a contrary purpose for it to not apply to all the elements (MPC 2.02(4))?
    - No 🡪 that is the mens rea requirement for all the terms (MPC 2.02(4))
    - Yes 🡪 recklessness (MPC 2.02(3)), unless strict liability (MPC 2.05)
      * + MPC 2.05: silence not enough to create SL unless language explicitly says so
  + No 🡪 recklessness (MPC 2.02(3)), unless statute explicitly says it’s a strict liability offense or crime is a violation (MPC 2.05)
    - note: statutory rape is strict liability under MPC if victim is <10 years old (otherwise, mistake of fact allowed as affirmative defense)

**Common Law:**

If statute is silent on mens rea, consider:

* + *Prince* moral wrong & legal wrong
  + public policy issue?
    - new (**public welfare offense**) vs. traditional offense (*Morrissette, Balint, Dotterweich)*
      * inherently dangerous to public (should be on notice of requirements)
      * sophisticated actor (corporation)
      * would making SL criminalize a lot of presumably innocent conduct (*Staples*)
      * penalties (*Olsen* dissent)
        + If high 🡪 probably not SL
        + If low 🡪 could be SL (regulatory offenses usually have lower penalties)
    - protecting age group: statutory rape (*Olsen*)
* statutory structure suggesting legislative intent (*Olsen)*

**Mistake of Law:** legal error; “I didn’t know this was illegal”

**Common Law Framework:**

**General Rule:** mistake of law is not a defense

* ***People v. Marrero:*** corrections officer arrested in nightclub for having unregistered firearm; thought he fell under “peace officer” exemption, but didn’t
* **ignorance/mistake of law does not relieve defendant of liability**
  + policy: encourage people to learn the law (utilitarian); limit risk of fraud; limit people searching for loopholes to escape liability
    - allowing ignorance/mistake of law as defense would “foster lawlessness”
    - rely on prosecutorial/police enforcement discretion to bring in fair cases

**Four Exceptions to General Rule:**

1. If an offense requires legal knowledge as an element of the crime:
   * ***Regina v. Smith:***defendant charged with destruction of property; thought property was his own
     + requirement of offense is that he knows property belongs to someone else
   * ***People v. Weiss:*** D believed police gave them permission to kidnap felon; no SL because statute required intent to confine victim *without authority of law*
     + court read intent to apply to having authority of law; thought they had authority of law; mens rea not met to convict
   * **argue legal & moral wrong for having legal knowledge**
2. Court may read in “knowingly” or “willfully” requirement to require knowledge of legal duty:
   * compare *Overholt & Int’l Minerals* to *Liporata & Cheek*
   * factors courts look at to determine whether to require knowledge of legal duty:
     + **complicated laws + unsophisticated actor**
       - ***Cheek v. United States:*** tax evasion has knowledge of law requirement because it’s very complex
       - *compare to* ***United States v. International Minerals:*** violating interstate commerce commission by shipping corrosive liquids doesn’t require knowledge of specific statute
         * complex law like *Cheek*, but **sophisticated actor** + **regulated industry** (should be on notice)
     + **as long as wouldn’t criminalize broad range of activity** 
       - ***Liparota v. United States***: using food stamps in unauthorized manner
         * requires knowledge of use being unauthorized; otherwise would criminalize too many presumably innocent people
     + **inherently dangerous activity/regulated activity** (should be on notice)
       - sometimes may just require awareness that doing something unlawful (not necessarily know specific statute)
         * ***US v. Overholt:*** spilling contaminated water into river violated statute

defendant didn’t have to be aware of specific statute; just that was doing something illegal

**should be on notice: regulated activity, potential public danger, sophisticated actor**

1. If defendant relied on official statement in interpretation of statute:
   * police officer, court official, statute, etc. told you interpretation
     + ***Hopkins v. State:*** conviction upheld for putting up a sign advertising ability to perform marriages as a notary even after seeking advice from lawyer about the meaning of the relevant statute
       - wasn’t relying on official statement of law or statute; relying on lawyer’s interpretation not enough
     + ***United States v.*** ***Albertini:*** defendant allowed to rely on earlier court decision if it was valid law at the time he commits act (court decision = official statement of law)
   * some statutes (NY law & MPC) only allow this if you relied on statute that was **later found to be erroneous**
   * common law equitable estoppel doctrine: can’t convict defendant for conduct official (in their capacity) have earlier said was lawful
2. Constitutional (Due Process) Argument – you were not on notice enough for conviction:
   * ***Lambert v. California:*** defendant convicted for failing to register in California bc she had a felony
     + crime resulted from **omission** (wholly passive) 🡪 requires knowledge of law
     + unsophisticated actor 🡪 not on notice
       - **must at least have proof of probability of having knowledge**, otherwise not enough notice to be constitutional
     + still good law, but limited to it’s facts (**usually only applies to omissions and malum prohibitum (regulatory) crimes**)
   * *compare to* ***United States v. Wilson:*** judge never explained to D that he can’t have a gun after felony conviction; federal statute makes firearm possession unlawful if felony conviction; D convicted anyway
     + strong public policy reason for prohibiting (gun ownership is more serious than registration in *Lambert*)
     + not crime of *omission* (unlike *Lambert*)
     + more notice than in *Lambert* case
       - can connect gun ownership w/ felony conviction as possible problem

**MPC Framework**: (similar to CL exceptions so make same arguments)

* **MPC 2.04:** ignorance of law or fact is a defense if
  + - * + (1) negates mens rea required to establish material element of the offense
        + (2) statute isn’t known the defendant and has not been published or otherwise made reasonably available
        + (3) acts in reasonable reliance upon official statement of law, later found to be invalid or erroneous contained in

statute or other enactment

judicial opinion, decision, judgment

administrative order

official interpretation by public officer/ agency with responsibility for interpretation

**SUBSTANTIVE OFFENSES:**

**Homicide (MPC § 210):**

**Homicide:** killing of a human being by another human being

* almost entirely **governed by distinctions of mens rea**
* for there to be distinctions between homicides, there must be a statute

**Intentional Killings:**

**Common Law Framework:**

Intentional killing is **murder *unless*** **adequately provoked** (then it’s manslaughter)

* **Murder:** unlawful killing with “malice aforethought” (willful, deliberate)
  + statute may divide murder into degrees (based on **premeditation** (prior planning))
    - ***Commonwealth v. Carroll:*** argument with wife; 5 min after argument, grabbed gun and shot her
      * 1st degree murder statute required: “willful, deliberate and premeditated”
        + **no time is too short for a wicked man to frame in his mind the scheme for murder** (5 min is enough for premeditation)

premeditation = any intent to kill (basically no distinction btwn 1st & 2nd degree)

* + - ***State v. Guthrie:*** co-workers joking around; defendant got mad, pulled knife from pocket and stabbed man in the neck
      * court said premeditation requires **some period between the formation of the intent to kill and the actual killing, which indicates an opportunity for reflection**
        + must kill purposely after contemplating intent to kill

premeditation = intent + opportunity for reflection on intent

* + - * relevant **evidence for determining premeditation (*Anderson*):**
        + planning activity: facts about prior behavior that may indicate design to kill
        + motive: info about prior relationship to victim that may indicate reason to kill
        + preconceived design: manner of killing was so particular that must have been thought out prior
* policy for dividing murder into degrees based on premeditation: premeditation is more culpable (retributivist); premeditation is easier to deter than impulse (utilitarian)
  + - * note: MPC rejects premeditation distinction (culpability is same; impulsive people arguably more dangerous to society)
* **Voluntary Manslaughter:** intentional killing that is **adequately provoked** can be mitigated to manslaughter
  + need some **external, provoking event** (unlike MPC)
  + policy for provocation defense: killer is not fully culpable (retributive); provocation can’t be controlled/deterred (utilitarian)
  + **Test for Adequate Provocation:**

1. Adequate provocation must be **calculated to inflame the passion of a reasonable man** and to cause him to act for the moment from passion rather than from reason
   * + - ***Girouard v. State:*** stabbed wife during heated argument where she repeatedly insulted him
         * words are not adequate provocation unless accompanied by threatening conduct
         * only **5 categories** of provocation that justify mitigation to manslaughter

extreme assault or battery upon defendant

mutual combat

defendant’s illegal arrest

injury or serious abuse of a close relative of defendant

sudden discovery of spouse’s adultery

* + - * *compare to* ***Maher v. People:*** defendant ran into bar and shot victim after being told he had sex with his wife
        + provocation can be **expanded** beyond the 5 categories

reasonable man standard = **at the time of the act,** he was **disturbed or obscured by passion** to an extent **which might render** **ordinary men**, of fair average disposition, **to act rashly from passion rather than judgment**

juries should determine reasonableness based on the circumstances of a particular case (doesn’t have to be 5 categories)

“reasonable man” attributes: question of what should be taken into account

relevant physical attributes 🡪 yes

moral peculiarities 🡪 no

mental issues 🡪 ???

education 🡪 ???

* + - * + court said rumor of adultery is reasonable evidence of provocation to send to jury

*dissent:* provocation has to happen in presence of person committing homicide (can’t be a rumor)

* + - * + note: *Maher* allows more cases to go to juries (check on prosecutorial discretion)

1. Killing was actually done in the heat of passion
2. There was no opportunity for the passion to cool

**MPC Framework:**

intentional killing is **murder, *unless* defendant was acting under extreme emotional disturbance** (then it’s manslaughter)

* **Murder (MPC 210.2(a)):** criminal homicide constitutions murder if it is committed **purposely or knowingly**
  + note: MPC has **no premeditation** **distinction**
* **Manslaughter (MPC 210.3(1)(b)):** a criminal homicide constitutes manslaughter when a homicide which would otherwise be murder is committed under **influence of extreme emotional disturbance** (*subjective*) for which there is a **reasonable explanation or excuse**. The reasonableness of such explanation or excuse shall be determined from the **viewpoint of a person in the actor’s situation** under the **circumstances as he believes them to be** (*objective*)
  + EED is an *affirmative defense* (burden on defendant to prove new set of facts to mitigate charge)
  + Test is **subjective** (EED) & **objective** (reasonable explanation or excuse for the EED)
    - reasonableness also has subjective twist (**in defendant’s situation under circumstances as defendant perceived them to be**, even if they’re not accurate)
      * “defendant’s situation” factors for reasonableness inquiry: grief, physical attributes 🡪 yes; moral compass, intelligence 🡪 no
    - ***People v. Cassassa:*** defendant and neighbor casually dated; eventually broke up; broke into her apartment w/ knife before; broke in another time & stabbed her when she rejected him again
      * **EED:** probably yes
        + evidence: broke into apartment; became obsessed w/ her
      * **Reasonable:** no
        + evidence: short relationship, casual, normal breakup

court said reaction was too peculiar to defendant to be reasonable under the circumstances (even as he believed them to be)

* **MPC broadens provocations defense: no external provoking event required/no cooling off period inquiry** (unlike common law)

**Unintentional Killings:**

**Common Law Framework:**

* **Unintentional Killings as Involuntary Manslaughter:** “wanton or reckless conduct”
  + based on recklessness or criminal negligence
    - higher standard than regular negligence (need high likelihood of harm & seriousness of harm)
      * even if statute only says recklessness, **courts usually read in criminal negligence for involuntary manslaughter** (but can argue that if statue says reckless, need awareness)
  + ***Commonwealth v. Welansky:*** owned nightclub w/ no proper emergency exits; fire broke out and many died because exists were blocked, improperly lit, etc.
    - charged w/ involuntary manslaughter based on “wanton or reckless conduct”
      * **“wanton or reckless” = gross negligence standard**
        + must be high degree of likelihood that substantial harm will occur

need big risk & big departure from reasonable conduct to have gross negligence

* usually requires affirmative act, but in cases with **duty of care** (like this case), gross negligence can be intentional failure to take such care in disregard of probable harmful consequences (omission)

***State v. Williams:*** Native American defendants failed to get medical care when child developed toothache and baby eventually died; defendants were uneducated and didn’t realize how sick baby was, were afraid baby would be taken away by child services

under state’s particular statute, ordinary negligence was enough for negligent homicide conviction

failure to act (omission) was enough for negligence because had duty of care

**negligence based on what reasonable person would do in same situation**

* issue: should **culture** factor into reasonableness determination (their situation legitimately made them afraid of going to doctor bc of racism at the time)?
  + in this case, culture didn’t factor into objective standard
  + policy for allowing negligence as mens rea: death is a very bad result (harm-based retributive); want to make prosecution easier (utilitarian)
* **Unintentional Killings as Murder** (meet requirement of “malice aforethought” even though unintentional)
  + **Depraved Heart Murder**: actions done with **deliberate indifference to human life** (more than just recklessness)
    - * no justification in taking risk
      * pointless activity (no social benefit)
      * aware of high risk & disregards it
    - ***Commonwealth v. Malone:*** boy killed friend while playing Russian roulette
      * even though unintentional, killing shows “abandoned & malignant heart” because was done in **reckless disregard of very likely consequences**
        + depraved heart murder = intentionally doing un-called for act in callous disregard of very likely harmful effect on others
    - ***United States v. Fleming:*** defendant was driving drink at dangerous speeds, lost control of car and killed someone
      * even though unintentional, had “malice aforethought” to make crime murder because drove in manner than shows more than just recklessness but **depraved indifference of human life**
      * note: drunk driving cases are usually manslaughter because can’t show that driver acted maliciously, just that judgment was impaired (shows recklessness so involuntary manslaughter), but if can show that driving was *very reckless*, then can make case for depraved heart murder
  + **Felony Murder**: killing that happens in the course of a felony (in furtherance) is treated as murder (no distinction between intentional or unintentional) (*see more on FELONY MURDER below)*

**MPC Framework:**

* **Unintentional Killings as Manslaughter or Negligent Homicide:**
  + - * + If not murder, MPC will either charge negligent homicide or reckless manslaughter (based on whether defendant was *aware* of the unwarranted risk he was creating)
        + **Negligent Homicide (MPC 210.4(1)):** criminal homicide constitutes negligent homicide when it is committed negligently

defendant is **unaware** **of the unwarranted risk** he is creating

conduct judged based on reasonable person standard: “**gross deviation** from standard of care that a reasonable, law-abiding person in the actor’s situation would have observed under the circumstances”

gross deviation = **gross negligence** requirement

* policy for criminalizing negligence: (+): additional motive to be more careful, prompts awareness (utilitarian); culpable due to insensitivity to others’ interests (retributive); (-): can’t deter what someone is unaware of (utilitarian); no culpability if don’t realize something could cause harm (retributive)
  + - * + **Reckless Manslaughter (MPC 210.3(1)(a)):** criminal homicide constitutes manslaughter when it is committed **recklessly**

recklessly = “**consciously disregard** a **substantial and unjustifiable risk** that death could result from actions”

most courts say that substantial = subjective (must be aware that risk is substantial); unjustifiable = objective (based on reasonableness)

***People v. Hall (2000):*** man was experienced skier, skiing very fast and out of control; flew off knoll and killed someone; charged w/ reckless manslaughter

**consciously disregarded** (vs. negligent homicide)**:**

defendant was trained skier, likely that he was aware that skiing fast increases risk of accident and ignored that risk so continued skiing

* court remanded and jury eventually found defendant guilty of negligent homicide, not reckless manslaughter so didn’t think he consciously disregarded risk (but this was enough evidence to send to jury)

**substantial risk:** substantial nature of risk is **situational, not # standard**

evidence: high speed, lack of control, improper technique increased likelihood of an accident and severity of possible accident (substantial)

**unjustified risk:** defendant was skiing for his own enjoyment (unjustified)

usually left up to jury to determine whether conduct was unjustified

* reasonableness standard (skiing fast for fun or to rescue someone at bottom of the mountain)
  + - * **Unintentional Killings as Murder:**
        + **Depraved Heart Murder (MPC 210.2(1)(b)):** criminal homicide constitutes murder when it is committed recklessly under circumstances **manifesting extreme indifference to the value of human life**

*Fleming* & *Malone* cases for reference

* + - * + **Felony Murder (MPC 210.2(1)(b)):** recklessness and indifference to value of human life is presumed if the actor is engaged in or **is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse, arson, burglary, kidnapping or felonious escape**

only **certain felonies** will constitute felony murder (the most serious ones)

too many felonies for smaller crimes today to include all

**affirmative defense:** recklessness is *rebuttable presumption* (can try to show you were being really careful)

**Felony Murder:**

* policy: (+) encourage even felons to be more careful & avoid unnecessary deaths (utilitarian); when harm occurs, sentence should be increased (harm-based retributivism); (-): unsound to punish more when culpability is the same, but another crime happens to occur (retributive)
* felony murder is very **helpful to prosecutors**, because **encourages people to plead guilty** **to underlying felony** in exchange for not also being charged w/ felony murder
  + - * felony-murder rule usually imposes **strict liability** for killings that result in the commission of a felony, regardless if felon knew or should have known that conduct would endanger a life (no foreseeability needed)
        + ***People v. Stamp:*** obese man w/ heart problems was robbed at gun point and died from a heart attack as a result; still felony murder (**you get victim as you find them)**
      * although felony murderdisposes of mens rea requirement for murder, **still requires actus reus & causation** (must show defendant’s conduct caused the death)
      * killing must be **in furtherance of felony**

**Common Law Framework:**

murder (“malice aforethought”) includes killings (even unintentional) when done in the course of a felony

* ***Regina v. Serene:*** defendants willfully set fire to house (felony = arson), and unintentionally killed boy inside the house
  + - * + court said felony murder should not be extended to *every* felony (especially since there are so many felonies today)

**felony murder =** any act **known to be dangerous to life and likely in itself to cause death,** done for the **purpose of committing a felony, which causes death** (high risk crimes)

instead of *any act done with intent to commit felony, which causes death*

**MPC Framework:** *see above* ***(MPC 210.2(1)(b))***

* MPC **limits felony murder** by:
  + giving **specific categories** of felonies that could become felony murder (similar to *Serene)*
  + **affirmative defense**: recklessness is presumed, but **defendant can override it by showing that they were being careful**, couldn’t have expected death to result, etc.

**CAUSATION (MPC § 2.03):** required for any criminal offense where a result is an element of the crime

**Common Law Framework:**

Causation Requires:

1. **“But For” (actual) Cause**: result would not have occurred in the absence of the defendant’s act
   * prosecution must prove *beyond* *a reasonable doubt* that defendant’s actions caused death
     + ***State v. Montoya:*** victim was shot, M left him in remote area to die instead of seeking help
       - prosecution wasn’t able to prove beyond a reasonable doubt that victim would’ve survived if M had gotten help
     + ***State v. Muro:*** M came back and saw that husband beat her daughter, waited 4 hours to call 911
       - prosecution couldn’t prove beyond a reasonable doubt the calling 911 earlier would’ve made a difference
   * **minority view:** some jx expand this requirement that just reducing victim’s chances of surviving is enough for causation
   * there can be two or more “but for” causes, and each could be liable
     + e.g. drunk driver hits truck whose driver is sleeping, which hits and kills another person 🡪 both drunk driver & sleeping driver are “but for” causes of the death
2. **Proximate Cause:** act must have a sufficiently close relationship to the result (foreseeable)
   * no set guide to determine proximate cause (common sense based)
   * ***People v. Acosta:*** A stole car and police on helicopters were pursuing him; during pursuit police helicopters crashed & killed the officers in them, A was charged w/ 2nd degree murder; argued no proximate cause of death
     + **proximate cause vs. actual cause:** threshold question is “but for” cause, then determine if the cause was foreseeable
       - in this case, because helicopter death crash was a **possible consequences that might have reasonably been contemplated** 🡪 there is proximate cause
         * very broad proximate cause determination
     + *Dissent:* only death of people on the road where A was driving would’ve been enough for proximate cause
   * ***People v. Arzon:*** A set fire to abandoned building, firefighters came, fire broke out in another part of building making it hard to escape; firemen were injured & died; A argues no proximate cause
     + defendant’s acts **must forge an indispensable link in the chain of causes** which actually brought about the death
     + “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**”
       - foreseeable that firemen would respond to A’s fire
         * A’s actions made the firemen vulnerable (if by his act, **defendant makes victim more vulnerable** to other act that actually causes death, there is proximate cause)
   * ***People v. Kibbe:*** defendant’s abandoned drunk victim on the side of the road, victim was killed
     + proximate cause because **made victim more vulnerable** to the actual cause of death (conduct was a **sufficiently direct cause of death**)
       - forged link in causal chain; **ultimate harm is something that should’ve been foreseen** as **reasonably related** to defendant’s actions
   * ***People v. Stewart:*** S stabbed victim in stomach, in hospital, surgeon performed unrelated procedure which caused victim’s death
     + defendant’s acts were not actual cause of death (**not sufficiently direct cause**)
       - could not be foreseen as reasonably related to defendant’s actions
     + **note on medical malpractice:** law expects there to be negligent medical care, so is usually still a proximate cause of defendant’s actions (negligent medical care is foreseeable) **(*Shabazz*)**
       - only not foreseeable if wound that caused treatment is no longer an operating or substantial cause of the treatment (e.g. *Stewart*)
   * ***People v. Warner-Lambert:*** some of defendant’s employees were killed in explosion in factory because of two potentially explosive substances used in manufacturing process; unclear what triggered the explosion
     + need **precise chain of events to be foreseeable** to have proximate cause
       - defendant must be able to foresee the specific triggering cause of the explosion
         * ***manner* of death, not just result of death must be foreseeable**
   * note: **compare *Acosta* (very broad) 🡪 *Arzon, Kibbe, Stewart* (middle) 🡪 *Warner-Lambert* (narrow)**
     + prosecution likes *Acosta*, defense likes *Warner-Lambert*
   * **omissions** can be treated as proximate causes as long as there was a legal duty to act

**MPC Framework:**

**MPC 2.03:** conduct is cause of result when:

1. “but for” cause, AND
2. relationship btwn conduct and the result satisfies any **additional causal requirements** imposed by the Code or by the law defining the offense
   * + - * when need to **purposefully or knowingly cause result:**

**no causation** if actual result is not within purpose or contemplation of the actor, **unless**:

actual result differs from contemplated result only bc **different person/property** was injured, or **contemplated injury/harm would’ve been more serious** than actual injury, OR

actual result involves same kind of injury as contemplated result and is **not too remote or accidental** to have a just bearing on liability

* + - * + when need to **recklessly or negligently cause result:**

**no causation** if result is not within risk of which actor *was aware of* (reckless) or *should have been aware of* (negligence), **unless:**

actual result differs from probable result only bc **different person/property** was injured, or **probable injury would’ve been more serious** than actual injury, OR

actual result involves same kind of injury as probable result and is **not too remote or accidental** to have just bearing on liability

* + - * + when causing result is material element of a **strict liability** offense:

**no causation**, unless actual result is a ***probable* consequence** of actor’s conduct

**Causation & Intervening Human Actions:**

Intervening actor’s may break chain of causation and render defendant not liable

* **Subsequent Intentional Human Actions**: actions intended to produce their result
  + **Freely Chosen Intentional Subsequent Acts (Voluntary):**
    - suicide/assisted suicide:
      * ***People v. Campbell:*** C and victim were both drunk, C was mad that victim was sleeping w/ his wife; encouraged victim to kill himself, offered to sell him gun, eventually just gave him the gun and left
        + intervening actor broke causal chain (victim killed himself)

actual **killing was outside defendant’s control**

hope that he would kill himself is not high enough degree of intention to charge murder

* + - * + focus on **agency of the victim**
        + policy: law respects free will/autonomy (law assumes can’t make other people do things unless literally forcing them, otherwise actions are independent choices)
      * ***People v. Kevorkian:*** doctor charge w/ assisted suicide for helping terminally ill patients end their life via “suicide machines”; victims would press the button that started the machine (he furnished the means, victims did the last act)
        + defendant **must participate in the final overt act** that causes death, not merely be involved in the events leading up to the commission of it (e.g. just providing the means)

distinction between **active participation in act vs. involvement in events leading up to act**

* + - * + focus on **participation of defendant**
        + *Dissent:* disagreed with active participation distinction bc didn’t equate to blameworthiness properly
        + note: this court was **less concerned w/ agency** (free will) of the intervening actor, and **more concerned with how involved the defendant is** in the act
      * ***People v. Minor:*** victim convinced defendant to hold knife against steering wheel while victim repeatedly lunged into knife
        + murder or assisted suicide?
  + **Intentional Subsequent Acts Constrained by Duress, Duty, Exigency (Not Voluntary):**
    - prosecution will try to argue that the **intervening action was not a fully voluntary choice** (was somehow constrained by defendant)
      * ***Stephenson v. State:*** defendant kidnapped woman and raped and tortured her for days; she swallowed poison in an attempt to kill herself; defendant eventually drove her home but doctor was unable to save her
        + victim was still under the defendant’s control when she attempted to commit suicide

“when suicide follows a wound inflicted by the defendant, his act is homicidal if the deceased is **rendered irresponsible** by the wound or as a natural result of it”

defendant’s acts rendered her mentally irresponsible

all the events were part of one transaction (all while defendant was in control of her)

* + - * ***Regina v. Blaue:*** victim was stabbed but refused a blood transfusion because was a Jehovah’s witness
        + defendant is liable because refusal of transfusion is not a voluntary choice

religion is pre-existing condition (take victim as you find them)

* + **Overview:**
    - when intervening actor **intends the result**, the chain of causation will be broken, unless
      * the defendant **actively participated** in causing the result (*Kevorkian)*
      * the intervening actor’s actions were **not fully voluntary**
        + defendant is in control of actor (*Stephenson*)
        + actor’s religious beliefs (*Blaue*)
        + actor’s mental state was created by the defendant (*Stephenson*)
* **Subsequent Unintentional Human Actions:** actions that recklessly risk the result
  + subsequent reckless actions **must be fully voluntary** to negate liability of first actor; **cannot be result of predicament created by the first actor**
    - ***People v. Kern:*** defendant chased black men w/ death threats; one of the men tried to escape by running onto highway and was killed by a car (recklessly risked result by running onto highway)
      * victim’s running onto highway was by duress (not voluntary)
        + result of **predicament created by defendant**
  + when action is fully voluntary, courts are split on these cases:
    - ***Commonwealth v. Root:*** defendant & other driver were drag racing, defendant was in the lead and other driver in an attempt to pass him, crossed highway line and collided head on w/ truck resulting in his death; defendant charged w/ involuntary manslaughter
      * unlawful or reckless **conduct must be the *direct cause of death***
        + defendant didn’t force competitor to swerve
        + competitor was aware of the risk defendant created, but still chose to do recklessly swerve into oncoming traffic
    - *compare with* ***State v. McFadden:*** defendant & other driver were drag racing, other driver lost control and killed himself & passenger in another car; defendant was charged w/ involuntary manslaughter of both the driver and the passenger
      * court said there is proximate cause if the defendant **plays a part in the risk creation**
        + “acts of two or more people can work concurrently as the cause of an injury and in such a case, each of the acts are regarded as a proximate cause”
    - ***Commonwealth v. Atencio:*** defendants were playing Russian roulette w/ the victim; each of them pulled trigger & nothing happened, but when they passed gun to victim, gun fired & killed him; each of the defendants were changed w/ involuntary manslaughter
      * defendants **participated via mutual encouragement** in the joint enterprise
        + defendants had a duty not to participate in such a foolish and reckless game

their participation and cooperation helped bring about the victim’s foolish act (**played a part in the risk creation**)

* note: intervening actors & original defendant would be on the hook for **accomplice liability**in all these cases except suicide
  + purposeful in regard to the conduct (Russian Roulette, drag racing) & reckless toward result (need same mens rea for result as principal for accomplice liability) (recklessness = involuntary manslaughter)
    - remember: you can be an accomplice to an unintentional crime

**Causation & Felony Murder:**

* felony murder only applies when killing is done **in furtherance of the felony**
  + ***People v. Gillis:*** court found that defendant who crashed into another car and killed passenger while **trying to evade police** that were looking for him after an attempted burglary was guilty of felony murder
    - trying to evade police after felony is **still in furtherance**
  + note: this is especially **important in group crime context** (where co-defendant is responsible for all crimes of others if they are done in furtherance of the intended felony)
    - ***People v. Cabaltero:*** lookout during robbery panicked and fired shots, leader of robbery shot & killed lookout out of anger; court upheld felony murder conviction for all participants in the robbery (not just the shooter) bc **shooting was to help ensure success of ongoing robbery** (in furtherance of felony)
  + when lethal act is committed by **someone resisting the felony**:
    - **agency theory:** focus is on *who does the killing* (most courts prefer this)
      * ***State v. Canola:*** owner of jewelry store in an attempt to resist an armed robbery, fatally shot one of the robbers; other robbers were charged with felony murder of their co-robber
        + court applied **agency theory**: felony murder doesn’t extend to a killing that is done by someone other than the defendants or someone associated with them in the unlawful enterprise
      * policy: modern theory favors restriction of felony-murder rule (very expansive crime), especially when there are so many felonies now; criminal liability should be in accordance with actor’s blameworthiness
      * note: in agency jx, can still try to charge defendant w/ depraved heart murder or manslaughter (just cant charge w/ felony murder if killing wasn’t done by one of the felons)
    - **proximate cause theory:** focus is on whether the *killing was a foreseeable risk*
      * attaches liability under felony murder for any death proximately resulting from the felony (no matter who did the killing)
        + courts feel uneasy about how expansive this rule is
      * policy: deters felons; encourages them to be more careful at least (utilitarian)

**Rape:**

Issues:

* prevalence of rape is very high
* different perceptions of reasonableness based on gender
* how much should the law reflect a defendant’s subjective culpability (often defendant doesn’t realize they’re doing anything wrong, but victim is greatly harmed)
* how broad is rape: crime of violence or non-consent?
* tricky area of criminal law because the act underlying the offense (sex) is fine when both parties are consenting
  + - * + line between consensual sex and rape depends on: **force, non-consent, and the mens rea attached to those elements**

**ACTUS REUS:** most states require force & non-consent

**Relationship between Fraud, Non-Consent and Victim’s Fear:**

* was force established beyond a reasonable doubt?
* was lack of consent established beyond a reasonable doubt?
* was victim’s fear reasonable?

**Force Requirement:** usually requires **physical compulsion** or **threat of physical compulsion** (likely to cause serious bodily harm)

* ***State v. Rusk:*** P and R met in bar, R asked her for a ride home, was in unfamiliar neighborhood, he asked her to come upstairs, she said no at first, then he took her keys and asked her again; P asked if she could leave, he said he wanted her to stay and began to undress her; asked “if I do what you want, will you let me go without killing me?”, he didn’t answer, she started to cry, he lightly choked her, she asked again “if I do what you want will you let me go?” and this time he said yes, so they had sex; she P reported the incident as rape
* elements of rape statute: (a) vaginal intercourse, (b) made by force or threat of force, (c) without consent of other person
  + - * + **force 🡪 lightly choking is best evidence**

taking keys away, not answering when asked “if I do what you want will you let me go w/out killing me” = threat of force

threat of force = subjective apprehension + reasonableness of apprehension

* + - * + **lack of consent** is generally established through **proof of resistance** or proof that the victim **failed to resist because of fear**

**fear = genuine (subjective) + reasonably grounded (objective)**

possible for **jury to reasonably conclude** that by taking her keys in the middle of the night in a neighborhood she was unfamiliar with made her afraid that R would kill her unless she had sex w/ him

* + - * + *Dissent:* fear must be generated by something of substance

Must resist unless R objectively manifested intent to use physical force

No evidence of this (conduct could all be ordinary persuasion)

* + policy for requiring force in addition to non-consent:
    - * culpability: force makes it much more likely that defendant knew victim wasn’t consenting
        + alerts the actor to the situation
      * if consent does all the work 🡪 issues with what type of consent should be required
        + what mens rea should be required for defendant with regards to consent?

different people interpret same scenario differently

how to define law to make sure getting the blameworthy people?

retributive = need mens rea for defendant

utilitarian = encourage people to understand what conduct is objectively wrong by prosecuting negligent rape as well (to change society’s attitude)

* + - * + force has less line-drawing issues and ambiguity
      * corroboration issues: case will be built almost entirely on testimony
  + **Non-Physical Threats:** when jx require force, intimidation or fear may be insufficient
    - * ***State v. Thompson:*** principal threatened to stop girl from graduating if she didn’t have sex with him. Court said force/non-consent requires threat of bodily harm/kidnapping/death
      * ***Commonwealth v.*** ***Milnarich:*** defendant assumed custody of girl from juvenile center, forced her into sexual intercourse by threatening to send her back if she refused
        + court said force = physical compulsion or threat of physical compulsion

slippery slope issue of criminalizing beyond physical threats (e.g. if you don’t have sex with me, I’ll break up with you)

* + - * + *Dissent:* force can have multiple meanings
      * **Psychological Pressure:** some statutes allow rape via psychological pressure on vulnerable person
        + ***State v. DiPetrillo:*** boss called 19 yr old over to his desk when they were working late, grabbed her by the wrist and pulled her onto her lap and began kissing her, moved her into chair and hovered over her, told him to stop but he continued, also put her hand up her blouse and digitally penetrated her; she was finally able to push him off and walk away

statute required penetration by **force or coercion**

coercion = compelling victim by threat to use force or violence or imposition of **psychological pressure** upon a person who is **vulnerable** under the circumstances

no coercion in this case (**employer/employee relationship** is not same as cop/arrestee to be enough for “psychological pressure on vulnerable victim”)

remanded back to trial court to see if could convict based only on force

note: *compare to* ***State v. Burke:*** police officer forcing victim to perform oral sex = force

position of authority where victim reasonably believed resistance would be useless

* + **Resistance:** resistance is not often a requirement written into statute, but **often used as evidence of force or non-consent**
    - * if no resistance, courts may view as implied consent
      * reasonable resistance can be displaced by question of whether victim reasonably feared serious bodily harm (in this case no resistance = reasonable resistance)

**Eliminating the Force Requirement:**

* ***MTS:*** victim claimed that she fell asleep and woke up w/ defendant penetrating her
  + statute required “act of sexual penetration using physical force or coercion”
    - court read physical force as any act of sexual penetration engaged in w/ out victim’s freely given consent
      * **act of penetration is enough to show the element of force**
  + question: who should change force requirement – courts or legislature?

**Absence of Consent:**

* is consent a state of mind (something the person feels) or an action (giving authorization)?
  + possible conceptions:
    - verbal resistance + some other behavior that makes unwillingness clear
    - verbal resistance alone (“no means no”)
    - verbal resistance *or* passivity, silence or ambivalence (anything other than affirmative permission by word or conduct)
      * *MTS* approach
    - all words or actions other than express verbal permission (anything other than saying “yes”)
* **Defective Consent:** consent must always be freely given/voluntary & person must have capacity to give consent
  + **Maturity:** statutes often draw a bright line by setting a specific age of consent via statutory rape laws
  + **Incapacity:** most states impose liability when victim is unconscious
    - some impose liability when impose liability if victim is severely incapacitated by drugs/alcohol defendant gave her without her knowledge (MPC)
    - most don’t impose liability if victim is incapacitated short of unconsciousness if *someone other than the defendant* secretly drugged her
    - some states (seeing risk of abuse) allow intoxication (even if voluntary) to negate consent
      * ***People v. Giardino:*** intoxication could invalidate consent even when not physically incapacitating
        + effects of intoxicant should be on power of victim’s judgment rather than power of resistance should be the focus
  + **Relationships of Authority & Trust:** outside psychiatrist/patient relationship, criminal law generally doesn’t invalidate consent in adult relationships
* **Deception:**
  + ***People v. Evans:*** E met young naïve girl, told her he was psychologist & asked her to participate in study, took her to his apt, tried to have sex w/ her, told her she failed experiment, told her “look where you are, you’re in an apt w/ a strange man. How do you know I’m really a psychologist? I could rape you. I could kill you”, then told her sympathetic story of how she reminds him of old dead gf (played mind games); when she reached out he grabbed her and said “you’re mine”; had sex
    - prevailing view is that **there can be no rape which is achieved by fraud or trick** 
      * **consent = consent to the nature of the act** (sex), not the circumstances surrounding it(e.g. whether or not E was actually a psychologist)
    - possible other argument was threat of force:
      * court must find either forcible compulsion or **threat of forcible compulsion**
        + “I could kill you, I could rape you” as threat of forcible compulsion?

**threat must be viewed from defendant’s perspective** 🡪 if he didn’t intend for words to be a threat, no culpability

victim misconstruing statement as threat is not enough

* + ***Boro v. Superior Court:*** victim received phone call from man claiming to be a doctor saying she had a disease and the only way to get rid of it was to have sex with him
    - **consent = consent to the nature of the act (sex)**
      * consent induced by fraud is as effective as any other consent if deception relates not the thing done (sex), but some collateral matter **(fraud in factum vs. fraud in the inducement)**
    - *Dissent:* legislature by saying consent must be “truly free & voluntary” and “truly unrestricted & knowledgeable” intended for it to bar consent induced by fraud
* *compare to* Zarchin article where in Israel informed consent is required
  + - defendant told victim he was Jewish & single and they had consensual sex, but defendant was convicted of rape when it turned out he was neither because if she had known, she wouldn’t have had sex with him

**MENS REA:**

Most rape statutes are **silent on mens rea requirement**

* mens rea becomes more important if force & resistance requirements are lessened and rape is focused more on **non-consent**
  + do we judge consent based on reasonableness (negligence standard), defendant’s subjective perspective (recklessness/knowledge standard), or strict liability?
  + strict liability for some cases (statutory rape) when policy > culpability issues
  + most courts require **honest + reasonable belief** (negligence) for mistake of fact (mistake of consent) defense (*Sherry*)
  + note: Alaska requires recklessness standard if force is not an element (culpability-based)
    - argument for recklessness standard: because elimination of force no longer requires resistance, victim’s actions may be more ambiguous
    - policy for negligence standard: reflects societal norms, easier to apply, greater deterrence
  + *issue:* which reasonableness standard to apply when male and female perceptions of reasonableness differ?

***Commonwealth v. Sherry:*** 3 defendants took woman to house party, she claims they forced her to get into car and go to one of their houses and had sex w/ her; they claim she willingly did this; tried to get mistake of fact (didn’t realize she wasn’t consenting) defense

* “no American courts recognize mistake of fact as a defense without consideration of it’s reasonableness”
  + any resistance demonstrating lack of consent is enough to negate reasonableness of belief of consent

***Commonwealth v. Fischer:*** college student charged w/ rape when he got on top of her and said “you know you want it”, pushed her onto bed and forced her to perform oral sex; argued mistake of fact of non-consent because a few hours earlier they had similar, consensual rough sex

* **binding precedent of pervious cases did not allow for mistake of fact to be a defense** 
  + may be allowed in some “new” date rape cases, but this is not a “new” case, but is one where she is alleging force so mistake of fact defense not allowed
    - if want to include it as defense, **up to legislature to change law**, not the courts

**courts interpret rape statutes in two ways:**

1. what is force?
   * is any act of non-consensual penetration enough (*MTS*)?
     + - note: majority view is still force + non-consent
         * force includes threat of force

threat for whose perspective (*Rusk* vs. *Evans*)?

what kind of threat (*Milnarich, Thomspon, Dipetrillo*)?

1. what type consent is required?
   * what mens rea is required for defendant with regards to non-consent?
     + - mistake of fact defense?

**Blackmail (MPC § 223.4)**

Policy Considerations: (+): private actors shouldn’t engage in private bartering using a public resource (e.g. threatening suit); (-): why should law step into private situation, sometimes threats are all the power people have (e.g. consumers vs. big companies)

* statutes are often written broadly and left to discretion of prosecutors

**Common Law Framework:**

need to **look at statute** to see how jurisdiction views blackmail/extortion

* what kind of threat triggers it?
  + threat to accuse of a crime, threat of violence, threat to reveal a secret, etc.
* threat to get what?
  + using threat to obtain property?
  + using threat to get someone to do an act against his/her will?
* requires **specific intent** (mens rea very important)
* ***State v. Harrington:*** defendant attorney hired prostitute to seduce client’s ex-husband and took pictures, sent letter saying that if he doesn’t agree to settlement they will have to bring all this embarrassing evidence to light in court; also said he would consider advising his client to report him to the IRS
* **a demand for settlement, accompanied by malicious threat to expose criminal conduct, if made with intent to extort payment, against his will, constitutes crime of blackmail**
  + - participation was done w/ preconceived design to get $$ for his own benefit
      * + **exceeded limits of defendant’s representation of his client in divorce**
  + note: this particular statute allowed threat to sue as form of blackmail (not just property), but statutes vary
  + also note that if **other side offered to settle first** (e.g. he sent pics and husband said what do you want, I don’t want these pictures getting out) 🡪 no extortion
* ***People v. Fincher:*** supermarket managers saw plaintiff stealing, threatened to accuse him of stealing if he didn’t (a) pay $75 + (b) sign paper admitting he stole $; plaintiff accused them of extortion
  + **law doesn’t authorize collection of just debts by threatening to accuse debtor of crime, even if he is actually guilty** 
    - **good faith** in enforcing payment of money alleged to be due to employer **is not a defense** (even though defendant not personally benefiting)
  + policy: don’t want people taking law into their own hands, would rather they go through the official channels
  + *Dissent:* no criminal intent if defendants honestly believed the amount demanded from the plaintiff was the amount they were rightfully owed (acted w/ out malice & in good faith)

**MPC Approach:**

* **MPC 223.4: Theft by extortion**
* A person is guilty of theft if he **purposely obtains the property of another** by threatening

inflict bodily injury on anyone or commit any other criminal offense

accuse anyone of a criminal offense

expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business reputation

take or withhold action as an official, or cause on official to take or withhold action

bring about or continue a strike, boycott or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interst the actor purports the act

testify or provide information or withhold testimony or information with respect to another’s legal claim or defense

* + It is an **affirmative defense** to (2), (3) or (4) that the property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was **honestly claimed as restitution or indemnification for harm done** in the circumstances to which such accusation exposure, lawsuit or other official action relates, or as compensation for property or lawful services

note: blackmail doesn’t extend to **your** **own property** (Tobi the bunny example)

**Attempt (MPC § 5.01):**

separate statutory crime

* under common law: usually graded one step lower than the actual crime
* under MPC: graded same as actual crime

Policy Considerations for Punishing Attempt:

* **Utilitarian**: deters criminal if even attempt to do crime is criminal
* **Retributive**: same moral blameworthiness of person who attempts to commit a crime but doesn’t succeed and one who does succeed
  + *but* no **harm-based retributive** argument: blameworthiness depends on the harm caused (no harm caused by attempt)
    - law cares a lot about harm (why most attempts are graded lower than completed crimes)

**MENS REA:**

**Common Law Framework:**

attempt is a **specific intent crime** (need to show **intent for result element** (crime he’s charged w/ attempting))

* need specific intent for attempt even if lesser mens rea would suffice for conviction of the completed crime

***Smallwood v. State:*** defendant was convicted w/ rape and attempt to murder for raping victims w/out a condom even though he was HIV positive

* to charge attempt to kill, must show **specific intent** to kill
  + **can infer intent from circumstantial evidence** (acts, conduct or words)
    - but need to **make sure there is enough evidence** for trier of fact to reasonably conclude there was an intent to kill
      * when viewing evidence, consider:
        + **magnitude of risk** **of result**

**“it is permissible to infer one intends the natural and probable consequences of his act”**

compare to shooting gun at victim (**risk of death is so high it becomes reasonable to assume defendant intended to kill**), here prosecution couldn’t show that death by AIDS was the **probable result** of defendant’s actions

* + - * + **defendant’s actions**

in this case, actions were wholly explained by intent to commit rape

compare to cases where defendant wore condoms w/ some people and not with others

* **explicit statements or actions demonstrating such an intent**
  + - * no explicit statements in this case
        + *compare to* ***Hinkhouse:*** defendant said he wants to give others HIV & actively lied about not having HIV

**MPC Framework:**

**MPC 5.01: Criminal Attempt**

* conduct:
  + 5.01(1)(a) **(completed attempt)**: purposely engages in conduct that would constitute crime if the attendant circumstances were as defendant believes them to be
  + 5.01(1)(c) **(incomplete attempt)**: purposely engages in act or omission constituting **substantial step** in a course of conduct planned to culminate in his commission of the crime
* attendant circumstances: same mens rea required as underlying offense (5.01(1)(a))
  + *ex*: if for burglary need to know that building is a dwelling 🡪 need to know it’s a dwelling for both attempt & actual crime
* result: purpose or belief that result will occur (5.01(1)(b))
  + *cannot attempt unintentional crime*

**ACTUS REUS:** distinguishing between **preparation vs. attempt**

**Common Law Framework:**

**Three Tests:**

* **Dangerous Proximity Test:** how far does the defendant have left to go?
  + ***People v. Rizzo:*** four people trying to commit robbery, jumped out of car and ran into bank looking for bank roll holder, but he wasn’t in bank, were arrested at that point
    - Attempt has to be when the act is so near to its accomplishment that in all reasonable probability the crime itself would’ve been committed but for a timely interference (must have **“dangerous proximity to success”**)
      * In this case there was no dangerous proximity (didn’t even find the person they wanted to rob yet)
  + policy: want to place threshold of criminality very close to the last act to give the defendant a chance to change his mind since abandonment is usually not a defense at common law
    - *compare to MPC*: adopts abandonment defense instead, and allows conduct to be less proximate
* **Res Ipsa/Equivocality Test:** “the act must speak for itself”
  + ***McQuirter v. State:*** black man found guilty of attempt to rape white woman from evidence of him following her home & police testimony of him claiming to have wanted to rape her
    - uses actus reus to point to intent
      * criminal attempt is an **act which shows criminal intent on its face**
        + how clearly do defendants actions bespeak his intent?

ex: buying a box of matches with intent to commit arson 🡪 not attempt; buying a box of matches and saying you will use them to commit arson 🡪 not attempt; buying box of matches and taking them to where you want to make fire, lighting them but then blowing them out when you notice someone watching 🡪 attempt

* + - * + criticism: act may be ambiguous when it is very proximate

ex: could be lighting a match to smoke a cigarette

* **Last Act Test:** defendant must have taken the **last act needed along the road of his criminal intent**
  + ***R. v. Eagleton:*** firing gun but missing 🡪 attempt, everything else before pulling trigger is preparation
    - everything up until **point where defendant can no longer change his mind** is preparation

**MPC Framework:**

* **Substantial Step Test:** focus on how far defendant has already gone
  + MPC 5.01(1)(c): defendant must purposely engage in act or omission constituting **substantial step** in a course of conduct planned to culminate in his commission of the crime
    - MPC 5.01(2): to constitute substantial step, conduct must be **strongly corroborative of actor’s criminal purpose.** substantial step can include but is not limited to:
      * lying in wait, searching for or following the contemplated victim of the crime;
      * enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
      * reconnoitering the place contemplated for the commission of the crime;
      * unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
      * possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;
      * possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances
      * soliciting an innocent agent to engage in conduct constituting an element of the crime.
    - ***United States v. Jackson:*** defendants conspired to commit armed robbery, police were informed, apprehended them as they were in car w/ covered up license plate moving toward bank; in car they found masks, gun, handcuffs
      * conduct was enough to constitute substantial step (driving toward bank) and items found in car were strongly corroborative of criminal intent
  + MPC 5.01(4): renunciation of criminal purpose (**abandonment**) is an **affirmative defense**
    - defendant 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 abandonment is **motivated by unexpected circumstance that would lead to increased probability of detection** or **makes commission of the offense more difficult**
* note: MPC allows police to intervene much earlier than other tests & in exchange allows abandonment defense

**\*\* most courts use either MPC or dangerous proximity test \*\***

**Accomplice Liability (MPC § 2.06)**

* policy considerations:
  + powerful law enforcement tool that extends reach of prosecutors
    - if charged as accomplice, charged w/ actual crime 🡪 incentive to plea
  + may not be perfectly in line with culpability (disproportionate punishment)
  + expands criminal law (mass incarceration issue)
* an accomplice needs their own mens rea + actus reus (**not a crime of vicarious liability**)
  + ***State v. Guminga:*** tried to prosecute restaurant owner when waitress sold underage girl alcohol w/ out owner’s knowledge
    - against Due Process to impose criminal penalties based on vicarious liability (only ok for civil penalties)
* accomplice is usually **charged with the same crime** as the person that actually did the conduct

**ACTUS REUS:**

* very minimal requirement
  + no causation needed (**don’t need to show “but for” cause**)

**Common Law Framework:**

* must **aid** or **encourage** the commission of the crime
  + note: under common law (but not MPC), **need to *actually* aid or encourage** (even if in some small way)
    - have to at least tell the person committing the crime that you will aid/encourage, even if it turns out your help is not needed (can’t just resolve in your mind to help)
* standard is **minimal**
  + **encouragement:**
    - ***Wilcox v. Jeffery:*** J was charged w/ aiding and abetting commission of illegal concert; bought ticket & attended concert that he knew was unlawful
      * buying ticket, clapping, attending concert are all enough to show encouragement
  + **materiality of aid:**
    - ***Attorney General v. Tally, Judge:*** brothers set out to kill victim who seduced judge’s brother in law; judge stopped warning telegraph from being delivered to victim
      * judge is guilty because by stopping telegram, made it easier for brothers to accomplish their crime (not getting warning telegraph put victim at greater disadvantage)
        + **it is enough for assistance to facilitate result, even if would have happened w/ out the assistance** (no need for “but for” cause)
      * note: if telegraph operator still sent the letter & if brothers didn’t know the judge was trying to stop the letter 🡪 no accomplice liability bc no aid (letter was still sent) or encouragement (brothers weren’t encouraged bc they didn’t know)
        + intent (mens rea) exists but no actus reus

*compare to* MPC (where attempt to aid is enough for actus reus)

**MPC Framework:**

* **MPC 2.06(3):** a person is an accomplice if:
  + (a) with the purpose of promoting or facilitating, he:
    - (i): **solicits a person to commit a crime**
    - (ii): **aids or agrees or attempts to aid in planning or committing crime**
      * MPC allows conviction even if crime didn’t occur (attempt)
    - (iii): **having legal duty to prevent, fails to make a proper effort to do so** (omission)
  + (b) **his conduct is expressly declared by law to establish his status as an accomplice**

**MENS REA:** since actus reus is so minimal, mens rea ends up doing most of the work

**Common Law Framework:**

Conduct Element: **PURPOSE**

* **Majority View:** must **intend to aid or encourage** the commission of the crime
  + ***Hicks v. United States:*** Hicks was charged w/ murder of Covlard by aiding & abetting Rowe; convicted bc jury was wrongly told all that’s needed is for H’s actions to have encouraged/aided R
    - for H to be charged, **needs to have the specific intent to encourage/aid** (intent to aid & abet commission of crime)
* **Minority View:** **knowledge** may be sufficient
  + ***United States v. Fountain:*** prisoner allowed prisoner to take knife from waistband, which other prisoner used to kill a guard
    - defendant knew knife would be used to kill guard, even if he didn’t intend for guard to die, knew it would happen
      * knowledge is enough bc **crime is serious** (knew knife would be used to kill, **had time to change his mind**, still gave knife)
  + note: if you make crime have knowledge requirement, defendants will also be on the hook for **willful blindness**
    - would result in broad liability, especially for merchants (e.g. realtor case didn’t ask where $$ was from when buyer was shady & paid all cash)
  + ***Rosemond v. United States:*** must have knowledge sufficiently in advance to have some **realistic opportunity to quit the crime** (time to change your mind hinted at culpability)
* When is Evidence Sufficient to **Infer Intent from Knowledge**?
  + ***State v. Gladstone:*** T was hired by police to ask G for weed. G said he doesn’t have any but knows that K does (gave him K’s address and drew him a map of how to get there)
    - no aiding & abetting unless one “in some sort **associate himself w/ the venture**, that he participates in it as something that he wishes to bring about and by his action seeks to make succeed
      * he is not being charged w/ helping T buy weed, but w/ helping K sell it
    - factors that could have inferred intent:
      * if G is present at the sale or touting the product
      * G having some stake in the venture (making $$ from K’s sales)
      * G associating himself w/ venture in some way
        + calling K to ask if he can sell T weed
        + walking T over to K’s house
  + note: can also use *Lauria* factors from conspiracy

Result Element: **SAME AS UNDERLYING CRIME** (can be an accomplice to unintentional crime)

* **Majority View:** liable if you **purposely facilitate the conduct** that causes the result and your ***mens rea with respect to the result is the same as required for the underlying offense*** (same as principal)
  + ***State v. McVay:*** defendant directed engineer & captain to operate boiler on ship that exploded, charged w/ manslaughter (requirement criminal negligence) as accomplice
    - **defendant intended to aid the underlying conduct** (operation of boiler) and negligence is sufficient for result element because **mens rea for result element = same as for principal**
  + ***Commonwealth v. Roebuck:*** victim was lured into apt where he was ambushed, ended up being shot & killed; defendant helped orchestrate events but didn’t shoot victim (or intend for victim to be shot)
    - defendant **intentionally aided/abetted conduct** (ambushing victim) and was reckless as to his death (was aware there was high risk of shooting happening), which is same as required of principal for manslaughter
  + ***People v. Russell:*** defendants were having gun battle outside apt complex; one of them shot & killed passerby; all 3 charged w/ depraved heart murder (under accomplice theory)
    - all of them had the **intent to engage in the gun fight** (conduct) and were grossly indifferent to value of human life (what’s needed for depraved heart murder result)
* **Minority View:** some jurisdictions say you can’t be an accomplice to negligent/reckless crimes

**MPC Framework:**

Conduct Element: **PURPOSE**

* **MPC 2.06(3)(a): purpose** to facilitatecommission of the offense (conduct)
  + must have the **specific intent to further the underlying conduct** committed by the principal
    - can infer purpose from knowledge same way as CL (*Hicks*, *Gladstone*)

Attendant Circumstance: **AMBIGUOUS**

* ambiguous on purpose (leaves to courts to decide)
  + ex: if it’s a crime to possess a gun if you’re a felon
    - A sold gun to B (felon), but had no idea he’s a felon, should A be liable as an accomplice for B’s possession (in all otherwise besides attendant circumstance A is accomplice)?
      * think about **culpability**
        + usually if it’s the type of attendant circumstances that doesn’t require special knowledge/presence to make judgment call 🡪 same mens rea as principal
        + if it’s the type of attendant circumstance that requires prior knowledge/being at the scene of the crime 🡪 higher mens rea required
        + if element is there more for deterrence (e.g. shooting police officer) 🡪 same mens rea as principal

Result Element: **SAME AS UNDERLYING CRIME**

* **MPC 2.06(4):** requires same mens rea as underlying offense (*McVay, Russell, Roebuck)*
  + can be an accomplice to unintentional crime (unlike for attempt)

MPC does not use *Luparello*

**MPC 2.06(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 its effectiveness** in the commission of the offense (stops to commission), OR
  + (ii) **gives timely warning to law enforcement** or otherwise makes proper effort to prevent the crime

**MPC 2.06(7):** a person can be convicted via complicity even though the person who committed the crime has not been convicted (*unlike in CL*)

**Liability for Additional Crimes of Principal:** **common law only** (MPC rejects)

* ***People v. Luparello:*** L enlisted several friends to find out where his ex-wife is from M; said   
  “willing to do whatever it takes” to get info; when L wasn’t there, friends went to M’s house and one shot him; L charged w/ murder under accomplice liability
  + did not intend to facilitate murder (against his purpose of getting info from M), probably just intended to facilitate battery
    - court **extends liability to any reasonably foreseeable offense that may happen as a result of the crime you are intentionally aiding & abetting** (if you set in motion something bad, you’re on the hook if something worse ends up happening)
      * murder was reasonably foreseeable in this case
* ***Roy v. United States:*** M tried to buy gun from Roy, Roy referred him to Ross, Ross sold M gun, then took it back and robbed M of the rest of his money; Roy charged as accomplice to armed robbery
  + For defendant to be liable, result must be **in the ordinary course of things, a** **natural and probable consequence** of the conduct defendant is intentionally aiding & abetting (narrowed *Luparello* rule)
    - result must be something that may reasonably ensue from the planned events, not what may conceivably happen (like *Luparello* says)
      * not enough evidence to show that robbery was natural & probable consequence of gun sale
* **Analysis:**

1. did the principal commit the target offense?
2. is the secondary party an accomplice to the targeted offense (did he aid & abet it)?
3. did the principal commit an additional crime beyond the targeted crime?
   1. *Luparello*: was the additional crime reasonably foreseeable from first crime he intended to facilitate (even if wasn’t contemplated)?
   2. *Roy:* was it a natural & probable consequence of the crime he intended to facilitate?

* note: this is a **minority view** because it broadens accomplice liability so much

**Negation via Defenses** (see more on *DEFENSES)***:**

* if principal has **justification defense** 🡪 accomplice not liable
* if principal has **excuse defense 🡪** accomplice still liable

**Relationship between the Liability of the Parties:**

**Common Law Framework**: **principle must have committed a crime for you to be able to charge accomplice**

**Analysis:**

1. did principal commit target crime?
   * + yes 🡪 step 2
     + no 🡪 step 5
2. does principal have justification defense?
   * + yes 🡪 can’t charge accomplice (justification defenses transfer to all parties)
     + no 🡪 step 3
3. does principal have excuse defense?
   * + yes/no 🡪 can still try to charge accomplice (excuse defenses don’t transfer)
       - ***Vaden v. State:*** police officer asked V to take him on illegal hunting trip, officer shot & killed 4 foxes, V was charged as accomplice

since officer has law enforcement *excuse defense*, it doesn’t transfer to V

1. did accomplice aid & abet (mens rea + actus reus) target crime?
   * + yes 🡪 can charge as accomplice 🡪 step 5
     + no 🡪 can’t charge as accomplice
2. did principal commit any other crimes?
   * + yes 🡪 if we are in *Luparello*, can charge as accomplice to other reasonably foreseeable crimes committed by principal
     + no 🡪 end of analysis (only charging as accomplice to target crime)
3. did principal attempt target crime?
   * + yes 🡪 step 6
4. did accomplice aid & abet (mens rea + actus reus) the attempt?
   * + yes 🡪 can charge as accomplice to attempt
     + no 🡪 can’t charge accomplice with anything
       - ***State v. Hayes:*** defendant was tricked into robbing store w/ Hill (Hill wanted defendant caught); defendant lifted Hill through the window into store so Hill did the actual “burglary”

* because Hill was not committing a crime (no intent to steal), defendant couldn’t be charged as an accomplice
* also can’t charge Hill w/ attempt so can’t charge D w/ attempt

**MPC Framework: principal doesn’t have to commit any crime for you to charge accomplice**

**MPC 5.01(3):** can charge accomplice w/ attempting a crime even if you can’t charge the principle with it (as long as he has right mens rea + actus reus for attempt)

**Withdrawing From Accomplice Liability:**

**MPC 2.06(6)(c):** must (a) render assistance ineffective (undo assistance) OR (b) give timely warning to law enforcement

**Common Law:** must render assistance ineffective (undo aid or encouragement)

**Conspiracy (MPC § 5.03)**

**conspiracy:** agreement to commit a crime

* conspiracy is a **crime in itself** and a **mechanism for accomplice liability**
  + can charge someone with: (a) conspiracy itself, (b) crime they conspired to commit (if accomplice), AND (c) any reasonably foreseeable crimes committed in furtherance of the conspiracy (if in *Pinkerton* jx)

policy considerations: (-): punishment not proportional (retributive), casts wide net of criminality (corner drug seller is on the hook as if they were drug kingpin); (+): critical law enforcement tool for breaking up group crime, very hard to otherwise get the leaders of group operations, when people agree to commit crime together it’s more likely they’ll do it so we want to prevent group crimes (utilitarian), assumption that if people know they’re on the hook for crimes of co-conspirators, will encourage them to be more careful (unrealistic in uneven power structure crime organizations)

**ACTUS REUS**

**Common Law Framework:**

* **Tacit Agreement Test:** actus reus = agreement itself
  + ***Interstate Circuit, Inc. v. United States:*** 8 different movie theaters all agreed to same provision w/ distributor; would not have made sense if all didn’t agree; all knew that others were being offered this provision
    - **tacit agreement** is sufficient (don’t need to show actual, express agreement)
      * direct evidence of agreement usually not available and must rely on **inferences from the course of conduct of the alleged conspirators** 
        + nature of the proposals (wouldn’t have made sense for any to agree unless all agreed)
        + manner in which proposals were made (all knew that they were being sent to others)
        + unanimity of action (all agreed to proposal)
        + none were able to call any witnesses that could say they attempted to negotiate term
    - ask: does the conduct make sense absent an agreement? could these actions be coincidental or does it make sense that they would have an agreement?
* **Overt Act Test:** actus reus = agreement + overt act
  + some states require a step towards effecting the objective of the conspiracy
    - usually very minimal requirement (if at all)
      * what would count as preparation in attempt would count as overt act here
        + e.g. telephone convo agreeing to conspiracy (agreement) + continuing to talk & starting to plan it planning (overt act)

**MPC Framework**: wants overt act unless felony

* **MPC 5.03(1):** a person is guilty of criminal conspiracy if
  + (a) **agrees** **to engage** in conduct which constitutes crime, or attempt or solicitation to commit such crime, or
  + (b) **agrees to aid** in planning or commission of crime, or attempt or solicitation to commit such crime
* **MPC 5.03(5):** all crimes need **overt act**, except 1st & 2nd degree felonies

**MENS REA:**

* conspiracy is **specific intent** crime (need intent to agree + intent that crime be committed)
  + cannot conspire (or attempt) to commit unintentional crime (unlike accomplice liability)

**Common Law Framework**:

* ***People v. Lauria:*** telephone service operator knew his answering service was used by prostitutes; charged w/ conspiracy; claimed no intent for crime to occur
  + if **serious crime** 🡪 **intent may be inferred from** **knowledge** 
    - arguments against knowledge standard: high penalties should have higher mens rea, conspiracy attaches early on so want to make sure defendant is culpable
      * note: if knowledge standard, also on the hook for **willful blindness**
  + if **not that serious crime** (e.g. prostitution) 🡪 need **specific intent for crime to occur**
    - intent can be *inferred*from knowledge by showing that defendant has **stake in the venture:**
      * charges criminals above market price
      * no other legitimate use exists for these services/goods
      * volume of business w/ criminal is grossly disproportionate to any legitimate demand, or sales for illegal use are high proportion of seller’s total business
* note: can also use *Gladstone* (from accomplice liability)
* ***People v. Powell:*** some courts (**minority**) say that to be criminal, a conspiracy must be **“animated by a corrupt motive or an intention to engage in conduct known to be wrongful”**
  + good faith & ignorance of criminality are defenses
    - **many states (and MPC) reject because essentially allows mistake of law defense**

**MPC Framework**:

* **MPC 5.03(1):** need **purpose** to promote or facilitate commission of crime
  + conduct = purposeful
  + result = purposeful (must be your intent that result occur) (note: compare to *accomplice*)
  + attendant circumstance = ambiguous on purpose
    - again look to **culpability** to argue (*same as ACCOMPLICE*)
      * ***United States v. Freed:*** upheld conspiracy to possess unregistered hand grenades (even though defendant didn’t know they were unregistered), registration strict liability std
        + possessing grenades is culpable in itself

**\*\* this only shows intent for the conspiracy, you need to still prove accomplice liability for the target crime of the conspiracy separately unless you’re in CL *Pinkerton* (very easy to show bc agreement = actus reus; intent = intent to commit target crime inferred from conspiracy) *\*\****

***Pinkerton*:** COMMON LAW ONLY (including **federal government**), not MPC

***Pinkerton v. United States:*** brothers were charged w/ conspiracy to commit tax fraud, only one committed it, both were charged w/ committing it (even though no evidence that other brother aided & abetted commission)

* when parties agree to commit crime, they are **responsible for the crime they agreed to commit**, and for any **reasonably foreseeable** crime committed in **furtherance of the conspiracy** (no need to show accomplice liability to charge)
  + **limits/exceptions to *Pinkerton:***
    - ***State v. Bridges:*** man was at party and got into argument w/ partygoer, left to go get some friends, went to pick up guns that friends would use to keep crowd at bay while defendant fights partygoer; friend began firing gun which killed someone; defendant charged w/ conspiracy to commit assault + substantive crime of murder
      * court applied *Pinkerton*, saying co-conspirator can be held liable for the commission of the substantive criminal acts not within the scope of the conspiracy if they are **reasonably foreseeable as natural and probable consequence of the conspiracy** 
        + in this case, gun firing was foreseeable natural and probable consequence of bringing loaded gun for purposes of intimidating crowd
    - ***United States v. Alvarez:*** undercover agents were in big drug deal, shootout occurred and agent was killed, all members of drug deal were charged w/ murder under *Pinkerton* theory
      * argued that murder of federal agent was not foreseeable or intended part of crime
        + court acknowledged this was unprecedented application of *Pinkerton* but allowed extension in this case (big drug deal = public policy issue)
      * note: court acknowledged that there may be an **exception** under *Pinkerton* for people who play a **minor role** in the conspiracy (always make this argument)

policy considerations: (+): increasingly sophisticated organized crime makes *Pinkerton* the only way to get to top members, gives co-conspirators incentive to police unnecessary violence (utilitarian), **increases prosecutorial power** to threaten high sanctions to low-level members in exchange for information on high-level criminals; (-): broadens net of liability, imposes sanctions for crimes defendant didn’t commit (retributive)

**Duration of Conspiracy:**

* conspiracy is traditionally viewed as a continuing offense (continues until **goal has been achieved** or it has been **abandoned**)

**Common Law Framework**: can’t renunciate, but can try to withdraw

* **can’t renunciate:** once make agreement 🡪 on the hook for crime of conspiracy
* **can try to withdraw:** not be liable for any further crimes after withdrawal (but still liable for the conspiracy)
  + withdrawal must be **unambiguous and effective** 
    - note: this is a big issue in *Pinkerton* jurisdictions

**MPC Framework:** can try to renunciate and withdraw

* **MPC 5.03(6):** **renunciation is affirmative defense**
  + must show that (a) thwarted success of conspiracy + (b) manifested complete and voluntary renunciation of criminal purpose
* **MPC 5.03(7)(c):** can **withdraw** if (a) advises co-conspirators of withdrawal or (b) informs law enforcement
  + only lets you escape liability for *subsequent acts*, not prior acts already committed

**Scope of Conspiracy (Bilateral vs. Unilateral):**

* **Common Law**: usually if there are only 2 people in the conspiracy and one person is acquitted (e.g. other person in conspiracy is law enforcement officer) 🡪 cant charge other person w/ conspiracy
  + ask if jurisdiction allows **unilateral conspiracies** or if requires **bilateral**
* **MPC 5.04(b):** doesn’t matter if other person is acquitted, can still charge defendant as long as has requisite actus reus + mens rea

**Sentencing of Conspiracy:**

**Common Law Framework:** consecutive sentences for both conspiracy & substantive crime

**MPC Framework:**

* **MPC 1.07(b):** doesn’t allow separate punishments if one of the offenses is just the conspiracy to commit the other offense

but *does* allow consecutive sentences if conspiracy was to commit more crimes than just the one charged

**Corporate Crime (MPC § 2.07)**

policy of indicting corporations: (+): stake of criminal prosecution may be the only way to induce company to change their culture (utilitarian); (-): prosecuting corporation may affect innocent people (stockholders, employees, etc.)

**Common Law Framework:** a corporation may be held criminally liable for the acts of its agent if an agent:

* **(1) commits a crime**
  + must prove that illegal act was committed (mens rea + actus reus required for particular offense was met)
    - only necessary to prove that *some* agent committed a crime (don’t have to show a specific person)
* **(2) within the scope of his employment** 
  + just have to show that act occurred while agent was carrying out job-related duty (easy to show)
* **(3) with the intent to benefit the corporation** 
  + don’t have to show that the corporation *actually* benefitted
    - ***United States v. Sun Diamond:*** corporation was held liable for acts of employer who defrauded the corporation to give money to campaign of the brother of the secretary of agriculture
      * court said that although not actually beneficial, actions were *intended* by employee to benefit the corporation (wanted to cultivate relationship w/ secretary of agriculture for benefit of corporation)
        + intent to benefit is a **fully subjective test** on the part of the employee
* (2) & (3) can be shown by **ratification** on the part of the corporation
  + when employee acts outside of the scope of his employment or with no intent to benefit the corporation, subsequent approval of the act by his supervisor is enough to hold corporation liable (even though otherwise, employee’s acts wouldn’t be enough to hold corporation liable)
* ***United States v. Hilton Hotels Corp.:*** corporation was charged as violating antitrust law bc hotel buyer participated in boycott; corporation argued that they expressly told employee not to participate in boycott and that this was against their policy
  + corporation is responsible for the acts of it’s agents **even if their conduct may be contrary to the corporation’s instructions to them or the corporation’s stated company policies**
    - policy: stated policies may not comport w/ the actions actually condoned by corporation (too easy of a defense for them)
* note: this is the **test used in the federal system** and **most corporate crimes are prosecuted federally**
  + very easy to establish liability (no defense that conduct was against policy or that employee was told not to do it)
    - **gives prosecutors a lot of power & encourages plea bargaining** (bc will likely be found guilty if go to trial)

**MPC Framework**: narrower than common law

* **three ways a corporation may be convicted (MPC 2.07(1))**:
  + **(1) MPC 2.07(1)(a):** the offense is a **violation** or the offense is **defined by a statute in which a legislative purpose to impose liability on corporations *plainly appears*** and the **conduct is performed by an agent** of the corporation **acting on behalf of the corporation within the scope of his employment**
    - **MPC 2.07(5):** unless it is a strict liability offense, it is a defense if the defendant proves by a preponderance of evidence that the high managerial agent employed **due diligence** to prevent the commission of the offense
      * companies can bring in policies as a defense (unlike in common law)
        + why companies have compliance departments (to show due diligence)
  + **(2) MPC 2.07(1)(b):** the offense consists of an omission of a specific duty imposed on the corporation by law, OR
  + **(3) MPC 2.07(1)(b):** the 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 employment
    - **high managerial agent = someone who has duties of such responsibly that his conduct may be fairly assumed to represent the policy of the corporation**
      * **majority:** responsibility in relation to particular business function
        + ***Commonwealth v. Beneficial Finance Co.:*** corporation held liable for bribery

to be a high managerial agent, enough to show that corporation placed the agent in a position where he has enough authority to act on behalf of the corporation in handling the particular business he was engaged in at the time he committed the criminal act

* + - * **minority:** responsibility in relation to whole company (CEO, CFO, etc.)
* **MPC 2.07(6):** person is legally responsible for the criminal acts he performs on behalf of the corporation to the same extent that he would be liable if they were made on his own behalf
  + employee himself is **always accountable for his own actions**

**Sanctions:** how to criminally punish corporation (can’t put them in jail)

* **Fines:** most common sanction
  + why go beyond fines?
    - can negatively affect shareholders & innocent employees
      * can result in **corporate death penalty**
    - may not deter employees whose personal interests don’t align w/ corporation’s interests
    - cost benefit analysis: to deter company must fine (more than benefit of committing crime x probability they’ll get caught), if that amount is more than company is worth 🡪 company may just take the risk and go bankrupt if it’s caught
* **Compliance Programs:**
  + carrots approach: less sanctions if crime occurs while compliance program in place
  + sticks approach: more sanctions/more likely to prosecute if crime occurs while no compliance program is in place
  + can also be requirement of **probation sentence**
* **Non-Prosecution/Deferred-Prosecution Agreements (NPA/DPAs):** very common now
  + government agrees not to prosecute if corporation complies w/ their demands
    - benefit of no collateral consequences (won’t affect innocent employees) while still forcing company to change business practices & activities
    - results in **high prosecutorial discretion**
      * they are in position to regulate corporation’s business activities (can tell them to lower fees, fire someone, get out of a line of business, get compliance department, etc.)

note: for corporate crimes, there is DOJ memo for prosecutors to consider collateral consequences of prosecuting corporation (unlike for crimes of individuals)

**DEFENSES:**

**Justification:** defense that says although crime was committed, it was the right thing to do in that situation

* defense **spreads to everyone involved in crime** (accomplice, co-conspirator)

**Self Defense:** protection of life & person

**Common Law Framework:**

* **Non-Deadly Force:** justified as long as actor reasonably believes that force is necessary to protect yourself from the imminent use of unlawful force by other person
* **Deadly Force:** justified if actor **reasonably believes** that deadly force is **necessary** to prevent the **imminent** use of **deadly force by the other person**
  + deadly force = force reasonably expected to cause death or serious bodily injury
  + **reasonableness**
    - ***People v. Goetz:*** G was sitting in train when 4 youths approached him and said “give me $5”, after he refused and they didn’t back away, he shot them multiple times (going back to re-shoot some if they didn’t look like they were that hurt); charged w/ attempted murder, tried to argue self-defense (G was victim of mugging before and was afraid of them)
      * court said defendant’s conduct must be **reasonable based on the circumstances of the defendant’s situation** 
        + what factors into defendant’s “situation” for reasonableness inquiry?

anything **readily observable** (physical attributes, weapon being used) will be automatically factored in by the jury

prior experiences (G’s prior mugging)?mental health issues (PTSD)?

**battered woman syndrome**

***State v. Kelly:*** K stabbed husband to death w/ pair of scissors after was subject to numerous beatings over the year

courts usually allow BWS to show that defendant *honestly believed* victim was using deadly force & why she didn’t just leave him instead (felt like she had no other choice)

courts usually don’t allow to come into actual reasonableness inquiry (whether her belief that he was using deadly force was *reasonable*)

***People v. Romero:*** culture not part of reasonableness inquiry

***People v. Maggio:*** neurotic fearfulness not part of reasonableness inquiry

* + - **imperfect self defense**: if honestly but unreasonably thought deadly force was necessary may mitigate from murder to manslaughter
  + **imminence**
    - ***State v. Norman:*** wife was consistently beat up by her husband, tried getting help & didn’t work, shot husband while he was sleeping
      * no honest *or* reasonable fear of **imminent** death or great bodily harm bc husband was sleeping
        + **imminence = threats of immediate danger that must be instantly met and cannot be guarded against by calling for assistance or protection of law**

husband was asleep so she had ample time to resort to other means to prevent further abuse

* + - * *dissent:* argument that imminence *was* honest + reasonable 🡪 BWS, tried calling for help before & didn’t work (no other alternative to prevent further abuse), could wake up at any moment & hurt her
    - ***Commonwealth v. Sands:*** wife was consistently beat up by husband, shot him while he was watching TV
      * no imminence bc **no overt act by her husband** at time of shooting to present an imminent danger to her life (was just sitting watching TV)
    - note: some courts replace imminence requirement with “necessary” or “morally justified” (less strict) (**minority view)**
* **Use of Force for Third Party Protection:**
  + use of force for the **protection of other persons** is justifiable when standing in the shoes of the third party, self defense would be allowed AND it’s reasonable *from the perspective of the defendant*
    - basically same as MPC

**MPC Framework:** subjective (not reasonableness) + immediately necessary (not imminent)

* **Non-Deadly Force:**
  + **MPC 3.04:** the actor is allowed to use force when the actor **believes** (*subjective*) the force is **immediately necessary** (*instead of “imminently”*) to protect against unlawful force by other person in the situation
* **Deadly Force:**
  + **MPC 3.04(2)(b):** use of **deadly force** is not justifiable, *unless* the actor believes that such force is **necessary** to protect himself against death, serious bodily harm, kidnapping or sexual intercourse compelled by force or threat
    - **MPC 3.09 caveats:**
      1. **no mistake of law defense** (MPC 3.09(1))
         * self defense justification is unavailable when (a) actor’s belief of the unlawfulness of the force against which he employs protective force is **erroneous**, AND(b) his error is due to **ignorance or mistake as to a provision of the code**
      2. **honest but reckless/unreasonable** belief that deadly force is necessary is not a defense for reckless/negligent crimes (MPC 3.09(2))
      3. **transferred intent:** when actor is justified in using force, but **recklessly/negligently harms innocent person**, can’t use defense for the use of force against the innocent people (MPC 3.09(3))
* **Use of Force for Third Party Protection:**
  + **MPC 3.05(1):** use of force for the **protection of other persons** is justifiable when
    - (a): use of force would be justifiable for self-protection under 3.04,
    - (b): the person who he is helping, under circumstances as the actor believes them to be, would be justified in using such force, AND
    - (c): the actor believes his intervention is necessary

**Exceptions to the Right of Self-Defense:**

**Duty To Retreat:**

* note: you **never** have to retreat when using non-deadly force, question only comes in when using **deadly force**

**Common Law Framework:**

* **No Retreat Requirement (“True Man” Rule/Stand Your Ground Laws):** no requirement to retreat if you are where you have a right to be (majority)
  + policy: (+): deters people from engaging in crime if know person are allowed to use deadly force against them, prevent people from feeling intimidation of being force to leave place they have a right to be; (-): encourages people to engage in more conflict, racial disparity of success of the defense
* **Retreat Requirement:** if state’s have a retreat requirement at all (minority), it’s usually **limited**
  + **“castle” exception:** no duty to retreat if attacked in your own home
    - by intruder (yes), guest (yes), co-occupant (in most states & MPC)
  + ***State v. Abbot:*** A & neighbor’s son got into fight, parents came out w/ hatchet & carving knife; ended up being hurt by it
    - **deadly force is not justifiable when actor knows he can avoid the necessity of using such force with complete safety by retreating** (*same as MPC*)
      * very limited requirement

**MPC Framework:**

* **MPC 3.04(2)(b)(ii):** for there to be a retreat requirement, actor must **know** that he can avoid the necessity of using deadly force **with complete safety** by retreating or by surrendering the possession of a thing to a person or by complying to a demand to abstain from an action which he has not duty to take, except that:
  + **MPC 3.04(2)(b)(ii)(1):** the actor is **not obliged to retreat from his dwelling or place of work**, unless he is the initial aggressor or is assailed in his place of work by another person whose place of work the actor knows it to be
    - attacked by **co-occupant** of dwelling 🡪 no duty to retreat

**On Exam:** (1) is there a duty to retreat? (2) where does the duty kick in (home or anywhere)? (3) under what circumstances does the duty have to kick in (complete safety)? (4) what is the standard for the circumstance (reasonableness or subjective (*Abbot* knowing)?

**Initial Aggressor:**

**Common Law Framework:** if you are labeled the **“initial aggressor”** 🡪 no justification defense for use of deadly force under any circumstances (most states bar defense even for **non-lethal aggressors** (unlike MPC))

* can separate general event into **discreet interactions** (fact-based inquiry of who is initial aggressor at each point)
  + ***United States v. Peterson:*** P & friends were in backyard, had argument, argument ended & friend was leaving, P came outside with a gun and said “if you come in here, I will kill you”, friend got wrench from car & started advancing toward P, P shot him; tried to argue self defense
    - **one cannot support of claim of self-defense by a self-generated necessity to kill**
      * evidence showed that first fight was over, so now P was the initial aggressor to this *new* fight that caused the friend’s death
* **what counts as initial aggression?**
  + some states have **“free from fault” requirement** (very broad limitation on availability of defense)
    - ***Allen v. State:***A & GF got into fight, A went after GF but GF got a rake and struck A in the face, A got into car & followed GF; GF came at her holding the rake, A got gun out of compartment & shot her
      * even though A was not the intial aggressor in this interaction, the fact that they had a fight before bars A’s self defense claim due to **“free from fault” requirement**
        + **anything you do that makes someone mad** is enough for you to count as initial aggressor (very broad limitation)
  + some states require initial aggression to be **“reasonably calculated to incite reaction”**

**MPC Framework:** modification (limitation) to common law rule

* **MPC 3.04(2)(b)(i):** no justification defense if the actor, **with the purpose of causing death or serious bodily harm**, **provoked the use of force** against him in the same encounter
  + **person who uses deadly force first counts as the aggressor** and forfeits their right to self defense
    - if you are the initial aggressor but you only insult someone, and they in return use or threaten to use deadly force 🡪 you can still use deadly force and keep justification defense

**Defense of Property:**

**Common Law Framework:**

* ***People v. Ceballos:*** C saw that some items were stolen from garage, set up death trap for next time someone tried to rob him; two teenagers tried to rob him and were shot but automatic gun that fired when they broke in; C tried to invoke property self-defense justification
  + statute: “homicide is justifiable when committed in defense of … one who manifestly intends or endeavors by violence or surprise to commit a felony”
    - **deadly devices** **(deadly man traps) are not justifiable**
      * policy issue of law enforcement, emergency responders, etc.
      * idea that person can judge whether force is necessary in the situation but a machine can’t
    - since so many felonies today, statute should be read to only apply to **felonies that involve a danger of serious bodily harm** 
      * when felony doesn’t create reasonable fear of great bodily harm, there is no reason to take a life
        + deadly force is not reasonable to prevent all burglaries, especially when no one is, or is reasonably believed to be, on the premises
* note: **pay attention to what specific statute requires** (they often differ)

**MPC Framework:**

* **MPC 3.06(3)(d):** the use of deadly force is **not justifiable**, unless
  + (i): the person against whom the force is used is **attempting to dispossess him of his dwelling** other than under a claim of right to its possession, OR
  + (ii): the person against whom the force is used is **attempting to commit or consummate, arson, burglary, robbery, or other felonious theft or property destruction** AND either
    - (1): has **employed or threatened deadly force** against or in the presence of the actor, or
    - (2): the use of **force other than deadly force** to prevent the commission of the crime **would expose the actor or another in his presence to substantial danger of serious bodily harm**
* **MPC 3.06(5):** it is never justifiable to use **deadly device** to protect property

**Necessity/“Choice of Evils”**: defendant had to commit crime because it was the **lesser evil** of his two choices

* use as **last ditch argument**
  + most states don’t codify this defense at all (strictly common law)

**Common Law Framework:**

* defendant must be faced with a **choice of evils** + choose “lesser evil”
  + standard for determining the lesser evil:
    - **objective standard –** must be “as a matter of fact” correct, regardless of how reasonable
    - **negligence standard** – what one “reasonably believes” (doesn’t have to actually be correct)
    - **subjective standard** (uncommon)– what one believes
  + weighing the two evils includes **the evil of allowing this type of necessity defense going forward** (not just the evil of the crime itself)
    - e.g. what is the evil of allowing an economic necessity defense going forward for law/society
      * always make **slippery slope argument**
* must believe behavior is **“necessary”** to avoid greater harm or evil
  + have to show that there were no legal alternatives
* harm must usually be **“imminent”** (but depends on statute)
* must consider **legislative intent**
  + if there is any evidence that legislature considered and rejected this situation as a defense 🡪 no defense
    - this defense is meant to only be for **situations the legislature didn’t think about**
      * ***Commonwealth v. Hutchins:*** defendants grew weed on property to give to sick child for pain; necessity defense (growing weed to save child > gov policy of drug crimes)
        + argument **against** **legislative intent**: slippery slope (harder for drug enforcement going forward); other state have this defense but this state doesn’t (conscious choice for legislature not to allow it)
        + argument **for legislative intent**: narrow use of defense (not growing to sell, sick child), legislature didn’t consider this issue when statute was made

note:

* necessity defense **doesn’t apply to homicide** (unlike MPC)
* some common law jx require emergency to be created by **natural forces** (not human forces)
* most jx don’t allow defendant to raise necessity defense **if defendant created the situation of necessity in the first place** (MPC allows as long as crime requires greater culpability than defendant had)
* **medical necessity:** courts are split about allowing use of weed to alleviate medical symptoms (*Hutchins*)
  + note: federal prosecution doesn’t allow this defense for drug crime
* **economic necessity:** most states **don’t allow** economic necessity defense (slippery slope issue)
  + argument can come in at sentencing, but not prosecution

**MPC Framework:**

* MPC doesn’t limit by **type of necessity** (e.g. economic, medical, etc.)
* MPC doesn’t limit for homicide (unlike common law)
* MPC doesn’t preclude defense if crime requires higher culpability than defendant had (no matter who started it)

**MPC 3.02:**

1. conduct which the actor **believes** (*subjective*) to be **necessary to avoid a harm or evil** to himself or another is justifiable provided that:
   * 1. the harm or evil sought to be avoided is **greater** than that sought to be prevented by the offense charged
     2. neither the code or other law defining the offense provides **exceptions dealing w/ this specific situation**
     3. **legislative purpose** to exclude necessity defense claimed **doesn’t otherwise plainly appear**
2. when actor was **reckless or negligent** in bringing about choice of evils situation OR in **appraising necessity** of his conduct, necessity defense is unavailable for crimes that **only require recklessness or negligence to establish culpability**

**Excuse:** defense admits that act was not the right thing to do, but that particular defendant should not be held responsible (focuses on the *actor*, not the *act*)

* defense **does not spread to all involved** (limited to particular defendant)

policy considerations for excuse defense: utilitarian: uncontrollable actions can’t be deterred, confining liability to acts that person has control over maximizes deterrence effects (people can control whether or not they’ll avoid criminal punishment); retributive: no blameworthiness for action person can’t fully control

**Duress:**

**Common Law Framework:**

conduct is a result of an **imminent threat** **from a human being** of **serious bodily injury or death** to **yourself or a family member**, and as a result of that threat, a **man of ordinary fortitude and courage might justly yield to it** (*reasonable person standard*)

* reasonable person standard:
  + - * + immaturity/age: probably not (unlike MPC)

***State v. Heinemann:*** defendant tried to argue that teenagers are more susceptible to pressure & duress so age should be considered in reasonable person determination

court said no bc legislative intent shows wanting to treat 16 yr olds as adults for trial

* + - * + IQ: courts are split

***United States v. Johnson:*** low IQ (even if low enough for mental retardation) should not be included in reasonable person standard

*compare to* ***Commonwealth v. Demarco:*** IQ should be included in reasonable person standard if mental disability is “gross and verifiable”

* + - * + battered woman’s syndrome:courts are split

some differentiate bc self-defense is *against her batterer*, but duress is crime *against someone else under pressure from her batterer*

policy: want to figure out who could have stood up to pressure, and who couldn’t have

* want to make sure people who *can* stand up to pressure, do so (don’t want to extend defense too much)
  + **no duress defense for homicide** 
    - note: some statesallow duress as *mitigation from murder to manslaughter*
  + **no duress defense if person created situation where he would likely be under duress to commit crime** (e.g. joined a gang)

**MPC Framework:**

**MPC 2.09:**

1. duress is an affirmative defense if actor engaged in criminal conduct because he was **coerced to do** so by the use, or threat of use, **unlawful force** **against himself or another person**, which a person of **reasonable firmness in his situation wouldn’t have been able to resist** 
   * + no imminence requirement (unlike CL)
     + must be threat by a person
     + doesn’t limit who threat is *towards* (unlike CL person or family member)
     + person of reasonable firmness in defendant’s situation:
       - **stark, tangible factors** come into reasonableness inquiry (health, size, age, etc.)
       - NOT **temperament** (e.g. doesn’t matter if person is especially timid)
2. Duress defense is **unavailable** if the actor recklessly placed himself in a situation where it was probable that he would be subject to duress

Duress defense is **unavailable** if the actor negligently placed himself in such situation, whenever negligence suffices to establish the culpability of the offense charged

1. When the conduct of the actor would otherwise be justifiable under 3.02 (necessity), this section does not preclude such defense
   * + can raise **both necessity & duress defense** (if crime you committed was a choice of lesser evil)

**Insanity:**

policy:(+): utilitarian: can’t deter conduct that people don’t understand; retributive: making culpable choices is core of blameworthiness, BUT no harm-based retributive argument bc still did harm; (-): hard to tell when someone is faking it

**legal insanity:** specific subset of mental illness that allow defendant to be excused from having committed a crime (term of art)

* defense is **very rarely invoked**
  + - * + depending on jx, some places automatically put you in mental institution

most only want to raise defense if facing high prison sentence

* + - * there is **presumption of legal sanity**, jx vary on who has burden of proof to defeat presumption:
        + some jx 🡪 if defendant raises insanity defense, burden on prosecutor to prove defendant is sane
        + some jx **(federal system)** 🡪 burden on defendant to prove he meets test of legal insanity
      * note: some jx want to **get rid of insanity defense** (and use as mens rea indicator or just in sentencing)
        + SCOTUS hasn’t ruled on due process issues of allowing/not allowing insanity defense

**Common Law Framework:** lacks “knowledge”

1. ***M’Naghten’s Case* Test**:at the time of the committing of the act, the defendant had a **disease of the mind**, as to ***not know* the nature and the quality of the act** he was doing OR **not know that it was wrong**
   * **no volitional acts** (irresistible urges)
   * have to not be able to know nature/wrongness of conduct (strict standard)
2. **Federal Test:** at the time of the act, as a result of a **severe mental disease or defect**, defendant is ***unable to appreciate* the nature and quality of the wrongfulness of his act**
   * compromise btwn *M’Naghten* & MPC
     + **no volitional acts**
     + can *know*, but **not appreciate** nature/wrongfulness of act (less strict standard)

**MPC Framework:** lacks “capacity”

**MPC 4.01:**

1. a person is not responsible for criminal conduct if **at the time of such conduct** as a result of **mental disease or defect**, he **lacks substantial capacity** **to** either **appreciate the criminality of his conduct** OR to **conform his conduct to the requirement of the law**
   * **“capacity”** not just knowledge (broader than CL)
   * includes **volitional prong** (irresistible urges)
     + note: this has fallen out of favor because experts can’t tell who has volitional control or not (who’s faking it)
       - ***United States v. Lyons:*** defendant convicted of drug possession tried to show he was addicted & couldn’t control his behavior
         * drug addiction can’t be entered as evidence that can’t control actions (can only be entered to show evidence of addiction’s effects on the brain)

to hard to distinguish between irresistible & resistible urges

1. the term “mental disease or defect” does not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct (meant to prevent defense for **psychopaths**)

**Competence to Stand Trial:**a person who lacks sufficient mental capacity to understand or participate in the relevant legal proceedings is **incompetent**

* **MPC 4.04:**no person who as a result of mental disease **lacks capacity** to **understand the proceedings against him** or to **assist in his own defense** shall be tried, convicted, or sentenced for the commission of the offense as long as such incapacity endures

**Result of Acquittal Based on Insanity Defense:**

* **civil commitment:** orders person to be placed in mental institution until well enough to be released
  + some jx require mental illness + danger to society to be proven before sending to mental institution
  + some jx say mental institution commitment is automatic & mandatory
* **guilty but mentally ill:** get sentenced normally but required to get treatment in mental institution instead of jail while serving sentence

**Expansion of Excuses:** can’t criminalize *status*

* ***Robinson v. California:*** charged R for being a drug addict
  1. can’t criminalize someone for being an addict because it’s: (a) status, (b) disease/illness, (c) involuntary/can’t control
     + **holding: can’t criminalize status, but once person takes some action (even if *compelled by status*), can punish for that action (actus reus)**
       - ***Powell v. Texas:*** P charged for being intoxicated in public place; tried to raise defense that he was a chronic alcoholic & couldn’t control his actions, court still imposed punishment
         * he wasn’t punished for *being an alcoholic*, he was punished for appearing in public drunk (separate actus reus)
       - ***United States v. Moore:*** drug addict was charged w/ possession, claimed was addicted and couldn’t control behavior; court still imposed punishment
         * he wasn’t punished for *being a drug addict*, he was punished for possession of drugs (separate actus reus)
     + policy considerations for *status* as holding:
       - if we said control/voluntariness is key 🡪 slippery slope (hard to tell who is faking, have to get rid of all SL offenses, etc.)
       - if we said disease/illness is key 🡪 what else to do with people with diseases (civil commitment may be worse bc no due process protection)
* **How (if ever) Should Environmental Depravation Be Part of Criminal Justice Inquiry?**

1. expand *Robinson* to include illnesses/volitional issues
   * + have to figure out a different system to deal with these people (not criminal justice system)
       - civil commitment?
         * is it really any different than jail, or just jail with different name?
   1. take factors into account at sentencing
      * does this meet the general theories of criminal justice (deterrence, rehabilitation, public safety)?
   2. expand insanity defense to be like MPC and include volition
      * how can you tell when people are faking it?
   3. divert people into problem solving (not criminal court) where they can be ordered into drug treatment program, etc.
      * some issues can’t be cured
      * what if they refuse drug treatment (can you threaten criminal prosecution then)?

**SENTENCING:** very important since 95% of cases plead guilty

sentencing should serve the **theories/goals of punishment**:

* **retributive:** reflect seriousness of the offense, promote respect for the law, provide just punishment
* **utilitarian:** afford adequate deterrence to criminal conduct
* **incapacitation:** protect the public from further crimes of the defendant
* **rehabilitation:** provide the defendant with the needed educational or vocational training, medical care or other correctional treatment in the most effective manner

**Factors to Consider at Sentencing:**

* ***United States v. Bernard Madoff:*** judge gave Madoff 150 years in jail
  + offense characteristics (**seriousness of crime)**
    - lots of $$ stolen, many victims, big impact on victims (harm-based retributive)
  + offender characteristics (**about the person)**
    - age didn’t matter (he was 71) 🡪 wanted to deter younger people from committing crime (utilitarian)
    - didn’t get any letters of good character/community support 🡪 shows not a good person (retributive)
* ***United States v. Jackson:*** young man got out of jail & robbed bank same day; at sentencing judge gave life w/ out parol
  + fact that he committed crime right away showed that he is likely to commit more crimes (incapacitation)
* age: can swing in both directions
  + if too young, brain may not be fully developed to be blameworthy (retributive)
  + younger age is prime time to commit crimes (utilitarian, incapacitation)
* family circumstances/community involvement:
  + may encourage rehabilitation
  + putting someone w/ kids away may have collateral consequences
    - but is this too disparate (one person will have lower sentence just because he has kids)?

**Alternative Punishments (instead of jail time)**:

* **Shaming Punishment: *United States v. Gementera:*** G was charged w/ stealing mail; judge order 2 months in jail & 3 yrs conditional release (as part of condition had to stand outside post office w/ sign, talk to HS kids, write apologies)
  + Sentencing Reform Act: **state can authorize any condition of release** it considers appropriate as long as: (a) **reasonably related to nature/circumstances of the offense** & (b) **serves goals of punishment** 
    - court claimed promoted deterrence & rehabilitation so it was fine
* **Fines:** won’t work because would have to set based on ability to pay to make effective (too disparate)

**Sentencing Systems:**

* **Discretionary Sentencing Systems:** judge has complete discretion in imposing sentence
  + policy considerations: (+): very individualized sentence; (-): disparate sentences for same crime, outcome based on judge you get, judicial bias
  + ***Williams v. New York:*** defendant was found guilty of 1st deg. murder, judge sentenced to death
    - judge considered **pre-sentence report** which said he is very dangerous & committed many crimes
      * allegations in pre-sentence report don’t get due process protection like those at trial (can be based on hearsay, no cross-examination, preponderance of evidence std., etc.)
    - note: *Williams* has now been **overruled for capital cases** (now need due process requirements)
* **Mandatory Minimums:** legislature takes sentencing into own hands and sets floor for punishment for specific crime as statutory matter
  + policy considerations: (+): limits judicial discretion, sets more standard punishments for same crime; (-): takes discretion away from judges & gives even more to prosecutors, doesn’t allow judges to bring in mitigating factors
  + ***United States v. Vasquez:*** V was charged w/ trafficking cocaine and had mandatory min of 5 years based on amount he was trafficking
    - judge didn’t like bc there were a lot of mitigating factors that couldn’t come in: mental disability, children to take care of (was good dad), prior crimes were result of stress from ex not letting him see his kids
      * mandatory minimum based on amount trafficked doesn’t work w/ goals of punishment
* **Guideline Sentencing:** different jx have different guidelines models that judges use to determine sentence based on variety of factors
  + federal system: creates sentencing commission that makes the guidelines
    - guidelines are **advisory** (not mandatory), but judge must still first consult guidelines

1. look in guidelines & determine sentence range based on factors
2. is case outside of “heartland” of cases considered by commission?
3. even if in “heartland”, judge can depart if sentence won’t serve aims of punishment

* ***United States v. Deegan:*** intentionally left baby home alone for 2 weeks w/ no food or caregiver, baby died, charged w/ 2nd degree murder & sentenced to 10 yrs based on guidelines
  + Appealed that judge should depart from guidelines bc of her unique situation (history of abuse, psychological issues)
    - majority: her situation warrants lower end of guidelines but guidelines and presumptively reasonable & sentence reflected seriousness of offense
    - dissent: this was atypical case outside “heartland” of cases & warrants departure
      * no risk of recidivism
      * doesn’t help general deterrence (safe haven laws)