***CRIMINAL LAW OUTLINE –* Erin Murphy – Fall 2016 (Grade: A)**

**THEORY OF SYSTEM**

***Goal***: Honor individual choices while still having a **cohesive, EXPRESSIVE body of criminal law.**

***Goal* sweet spot** between **over- and under-policing**

* **Too much leniency 🡪** discrimination, delegitimizes system, people self-help
* **Too severe 🡪** people self-help, police won’t enforce, delegitimizes system

**Retribution v. Utilitarian:** Deterrence (Specific/General), Incapacitation, Rehabilitation (check each other)

**REALISTIC CONCERNS**

* **Mass Incarceration** Crisis d/t policy decision NOT rising crime
* **Prosecutorial Discretion**
* **Plea Bargaining**
  + **Right to jury trial rarely exercised** because prosecutors have full right to strong-arm D’s
  + Judge has duty to make sure plea knowing, voluntary, intelligent
* **Sentencing Discretion**
  + Judge has **unrestrained discretion** w/in legal range (no appellate review, guidelines advisory)
  + **General Deterrence**
    - Career criminal who robbed bank get life sentence
    - Bernie Madoff 150 years symbolic (certainty/severity 🡪 deterrence)
* **Different Types** e.g. mail thief, but not common
* **Not individualized for cultural/systemic history** (contra Gladeau)

**ELEMENTS OF JUST PUNISHMENT**

* **LEGALITY i.e. notice**
* **CULPABILITY i.e. act** or omission w/legal duty + mens rea
  + ACT
    - Common-law statutes always presuppose voluntary action (e.g. drunk on highway case)
      * Rationale: avoid discrimination and mass incarceration (e.g. stop and frisk)
    - MPC - ACT = anything except involuntary physical movements
  + Omissions only when enumerated in law
    - Common-law
      1. Statute imposes duty of care. [MPC embrace]
      2. Status in relation to another. [MPC sort of]
      3. Assume contractual duty. [MPC embrace]
      4. Voluntarily assumed care & secluded to prevent others from aiding. [MPC reject]
* Minimal punishment, help must be easy to render, protections for those who try and fail, punishment for failure to aid itself, not for result.
* Always consider actor’s intent in creating peril, actor’s knowledge of peril, actor’s intent at time of rescue and how easy it is to rescue.
* **Peril-creators** only have duty to rescue if they created peril with criminal intent (e.g. not a crime to trip and knock someone into water)
* MPC – only if actor physically capable and duty is expressly enumerated in statute or otherwise imposed by law.
* Mens Rea
* Common-law & MPC: actor must have requisite mens rea for every element of an offense to be culpable (P, K, R, N).
* IMPLICIT in silent statutes esp. for commonlaw crimes and felonies (no strict liability!)
* Use Shimmens HYPOS/Use Lauria (stake in the venture = PURPOSE)
* **PROPORTIONALITY** – punishment must be retributively proportional/in step with social norms or people will self-help.

**STATUTORY INTERPRETATION** (for new statutes, don’t do for commonlaw crimes)

1. Break into elements (Act, AC, Result)
2. Address ambiguous terms (look to title and sentence, textual interpretation tools)
3. Identify and resolve MR for each element
   1. Note to her – since this is a felony – NO strict liability
   2. If no MR given, default to reckless for each element
   3. If any MR given, map it onto each element
   4. Make arguments to change them based on legislative purpose
      1. Felony? Maybe change reckless to knowing for some element
      2. Throwaway AC? Maybe negligence

**MPC § 2.02(2)**

1. **Purposely:** Conduct/Result - conscious goal

AC – Aware of them or hope they exist

1. **Knowingly:** Conduct/AC – aware

Result – practically certain

1. **Recklessly:** Consciously disregards substantial and unjustifiable risk of C/AC/R

Gross deviation from law abiding person’s conduct

1. **Negligently:** Reasonable person would be aware of substantial and unjustifiable risk of C/AC/R

Gross deviation from reasonable care (more extreme than tort)

**LENITY RULE: If all interpretation tools fail, default to LENITY.**

**ARGUMENTS FOR STRICT LIABILITY:**

* Newer regulatory offenses (industrial, NOT 1/1) that are
* Low penalty (fine, not prison);
* Low stigma (not felony); IF
* Punishment can prevent serious widespread harm
  + Social betterment, relative hardship for public danger, D should be on “notice” because activity risky.

**HOMICIDE**

**A. MURDER**

**Common-law: The killing of another human being with “malice aforethought”.**

**1. Common-law Intentional Murder – malice**

**Option A. No distinction between impulse and premeditated killings, as long as the killing was intentional, willful and deliberate. (Murder 1)**

**Option B. Separate premeditated and impulse killings, premeditation punished more severely.**

* **Premeditation = any reflection time between homicidal impulse and act**
* **CL – distinction breaking down. MPC- totally rejects.**

**Anderson factors**

1. **Behavior prior to killing (planning)**
2. **Prior relationship with victim (motive)**
3. **Manner of killing (particular, exacting - indicates preconceived design)**

**2. Common-law - “all other murder” – unintentional but with malice**

**A. Depraved Indifference to Human Life (egregious!)**

* + **Actor ignored a high probability of death for no justifiable reason.**
  + Subjective comprehension of risk
  + Capacity to comprehend risk
  + Degree to which failure to apprehend is blameworthy
  + Magnitude of risk
  + Probability of risk materializing
  + Justification for risk.
  + **Gross deviation from standard of reasonable care – OK to impute malice (100mph drunk driving, nightclub fire)**

**B. Felony Murder**

* + **Strict Liability for death that occur during commission of felony (no mens rea for murder, malice established from felony commission)**
    - **Death need not be a foreseeable or natural result of felony (e.g. robbery 🡪 heart attack)**
    - **No intentionality for death necessary (e.g. host march madness party [gambling] and someone drives home drunk 🡪 felony murder for host)**
    - **Causation can be highly attenuated, but there must be some nexus btwn felony and death. (drug plane NO, Stamp YES)**

**Option A. Limit FM to felonies that are inherently dangerous in the abstract.**

* + **Regardless if felony committed dangerously and someone died, only FM conviction if there was NO way to commit the felony (on paper) in a a safe way**
  + **BROADENS FM: Burglary not dangerous in abstract, but thief convicted**
  + **NARROWS FM: False imprisonment not abstractly dangerous. (deceit/fraud usually not)**

**Option B. Limit FM to felonies that are inherently dangerous as committed.**

* + **No matter the crime on paper, D liable if he committed the felony in a way that created a foreseeable risk of death.**

**Option C. Limit FM to those enumerated in statute. Remember, “all other murder” can still include Options A and B.**

**3. MPC [§ 210.2.] - Murder**

**Impulse, premeditation, depraved indifference to human life, felony murder all punished the same.**

* **Felony murder supports depraved indifference conviction. (enumerated + “as committed”)**

**Criminal homicide constitutes murder when**

1. **it is committed purposely or knowingly**
2. **it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. (look to common-law)**

**We can presume such recklessness and indifference when the actor is engaged/accomplice in commission/attempt/flight after commission or attempt of:**

robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.

* + - * *Rebuttable presumption*

**B. Manslaughter – \*without\* malice**

**1. Voluntary (Intentional) Manslaughter (Not excusable but mitigated)**

**A. Common-law**

**A. Provocation**

Intentional murder can be mitigated to voluntary manslaughter if:

1. D was under passion or heat of blood
2. **Provoked by an adequate or reasonable provocation (flexible v. categorical)\***
3. **He did not have cooling time\*\***
4. It was the result of a temporary excitement rather than a cruelty disposition

**\*Adequate/Reasonable Provocation?**

**Option A. Flexible (jury decide, judge gatekeeper)**

**1) The provocation would inflame or cloud the judgment of an ordinary man (not necessarily make him kill, just cloud)**

**2) It did inflame D**

**3) There was not cooling time.**

**Option B. Categorical**

**1) extreme A&B**

**2) mutual combat**

**3) illegal arrest**

**4) injury or serious abuse of a close relative**

**5) sudden discovery of adultery.**

**Words alone?**

* **Option B. Categorical – never adequate/reasonable as a matter of law** 
  + **Words that threaten physical harm are an exception.**
* **Some jurisdictions find that words that describe facts that, had they been observed, would count as an adequate provocation, constitute an adequate provocation.**

**\*\*Cooling Time**

**Cooling-time strictly destroys manslaughter claim in all commonlaw jx. (very strict requirement – manslaughter has immediacy)**

* + **If you’re subject to repeated provocations and you snap on the 5th time, you’ve had cooling time – NO mitigation**
    - **Defenses: Smoldering (snap), Rekindling (PTSD) – for flexible jx. Cooling time a bit more permissive in flexible jx.**

**B. MPC – Extreme Emotional Disturbance [EED]**

* Under the **MPC § 210.3(1)(b)** a homicide which would otherwise be murder can be mitigated to manslaughter if:

1. **The defendant was under extreme mental or emotional disturbance**
2. **There is a reasonable explanation or excuse for the EED from the viewpoint of a person in D’s situation as he believed them to be**.

Objective/Subjective standard (uncertain RP standard, but we have guideposts – it’s a spectrum)

* Consider immutable characteristics e.g. blindness, physical disability
* Do NOT consider idiosyncratic moral values or something that is too peculiar to one person
* Consider everything in the middle.
* No concern with whether provocation was adequate or whether there was cooling time. Just ask – was D under EED? Was there reasonable basis for EED?

**2. Involuntary (Unintentional) Manslaughter**

1. **Reckless Manslaughter**

Consciously disregards a substantial and unjustifiable risk that death will occur. (less than depraved indifference which is high probability)

* + **Substantial**: A reasonably prudent person would know of a high magnitude of risk. However, we also take D’s subjective awareness into account. (fact intensive!)
  + **Impute recklessness to defendant** if the risk was so evident, obvious, and of such high magnitude that he must be aware of it.

1. **Negligent Homicide**

Reasonable person would be aware of a substantial and unjustifiable risk of death. Conduct constituted a **gross deviation from the standard of reasonable care.**

Omissions can count as negligent homicide if there was a **legal duty** to provide care, and appropriate care **would have prevented death** **at the time** **the duty was activated**.

1. Was there a legal duty?
2. When was the duty to provide care activated? (i.e. when was danger apparent?)
3. Would care have prevented death at the time the duty was activated? (not before)
4. **Misdemeanor Manslaughter** (don’t forget!)

Parallel doctrine to felony murder (See all information from FM)

* Reason to further limit the “inherently dangerous”, as certain misdemeanors, like speeding, are very common.

**3. MPC – Manslaughter = EED and Reckless Manslaughter** (Negligent Homicide is separate less culpable category)

**C. CAUSATION**

**Common- Law**

1. **Factual Cause (But-For)**
2. **Proximate Cause (Foreseeable)**
   1. Artificial concept based on policy, expediency, fairness and justice
   2. More a matter of commonsense than logic. Culpability does more work.

**Was the result a proximate cause of D’s act?**

* Foreseeable = not extraordinary
  + Negligence of 3rd party doesn’t break the causal chain if the negligence is a foreseeable result of D’s act (e.g. helicopter crash chasing speeding car)
  + Multiple contributing causes do not break the causal chain if they fit the picture of D’s act (e.g. arsonist, firefighters killed by smaller fire and his combined)
  + CAVEAT – need the causal map in manufacturing/commercial context. Activity is socially valuable so we need the causal map to establish culpability in the first instance.

**Victim’s own actions**

* Do NOT break the causal chain IF D has control and dominion over victim and suicide is a probable result (humiliation, death preferable to life)
* Break the causal chain if person’s actions are more autonomous

**If I inflict nonfatal wound on someone and they end up dying I am liable unless:**

* GROSSLY incompetent med mal (not ordinary)
* INTENTIONAL intervening act by another
* Victim has eggshell skull because of own damaging actions (regular eggshell skull DOESN’T break causation)

**Transferred Intent**: I am liable if I mean to hit one person but I hit another person instead.

**MPC § 2.03 – Causation /Transferred Intent**

* But-For Causation (+ any other requirements in statute)
* **When purpose or knowledge is required for result**, result must be in purpose or contemplation of actor.
* **When reckless or negligent required for result**, result must within the risk of which the actor is/should be aware.
* STILL LIABLE IF:
  + different person/property is injured
  + injury not as extensive as intended
  + causation not attenuated enough to change underlying culpability
* **If strict liability for result**, actual result must be probable. (element not met if result unforeseeable)

**D. SELF-DEFENSE**

**COMMONLAW**

Self- Defense available when:

* **Honest and Reasonable belief** that you are in **imminent peril** and that you **must use force** to save yourself.
  + Must be faced with immediate and unlawful force
* You must use proportional force or else you lose self-defense (i.e. no deadly force in response to non-deadly threat)
  + Deadly threat = threat of death or SBI
  + wielding a deadly weapon, especially pointing it at somebody, is considered a deadly threat. BUT, if the weapon is wielded merely to create an *apprehension* (wielded in a defensive posture), it is not such a threat. (MPC 3.11(2))

**Reasonable belief**

Allowed to consider:

1. Physical attributes of those involved
2. D’s past experiences
3. Relevant knowledge D has about specific attacker

**Mistaken belief:**

Honestly held + reasonable, **OK**

Honestly held but UNREASONABLE

**Option A**. No self-defense whatsoever (all or nothing jx)

**Option B**. Incomplete Self Defense (murder to manslaughter)

**Option C**. MPC

* + - 1. Honestly held but recklessly formed belief: reckless manslaughter
      2. Honestly held but negligently formed belief: negligent homicide

**Imminent Peril**

**Truly immediate/kill or be killed** – i.e. mid-choke, NOT when grip relaxed

**Aspirational standard**, not normative (purposefully very narrow, doesn’t reflect human instincts)

**NOT relaxed for battered women**, even after years of egregious abuse with no way out. Testimony only relevant to establish honesty of belief of deadly threat, NOT reasonableness.

**MPC §3.04**

Use of force justifiable as self-defense when actor believes force is immediately necessary (*tiny bit looser than common-law imminence*) to purpose of protecting himself against unlawful force by another.

Not justifiable for resisting arrest which actor knows is being made by a peace officer, even if arrest is unlawful, or to resist force used under a claim of right to protect one’s property

Deadly force is not justifiable unless actor believes such force necessary to protect against death, serious bodily harm, kidnapping, or rape

Deadly force not justified if actor is first aggressor or can retreat with *complete* safety (but no obligation to retreat in one's home or place of work)

**MPC §3.09**: No SD for erroneous belief based on ignorance or mistake of law

* If actor acts with honest but unreasonable belief recklessly or negligently formed, self-defense justification is not available in prosecution for an offense in which *recklessness* or *negligence* suffices for culpability.

**Killing of innocent 3rd parties during lawful SD**

**Option A. MPC** § 3.09 (3)Liable for recklessly or negligently inflicted harms/death (reckless/negligent manslaughter)

**Option B. Full liability for harm** especially when caused recklessly (normative)

**Option C. Full immunity** even when caused recklessly (descriptive, can’t expect ppl to act reasonably when attacked)

**Defense of Others**

**Common-law – “stand in shoes”** – extremely literal. D only has SD if victim would have it.

**MPC § 3.05** – more subjective– D has SD if:

1. He would be justified in using such force to protect *himself* against the injury he *believes* to be threatened to the third person, and
2. Under the circumstances *as the actor believes them to be*, the *third party* would have a valid self-defense claim, and
3. The actor *believes his intervention is necessary* to protect that other person

Just as with self-defense generally, *if these beliefs are negligently or recklessly formed*, the actor is liable for negligent or reckless harms (MPC § 3.09(2))

*Duty to retreat* only if both actor and third person can get away with complete safety.

## Losing Self-Defense

**Duty to Retreat**

**Common-law and MPC 3.04:** You MUST retreat before using DEADLY force if you become aware of an opportunity to do so with COMPLETE safety. **If you fail, you lose SD.**

**Castle Doctrine**: NO duty to retreat at home or at work (MPC addition).

Problem: batterer has SD claim if wife defends self with knife and he kills her.

**Option B.**

**Stand Your Ground doctrine – NO duty to retreat**

Turns the world into your castle, NO duty to retreat at all. (descriptive, more killings result)

**First Aggressor**

Common-law: A first aggressor has no SD claim unless he:

1. Makes a good-faith effort to withdraw
2. Communicates intent to withdraw to adversary
   * If first aggressor withdraws, whoever reinitiates the conflict becomes the new first aggressor. (reset)

**What constitutes a first aggression?** Conflicting approaches

* **Unlawful act** reasonably calculated to produce an affray
* **Presence** alone where you know you will provoke trouble
* **Unrelated culpable act** E.g. sleep with someone’s wife – you are the first aggressor if husband walks in.
* **Mere Words** not sufficient (conflict with presence)

**FA: Non-deadly force, ESCALATED RESPONSE: Deadly Force, FA: Kills**

* **Commonlaw** NO SD claim
  + Or imperfect SD
* **MPC:** Non-deadly first aggressor who is met with deadly force regains SD if he kills. He is still liable for the non-deadly assault, but NOT for the SD homicide. (3.04(2)(b)(i))
  + **Deadly weapons**: wielding deadly weapons is generally considered to constitute a threat of force, but if it is wielded in a defensive posture (no intent to use it), to create an apprehension, it is not. **Problem**: How is person supposed to know?
  + **Note about the first aggressor doctrine**: it is ONLY relevant to the person who *is* the first aggressor. It does NOT relieve the other actor of criminal liability.

**Defense of Property**

LETHAL self-defense is NEVER acceptable to defend property alone

Note: sometimes, self-defense to protect a person looks a lot like defense of property (e.g., armed robbery) – harder when the robber is unarmed and when there are no deadly threats

-see stand your ground laws though – sometimes can use deadly if you’re at home.

*Ceballos* (trap case): **must be present and presently in danger** to have a right to self-defense

**MPC:**

(d) The use of [deadly force](http://www.dubberkelman.com/restricted/student_cd/web/MPC/PART1/snippets/3_11.htm) is not justifiable unless **the actor believes that the other is**:

(i) attempting to dispossess him of his [dwelling](http://www.dubberkelman.com/restricted/student_cd/web/MPC/PART1/snippets/3_11.htm) (otherwise than under a claim of right to its possession); **or BURN ENTIRE HOUSE DOWN**

(ii) attempting to commit or consummate arson, burglary, robbery or other felonious theft or property destruction **and either**:

       (1) has employed or threatened [deadly force](http://www.dubberkelman.com/restricted/student_cd/web/MPC/PART1/snippets/3_11.htm) against or in the presence of the actor;  or

(2) the use of force other than [deadly force](http://www.dubberkelman.com/restricted/student_cd/web/MPC/PART1/snippets/3_11.htm) to prevent the commission or the consummation of the crime would expose the actor or another in his presence to substantial danger of serious bodily harm. …

(5) Use of **Device** to Protect Property.  The justification afforded by this Section extends to the use of a device for the purpose of protecting property only if:

(a) the device is not designed to cause or known to create a substantial risk of causing [death](http://www.dubberkelman.com/restricted/student_cd/web/MPC/mpc2.htm) or [serious bodily harm](http://www.dubberkelman.com/restricted/student_cd/web/MPC/mpc2.htm);  **and**

(b) the use of the particular device to protect the property from entry or trespass is reasonable under the circumstances, **as the actor believes them to be**;  **and**

(c) the device is one customarily used for such a purpose or reasonable care is taken to **make known to probable intruders the fact that it is used.**

**ATTACK PLAN FOR SELF-DEFENSE PROBLEM**

1. Map out who does what and when
   1. What level of force they're using
   2. Withdrawals, opportunities to retreat
2. Who is the FA?
   1. Did they stay the FA?
   2. Any withdrawals or changes to FA?
3. What level of force did FA use? (deadly or non-deadly)
   1. What level of force was used in response?
   2. If it was a commensurate response, then the FA will be liable
4. Was the response escalated and then the FA killed?
   1. Common-law – No SD
   2. Incomplete Common-law – liable for negligently or recklessly formed beliefs RE deadly force (manslaughter)
   3. MPC – full SD back
5. Was the FA Non-Deadly and the responder killed?
   1. Common-law – No SD
   2. Incomplete Common-law – liable for negligently or recklessly formed beliefs RE deadly force (manslaughter)

**ATTEMPT**

Common-law: most jx punish attempts at about half of the completed offense

MPC: punish attempts at SAME as completed offense except homicide

**ACTUS REUS**

**Option A. Dangerous Proximity Test** (aka “last step test”): dangerously close to the final act regardless of mental state. (physical requirement, on the edge) (should PRECLUDE abandonment

* + 1. Mere preparation, no matter how inculpatory, is not enough

Rationale: Protect those who would have repented

Dangerous: Doesn’t allow for intervention until the final moment, which can be dangerous

* + 1. *Rizzo*: driving around with guns looking for the payroll man to rob him – despite a clear mens rea, they never found the payroll man – not physically near enough, so no liability

**Option B. Equivocality Test** (mostly dead now): requires the act to be unequivocally related to the criminal offense on its face, regardless of mental state. If act is equivocal on its face (e.g., buying matches), then it is not an attempt. Acts must bespeak intent themselves. (RIL)

**Option C. Substantial Step Test** (**dominant, embraced in MPC)** (§ 5.01(2)): “substantial step toward the commission of the crime,” and the steps must be “strongly corroborative” of the criminal intent.

1. **Did D take a substantial step toward commission of crime?**

* Less demanding than DP test. Less concerned with opportunity to repent

1. **Did the step itself bespeak criminal intent?**

MPC examples: Lying in wait; enticing victim to go to the place contemplated; reconnoitering to the contemplated place for commission; unlawful entry of enclosure where crime is contemplated; possession of materials specially designed for use in contemplated crime OR that can serve no lawful purpose; possession of materials for the crime, at or near the place contemplated, that can serve no lawful purpose; soliciting an innocent agent to engage in conduct constituting an element of the crime.

**Note:** if the attempt is CERTAIN not to succeed (e.g., voodoo doll), there is no liability (MPC suggests this, too – § 5.05(2))

**ABANDONMENT DEFENSE** (the MPC and some common-law Jxs use it)

After you pass the threshold and are guilty of an attempt, you can claim an abandonment defense if you VOLUNTARILY AND COMPLETELY renounce the attempt.

**MPC 5.01(4)**

A person is NOT guilty of attempt if:

* + (1) He abandons his effort to commit the crime or prevents it from being committed, AND
  + (2) His conduct manifests a complete and voluntary renunciation of his criminal purpose
    - * Not voluntary if it is partially or wholly motivated by “circumstances, not present or apparent at the inception of the actor’s course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose.”
      * Not complete if it is “wholly or partly motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim."

**MENS REA**

|  |  |  |
| --- | --- | --- |
| **Act** | **AC** | **Result** |
| Purpose | Same as underlying offense | Purpose |

1. **General Scheme**: (MPC § 5.01, with note where common law differs)**:**
   1. **Act:** Purpose
      1. Can be shown through high magnitude of risk or vice versa (Smallwood – HIV small chance)
   2. **Attendant Circumstances**: same as the underlying offense
      1. MPC: you have purpose if the AC are as you believe them to be even if you’re wrong (e.g. shooting at pillow think its your husband)
   3. **Result**:purpose
      1. Even if the completed offense would have a lower MR

*Jones* ∆ shot at house full of people, killed one. *HELD:* Murder for person actually killed, *not guilty of attempted murder* for those not killed.

* + - 1. Murder does not require specific intent
      2. Attempted murder requires the specific intent to cause death

**Common-law outlier views (allow less than purpose)**

* + 1. **Attempted Reckless Manslaughter:** some jurisdictions allow recklessness vis-à-vis result

**If criminal shoots at an empty house:**

Someone is there and dies 🡪 Reckless Manslaughter

Someone is there but survives

MPC: No attempted reckless manslaughter

Outlier common-law: Attempted reckless manslaughter

House is empty 🡪 NO court finds attempted reckless manslaughter

* + 1. **Attempted felony murder**: is *not* a crime anywhere – it is a step too far
    2. **Attempted voluntary manslaughter**: a crime in many jx (person has purpose to kill)

**MPC §5.01**

1. A person is guilty of an attempt to commit a crime if, **acting with the kind of culpability otherwise required for commission of the crime**, he:
   1. **Purposely** engages in conduct that would constitute the crime if the *attendant circumstances* *were as he believed them to be*; or
   2. when *causing a particular result* is an element of the crime, does or omits to do anything with the **purpose of causing or with the belief that it will cause** such result without further conduct on his part; or
   3. **Purposefully** does or omits to do anything which under the circumstances as he believes them to be, is an act or omission constituting a **substantial step**

**ACCOMPLICE LIABILITY (complicity/aider and abettor)**

**Principal** = The actor who does the act, causes the result directly (not necessarily more culpable, just physical)

**Accomplice** (aider and abettor) = Aids the commission of the crime, but is not the one who physically acts

*(Both punished the same, used to differentiate)*

* **Common law:** Accomplice liability lives and died with the principle, no matter how culpable the aider is. Accomplice can be charged with worse crime than they thought they were aiding. (technical)
* **MPC**

**Decouples** principal and aider. **MPC §2.06(7)**: Accomplice can be convicted on proof of completed offense + completed aid even if principle convicted of different crime, immune, or not prosecuted.

**DO MENS REA ANALYSIS FOR THE CRIME THE ACCOMPLICE AIDED, not the crime the actor committed** – accomplice liable for full offense (they could be more culpable - culpability worked out at sentencing)

**ACTUS REUS:** Preconcert (Agreeing to aid) OR point in fact aid

* Extremely low threshold (common-law & MPC)
  + Point in fact
    - Buying ticket and being in the audience (**encouragement enough**) (w/MR)
    - **Principle doesn’t have to be aware of aid** (Tally) “point in fact aid”
    - **Aid doesn’t have to be material** “Snuff one chance at life” (telegram that may or may not have arrived)
    - Presence alone only sufficient **w/ preconcert or other proof of mens rea**
  + **Emboldening/pre-concert**: conversation before the fact where you agree you will back them up. (not just ANY pre-concert – like – I’ll show up to give you the tools)

**MPC § 2.06(3)** A person is an accomplice of another person in the commission of an offense

if:

(a) with the purpose of promoting or facilitating the commission of the

offense, he

(i) solicits such other person to commit it, or (ii) aids or agrees or attempts to aid such other person in planning or committing it, or (iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or

(b) his conduct is expressly declared by law to establish his complicity.

**MENS REA**

|  |  |  |
| --- | --- | --- |
| Act | AC | Result (MPC) |
| **Purpose (to aid)**  MPC and CL  Knowledge allowed in some CL jx (never MPC!) when:  1. crime particularly serious  2. aid material to serious crime | **Policy Punt**  Equal or higher than underlying offense | **Same as underlying offense** (the one aided, NOT the one committed by the principal –think undercover police officer)  (MPC & CL) |

* Must be **purposeful as to act** (e.g. supervisor told worker to force ship along even though boiler in bad shape), **but can be negligent/reckless/knowledgeable about result** **IF SATISFIES UNDERLYING OFFENSE** (e.g. negligent as to whether boiler would explode and kill people).

\*DIFFERENT from Attempt, where you need purpose for result.

* No attempted negligent homicide
* Yes aiding and abetting negligent homicide

**AC – Policy Punt (MPC)**

The policy of the substantive offense should control, leave it to the discretion of the courts.

Don’t go higher than underlying offense (then you’d have A&A when crime not even completed)

* + 1. What is the *purpose* of the statute?
    2. In what ways might the culpability between actors and aiders be consistently different?
    3. How widely should we cast the net of liability? Who would be included but shouldn’t be? Who wouldn’t be included but should be?
    4. Is the AC the *core* of the crime (e.g., hunting without a license), or is it a “throwaway” part not critical to the actor’s culpability (e.g., amount of money stolen in burglary)?
    5. How serious is the crime? If the stigma is low, more comfortable pushing MR down.
    6. How serious is the harm? If the harm is great, more comfortable pushing MR down.

**LUPARELLO N&P Consequences (MPC Rejects!)**: If you aid and abet in crime A, you are also responsible for any crime which is the natural and probable consequence (Crime B). (objective inquiry)

* MPC complaints: You can get a lot of ppl on very low mens rea/violates culpability standards

***CAUSATION***: Can be VERY attenuated. Must allow for intervening human action of principle.

* CL – some causation – “snuff one chance at life”
* MPC – no notion of causation

**Renunciation Defense** (defense after aid completed)

* **MPC §2.06(5)(c):** Not an accomplice if he terminates complicity prior to commission, and:
  + **(i)** **wholly deprives it of effectiveness** in the commission, **or**
  + **(ii)** **gives timely warning to the law enforcement** **authorities** or otherwise makes proper effort to prevent commission
* More demanding than abandonment defense – people could still be out there committing crime based on your aid. Note- might not be able to deprive emboldening of effectiveness unless call police.

**NOTE:** \*\*Don't forget: There can be complicity liability for **omissions** as well.\*\*

The rules are the same: Omissions are unlawful when they breach a duty owed.

# Attempts to Aid & Abet (when crime failed or aid failed or both)

Common-law – HARM based view

* Accomplice liability ONLY when both aid and crime/attempt complete
  + Completed crime/attempt + failed aid = no accomplice liability
  + Failed crime/no attempt + completed aid = no accomplice liability
    - Remember successful aid only snuffs one chance at life (Tally)

**COMMON-LAW BOXES**

|  |  |  |
| --- | --- | --- |
|  | * **Aid successful** | * **Aid failed** |
| * **Principle completes crime or attempt** | * **Liability for both actor and aider**   -aid need only be minimal/snuff one chance at life, but must be more than MR (i.e. presence alone with nothing else)  -open question: is preconcert without actually delivered aid sufficient? If emboldens principle, maybe yes. | * **No liability for aider** (principle guilty) * (harm based)   e.g. telegram went to wrong house |
| * **Crime fails, short of attempt.** | * **No liability** | * **No liability** |

**MPC:** §2.06 + **§5.01(3)**: "A person who engages in conduct designed to aid another to commit a crime which would establish his complicity under Section 2.06 if the crime were committed by such other person, is guilty of an attempt to commit the crime."

|  |  |  |
| --- | --- | --- |
|  | * **Aid successful** | * A&A aid thwarted, incomplete, not received |
| * **Principle completes crime or attempt** | * **Liability for both actor and aider**   §2.06(2)(c): "he is an accomplice of another person"  §2.06(3)(a)(ii): agrees to aid = sufficient (embolden)  -aid need only be minimal/snuff one chance at life, but must be more than MR (i.e. presence alone with nothing else) | * **Liability for both actor and aider** * §2.06(3)(a)(ii): (attempts to aid);   §2.06(7): Aider can be convicted even if Principal is not  -e.g. telegram to wrong house |
| * **Crime fails, short of attempt.** | **Aider liable for attempt to commit a crime** (even though principle not liable bc no completed attempt)  **-make sure AR/MR done**   * §2.06 and 5.01(3)   §2.06(7): Aider can be convicted even if Principal is not | * **Aider is liable for attempt to commit a crime.** * (comment to 2.06)   *If only preconcert* 🡪 conspiracy (only if crime/attempt not committed!) |

**Conspiracy**

This is a **substantive crime**, not a theory of liability – so defendants can be guilty of conspiracy in *addition* to the substantive offense which is the aim of the conspiracy. *Inchoate* crime – can be guilty even if you never carry out the crime. Charge = less than substantive offense.

**Actus Reus:** Agreement to further a criminal objective

* not every individual has to know every detail of the agreement or even know the identities of other co-conspirators/not all conspirators need to be joined at once/no written or verbal agreement/communication needed

**Option A.** **Prove agreement through circumstantial evidence. (no overt signals required)**

* + - e.g. everyone cc’d on letter, nature of activity (only works if everyone does it)

**Option B.** **Overt Act required in some statutes.**

* + - Act need not be illegal (e.g. buying clorox wipes) or even a substantial step, just must manifest existence of conspiracy.
    - Can be committed by any member of the conspiracy, even unbeknownst to D.

*Federal Statute*: Do NOT read overt act into silent statute

**Option C.** **MPC § 5.03.** **Overt Act required unless 1st or 2nd degree felony conspiracy.**

*Rationale*: Avoid false positives (ppl talk cheap about low level crimes). Less likely for serious crimes.

(1) **Definition of Conspiracy.** A person is guilty of conspiracy with another person or persons to commit a crime if with the **purpose** **of promoting or facilitating its commission** he:

(a) **agrees** with such other person or persons that they or one or more of them will engage in **conduct that constitutes such crime or an attempt or solicitation to commit** such crime; or

(b) **agrees to aid** such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

(5) **Overt Act.** No person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

|  |  |  |
| --- | --- | --- |
| Act | AC | Result (MPC) |
| **Purpose** to enter conspiracy to commit criminal objective  MPC- NEVER lower to knowledge!  Common-law – may lower to knowledge for SERIOUS crimes (make policy args) | **Policy Punt** | **Purpose** (as to result of future offense)  (NO conspiracy for unintentional crimes!)  Some common-law jx that are confused may allow it. |

**Mens Rea:**

* HOW TO **PROVE D HAD PURPOSE** as to criminal objective? **Prove D has a stake in the venture.**

Argue both sides

* + Making inflated profits?/Offering discount to encourage business?
  + D’s activity has no legitimate use? (arguments nuanced though – e.g. burner cellphones- some ppl can’t afford more)
  + Profits constitute a large volume/proportion of business? (but watch discrimination of businesses in certain areas/deterrence)

**Pinkerton (MPC rejects!)**

* **Once you are found to be in a conspiracy (purpose), you are liable for any acts done by any co-conspirator REASONABLY FORESEEABLE in furtherance of the conspiracy, within the scope of the conspiracy.** (even if you have NOTHING to do with them – e.g. brother in jail liable for sales of moonshine)
  + Maybe limitation for minor participants
  + **Counter-argue:** If you can’t get someone on accomplice liability, don’t create a backdoor. Liability way too expansive – disproportionate.

**Bridges (MPC rejects!)**

* **Once you are found to be in a conspiracy, you are liable for any REASONABLY FORESEEABLE subsequent crimes done by any co-conspirator that are a natural and probably consequence of the conspiracy, even if they are OUTSIDE the scope of the conspiracy.** (e.g. airline execs falsify records, liable for death – no mens rea analysis as to the death)

**Defenses**

* **Abandonment** [MPC §5.03(7)(b)]
  + If there has been NO ACTION by ANY MEMBER of the conspiracy and the SoL has run since the last action, no liability. (any action restarts the clock)
* **Withdrawal** [MPC §5.03(7)(c)]
  + If one person takes an AFFIRMATIVE action indicating they want out OR they inform law enforcement, Pinkerton liability cuts off. Your SoL clock starts for conspiracy charge (still liable until it runs)
  + Ways to benefit:
    - SoL runs out with regard to you
    - No pinkerton
    - MPC: more about scope of conspiracy – you’re liable for the scope you were involved in before you withdrew
* **Renunciation** [MPC §5.03(6)] (MPC innovation, some common-law jx embrace)
  + COMPLETE defense even if SoL not run
  + Must THWART success of conspiracy COMPLETELY and VOLUNTARILY (not bc cops found out)
    - OR alert law enforcement when they still have time to stop the crime.

# Rape (We covered this quickly at the very end FYI, so this section is not very organized. Wasn’t on the exam)

**Option A: FORCE** (fear excuses resistance)

* Traditional view: legal force = serious physical violence. (gun to head)
* Broadening view: totality of circumstances (isolated, “the implication”)
* MTS view: Any sexual act without affirmative consent is force

**Option B: RESISTANCE** (obviates force)

* Traditional view: legal force = kicking, biting, screaming
* Broadening view: any indication of lack of consent is resistance (verbal no, crying)

**Option C: Inherently coercive relationship** (Excuses force, resistance, even explicit consent)

* Cop – consent never sufficient
* Boss – doesn’t qualify (policy concern – marriages start at work)
* Broadening view to implication of negative outcome (e.g. I won’t pay your rent)
  + But watch for getting people that otherwise look innocent (e.g. Always Sunny)
* Psychological, emotional, moral compulsion (VERY broad – e.g. exploit someone’s crush)

**Option D (MODERN): Lack of affirmative consent excuses force and resistance.**

* Any sexual contact (e.g. penetration) without affirmative consent is force.
* No resistance requirement
* Affirmative consent = totality of the circumstances (words or conduct)
  + Critique: conviction equal to violent rape – disproportionate?

Concerns:

1. Notice (less clear)
2. Overdetermines sexual relationships
3. Lack of grading (immigration threat not as bad as gun to head)
4. Infantilizes victims
5. Studies show that women who resist sexual assault - there are less completed rapes and less PTSD
6. Pragmatic problem with drawing lines/proof

Arguments for:

* Deterrence more importance than burdening sexual relationships
* Line drawing can be done
* Definition should be normative

Same-sex sexual violence

* People resistance to recognizing
* Feminist critue to force requirement – women resist in a soft way

Policy concerns

* Ppl should not be able to use rape accusations as political tool (make doctrine narrow and objective)
  + Traditional, requirement of obvious force and resistance
* Should we strive to be descriptive or normative?

BDSM = affirmative defense

**Mens Rea**

Option A: Not required if we have traditional legal force or resistance

Option A (MODERN): Strict liability (maybe negligence) for non-consent if any indication of non-consent or absence of affirmative consent in some jx.

* Not about retribution; about deterrence
* Burden on D to proceed even if “no” seems coquettish
* Should the requirement be heightened as we move to affirmative consent model?

No concept of conditional consent (rough sex, no protection)

QUESTIONS TO ASK ON EXAM:

* Does the jx define consent at all?
* What counts as an “affirmative consent” rqmt?
* Law = statutory or case law or jury instructions?
* Include only felony or also misd?
* Include only penetration-targeted, or also contact?
* Count jx that have broad definition of consent, if undercut in substantive law?
* Count jx that does not require consent, if substantive law gives workaround?
* Mens rea?