

# **Criminal Law Outline**

## **I. Basic Principals**

A Crime is a moral wrong that results in some social harm.

A single harm may give rise to both civil and criminal liability. Note OJ Simpson trials. However, there are important points of differentiation between civil and criminal offenses.

- (1) The Nature of the wrong: Civil there is some loss to the individual. In a criminal case the type of harm in general is a social harm. Really looking at the community in general in criminal harm to social fabric, which affect your sense of security, and thus justify the moral condemnation of the community.
- (2) The purpose of the legal action: Civil is to compensate loss. Criminal has multiple purposes: punishment, incapacitation, or deterrence.
- (3) Person brining the suit: The victim brings the suit in the civil case. In a criminal case, it is not the victim, the harm is committed against the people. The criminal system the power to bring a case rests exclusively in the government's hands.
- (4) Interests represented in court: The district attorney chooses whether to bring a case or not.
- (5) The sanction: Criminal 2 types of sanctions: (1) being declared guilty—social stigma; and (2) punishment itself—fine, incarceration, etc.

### **Four Conditions Necessary to have a penalty:**

1. The primary addressee who is supposed to conform his conduct to the direction must know:
  - a. Of its existence.
  - b. Of its content in relevant respect.
2. He must know about the circumstances of fact, which make the abstract terms of the direction appropriate in particular instance.
3. He must be able to comply with it.
4. He must be willing to do so.  
→Legislatures are also limited by state and federal constitutions.

**Voir Dire:** Getting Rid of a juror for cause.

**Preemptory Challenges:** Getting rid of a juror without cause (unless it is going to violate the equal protection clause of the Fourteenth Amendment).

**Due Process:** requires the prosecutor to persuade the fact finder beyond a reasonable doubt of every fact necessary to constitute the crime charged.

→When an appellate court is resolving an insufficiency of evidence claim, the inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven BRD.  
Substantial error?

**“Proof beyond a reasonable doubt”**

→**REMEMBER:** It is far worse to convict an innocent man, than to not convict a guilty man.

→Judges have described this as...

- a. The “Moral certainty” instruction.  
→No other possibility that the juror could imagine.
- b. The “Firmly Convinced” instruction.  
→Firmly convinced, doubt that there is any other likely outcome.
- c. The “No waver or vacillating” instruction.  
→If the doubt is reasonable, then you can’t convict, but if the doubt is not reasonable then you can convict.
- d. The “No Real Doubt” instruction.  
→Proof beyond a reasonable doubt, means that you can have doubts, but no “real doubts.”
- e. The “Thoroughly convinced” Instruction.  
→The judge asks the jurors if they are thoroughly convinced.

Owns v. State—Guy sleeping in his car in his driveway with beers all around the car and Δ was charged with DWI. Rule state that a condition upon circumstantial evidence alone is not to be sustained unless the circumstances are inconsistent with any reasonable hypothesis of innocence. There was no hard evidence he was actually driving. This case shows how difficult the standard of BRD is.

**Two main theories of punishment: Utilitarianism and Retributionism**

Utilitarianism—Forward looking. Believes that justification for punishment lies in the useful purpose to society that punishment serves. Upon the principal of utility, punishment ought not to be inflicted where it is groundless, ineffective, unprofitable, too expensive, or needless.

Justifications of Utilitarian Punishment:

- (1) General deterrence—deter the public in general.
- (2) Specific Deterrence—deter the repeat offender.
- (3) Incapacitation and other forms of risk management.
- (4) Reform.

Retribution—backward looking. Claims punishment is justified because people deserve it. Moral culpability is sufficient and necessary to liability to punitive sanctions. The moral culpability of the offender gives society the duty to punish.

Justifications of Retribution punishment:

- (1) Moral desert of an offender is sufficient reason to punish him.

## II. Elements of a Crime

### **Actus Reus: (1) a voluntary act, (2) that causes, (3) a social harm. \*small mental element in first element.**

- (1) A voluntary act that causes some social harm.
- (2) An act is some bodily movement, a muscular contract.
- (3) American law requires an act both for a principled and pragmatic reason.
- (4) An act is *voluntary* if there is evidence of *volition*: the act is a willed act that follows from a mental decision by the actor. "There is a certain minimal mental element required in order to establish the actus reus itself. This is the element of violation."
- (5) In our hypotheticals, Brenda #1 commits a voluntary act, but Brenda #2 does not. In the first case, while the prosecutor could establish that it was voluntary, he would have a difficult time finding a mens rea, AND he would have to get around the defense of duress, but in the second case, the prosecutor would be stopped with the lack of voluntary will of the act alone.
- (6) The requirement of a voluntary act represents the minimal mental element present in the actus reus.
- (7) Whereas the MR concerns the Δ's state of mind with the social harm of the offense, the voluntariness requirement of the AR concerns the Δ's state of mind with the act that caused the social harm.
- (8) Most cases do not present questions about whether or not the act is voluntary; nonetheless. Failure to establish voluntariness BRD (beyond a reasonable doubt) means ~ crime.

**There are 3 components to the AR, and all must be done with volition, and should be able to identify each if present:**

- (1) Conduct Element**—Prohibit specific behavior.
- (2) Result Element**—punishes because of unwanted outcome.
- (3) Attendant Circumstances**—a condition that must be present.

**ATTENDANT CIRCUMSTANCES:** A condition that must be present, in conjunction with the prohibited conduct or result, to constitute the crime (**burglary**: breaking and entering a dwelling house of another at nighttime with the intent to commit a felony therein).

→→Burglary:

Actus Reus: "breaking and entering [conduct or result] a dwelling house [attendant circumstance] of another [AR] at nighttime [AR]."

Mens Rea: "with the intent to commit a felony therein."

**Voluntary Act:** A bodily movement that follows from the person's volition, a willed act.

Martin v. State: Δ arrested at his home and was drunk and cops took him onto the public street and then charged him with being drunk in a public place but court holds not valid because he did not satisfy the AR—being drunk in a public place—as a result of his own will, but rather was carried there by police. This case shows that the act must be voluntary.

State v. Utter: Dad drinking all day and son come home and dad stabbed him in the chest after son approached him from behind and he claims that it was an automatist—and thus not voluntary—act as a result of his military training that caused him to do this. The rule is that **an act committed while unconscious is not an act at all**. However, when the state of unconsciousness is voluntarily induced, the state of unconsciousness is not a complete defense. This case shows that an act must be voluntary.

**WHY MUST AN ACT BE VOLUNTARY????** The word act presupposes it being a voluntary act.

Retributivists would say that it requires volition because they do not deserve punishment if they are not morally culpability,

Utilitarian would say there would be no benefit to punishing for non-willed acts because they did not do anything morally wrong and thus nothing to deter or rehabilitate.

**Omissions (Negative Acts):** With few exceptions (like a duty to act) a person does not legal duty to act to prevent harm to a person, even if that person may lose their life.

People v. Beardsley: Guy with the hooker and she takes a ton of morphine and he leaves her with the neighbor to sleep it off and she dies. The law recognizes that under some circumstances the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, will make the other chargeable with manslaughter. Court holds guy not liable because no legal duty is created based on a mere moral obligation.

→**The Duty Must:** (1) be imposed by law or contract; and (2) the omission to perform the duty must be the immediate and direct cause of death.

Jones v. United States: There are at least 5 **exceptional** situations which failure to act may constitute a breach of legal duty...

- (1) Duty imposed by statute—like failing to pay your taxes;
- (2) Duty imposed by certain status relationship to the other person (parent/child);
- (3) Duty imposed where one assumed constructional duty to care for another (teacher/student, nurse/patient, lifeguard/patron);
- (4) Duty imposed where one voluntarily assumes care and secludes the person (if you prevent another person who was willing to act: like seeing someone drowning, and you tell everyone that you'll save them, and then you chicken out);
- (5) Duty imposed when a person creates the risk of harm to another (**only in some states**).

Barber v. Superior Court: Doctors took patient off of life support knowing that the patient would die because they said that he would never recover from his injury. Court holds that removal of life support is an omission of further treatment rather than an act, which is not unlawful failure to perform a legal duty. There is no criminal liability for failure to act unless there is a legal duty to act.

**Social Harm:** is the negation, endangering, or destruction of an individual, group, or state interest, which is deemed socially valuable.

**RESULT CRIMES:** Defined in terms of some prohibited result (murder, while also a conduct crime, requires a dead body, which is a result).

**CONDUCT CRIMES:** Defined in terms of harmful conduct, even where there may be no harmful result (drunk driving, it does not need a victim).

## **MPC—Actus Reus**

### **MPC § 2.01: Requirement of voluntary Act; Omission as Basis of Liability; Possession as an act.**

- (1) A person is not guilty of an offense unless his liability is based on conduct, which includes a voluntary act or the omission to perform an act of which he is physically capable.
- (2) The following are NOT voluntary acts within the meaning of this section.
  - (a) a reflex or conclusion;
  - (b) a bodily movement during unconsciousness or sleep;
  - (c) conduct during hypnosis or resulting from hypnotic suggestion;
  - (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.
- (3) Liability for the commission of an offense may not be based on an omission unaccompanied by action unless.
  - (a) the 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.
- (4) Possession is an act within the meaning of this section, if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

## **Mens Rea: culpability/blameworthy state of mind.**

**Default rule in common law** is that every crime has a MR requirement even if not explicit in the statute, judge's will read in a MR term in a general culpability sense. HOWEVR, today law uses mainly the elemental sense, and the MPC focuses solely on the elemental sense.

### **Rational for MR requirement—**

Utilitarian would say need to MR because if the person did not have a guilty mind then there is nothing to deter or rehabilitated. Punishment would be needless and no benefit derived from it. BUT, could say it is still deterrent because if you expand the time frame, there were decisions made that could have prevented the harm.

Retributivist would say you deserve punishment regardless of the social benefits. Look at the moral culpability and there was an act that is morally culpable.

**Culpability content:** Any blameworthy state of mind will satisfy it.

**Elemental Context:** Refers to the mental state of the  $\Delta$  must have had at which element of the social harm set out in the definition of the offense.

Regina v. Cunningham: The stolen gas meter case. Stole the gas meter and didn't turn off the gas so almost killed the victim, and statue makes crime to maliciously cause someone to take noxious things to endanger life. Question whether he had the MR requirement in the statute (elemental use). Court says malice requires: (1) an actual intention; or (2) recklessness.

People v. Conley: Beer bottle to the face case. The MR elements are intentionally or knowingly in the statute,  $\Delta$  says no evidence to prove BRD  $\Delta$  intended to inflict a permanent disability. A person acts intentionally when his conscious objective is to accomplish that result or engage in that conduct. A person acts knowingly when he acts with knowledge of the result of his conduct or he is consciously aware that such result is practically certain to be caused by his conduct. To get over problems of proof, there is a presumption that one intends the natural and probable consequences of his actions. AND intent can be inferred from the surrounding circumstances, the offender's words, the weapon used, and the force of the blow. Law not saying it presumes it, it just permits the jury to draw the inference that he intended to do the harm. Not a presumption because does not shift the burden of proof.

### **MENS REA IN THE COMMON LAW**

- (1) Intentionally:** Ordinary common law meaning is broad and encompasses what the MPC refers to separately as purpose and knowledge. A person intentionally causes the social harm of an offense if: (1) it is her conscious objective to cause the social harm; or (2) she acts with knowledge the social harm is virtually certain to occur as the result of her conduct.
- (2) Knowingly:** Knowledge of some material fact is required. Usually used in the common law to refer to knowledge of some attendant circumstance. A person has knowledge if he is: (1) aware of the fact; or (2) correctly believes the fact exists.

- a.** Willful blindness/deliberate ignorance: Knowledge will be imputed if: (1) aware of a high probability of the existence of a fact in question; and (2) deliberately fail to investigate to confirm.
- (3) **Willfully:** Sometimes just means intentional, or an act done with bad purpose (the culpability meaning of MR.)
- (4) **Negligently:** A person's conduct is negligent if it deviates from the standard of care that a reasonable person would observe. Civil negligence is distinguished from criminal negligence under the common law on account of the severity of the risk.
- (5) **Recklessness:** More culpable than negligence. Requires proof that the Δ disregarded a substantial unjustifiable risk of which they were aware and acted anyway. Difference from negligence is here they are aware of the substantial unjustified risk she is taking.
- (6) **Malice:** Either intent to cause the social harm of the offense or recklessly causing the social harm of the offense.

**General Intent offense:** An offense with an actus reus, but no listed mens rea terms, In such cases, the common law implied a mens rea understood to be a morally blameworthy state of mind.

Example: Common law rape, is the carnal knowledge of a woman by force against her will. →The idea is that the court will read into the statute to find a Mens Rea component, and they will find it requires a mens rea of reckless or higher (never negligent).

**Specific Intent Offense:** Is an offense where the statute expressly identifies the mens rea term.

- To be guilty of some offenses, the state must prove an intention by the actor to commit some further act (possession with intent to sell).
- An offense may require proof of a special motive or purpose for committing the act (offensive contact with intent to cause humiliation).
- Some offenses require proof of the actor's awareness of an alternate circumstance (intentional sale of obscenity to a person under the age of 18).

Example: Common law definition of murder as a killing of another person with malice aforethought.

## MPC—Mens Rea

### MPC § 2.02 General Requirements of Culpability!!

- (1) Minimum requirements of Culpability. Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.
- (2) Kinds of Culpability Defined.
  - (a) **Purposely**. A person acts purposely with respect to a material element of an offense when:
    - (i) Conduct Crime. If the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
    - (ii) Result Crime. If the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.
  - (b) **Knowingly**. A person acts knowingly with respect to a material element of an offense when:
    - (i) Conduct Crime. If the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
    - (ii) Result Crime. If the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.
  - (c) **Recklessly**. A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.
  - (d) **Negligently**. A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involve a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.
- (3) **Culpability Required Unless Otherwise Provided**. When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto. **NEVER ASSUME NEGLIGENCE.**
- (4) **Prescribed Culpability Requirement Applies to All Material Elements**. When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements

thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

- (5) **Substitutes for Negligence, Recklessness and knowledge.** When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposefully. **YOU CAN ALWAYS GO HIGHER.**

\*\*\*The Federal courts will generally permit a finding of knowledge on the basis of willful blindness, where there is a high probability of awareness, but deliberately avoiding the truth.

**Strict Liability Offenses:** a crime that does not contain a mens rea requirement...

The most common exception to the MR requirement is in dealing with public welfare offenses where criminal liability has been allowed without MR where the actor's conduct involves minor violations of the law.

**Two principles identifying the contours of public welfare offenses:**

- (1) If the punishment far outweighs the regulation of the people as a purpose of the law in question, then MR is probably required.
- (2) If the punishment is light, involving a small fine and no imprisonment, the mens rea is probably not required.

Staples v. United States: Filed down automatic gun case. This is a conduct crime. Statute makes liable for an automatic weapon and Δ is trying to say he wasn't aware it was modified to be automatic and wants them to read in a knowingly grade of MR into he otherwise silent MR statute. Court holds because of the extent of punishment the statute does not require a MR. Must construe that statute in light of background rule that common law requires some element of MR (presume MR). Court generally rely on the nature of the statute and the particular character of the items regulated to determine whether congressional silence should be read as dispensing with the MR.

**A court may find that a statute imposes strict liability when...**

1. The stator crime is not derived from the common law.
2. There is an evident legislative policy that would be undermined by a mends rea requirement.
3. The standard imposed by the statute is reasonable and adherence is to be expected of a person (i.e. presume notice).
4. The penalty for the violation of the statute is not sever.
5. The conviction does not "gravely besmirch" (stigma).

Usually seen in...

- Minor in violation of the liquor law.
- Pure foods law.
- Narcotics law.
- Motor vehicle and traffic violations.
- Sanitary building and factory laws.

\*\*\*Typically criticized on two grounds...

- (1) Strict liability legislation arguably does not deter, since the actor, by hypothesis is unaware and as a reasonable person, would not be aware of the facts that render his conduct dangerous.
- (2) It is unjustified to condemn a person who is not morally culpable.

**Constitutional innocence principal:** Strict liability is unconstitutional if the other elements of the crime, with strict liability elements excluded, could not themselves be made a crime. Otherwise strict liability is constitutional.

Garnett v. State: Mentally disabled guy gets charged with 2<sup>nd</sup> degree rape and statute has no MR. Court holds the plain language of the statute and the legislative history lead to the conclusion it is a strict liability offense, and therefore mental disability is of no avail to prove ignorance neither the fact he was misled. Sees the silence as legislative design because other sections have MR except this one and it was considered an dispensed by the legislature.

**Strict Liability and the MPC:** Culpability is required in the MPC § 2.02(3) says in the absence of MR tem if the actor acts purposefully, knowingly, or recklessly, any one of these 3 will satisfy the MR requirement. MPC does not allow strict liability unless a violation is a minor offense.

**Mistake of Fact:** is a mistake of fact about some elements of the offense and the effect of it is to negate the MR. A mistake of fact occurs when the is unaware of or mistaken about a fact pertaining to an element of the offense. Usually think of mistake of fact as a failure of proof defense.

People v. Navarro: Mistake of fact (common law approach) guy took wooden beams from contraction site.  $\Delta$  claims he thought he had the permission of the owner or they were abandoned. Common law assumes there is a MR. An honest mistake of fact or law is a defense when it negates a specific/required mental element of the crime. It will not be a defense when no specific mental element is required unless it was based upon reasonable grounds Common law rule

→ **Common Law Rule:**

- (1) specific intent (historic use) crimes—no guilt if in good faith;
- (2) General intent crimes—no guilt if in good faith and reasonable.

→ **MPC Rule:** No guilt if in good faith (same as #1 from above, since all MPC crimes are specific intent crimes).

**Moral Wrong Doctrine:** If the  $\Delta$  is involved in an immoral act, and the attendant circumstances are not what he believes them to be, then at is a risk he takes and is responsible for all illegal activity.

**Legal Wrong Doctrine:** If a  $\Delta$ 's conduct based on the facts as he believes them to be, constitutes a crime—not simply an immoral act, he may be convicted of the more serious offense that his conduct established.

**The common law generally prohibits a mistake of law defense, with ONLY these four exceptions...**

1. **Reasonable Reliance Exception:** If a  $\Delta$  reasonably relies on an official statement of the law obtained from a person or public body with reasonability to the inspiration, administration, or enforcement of the law defining the defense. (You can't rely on your lawyers interpretation of the law, or your own interpretation of the law) HOWEVER, you can rely on the state Attorney General.
2. **Constitutional exception:** Very Narrow. Based around a single case, and limited to Lambert v. California, a case where someone was unaware that they had to register with the city since he or she was a felon (no inherent notice).
3. **Knowledge of the law as an element of the offense exception:** ex, Michigan campaign finance act makes it illegal for any person to make or accept a cash contribution in excess of \$20. Statute further says a "person who knowingly violates this section is guilty of a misdemeanor." So you have to know of the law, in order to violate it, if you don't know then you can't violate it.
4. **Different-law mistake exception:** The claim to mistake is related to law, usually non-criminal law, other than the criminal defense offense that the defendant did that would then negate the mens rea EX, no larceny because Olga was unaware of difference law and therefore no intent to steal. Does not matter if reasonable or not.

(Olga is prosecuted for larceny even though it was her own car, granted it was at a repair shop that she refused to pay the bill at, but what she is unaware of is a special MI law that gives mechanics the constructive ownership of the car until the bill is paid, so technically she can be charged and convicted of larceny, BUT she was unaware of the mechanics law, so she did not have the intent necessary under the larceny law). You can't prove that she had intent to steal something that she did not know was at that moment was not her property.

**MPC § 2.04 Ignorance or Mistake:** The MPC uses an exclusively elemental approach to the MR. There is no strict liability in MPC. As long as in good faith, a mistake of fact claim will succeed. Ignorance or mistake is a defense if:

- (1) The ignorance or mistake negates the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or
- (2) The law states the state of mind established by such ignorance or mistake constitutes a defense.

**Mistake of Law:** Would serve as a defense in a classic sense, not the quasi-defense as mistake of law. Occurs where the  $\Delta$  is unaware of, or mistaken about the law under which he is charged with violating. The common law rule generally prohibits a mistake of law defense with these exceptions:

- (1) Reasonable Reliance Exception –
  - a. Not permitted in these cases:
    - i. Reliance on one's own interpretation of the law (Marrero); or
    - ii. Reliance on the advice of private counsel.
  - b. Excuse does not apply if the  $\Delta$  reasonably relies on an official statement of the law; later determined to be erroneous, obtained from a person or public body with responsibility for the interpretation, administration, or enforcement of the law defining the offense.
  - c. A Statement of the law is official if:
    - i. Expressly stated in a statute, determined invalid;
    - ii. Based on decision of the highest court in the jurisdiction, which is later overturned;
    - iii. Based on interpretation of the law from an officer with that responsibility.
- (2) Knowledge of the law as an element of the offense exception: "A person who knowingly violates this statute." Legislatures made knowledge of the law an element of the offense.
- (3) Different Law Mistake Exception: Applies in context of specific intent crime (historical). Ignorant to another law which makes you culpable in context of another law.

People v. Marrero: Mistake (ignorance) of law (common law approach) guard at out of state prison reads NY statute listing exceptions to statute prohibiting carrying guns in clubs for "peace officers" as permitting him to carry. Court holds the mistake of law did not relieve the  $\Delta$  of criminal liability because the weapons statute is one of general intent The defense should not be recognized except where specific intent is an element of the offense or where the mis-relied upon law has later been properly adjudicated as wrong.

**MPC Mistake of Law:** Follows the common law closely. MPC §2.02(4) lays general prohibition on mistake of law defense and recognizes the 3 exceptions.

**Causation:** The Actus Reus is a voluntary act that causes a social harm Really only an issue in result crimes, and mostly in homicides.

## (1) Actual Cause (cause-in-fact; but-for-cause).

### Common law

- But for the  $\Delta$ 's voluntary act, would the social harm have occurred when it did? If the answer is no (the social harm would not have occurred when it did) then the  $\Delta$  is not responsible for the social harm.

Velazquez v. State: There can be no liability for result crimes unless it can be shown that the  $\Delta$ 's conduct was a cause-in-fact of the prohibited result. Courts use the But-For-Test for determining whether the  $\Delta$ 's conduct was a cause-in-fact of the particular result. However, when there are 2  $\Delta$ 's acting independently, and not in concert with one another, they commit separate acts, each of which is sufficient to bring about the result, the court uses a substantial factor test to determine cause-in.

**A person cannot be a proximate cause without being an actual cause but a person can be an actual cause without being a proximate cause.**

MPC 2.03 Same as common law.

## (2) Proximate Cause (legal cause)— involves intervening force. Typically:

- (1) An act of god;
- (2) Act of independent third party, which aggravates the harm caused by the  $\Delta$ ; or
- (3) An act or omission of the victim that assists in bringing about the harm.

An intervening cause is another but-for-cause, after the  $\Delta$ 's but-for-cause, that falls in the causal chain leading to the social harm. An intervening cause is also a superseding cause when it breaks the causal chain as to the  $\Delta$  and thereby negates any finding of proximate cause as to the  $\Delta$ . Court in Rideout laid out 6 factors to determine if an intervening cause is also superseding cause.

People v. Rideout: drivers head on in the road then one goes out to turn flasher on because no lights on the car and gets hit by another car after having been safe on the side of the road. Question is whether  $\Delta$ 's act was a proximate cause to the death when the victim voluntarily left safety to go back in the road. No argument  $\Delta$  was but for cause. For  $\Delta$ 's conduct to be a proximate cause, the victim's injury must be a "direct and natural result" of the  $\Delta$ 's actions. If there was an **intervening superseding cause** between the  $\Delta$ 's conduct

and the injury, the  $\Delta$ 's conduct will not be a proximate cause. The crux of determining whether an intervening cause is superseding is one of **reasonable foreseeability based on an objective standard**. Other factors to be considered in determining if an intervening cause is superseding:

(1) **De Minims Causes:** Minor things after the internal act that might speed up death but do not hold criminal liability.

(2) **The "intended consequences" doctrine:** A  $\Delta$  is criminally responsible where the  $\Delta$  intended the intervening cause would lead to a social cause, or when an unintended intervening cause leads to the same social harm.

(3) **Omissions:** Do not typically break the causal chain, so even though the person would have lived that they warn their seatbelt, you take the victim as you find them, and no omission act on their part will be a defense to your act.

(4) **Foreseeability of the Intervening Cause**

Two types of intervening causes

1. Responsible intervening causes (IC): act occurs in response to  $\Delta$ 's wrongful act.
2. Coincidental intervening cause (IC): act does not occur in response to  $\Delta$ 's wrongful act: only relationship between the defendant and the victim is the act that put the victim in harms way.

(5) **"Apparent Safety" Doctrine (dangerous Forces that Come to Rest):** If the victim has made it to a safe point, then it will cut off the causal chain for something that happens after.

(6) **Free, Deliberate and informed human intervention.":** When you are in a place of safety and then you voluntarily, deliberately and informed make the decision by the victim to put him or herself back into harms way.

**State v. Rose, the case where the guy hit the woman in the cross walk and kept driving with her body underneath.** Since the state cannot prove that she died from his intent to kill her with her under the car, instead of from his unintentional impact, the state cannot charge him with homicide (because we have to assume in that jurisdiction that when someone cannot stop going into an intersection they are not at fault for hitting someone) and thus the  $\Delta$  had to be acquitted.

**Intervening Cause:** Another but-for cause, after the  $\Delta$ 's but for cause that fall in the causal chain leading to the social harm.

→Typical Pattern.

1.  $\Delta$  gravely harms the victim (actual cause)
2. Another force intervenes (usually wrongdoing of a third party; contributory negligence; natural force) as a second actual cause.

3. Intervening cause aggravates victim's injuries or accelerates victim's inevitable harm (i.e. death).

**Superseding Cause:** An "intervening" cause is also a "superseding" cause when it breaks the causal chain as to the  $\Delta$  and thereby negates any finding of proximate causation as to the  $\Delta$ .

### **Foreseeability of the Intervening Cause**

#### Two types of intervening causes

- (1) Responsible intervening causes (IC): act occurs in response to  $\Delta$ 's wrongful act.
- (2) Coincidental intervening cause (IC): act does not occur in response to  $\Delta$ 's wrongful act: only relationship between the defendant and the victim is the act that put the victim in harms way.

#### Rules:

1. Generally does not relieve the  $\Delta$  of criminal responsibility, UNLESS the response was unforeseeable and highly abnormal.
2. CIC does negate criminal responsibility, unless CIC was foreseeable

### **MPC Approach to Proximate Cause:**

- (1) What was the "actual result"?
- (2) Was the actual result "within the purpose of the actor"? If it was, then the actor's conduct is a "proximate cause." If it was not,
- (3) Did the "actual result involves the same kind of injury or harm, as that designed"? If it did not, the actor's conduct is not a "proximate cause." If it did,
- (4) Was the "actual result too remote or accidental in its occurrence to have a [just] bearing on the actor's liability"? If it was, then the actor's conduct is not a "proximate cause/" If it was not, the actor's conduct is a proximate cause.

## **HOW THE MPC DIFFERS**

- (1) Actual causation is the same under MPC
- (2) **Proximate cause does not identify a list of factors. It simply asks whether the particular MR requirement was satisfied. § 2.03(2)(b) and (3)(b). given the intervening cause happened, was the MR still satisfied depending on what the MR is?**

## Concurrence of the Elements

Concurrence of the elements really focuses on the AR. The elements of the crime must all come together at the same time.

**Temporal Concurrence:** The  $\Delta$  must possess the requisite mens rea at the same moment that her voluntary conduct causes the social harm (at issue in Rose).

**Motivational Concurrence:** The  $\Delta$ 's conduct that caused the social harm must have been set into motion or impelled by the thought process that constituted the mens rea of the offense) example: person who accidentally kills someone and later says you're glad they did it). HOWEVER, this is close to temporal concurrence, because you have to have the mens rea at the same time that you had the Actus Reus, BUTH MUST HAPPEN AT THE SAME TIME.

State v. Rose:  $\Delta$  hit pedestrian and then drove 600 feet with him under the car.  $\Delta$  charged with negligent manslaughter, but the  $\Delta$  questions whether the social harm occurred at impact (thus no MR for negligent manslaughter) or after the stop (possible MR). Acquit him on negligent manslaughter because cannot prove if victim died upon impact or after being dragged, AND BECAUSE the state statute did not hold someone liable if they hit the pedestrian in the cross walk in that manner.

## IV. **Homicide**: The killing of a human being by another human being.

**Criminal homicide**: Killing of a human being by another human being and doing so without justification or excuse (defense).

### **Intentional Killings**

**First Degree Murder**: WDP (willful, deliberate, and premeditated) INTENT to KILL.

- (1) Murders committed in some statutorily specified manner
- (2) Any “willful, deliberate, or premeditated” killing.
- (3) Felony Murder.

**Malice Aforethought**: Killing a human being by another human being with malice aforethought....

(1) Intent to Kill (WDP= willful, deliberate, premeditated—“sufficient duration for the accused to be fully conscious of what he intended”(which can vary from person to person on the mind, temperaments, and circumstance in which they are placed)). To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem. As a number of courts have pointed out, premeditation and deliberation characterize a though process undisturbed by a hot blood. While the minimum time necessary to exercise this process is incapable of exact determination, the interval between initial thought and ultimate actions should be long enough to afford a reasonable man time to subject the nature of his responsive to a “second look”

→Under the Guthrie case states are free to decide what WDP is, BUT, know that willful is close to intent, and might be too close to second degree than everything needed for first degree, AND THAT states will focus on time and deliberation.

- (2) Intent to cause grievous bodily injury to another person, where death results..
- (3) Extreme Recklessness/reckless disregard for the value of human life.
- (4) Felony Murder. Intent to commit a felony, during which a person is killed.

**Second Degree Murder**: Intent that is not WDP or intent that is not to kill, but is intent to cause great bodily harm and results in death.

- (1) Murders that are not WDP
- (2) Intent to cause grievous bodily injury
- (3) Depraved heart killings

## Unintentional Killings

**Manslaughter:** An unlawful killing of a human being by another human being without malice aforethought.

(1) **Voluntary Manslaughter:** intentional homicide (intentional killing), done in a sudden heat of passion, caused by adequate provocation, before there has been reasonable opportunity for the passion to cool, You have an intent to kill, so it is murder, but heat of passion is a partial defense reducing it to manslaughter.

**Common Law** recognized certain element of adequate provocation. Certain facts mitigate murder to manslaughter. These at mitigate murder to manslaughter because they create passion in the  $\Delta$  and are not considered the product of his free will.

- Discovering one's spouse in the act of sexual intercourse with another.
- Mutual combat.
- Assault and battery
- $\Delta$  illegal arrest
- Abuse of relative of  $\Delta$ .

### **Elements of Heat of Passion Defense**

- (1) **IN THE HEAT OF PASSION:** The  $\Delta$  must have acted in the **heat of passion**.
- (2) **WITH ADEQUATE PROVOCATION:** The passion must have been the result of **adequate provocation** (most debated issue).
- (3) **SUDDENT:**  $\Delta$  **cannot have had a reasonable opportunity to cool off**.
- (4) **CAUSAL:** There must be a **causal link between** the provocation, the passion, and the homicide.

### **→Standard for "adequate provocation":**

- (1) For provocation to be adequate, it must be calculated to inflame the passion of a reasonable man and tend to cause him to act for the moment from passion rather than reason. Must decide if the provocative event might cause an ordinary person, of ordinary and neither short sanity or temperament, to become enraged or otherwise emotionally overcome so that they lose control.

See some subjectivity:

- a. Measuring the gravity of the provocation to the person's culture.
  - b. Past traumatic experiences.
  - c. Level of self control
- (2) Provocation cannot merely be words. However, words can constitute adequate provocation if they are accompanied by conduct indicating a present intention and ability to cause the  $\Delta$  bodily harm.
  - (3) Common law does not recognize aggregation of a series of small events as provocation.

Misdirected Retaliation Rule: Common law says only qualify for voluntary manslaughter or heat of passion partial defense to the person who gave rise to the provocation (no defense if get the wrong guy).

Girouard v. State: Husband and wife fighting and she is screaming at him nasty things and he goes and gets a knife and then sabs her 19 times and psychologist testified it was an explosion of rage. Husband convicted of 2<sup>nd</sup> degree murder. Question is whether words alone are adequate provocation to justify manslaughter under heat of passion rather than 2<sup>nd</sup> degree murder. Words alone are not one of the common law recognized categories of adequate provocation. Court holds not reasonable or adequate here and that words can be adequate provocation if accompanied by conduct indicating present intention and ability to cause Δ bodily harm.

## (2) **Involuntary Manslaughter:**

- (a) Unintentional killing that results from an act, lawful in itself but done in an unlawful manner, with without due caution.
- (b) Unintentional killing that occurs during the commission of some unlawful act NOT a felony (“misdemeanor manslaughter”).

The common law draws a MR line between risk taking that is “depraved heart murder” which such states of mind constitute a form of malice aforethought (therefore murder), and a less culpable state of mind, sometimes call “Gross Negligence” which justifies the lesser offense of manslaughter. The MPC takes an alternative approach.

People v. Knoller: Big dog case. Dogs known to be vicious, had tons of complaints, and broke out and murdered the lady across the hall. Jury found her guilty of 2<sup>nd</sup> degree murder (depraved heart). The stator definition of implied malice is a killing by one with an abandoned or malignant heart. Court concludes a conviction for 2<sup>nd</sup> degree murder, based on a theory of implied malice (depraved heart), requires proof that the Δ acted with a conscious disregard of the danger to human life; a Δ’s disregard for the risk of seriously bodily injury does not suffice (must be awareness of death, not merely seriously bodily injury).

State v. Williams: Gangrene tooth case. Didn’t take the kid to the doctor even when it stunk and he couldn’t even eat and they knew medial help was available. Says both parents guilty of involuntary manslaughter. At common law, in the case of involuntary manslaughter, the breach had to amount to more

### **Common Law:**

→**Involuntary Manslaughter**: High degree of risk; unjustifiable; not aware.

→**Murder (depraved heart)**: Very High degree of risk; unjustified; aware.

### **MPC:**

→**Negligent Homicide**—substantial risk; unjustified; unaware.

→**Manslaughter**—substantial risk; unjustified; aware.

→**Murder**—substantial risk to human life; unjustified; aware.

than ordinary negligence—gross negligence was essential. Statute says punish for ordinary negligence.

Three risk factors:

- (1) Degree of risk;
- (2) Justification for risk
- (3) Awareness of risk.

## **MPC ON KILLING:**

- A person is guilty of criminal homicide, if whiteout excuse or justification, she takes the life of another human being purposely, knowing, recklessly, or negligently.
- Three forms of criminal homicide: murder, manslaughter, and negligent homicide.
- Murder is killing another person without excuse or justification:
  - (1) purposely or knowingly.
  - (2) Recklessly, under circumstances manifesting “extreme indifference to the value of human life” (common law: depraved heart murder).
- Murder differs from common law: NO degrees; abandons language of “malice aforethought.”

### **MPC § 210.1 Criminal Homicide**

- (1) A person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being. Criminal homicide is murder, manslaughter or negligent homicide.
- (2) Criminal Homicide is murder, manslaughter or negligent homicide.

### **MPC § 210.2 Murder**

- (1) Except as provided in Section 210.3(1)(b), criminal homicide constitutes murder when:
  - a. It is committed purposely or knowingly; or
  - b. It is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are 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 by force or threat of force, arson, burglary, kidnaping or felonious escape.
- (2) Murder is a felony of the first degree [but a person convicted of murder may be sentenced to death, as provided in section 210.6].

### **MPC 210.3 Manslaughter**

- (1) Criminal homicide constitutes manslaughter when:
  - a. It is committed recklessly; or
  - b. A homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is 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.
- (2) Manslaughter is a felony of the second degree.

### **MPC 210.4 Negligent Homicide**

(1) Criminal homicide constitutes negligent homicide when it is committed negligently.

(2) Negligent homicide is a felony of the third degree.

MPC is against punish for ordinary negligence—**Utilitarian's** say the actor cannot be deterred if he does not perceive the risk of his conduct. **Retributivists** say personal accountability not there because didn't consciously violate the social norm. Not morally culpable.

\*\*\*\***REMBEMBER**

**Intent:** Does it on purpose

**Knowingly:** knows that the risk is likely.

**Recklessness:** Knows the risk, disregards it, but has not intended.

**Negligence:** Should have known the risk.

DIFFERENCE BETWEEN MPC AND COMMON LAW:

At common law, you cannot compound previous events for heat of passion, but MPC allows it.

HYPOTHESIS: A man is walking down the street with his daughter, drunk driver runs into and kills the man's daughter, the man goes after the man who just killed his daughter, and accidentally killed a bystander. Under the common law, it's murder, under the MPC it could be manslaughter.

**Involuntary Manslaughter under the common law:** Where someone's negligence leads to a homicide. State v. Williams case where parents failed to provide proper childcare.

**MPC—Heat of Passion**

People v. Casassa: Guy obsessed with the girl and she rejected his gifts so he killed her and tries to claim "extreme emotional disturbance" to reduce murder to manslaughter. EED is broader than "heat of passion doctrine, EED need not be an immediate response.

Components of an extreme emotional disturbance defense:

(1) The particular  $\Delta$  must have acted under the influence of **extreme mental emotional disturbance** (subjective)

(2) There must have been a reasonable explanation or excuse for such EMED, the reasonableness of which is determined from the viewpoint of a person in the  $\Delta$ 's situation under the circumstances as the  $\Delta$  believed them to be.

→ This determination should be made by viewing the subjective, internal situation in which the  $\Delta$  found himself, and the external circumstances as he perceived them at the time, however inaccurate those perceptions may have been. AND assessing from that standpoint, whether the explanation of the excuse for his EMED was reasonable.

- MPC does not require specific provocation (common law does).

- Allows for more subjectivity in assessing what counts as adequate provocation.

Factor 1: Degree of Risk	Factor 2: Justification of risk	Factor 3 Awareness of risk	Mens Rea	Liability
Unreasonable risk of injury to another person	Unjustified	Not aware	Civil Negligence "ordinary negligence"	Civil Liability
High Degree of risk of serious bodily injury or death to another person	Unjustified	Not Aware	Criminal Negligence "Gross Negligence"	Manslaughter (involuntary)
High Degree of risk of serious bodily injury or death to another person	Unjustified	Aware "conscious disregard"	Recklessness "depraved heart" "Abandoned and malignant heart" "Extreme recklessness"	Murder 2 <sup>nd</sup> degree (when available)

- MPC allows for mistaken provocation (the car hypo above)
- MPC no fixed categories of adequate provocation, words count.
- MPC does not have a rigid cooling off period (no suddenness required).

**Common Law:**

**MPC**

Factor 1: Degree of risk	Factor 2: Justification for risk	Factor 3: Awareness of risk	Mens	Liability
<b>Substantial</b>	Unjustifiable	Not Aware	<b>Negligently</b>	<b>Negligent Homicide (MPC § 210.4(1))</b>
<b>Substantial</b>	Unjustifiable	<b>Aware</b>	<b>Recklessly</b>	<b>Manslaughter (MPC § 310.3(1)(a))</b>

<b>Substantial</b> “under circumstances manifesting extreme indifference to the value of human life.”	Unjustifiable	<b>Aware</b>	(extreme) <b>Recklessly</b>	<b>Murder (MPC § 210.2(1)(b))</b>  **No distinction between degrees of murder under MPC
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## **Felony Murder:** (1) Predicate felony (actus reus and mens rea), (2) homicide (just the actus reus).

People v. Fuller: Guys stealing tires from car lot and high speed chase and run a red light killing the other driver and statute makes stealing from a locked car a felony so charged with murder for that other drive. Court upholds the felony murder applies but notes it's irrationally here. Burglary is one of enumerated FMR for first-degree murder. Could probably also hold liable for murder with depraved heart murder, but FMR is easier because the prosecutor will not have to prove MR, also depraved heart is only 2<sup>nd</sup> degree.

## Limitations

- (1) "Inherently dangerous felony" limitation (hence, close to depraved heart murder; two tests).
  - a. In the abstract test: Court ignores the particular facts of the case and considers only the elements of the offense as defined by statutes and asks if the crime by its very nature cannot be committed without creating a substantial risk that someone will be killed.
  - b. Facts of the Case Test: Court considers the facts and the circumstances of the particular case to determine whether felony as it was committed was inherently dangerous.
- (2) "Independent felony" limitation/merger rule": predicate felony must be independent of homicide; otherwise it merges with homicide and no Felony murder rule.
  - Almost always applies in cases of assault
  - Rationales: (1) preserve degrees of culpability for homicide; (2) no longer a deterrence.

People v. Smith: Beating the kid and kid fell and hit her head and died. Δ was convicted of 2<sup>nd</sup> degree murder under the FMR based on felony child abuse (not enumerated FMR felony so only 2<sup>nd</sup> degree). Court holds cannot use the merger rule here because the underlying felony is assaultive in nature, and to hold otherwise would allow any assaultive crime resulting in death to bootstrap to murder if death resulted.

**The Merger Rule** is an exception to the FMR so when it applies you cannot use the FMR. FMR does not apply to assaultive felonies because not going to deter someone who has already decided to harm someone.

HOWEVER, the FMR can apply to an assaultive felony IF there is an independent felonious purpose. This is an exception to the merger rule. A felony does not merge if the underlying assault involves an "independent felonious purpose" (And therefore the FMR applies).

**(3) The *Res Gestae* requirement** (“things done to commit” the felony)

1. Under the common law, the felony-murder rule applies when a killing occurs “*during* the commission or attempted commission” of a felony.
2. Courts, therefore, have concluded that the FMR applies when the homicide occurs “within the *res gestae* of [things done to commit] the felony.”
3. This rule raises two questions:
  - a. To what extent does the rule apply if the victim dies after the crime occurs?
  - b. What causal relationship is required b/w the  $\Delta$ 's felonious action and the victim's death?
4. Answers
  - a. Time and distance requirements:
    - i. Must be some relative proximity b/w felony and the homicide in terms of both time and distance.
    - ii. Distance: The relevant period begins when the actor could be prosecuted for attempt, and continues at least until all the elements of the crime are completed. Most courts, however, apply the doctrine if the death occurs after the commission of the crime, while the felon flees and until the felon reaches a place of safety.
    - iii. Time: what's important is when the killing conduct occurred, and not when the death itself occurred. A person who dies days later b/c of killing conduct, could still make  $\Delta$  liable to felony murder.

Causal requirement:

- iv. Must be a causal relationship b/w the felony and the homicide.
- v. State must show that it was the felonious nature of the conduct that caused the death.
  1. Proximate and but-for causation.
  2. So if a person robs a bank and as a result an elderly man has a heart attack and dies, and it was the stress brought on by the robbery that precipitated the heart attack – felony murder rule likely applies.

**(4) Killing by a non-felon limitation:** FMR does not apply when it is not the felon who kills the person. BUT, if an accomplice kills the person, the felon and the accomplice can be liable for FMR.

## V. Rape

**Common Law:** The carnal knowledge of a woman, forcibly against her will.

### **Traditional Requirements of Rape are...**

#### (1) Force;

- a. Actual physical force not always required, can be a threat of force (constructive) and can be implied or express by the totality of the circumstances.
  - i. Age of both parties;
  - ii. The atmosphere and physical setting;
  - iii. Whether the  $\Delta$  is in a position of authority;
  - iv. Whether the victim is under duress.
- b. The resistance requirement served as a basis for defining the amount of force necessary to support a conviction of rape. The resistance requirement is a proxy for determining if there was force or non-consent, not a third element.

#### (2) Non-consent.

- a. Consent can be withdrawn at any point prior to penetration regardless of prior acts.
- b. Prior consensual relationships make determining victim's state of mind more difficult.

### **The Carnal Knowledge of a woman forcibly and against her will...**

#### **Actus Reus:**

Conduct: Vaginal intercourse.

Attendant Circumstances: *resistance requirement:* proxy for force and non-consent, given evidentiary challenges.

(1) Force: actual or threat of serious bodily harm.

(2) Non-consent.

**Mens rea:** None sated, therefore a general intent offense (morally blameworthy state of mind).

**At common law** there must be a mens rea component to crimes. The common law rape does not have a mens rea term specifically written into it, so it must have a general intent mens rea component.

**Rape** is a **general intent crime**. The  $\Delta$  does not have to intend to have sexual intercourse non-consensually. If successful, the mistake of fact negates the MR. So rape would negate the general disposition and common law allows mistake of fact for general intent crimes when the mistake is genuine and reasonable. Some jurisdictions have rejected the defense but that is bad because then rape looks like a strict liability crime.

**ALSO:** do we need a force requirement? Or should it just be non-consent? What is so difficult is that it is often a he said/she said battle and force may be the distinguishing point between rape and other CSC. Big question is whether rape is a violent crime? Debated topic.

**General intent is merely criminal culpability in the eyes of the fact finder.**

→ In order to refute facts of a specific intent crime...

- (1) Specific intent (historic use) crimes—no guilt if in good faith;
- (2) General intent crimes—no guilt only if in good faith and reasonable.

State v. Alston: Threatened to fix her face and then took her to his friend's house and had sex with her. The two have a prior sexual relationship. She complied with his sexual advances but cried the entire time and did not push him away. Δ convicted of 2<sup>nd</sup> degree rape. Rape requires (1) force; and (2) against the victim's will. The threat of force must be to submit to the unwanted sex not the actions of prior occasions (issue of time framing).

\*\*\*The default rule when there is a prior or ongoing sexual relationship between the victim and the Δ is that there is consent, and the burden is on the victim to prove she expressly and unequivocally withdrew her consent. It is an implied yes unless objectively manifests a no.

\*\*\*Actual physical force is not required. Threats of serious bodily harm which reasonably induce fear thereof are sufficient. Again, the threat of force must be to submit to the unwanted sex.

Rusk v. States: How much force? Resistance requirement—met at the bar, got a ride home, took her keys and they went upstairs. She did not try to leave or contact anyone for help. Δ was charged with 2<sup>nd</sup> degree rape but challenges there was no evidence of force. Court holds the evidence must warrant a conclusion either that the victim resisted and her resistance was overcome by force, or that she was prevented from resisting by threats to her safety (common law resistance requirement). Dissent in this case criticizes because it seems that the focus is almost entirely on the extent of resistance—the victim's own acts—rather than those of her assailant. That is the law and accepts it.

**Critical questions:**

1. Why does the proof of this crime focus on the victim's response?
2. What if victim's response is passive?
3. What if resistance increases risk of harm? (IT DOES).
4. Why require force at all? Isn't non-consent enough?

## **Modern Reforms**

### **How could we define rape?**

1. **Non-consent:** (definition of consent) [worry about how you define consent, because you may end up punishing someone when there was some level of confusion.]
2. **Non-consent + force:** Without resistance [common law]
3. **Force:** Force alone will not adequately define rape, because it will not capture cases of clear non-consent, but there is No forceful actions... like date rape.
  - a. **Mental psychological:** could include that someone is in a position of authority of the other person.
  - b. **Physical:**
    - i. **Violent:** Death or bodily harm.
    - ii. **Mere act:** The mere act of penetration.
    - iii. **Lesser Acts:** Some kind of restrain, positioning, moving, etc.

### **Possible Areas of reform**

1. Drop or diminish resistance requirement, but still require force and non-consent.
2. Redefine force → expand it to cover not just physical force, but also mental and physiological force (could include that someone is in a position of authority over the other person). ALSO physical force could be expanded from violent force, to just the mere act. HOWEVER that negates the force requirement.
3. Drop force requirement altogether: focus on non-consent. Question of sexual autonomy. If this is the definition of rape, then force and resistance both become proxy for non-consent.
4. Drop Non-Consent Requirement
5. There are problems with each of these, which is why it is so difficult. How do we prove consent? Are we ok with including passive acquiescence and gun to the head in the same category.

### **Challenges of Reform**

- (1) The underlying conduct—sex—is pervasive and non-criminal.
- (2) Therefore, very difficult to determine CSA without looking at the victim's response:
  - a. Force—hard to avoid measuring resistance.
  - b. Non-consent—is a feature of the victim's response, even if rule requires affirmative consent (because "yes" can be implied).

### **How do we deal with coerced, but non-violent sex between acquaintances?**

Commonwealth v. Berkowitz: College dorm room straddled her and tried to put his penis in her mouth then locked the door and put the victim on the bed and removed her pants and had sex with her while she said "no" the whole time. She did not physically resist but said no the while time, never screamed. The victim had asked the Δ about the size of his penis before. Charged with rape but court reverses because say the verbal protests show it was against he will but not evidence of force. Rape is not just non-consensual intercourse. Court dropped the resistance requirement.

M.T.S. case... → Any act of sexual penetration engaged in by the Δ without the affirmative and freely given permission of the victim of the sexual at of penetration constitutes the offense of sexual assault. That's non-consent... Which is strange because in that case, the state statute was silent on the issue of consent... and was supposed to be a force argument...

## VI. Theft

### **When attacking a theft question, ask yourself three things!**

1. Who initially had possession?
2. Whether and to whom possession transferred?
3. Where such transferred possession happened lawfully or trespassory (unlawfully)?

**Larceny** is the trespassory taking (*caption*) and carrying away (*asportation*) of the personal property of another with the intent to permanently deprive the possessor of the property.

### **ELEMENTS**

#### **1. Actus Reus**

##### **a. “Trespassory Taking” (Caption) Unlawful taking.**

- **Requires unlawful possession**, which turns on consent (NOT OWNERSHIP)
- Once a person has lawful possession, no possibility for a trespassory taking. → No possibility for larceny if there is lawful possession.
- **Doctrinal expansion: Custody v. possession:** Like the Chiser case where the merchant hands the customer a product but is able to legally retain constructive (lawful) possession, but only giving the customer custody prior to payment.

(1) Applied to bailments: third parties that are delivering packages to an owner. The bailee only has possession of the container, and custody of the contents. THE BAILEE has no possession of the contents, thus if they take the contents it is a larceny.

(2) Applied to frauds (larceny by trick): If someone takes an item by fraud, their relationship to that item is one of custody and not of the lawful possession that it would otherwise be. Pear case.

**b. “Carrying Away” (Asportation): ANY DISTANCE!** (Common law originally did not cover intangible property, services, intellectual property, or labor).

**c. “Personal Property of Another” (Not real property).**

**2. Mens Rea**—With the intent to permanently deprive the possessor of the property.

**3. Concurrence of the elements:** BUT we can use continuing trespass when the item was originally taken from a trespass.

#### **AR 1: Trespassory Taking:**

Less v. States: The requirement of trespassory taking made larceny an offense against *possession*. Thus, a person such as a bailee who had rightfully gained possession could not be guilty of larceny even for misuse. Trespassory taking focuses on the physical aspect of taking and obtaining possession.

Rex v. Chisser: Stolen cravats case. He is in the store and she hands him the ties and he just runs away with them. Looks like not larceny because she handed him the ties so no

trespassory taking. BUT court makes a distinction between custody and possession to get around this and charge him with larceny. Court said the Δ had mere physical possession (custody) of the property but the store had possession (constructive possession).

United States v. Mafnas: Armored car guy took some cash. Case explores another caveat that developed because here the Δ had lawful possession of the bags of cash as a bailee so he thought no larceny because no trespassory taking but the court develops the break bulk doctrine to show that the had possession of the bags, not the contents, so when he took some of the contents, and breaks bulk, he committed larceny. Court looks at distinction between custody and possession and says when a person receives property for a limited or temporary purpose, he only has custody. The owner will remain with constructive possession until the custodian's task is complemented. Employees presumptively obtain custody only, whereas agents acquire possession. He says he was an agent bailee so court develops he break bulk to still get him.. Under the break bulk doctrine, the bailee was given possession of the bailee, not its contents. The bailee only has custody of the contents, a bailee who breaks bulk commits larceny.

**AR 2: Carrying Away**—the slightest carrying away movement is good enough. Although it might only be slight, it must be a carrying away movement.

**AR 3: Of the personal property of another**—Must be PERSONAL property, and it must be of another, looking at possessory interest, not title, which allows statutes that protect car mechanics from people taking back their cars before they pay.

**MR: With the intent to permanently deprive the possessor.**

People v. Brown: Kid stole the bike but said that he did not intent to steal it for good but only for a little bit and then put it back, Court holds that this was not larceny because the felonious intent must be to deprive the owner of the property permanently. To satisfy the MR, must ask did he intent to permanently deprive the owner of the property? If not, there is no felonious intent and he has only committed a trespass.

\*\*\*HOWEVER what if the boy originally took the bike with no intent to permanently deprive, but then later while he had the bike changed his mind and wanted to keep it. See there is a concurrence of the elements issue because the AR, the taking and carrying away, and the MR, intent to permanently deprive did not come into being at the same time. **ANSWER??? Continuing Trespass**

**Continuing Trespass**: A legal fiction that assumes that a trespass is still occurring as long as the wrongdoer remains in possession of the property that is the subject of the prosecution. This is important, because if a Δ were to take something with the intent of returning it, but then later on decided that he was going to permanently deprive, then the mens rea and the actus reus would not occur at the same time. This allows the jury to convict, because the actus reus is on going, and in the event that the mens rea changes, a Δ will still be convicted. Makes up for a lack of the concurrence of the element. Only applies when the property was trespassory taken originally, NOT when the property was legally taken originally.

**Possession:** Does not require ownership; originally turned on having property by consent; gradually distinguished from custody (consent, but temporary and extremely limited authority to use property)—other person still retains constructive possession...

**Custody/Possession:** Distinction emerges because no larceny if lawful possession. (Once someone has lawful possession, they cannot be found guilty of a larceny). Possession/Custody is a form of legal possession.

→These are all legal fictions, to expand the scope of this crime to reach more activities that were illegal.

**Bailor/Bailee:** Possession of container; custody of contents. What about the armored truck driver who pockets the money? IT IS a LARCENY! Because, while the money sack is in the possession of the driver, the money inside is only in custody (legal fiction).

**Employer/Employee:** custody when employers give employees property. What about a bank teller who pockets money? Can't be a larceny (but it is embezzlement). Why?? Employee received money by a third party employer.

**Claims or Right:** A claim of right is a defense to burglary or larceny, which states that if the defendant reasonably believed that he had a right to the property, either because he mistakenly believed it to be his, or he was owed a debt, then it was not a felonious taking.

**Larceny by Trick (Device):** Occurs when the defendant obtains possession of (but not title to) another's property by fraud or trickery; fraud violates consent and takes the place of the trespass.

Rex v. Pear: Rented horse for a round trip but ended up just taking it and selling it and never returned it. Question is whether the delivery of the horse by the table keeper to the prisoner changed the possession of the possession of the property. Not custody because does not have a limited purpose. When the conveyance of the property is induced by fraud that the parting with the property did not change the nature of possession and it remained unaltered at the time of conversion and thus was a felony. This offense became known as larceny by trick.

**\*\*\*BIG GAP:** When someone receives lawful possession of another's property, and then steal the property (rent a car, intend o return it at the end of the day, but then sometime before the end of the day, decide to sell the car for money and or never return it). It is not covered by larceny.

## Contemporary Reformulations

**Embezzlement:** The fraudulent conversion of personal property over which one has lawful possession with the intent to defraud.

1. [AR] lawful possession
2. [AR] Fraudulent conversion
3. [AR] Entrustment (often, but not always necessary)
4. [MR] Intent to defraud at the time of conversion.

**\*\*\*REMEMBER:** we are not looking at property that the employer gives to the employee, we are only looking at the property that the third party gives to the employee to give to the employer.

**False Pretenses:** Knowingly and designedly obtaining title to the property of another by means of false representations of fact with intent to defraud. (Non-disclosure is not enough, UNLESS there is a duty to disclose). In the act of false pretense, the Δ can obtain lawful title, and still be held liable for the crime.

1. [AR] False representation
2. [AR] Of some existing fact
3. [AR] Obtaining title.
4. [MR] Intent to defraud (non disclosure is intent to defraud ONLY when there is a duty to disclose).

People v. Ingram: Distinguishes larceny by trick and false pretense.

**Larceny by Trick (Device):** Occurs when the defendant obtains possession of (but not title to) another's property by fraud or trickery; fraud violates consent and takes the place of the trespass.

**False Pretense:** fills the gap where one through false representation and with the intent to steal, obtains both possession and title to the property, because that is not larceny because he obtained title, not merely possession. False pretense occurs where the Δ makes a false representation with the intent to defraud the owner of his or her property, and the owner is in fact defrauded. **The distinction between larceny by trick and false pretense is merely one of title.**

**HOWEVER:** If one, through false representations and with the intent to steal, obtains both possession and title to property there cannot be a common-law larceny. The statutory crime of theft by false pretenses was created to fill the gap.

**Theft by false Pretenses:** Occurs where the defendant makes a false representation with the intent to defraud the owner of his or her property, and the owner is in fact defrauded. → In other words, as in any other case of fraud, the injured party must have been induced to part with his property in reliance on the false representation.

**Distinction between larceny and theft by false pretenses:** TITLE, larceny cannot obtain title.

**Elements of mail and wire fraud**

1. Δ engaged in a “scheme to defraud”
2. Scheme involved material misstatements or omissions
3. Δ acted with the intent to defraud
4. Scheme resulted, or would have resulted, in loss of money/property/honest services.
5. The U.S. mail, a private courier, or interstate or international wires:
  - a. Were use “in furtherance” of the scheme to defraud; and
  - b. The Δ used, or caused the use, of these services.

\*\*\*The powers are broad—any communication will trigger federal jurisdiction, will include inchoate crimes, and will include all crimes regardless for where they were committed (so crimes that were committed within states, which would typically be handled by states).

**The MPC consolidates all of the common law crimes into one crime, theft.**

→Then distinguishes from different forms of theft. Silent as to whether the Δ first had lawful possession.

## **VII. General Defenses**

### **Two Types of defenses....**

#### **1. Failure of Proof defense—Negative Defense:**

#### **2. Traditional Common Law defenses—Affirmative Defenses.**

- **Justification Defense:** Focus on the action, the actus reus, there was no crime because the actor did what they had to do no physically possible alternative.
- **Excuse Defense:** Focus on the mental state, the mens rea, there was a crime because the actor decided to but they were possibly under duress, or some other mental state that did not allow them to commit a crime.

**Defense:** A set of conditions where, if proven, prevent conviction or result in conviction for a lesser offense.

**Total Defense:** Acquittal (or no conviction in first place) (i.e. self defense).

**Partial defense:** Conviction for a lesser offense (i.e. heat of the passion—voluntary manslaughter).

**GENERAL RULE:** We do not hold victims of a crime liable for accomplice liability.

→The specific medications or defense will vary depending upon the offense...

\*\*\*This is because technically paying a kidnapper's ransom or a racketeers extortion, are part of the crime, but a court does not want to hold a victim liable.

\*\*\*Focus on the difference between justification and excuse...

**Justification:** A set of conditions, which prevent conviction because the otherwise criminal act was the right or permissible action in this instance.

EXAMPLES:

1. Someone is about to shoot you, and seconds before, you shoot and kill them before they kill you. BECAUSE it is the permissible thing to do under those set of circumstances, the social harm is negated.
2. Burning someone's corps out of necessity to prevent a wildfire from killing a town is not a crime, because the **necessity** is a justification for the otherwise criminal action.

\*\*\*To be justified, the responsive conduct must satisfy two requirements...

(1) It must be NECESSARY to protect or further the interest at stake, and

- (2) It must cause only a harm that is PROPORTIONAL or reasonable in relation to the harm threatened or the interest to be furthered.

**Necessity Requirement:** The defendant act only when and to the extent necessary to protect or further the interest at stake.

**Proportionality Requirement:** Places a limit on the maximum harm that may be used in protection from furtherance of an interest that it bars justification when the harm caused by the actor may be necessary to protect or further the interest at stake, but too severe in relation to the value of the interest.

**Excuses:** a set of conditions, which prevent conviction because the **actor** while committing an otherwise criminal act, is not morally blameworthy.

EXAMPLES:

1. Insanity defense → Vary from state to state, legal judgment not a medical judgment. Essentially, the defendant is not morally blameworthy...

\*\*\*Both justifications and excuses assume that the Mens Rea and the Actus Reus of the crime have occurred, Justification focuses on the ACT (to see if it was a justified action that should be encouraged, and not punished), Excuse focuses on the ACTOR (to see if he can be excused from the severity of the punishment).

**Burden of Proof:**

Justification: Burden of proof should be on the prosecution.... BECAUSE justified conduct would not be guilty beyond a reasonable doubt, unless proven otherwise.

Excuse: Burden of proof with the defense attorney, BECAUSE the elements of the crime are met, the circumstances do not justify the action, but the defendant believes that he is not morally blameworthy as an individual.

**Accomplice Liability:** If one party is acquitted on justification, then it follows that the other party should be acquitted as well (assuming they both were acting to prevent the greater social harm), HOWEVER if one party is acquitted on excuse, then other party might not have that excuse, and still be criminally liable.

**Self-Defense:** A non-aggressor is justified in using force upon another if she reasonably believes such force is necessary to protect herself from imminent use of unlawful force by another person.

\*\*\*Deadly force is only justified in self-protection if the actor reasonably believes that its use is necessary to prevent imminent and unlawful use of deadly force by the aggressor.

**Components:**

1. **Necessity:** Force should not be used against another person unless, and only to the extent that it is necessary.
  - a. **Imminence Rule:** Use of force in self-defense is permissible only where the threat of force is about to be realized in time (moments away). A corollary to necessity but not a requirement, because there are situations where the opportunity to prevent the harm is about to expire, but the harm itself is not yet imminent (just assume to happen to the best of our knowledge—this is what we use to excuse preemptive military action on terrorism...)
  - b. **Provocation Rule:** The right to use deadly force in self-defense is not available to someone who provokes a conflict or is in the aggressor in it, unless the  $\Delta$  first withdraws from the conflict in good faith and informs the other party's to the conflict of that withdrawal by words or acts.  
→ The idea is that force, in the bigger picture, force is not really a last resort because you could have prevented all of this in the first place by not provoking the party in the first place. **BECAUSE you can't create the necessity, in order for it to be a necessity.**
  - c. **Retreat Rule:** A person cannot invoke the doctrine of self-defense where that person had some means to safely retreat and avoid the harm.
2. **Proportionality:** A person is not justified in using force that is excessive in relation to the harm threatened.
3. **Reasonable Belief:**
  - a. **Subjective Prong:** person must believe that she needed to use (deadly) force to repel the attack.
  - b. **Objective Prong:** Person's belief must be one of a reasonable person in the same situation would have possessed.

United States v. Peterson: Stealing windshield Wipers, goes and gets his gun from the house, returns, guy approaches owner with a tire iron and the owner shoots him in the face. Homeowner claims self-defense to a claim of 2<sup>nd</sup> degree murder. There must have been a threat, actual or apparent, of the use of deadly force against the self-defender. The threat must have been unlawful and immediate. The defender must have believed that he was in imminent peril of death or serious bodily harm, and his response was necessary to save himself. These beliefs must be honest and objectively reasonable in light of the surrounding circumstances, and all elements must occur at the same time. One who is an aggressor in a conflict culminating in death cannot invoke the necessities of self-defense, unless he communicated to his adversary his intent to withdraw and in good faith attempts to do so

**\*\*\*Self-defense cannot be claimed by one who deliberately places himself in a position where h has reason to believe his presence would provoke trouble.**

\*\*\*Retreat to the Wall—is a common law doctrine, which forbade the use of deadly force by one whom an avenues for safe retreat was wide open.

\*\*\*CASTLE—is a common law doctrine, that one who through no fault of his own is attacked in his home is under no duty to retreat therefore, someone jurisdiction extend this to curtilage, and allow any action to be taken.

**MPC**

**MPC § 3.04**

**(1)** Use of force justifiable for protection of the person. Subject to eh provisions of this Section and of Section 3.09 the use of force upon or toward another person is justifiable when the actor believe that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

**(It is possible that imminence and immediately necessary overlap, however they do not completely overlap)**

**(2) (b)** The use of deadly force is not justifiable under this Section unless the actor believes that such force is necessary to protect himself against death, seriously bodily harm kidnaping or sexual intercourse compelled by force or threat; nor is it justifiable if:

- (i) The actor, with the purpose of causing death or serous bodily injury provoked the use of force against himself in the same encounter; or
- (ii) The actor knows that he can avoid the necessity of using such force with complete safety by retreating or by surrendering possession of a thing to a person asserting a claim of right thereto or by complying with a demand that he abstain from any action that he has no duty to take

So in they hypo where someone threatens another to walk on the other side of the street under penalty of death, then walking down that street with a gun, and allowing them to run at you menacingly will not afford you the ability to shoot and kill the aggressor under the MPC, but will allow you to kill the aggressor under the common law.

Meanwhile in the Hypo where the first man pushes a man, then tat man disproportionately takes out a gun and then respond to that by taking out his own gun, the MPC will afford the use of self-defense, common law would not, MOC rule is more popular.

**SO, COMMON LAW Necessity:**

1. Clear and imminent danger.
2. Reasonable belief that action will abate the danger.
3. No adequate alternative to avoid the danger.
4. Harm caused not disproportionate to the harm avoided.
5. Non of the following apply:

- Δ did not cause the danger.
- State does not limit to naturally caused emergencies.
- Legislature not struck a difference balance.
- State does not prohibit application to homicides

\*\*\*Δ did not cause the danger; defense not limited to naturally caused emergencies; legislature not balanced harm otherwise, and no exemptions for homicides.

**MPC § 3.02 is BRAODER IN THREE WAYS:**

1. No imminence requirement;
2. No automatic loss of defense because of fault;
3. Not limited to emergencies from natural causes (as in some of the common law states).

**Defense of Property:** A person may use non-deadly force against a would be dispossessor if she reasonably believes such force is necessary to prevent imminent, unlawful dispossession of property (TX is an exception).

**Defense of Habitation:** A person may use deadly force if she reasonably believes such force is necessary to prevent an imminent an unlawful entry of her dwelling (some states have required that you have to reasonably believe that someone will injure you, or cause a forcible felony against you).

**Defense of Others:** SAME ELEMENTS, except instead of on your own behalf it is on someone else's behalf. There was once a restriction to familial relationship, but that no longer exists, AND it usually will extend to fetus.

People v. Kurr: Guy punched pregnant girl in the stomach after she warned not to hit her because she was pregnant and then he came toward her and she stabbed him in the chest and he died. In this case defense of other extends to a fetus because of state legislation, but limits it solely to context of assault against the mother. Defense of others theory is available only if a person acts to prevent unlawful bodily harm against another (the reason why abortion cases by anti-abortionists have not been upheld).

\*\*\*MOST STATES provide that if the intervener acts on the basis of a REASONABLE BELIEF, the defense will apply to the intervener, even if the third party has no right to self-defense.

## **Necessity**

Nelson v. States: Kid got his truck stuck off roading and took state trucks from yard to try to pull it out and messed them up. He claims it was necessary to take and use the vehicles or his truck would have been damaged by rolling over. The defense of necessity may be raised if the Δ's actions, although vocative of the law, were necessary to prevent an even greater harm from occurring.

### **ELEMENTS:**

- (1) The act charged must have been done to prevent a significant evil.
- (2) There must have been no adequate alternative.
- (3) The harm caused must not have been disproportionate to the harm avoided.
- (4) Δ not the cause of the emergency.
- (5) Harm is imminent; and
- (6) Other laws don't reflect different policy balance.

The Queen v. Dudley and Stephens: Guys at the kid in the lifeboat after starving for days  
Court holds it was to more necessary to kill the boy than any other men on board.

\*\*\*Today some states limit the defense of necessity to **naturally caused emergencies, and some states preclude the defense if the act for which it is raised is homicide. Not available in homicide in common law, MPC does not deny per se.**

### **MPC § 3.02 Choice of Evils Defense. Difference between MPC and Common LAW**

- (1) The MPC purposefully does not have an imminence requirement.
- (2) There is no automatic loss of the defense if you are at fault.
- (3) The MPC is not limited to emergencies from natural causes.

\*\*\*Historically, necessity has been thought of as an excuse, but more recently has been thought of as a justification. It can be thought of as either.

## Duress

United States v. Contento-Pachon: Guy offered job as personal driver then coerced into eating a ton of cocaine balloons and got caught smuggling them. They said they would harm his family and that someone was watching at all times so triable issue on immediacy... Didn't report to police because they were corrupt so triable issue on opportunity to escape.

- (1) **Immediate (imminent) threat of death or serious bodily injury;**  
→ Requires that there be some evidence that the threat of injury was present, immediate, or impending. A veiled threat of unspecified harm will not suffice.
- (2) **A well-grounded fear that the threat will be carried out.**
- (3) **No reasonable opportunity to escape the threatened harm; and**
- (4) **Defendant not at fault for creating the situation.**

### **Difference between duress and necessity:**

- (1) **Traditionally** under necessity the coercion must have had its source in the physical forces of nature. Duress is defense when the Δ's acts were coerced by human force. Modern courts blur this distinction.
- (2) **The major differences between duress and necessity is that duress negates the MR, and necessity negates the AR.**  
→ Duress doesn't necessity negate the Mr. to determine whether the MR is negated in a particular case, the first question is whether the mental element of the offense is defined in such a way that either an actor's motives or his or her immediate desires have any relevance.
- (3) Necessity usually invoked when the Δ acted in the interest of the general welfare.

People v. Anderson: Fathers of campers kill the guy suspected of molesting kids and the main guy threatens to beat the shit out of the other guy if he doesn't help. Question is whether fear for one's own life justifies killing an innocent person? Can duress reduce murder to a lesser crime? **Common law rule is that duress is not a defense to killing an innocent person.**

**HOWEVER:** This is not necessarily a fair statement to say that **Duress** negates mens rea, because you can have duress, but it does not negate the mens rea EX. You can merely negate the motive, you don't want the outcome, but you are doing it on purpose.

**ALSO,** might not be a fair statement to say that **Necessity** negates the actus reus, because you can have necessity with an actus reus.

**\*\*\*Duress can never be an excuse nor a mitigating factor to MURDER under COMMON Law, BUT IT CAN UNDER MPC.**

**Today:** 19 states have a statute that counteracts the common law rule to allow duress for murder cases.

- **We are trading one harm for another equal harm... does that make it ok?**

**MPC § 2.09 Duress is an affirmative defense if:**

- (1) The  $\Delta$  was compelled to commit the offense by the use or threatened use of unlawful force by the coercer upon the  $\Delta$  or another person; and
- (2) A person of reasonable firmness in the  $\Delta$ 's situation would have been unable to resist.

**Differences between MPC and Common Law**

- (1) MPC has no requirement of immediate or imminent threat of death or serious bodily injury.
- (2) Under the MPC may be raised in homicide cases.
- (3) No requirement that the victim be  $\Delta$  or a member of  $\Delta$ 's family.

**Intoxication:** This disturbance of mental or physical capacities resulting from the introduction of any substance into the body, whether voluntary or involuntarily.

**HOW could intoxication be a defense?**

1. **Failure of Proof defense**
  - a. **Negate the Mens Rea** because you could not be in control of your mental faculties.
  - b. **Negate the Actus Reus** because you were not in control of your motor abilities... like someone who is completely intoxicated to the point where they are not in control of their body.
2. **Affirmative defense—“excuse” (never a justification).**  
→ Because, if alcoholism is a disease, and the Δ had no control over their ability to become intoxicated... NOT CURRENTLY A DEFENSE—but this is conceivable for the future.

**The common law rule:** Voluntary intoxication is never an excuse, but it can serve as a failure-of-proof defense if as a result of intoxication, the Δ did not have the requisite mens rea component required in a specific intent crime.

\*\*\*Under this common law rule, voluntary intoxication can be a failure of proof defense, for a **specific intent crime**, BUT NEVER a **general intent crime**.

United States v. Veach: Δ was drunk and threatened to chop and officer’s head off. Δ claims that he should not be liable because he was intoxicated—lacks intent to assault w/words.

**CANNOT be a defense in general intent crimes, because** you opened yourself up to the possibility of violating the law, and that makes you blameworthy enough... EVEN THOUGH the common law still reads in a mens rea component into the general intent crimes...

\*\*\*Majority of states follow tis common law rule... However, a minority of states have outright banned all intoxication defenses. IN FACT, Blackstone wanted the crime to be increased by the intoxication, thought that it made the situation worse and the individual more blameworthy.

**Involuntary Intoxication:** On occasion a defendant will assert that she could be exculpated because of involuntary intoxication. **FOUR TYPES:**

1. **Coerced Intoxication:** Intoxication involuntarily induced by reason of duress or coercion.
2. **Pathological intoxication:** intoxication has been defined as “**intoxication grossly excessive in degree, given the amount of the intoxicant to which the actor does not know he is susceptible.**”
3. **Intoxication by Innocent Mistake:** Occur when intoxication results from an innocent mistake by the defendant about eh character of the liquor or drugs.
4. **Unexpected intoxication:** ingestion of a medically prescribed drug.

## **Insanity**

### **Three Questions We have to Ask:**

1. **Competency**—Ability to stand trial RIGHT NOW, because the Supreme Court has stated that under the due process clause of the Fourteenth Amendment, a criminal defendant must have the ability to communicate with his or her attorney and meaningfully go through the criminal justice system. COMPETENCY is an ongoing issue throughout the process.

#### **THE COMPETENCY STANDARD**

- (1) Δ lacks the capacity to consult with her attorney with a “reasonable degree of rational understanding” or
- (2) Δ lacks “a rational as well as factual understanding of the proceedings against her.”

\*\*\*If someone cannot be competent for trial, then they are usually held until they can become competent. They can be forced to take medication to become competent.

2. **Insanity**—If someone is found not guilty by reason of insanity, then they will almost always be immediately civilly committed.
3. **Release**—People who are civilly committed, especially when they come from an egregious crime committed, then they can be held until they no longer pose a threat to themselves or society. AND at least once every six months there has to be one of these reviews before a court.

**Rational**—traditional goals of punishment not fulfilled.

**Procedure**—Competence (a person always has to be competent at every point of the process, at this point in time, and protected by the due process clause) vs. Insanity (as a matter of Law).

**Cognition**: Using “appreciate” rather than “know” to convey broader sense of mental ability.

**Volition**: Capacity to conform one’s conduct to the requirements of the law.

## **Tests—**

- (1) **M’Naghten Test**: To establish a defense of insanity it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind as not to know the nature and quality of the act that he was doing, or if he did know it, that he that he did not know that what he was doing was wrong.

\*\*\***Wrong, could be moral wrong or legal wrong—depends on the state.**

**DUAL PRONG test, focus on knowledge of Right v. Wrong.**

1. She did not know the nature and quality of the act she was doing; or
2. If she did know, she did not know that what she was doing was wrong.

WHAT DO WE MEAN BY “Know”?

\*\*\*Does it mean right from wrong, or does it mean appreciate the wrongfulness of the act?

Well, we...

→ **Refused to recognize volition or emotional impairments.**

→→ **AND only looked for total incapacity of cognition.**

(2) **Control Test**—AKA the **Irresistible Impulse Test**: Courts inquire both **Cognitive and volitional components.** In addition to M’Naghten, a person is insane if, at the time of the act:

**Prong 1:** She acted from an irresistible and uncontrollable impulse; or

**Prong 2:** She lost the power to choose between right and wrong because her free agency was destroyed.

(3) **Product Test**—AKA the **Durham Test**: An accused is NOT criminally responsible if his unlawful act was the produce of mental disease or mental defense. **\*\*\*ABANDONED in 1972.**

(4) **MPC Test**—**most generous test (WIDLY ACCEPTED)**: A person should be excused if, at the time of the conduct and as the result of some mental defendant, the person lacked substantial capacity to:

1. Appreciate the criminally (or “wrongfulness”) of her conduct; or
2. To conform her conduct to the requirement of the law.

**\*\*\*Recognizes cognition and volition**, and allows a three way conversation between the (1) lawyers and judges, (2) the medically trained experts, and (3) the jury.

**\*\*\*MPC allows insanity defense when...**

- (1) When as a result of mental disease or defect, thus Δ lacked substantial capacity to appreciate the criminally wrongness (blameworthiness) of his conduct; or
- (2) When, as a result of mental disease or defect, the Δ lacked substantial capacity to conform his conduct to the requirements of the law.

State v. Wilson: Δ shot a guy he went to high school with because e thought that he was hypnotizing people and was controlling people’s minds.

**THE MPC test is noteworthy because:**

- (1) It encompasses both a cognitive and volitional prong.
- (2) The test focuses on the Δ’s actual appreciation of, rather than merely his knowledge of, the wrongfulness of his conduct.

The most relevant here is the alternative phrasing of the cognitive prong.

→ A Δ may establish that he lacked substantial capacity to appreciate the “wrongfulness” of his conduct if he can prove that, at the time of his criminal act, as a result of mental disease or defect, he substantially misperceived reality and harbored a delusional belief that *society, under the circumstances as the Δ honestly must mistakenly understood them, would not have morally condemned his action.*

**Criticism**

- (1) Take into account both cognitive and volitional aspect;
- (2) Take into account degrees of insanity;
- (3) Ensure experts don't supplant role of jury;
- (4) Discern moral responsibility (ultimate issue).
  - **Today:** Swing back toward M'Naghten, to limit defense—while M'Naghten fell out of light for a while, the attempted assassination of President Regan caused the country to bring M'Naghten back into favor.

## **VIII. Inchoate Offenses—A step toward the completion of a crime (the target offense), which itself is a crime.**

### **THE SIX STAGES.**

- (1) Conceiving the idea of committing a crime.
- (2) Evaluating the idea.
- (3) Forming intent to go forward with the crime **(you can have mens rea)**  
**In between 3 and 4 is where the elements come together to equal inchoate crime.**
- (4) Preparing to commit the crime. **(you can have actus reus)**
- (5) Commencing with the commission of the crime (preparation).
- (6) Completing the Crime (target crime)

\*\*\*This is not about seeking justice, this is about allowing law enforcement to get involved before the crime is consummated.

\*\*\*We want to prevent attempts, but as a matter of law we are going to run up against the fact that we don't punish thought crimes.

#### **Attempt, solicitation, and Conspiracy**

##### Three factors:

1. When a person is seriously dedicated to commission of a crime, a firm legal basis is needed for the intervention of the agencies of law enforcement to prevent its consummation. In determining that basis, there must be attention to the danger of abuse; equivocal behavior may be misconstrued by an unfriendly eye as preparation to commit a crime.
2. Conduct designed to cause or culminate in the commission of a crime obviously yields an indication that the actor is disposed towards such activity, not alone on this occasion but not others.
3. When the actor's failure to commit the substantive offense is due to a fortuity, as when the bullet misses in attempted murder or when the expected response to solicitation is withheld, his exculpation on that ground would involve unequal treatment that would shock the common sense of justice.

## **Attempt**

**Attempt:** Occurs when a person with the intent to commit an offense performs some substantial step toward carrying out that intent (this is a specific definition, most common, but not universal).

### **Attempts are either incomplete or complete.**

**Incomplete:** The  $\Delta$  does some of the acts necessary to achieve the criminal goal, but quits or is prevented from moving forward before taking the final acts to complete the crime.

**Complete:**  $\Delta$  performs all the acts that she set out to do to commit the crime, but fails to attain the criminal goal.

### **MPC §5.05(1) Grading.**

Except as otherwise provided... attempt... crime of the same grade and degree.. except for capital crime or a felony of the first degree is a felony of the second degree.

**Rational: Preventing of crime** (specific, but not general deterrence)

**Grading of punishment:** Common law (often half target crime) MPC: SAME— except for murder.

### **Actus Reus—Two Values**

- (1) Liberty;
- (2) Security.

\*\*\*The earlier that you hold someone liable, the more likely you are to punish someone who was not going to go through with the crime.... HOWEVER, the earlier that you hold someone liable, the more likely that you can prevent a crime from happening (prevent someone from suffering, empowering police to protect the public).

People v. Gentry:  $\Delta$  spilled gas on his girlfriend then she went by the stove and caught on fire and they charged him with attempted murder. This case questions what is required for the MR of an attempt. Finding a specific intent to kill is a necessary element of the crime of attempted murder. You cannot intent to do a crime that is unintended. So cannot have attempted depraved heart murder.

### **Mens Rea—dual intent**

- (1) **MR1:** The  $\Delta$  must intentionally commit the act that constitutes the actus reus of an attempt;
- (2) **MR2:** The  $\Delta$  must perform these acts with the intent of committing the target crime.

**THUS\*\*\*THIS ONLY APPLIES TO CRIMES THAT REQUIRE INTENT!**

Nothing less than “intent (purposely) to commit the act.

Bruce v. States: Δ went to rob a shoe store and was holding the gun and the clerk ran into the Δ and the Δ shot him in the to stomach. Charged him attempted 1<sup>st</sup> degree felony murder. Case questions whether you can have attempted felony murder. Attempt does not apply to felony murder because felony murder doesn't have to prove intent to kill.

### COMMON LAW TESTS—Attempt Actus Reus

1. **The last act test**: A criminal attempt only occurs when the person performed all of the acts necessary to commit the target offense. **WEAKNESS**: You are waiting way too late (if the goal of attempt crime is to prevent the crime from happening). **PRO**: this is good for liberty; you give the potential perpetrator every last moment to change his mind.
2. **The physical proximity test**: The act must stand as either the first or some subsequent step in a direct movement toward the commission of the offense, after preparation have been made.
3. **The dangerous proximity test**: Similar to the proximity test, but more flexible, taking account of several factors: (1) the nearness of danger; (2) the greatness of harm; and (3) the degree of apprehension felt.
4. **The indispensable element test**: Attempt applies after Δ has secured every indispensable aspect of the crime. **May seem somewhat arbitrary, if the aspects are there but STILL might not be a culpable person.**
5. **The probable desistance test**: A court will find an attempt when, in the ordinary course of events, without interruption from an external source, the Δ reached a point where it was unlikely that he would have voluntarily desisted from his effort to commit the crime, judged by when an ordinary person would reach a point of no return. → Is it always the case that there will be a point of no return???
6. **The Unequivocally test**: An attempt occurs when a person's conduct, standing alone, unambiguously manifests her criminal intent. Idea is watching acts on video with sound muted (and you still know exactly what they're going to do). → Early or late, it is hard to tell... Might try to punish actions that would not be criminal, might allow criminal activity to occur without punishment).

People v. Rizzo: Guys going to rob the guy carrying the payroll but never find hi and get caught and get charged with attempt first degree robbery. Court applies the dangerous proximity test and hold that under the test there is a requirement of immediate nearness. No attempt because no attempt could be made until he was found.

People v. Miller: Drunk guy in post office says he will kill the other guy then marches out onto the field was a gun in his hand and walks up to the constable and just gives him the gun. He was charged with attempted murder. Court applies the Unequivocally test and holds not unequivocal because he could have been waking out there to demand the constable arrest.

State v. Reeves: Girls decide to kill their teacher with rat poison but get caught before go through with it but they got very close. Charged with attempted 2<sup>nd</sup> degree murder and court affirms concluding that a substantial step was taken.

### Attempt Defenses

- (1) **Impossibility:** Just because you could not have possibility concluded the crime does not relevant you from liability. **Impossibility is NOT A VALID DEFENSE!**
- (2) **Abandonment:** Under the
  - a. **Common law:** many jurisdictions do not recognize this as a defense. In the ones that do, it applies if the  $\Delta$  voluntarily and completely renounces the criminal purpose.
  - b. **The MPC** does not recognize a defense of abandonment and it is the same test at common law.

### MPC § 5.01 Criminal Attempt—Attempt Actus Reus

- (1) **Definition of Attempt.** 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;
  - (a) **COMPLETE:** Purposely engages in conduct that would be constitute the crime if the attendant circumstances were as he believes them to be; or [**CONDUCT**]
  - (b) **COMPLETE:** When causing a particular result is an element of the crime, does or limits 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 [**RESULT**]
  - (c) **Incomplete:** Purposely does or omits to do anything which, under the circumstances as he believes them to be (rejects the impossibility excuse), is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

**\*\*\*Is there a crime when there is impossibility???**

**YES, think of NBC dateline to catch a predator with Chris Hanson, sexual predator and the undercover cop.**

**How about renunciation or abandonment???**

- Most jurisdictions under the common law don't recognize abandonment.
- BUT SOME DO, they look for the defendant to **voluntarily and completely** renounce their criminal activity, **has to be genuine.** They have to really not want to, a true change of heart, anything less will not be enough.
- THE CPC does recognize abandonment, UNDER THE SAME circumstances as the common law jurisdictions that allow it.

## **Solicitation**

**Solicitation:** Occurs when a person invites, requires, commands, hires, or encourages another to engage in conduct constituting any felony, or a misdemeanor relating to obstruction of justice or breach of peace.

An attempt to conspire... Solicitation involves the asking, enticing inducing, or counseling of another to commit a crime, the solicitor conveys the criminal idea and furthers its commission via another person by suggesting to, inducing or manipulating that person.

**Solicitation:** Inviting, requesting, commanding, hiring or encouraging another person to engage in conduct consisting any felony, or a misdemeanor relating to obstruction of justice or a breach of the peace, with the intent that the other person commit the solicited crime.

Might be attempted conspiracy...

**Actus Reus:** Invite or request or command or hire or encourage another person to carry out a target crime.

**Mens Rea:**

1. Must intend to invite/request/command/hire/ encourage.
2. Must intend to have the act carried out.

**Merger Rule:** (NOT every jurisdiction has solicitation, but most do)

- You can't be guilty of both attempt and solicitation,
- You can't be guilty of both conspiracy and solicitation, and
- You cannot be found guilty of both the target crime and the solicitation.

\*\*\*The idea is that the larger crime will encompass the punishment for solicitation. It moves quickly because once you conspire, you have already committed a higher crime.

\*\*\*On the flip side, the prosecutor has the opportunity to utilize this crime to get a lesser penalty for an offender who only might be guilty of conspiracy, attempt, or the target crime (**because you cannot have a conspiracy or attempt without a solicitation**).

**MPC § 5.02:** Similar to the common law, except the crime is the exact same as the target crime (common law is usually less). Common law only uses solicitation for felonies, while MPC uses it for all offenses. Defense is to successfully thwart the success of the crime.

## Conspiracy

**Conspiracy:** An agreement between two or more person to commit a criminal act OR to accomplish a legal act by unlawful means (+ an overt act).

**Actus Reus:** An agreement (+an overt act).

- (1) Intent to commit an unlawful act;
- (2) Intent can be implied;
- (3) Awareness only as to essential elements;
- (4) Established through circumstantial evidence;
- (5) Overt act is any act pursuant to conspiracy—**Not all jurisdictions have it, but the ones that do have it because the mere agreement looks like a mental state (they want to feel confident that they are not criminalizing thought crimes).**

**Bi-/Uni-lateral:** Some states require bilateral agreements (both parties have to truly agree to commit the crime); MPC is unilateral (enough if one person agrees and the other person is faking).

**Mens Rea:** TWO PART

- (1) **Intent to agree—you have to intend to agree (with others)! IMPORTANT!**
- (2) Intent that the **object** of the agreement be achieved.

Pinkerton v. United States: Brothers conspired to commit tax fraud but only one of the brothers actually performed the illegal acts but both charged with the completed offenses even when the other brother was in jail the whole time. There is no evidence to show the one brother took affirmative action that would be necessary to establish withdrawal from it, and so long as the partnership in the crime continue, the partners act for each other in carrying it forward.

**Pinkerton Doctrine** (conspiratorial liability): Where a conspiracy forms and the substantive offense (target crime) is committed by one of the conspirators in furtherance of the conspiracy, and is reasonably foreseen as a necessary or natural consequence of the unlawful agreement, the other conspirators will be guilty of the substantive offense. **(MPC REJECTS THIS)**

People v. Swain: Drive by shooting and the kid says he wasn't there but is bragging in jail about how he shot the kid and how good aim he has. Questions whether intent to kill is a required element of the crime of conspiracy to commit murder. Court holds use, intent to kill is an element of the crime of conspiracy to commit murder. You cannot intend to do something that is not intended and therefore conspiracy to commit murder requires intent to kill.

**FUNCTIONS:**

- (1) Entered the breach and provided an opportunity for earlier official intervention.

- (2) Used to combat the extraordinary dangers allegedly presented by multimember criminal undertakings.

\*\*\*Research has shown that people tend to act differently in groups than individuals, validating the added concern over group criminal activity.

**AT COMMON LAW:** Conspiracy was a misdemeanor, however, only a few states STILL see conspiracy as a misdemeanor, and even the ones that do, will treat conspiracy to commit a felony as a felony (although still less, and sometimes significantly less time served).

**Wharton's Rule: (ONLY COMMON LAW, REJECTED BY MPC):** An agreement by two persons to commit an offense that by definition requires the voluntary concerted criminal participation of two person, cannot be prosecuted as a conspiracy....

→First think about the two rational of conspiracy... (1) early prevention, and (2) because we think that working together are more dangerous than individuals (collective action is more dangerous).

→THUS Wharton's rule makes some sense... because the punishment for a target crime that by definition, we can assume that the prescribed punishment already includes the fact that it includes two or more people....

**BUT** it stops making sense for the prevention issue, which is probably why the MPC rejects it.

→Is not looking at how many people this particular crime requires, but rather how many people the crime by definition of the statute requires to determine if the rule applies.

**Abandonment: At common law:** only complete abandonment will be a defense.

**MPC abandonment:** It is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

### **MPC § 5.03 Criminal Conspiracy**

- (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 of more of them will engage in conduct that constitutes such crime or an attempt to solicitation to commit such crime; or
  - (b) Agrees to aid such other person or persons in the planning or commission f such crime or of an attempt or solicitation to commit such crime.

**MERGER RULE (MPC ONLY):** If the target crime happens, then the conspiracy and the target crime merge together, and you are only liable for the target crime. HOWEVER at common law this does not exist, you will be charged with both the conspiracy as well as the target crime.

### **4 difference between MPC and Common Law: MPC § 5.03**

1. MPC requires an overt act (except for a felony of 1<sup>st</sup> or 2<sup>nd</sup> degree).

2. Punishment same for conspiracy as target crime (unless target crime is 1<sup>st</sup> degree felony → Punishment is 2<sup>nd</sup> degree) while common law is usually lesser punishment.
3. Merge Rule: Cannot be convicted of target offense and conspiracy (however, keep in mind that if there was a conspiracy to commit another crime that was not consummated, the you can still be held liable for the conspiracy for the target crime that was not committed, and then held only liable for the target crime that was consummated).
4. "Agreement" only to criminal act (not lawful act). Unlawful common law you can be guilty of the crime of conspiracy to commit a civil violation (like defamation) BUT under the MPC you can only commit a conspiracy of the criminal act.

**WHEN is a supplier guilty of conspiracy?**

1. Direct evidence that he intends to participate; or
2. Evidence that supports the inference that he intends to participate, based on:
  - a. The Δ's special; interest in the activity (stake in the venture; no legitimate use for the goods; high proportion of business)'
  - b. Aggravated nature of the crime (mere knowledge).

IF YOU HAVE #1, then you have satisfied the dual mens rea requirement, but if not move onto #2, and satisfy a or b. HOWEVER, if you can only satisfy (b), that might be a problem, because it seems to compromise the intent requirement, but understood as a practical accommodation for serious crimes.

**TWO EXCEPTIONS:**

- (1) **Third Party Exception:** If more than the minimum number of people necessary to commit the offense agree to do so.
- (2) If two persons involved in the conspiracy are not the two people involved in committing the target offense.

## **X. Liability for the Conduct of Another**

**Accomplice Liability:** A person is guilty as an accomplice in the commission of an offense if he intentionally assists another person to engage in the conduct that constitutes the crime or encourages the same, and shares the mens rea of the offense.

**Actus Reus:** Give assistance or encouragement to the crime of another, or fail to perform a legal duty to prevent it.

### **Mens Rea—Dual Intent**

**Intent #1:** Intent to assist the primary party to engage in the conduct that forms the basis of the offense. Typically...

- (1) Assistance by physical conduct;
- (2) Assistance by psychological influence;
- (3) Assistance by omission (however, this is going to have to be some legal duty to act... and there is rarely a duty to act).

**Intent #2:** The mental state required for the commission of the offense as defined for the substantive crime.

\*\*\*If all that is necessary for the target crime is recklessness or negligence, then the only mens rea needed in accomplice liability, then all you need is the same mental state for the crime. UNLIKE conspiracy and attempt which require intent, and thus invalidate all of crimes that lack intentional acts... Accomplice liability can attach to crime that have reckless and negligence mens rea.

\*\*\*It is a form of **derivative liability** that makes accomplice liability for the crime completed by primary actor (some act that renders you liable for the act that is committed).

### **Common Law Distinctions:**

- (1) **Principal in the First Degree** (person who carries it out);
- (2) **Principal in the Second Degree** (Actively or Constructively Present);
- (3) **Accessory before the Fact** (not present, but helped in the past);
- (4) **Accessory After the Fact** (helped evade punishment).

\*\*\*ALL actors are treated the same today, except for accessories after the fact... they have their own crime, and it is a lesser punishment!!

**AT Common Law:** Principal in the second degree may be tried and convicted prior to the trial of the principal in the first degree, or even after the principal in the first degree has been acquitted. An accessory cannot be tried, without his consent, before the principal, AND an accessory could not be convicted of a higher crime than the principal.

### **MPC § 2.06 Liability of conduct of another; Complicity**

- (1) 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;
- (2) When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.

HYPOTHESIS: About the grandmas house and leaving the widow unlocked for the other person to break in.... IF he comes through the front door instead, NOT liable under the common law, but IS liable under the MPC.

### **IS MERE PRESENCE ACCOMPLICE LIABILITY??? (V.T. Case)**

“Passive behavior, such as mere presence—even continuous presence—absent evidence that the Δ affirmatively did something to instigate, incite, embolden, or help others in committing a crime is not enough to qualify as “encouragement” as that term is commonly used.” –**assistance must be in fact! Even trivial assistance counts!**

**\*\*\*Attempting to AID is not AID IN FACT!**

**\*\*\*So attempt to Aid is not accomplice!**

**\*\*\*THERE NEEDS TO BE AN ACTUAL CRIME to be guilty of accomplice.**

**Thus**, if a principal is acquitted due to **Justification defense**, there is no crime, and the accomplice cannot be guilty. **EX, aiding the arsonists saving the town.**

**HOWEVER**, if a principal is acquitted due to **excuse defense**, there is a crime, and the accomplice might still be guilty even though the principal was acquitted. **EX. Being the getaway driver for the insane bank robber.**

## **RECAP**

**Attempt:** The Δ must perform the acts constituting the actus reus of attempt with the intent of committing the target crime.

**Conspiracy:** Δ must intend that the object of the agreement be achieved.

**Accomplice:** Δ must have the mental state required for the commission of the offense as defined for the substantive crime.