

# Criminal Law

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# Chapter 1 Introduction

1. Locating the subject
  - a. Difference between the law and the criminal procedure:
    - Law: the substantive law of crime themselves/key elements of crime. The conditions under which a person is guilty of a crime. (substantive criminal law)
    - Procedure: Steps as a person moves through justice system and the various procedural rights a person enjoy in that system --> 1940, Warren Court decides that rights in Bill of Rights also applies to the states (?)
  - b. The coverage:
    - Theories of criminal responsibility
    - Elements of a crime: beyond the reasonable doubt for every element
      1. Actus Reus (guilty act) - physical act
      2. Mens rea (guilty mind) - act **with** state of mind, conscious deliberation (purposefully, recklessly) --> distinguish the level of crime through mens rea
        - a. Some exceptions: just punish the act not the state of mind, like strict liability. Generally don't require. E.g. statutory rape.
      3. E.g. murder, burglary(severity of the crime, time tradition of keeping the bar high, for there was only capital punishment for felony),
    - Definition of specific common law crime (homicide; rape; various theft crimes)
    - Other general principles of criminal law
      1. Defense to liability (justification, excuses)
      2. Responsibility for inchoate offenses (attempt, conspiracy) - something that did not success, but still guilty for that conduct
      3. Responsibility for conduct of another person (accomplice liability)
  - c. Other criminal law courses:
    - Basic: criminal procedure (investigation); criminal procedure (adjudication), evidence
    - Practical: criminal trial advocacy, plea and sentencing Clinic I, II; Civil Clinic;
2. Course Logistics
3. Defining Criminal Law
  - a. Criminal v. Civil,
    - different burden of proof: more likely than not; beyond reasonable doubt
    - Single fact could raise as civil and criminal action or lawsuit. Civil usually being the Tort claim.
    - Though some could only be criminal, not civil claim. For victimless crime, there is no one who could bring the civil case. Kill a person with ordinary negligence.
  - b. Discussion:
    - Who is harmed? Social harm
    - Moral wrong (contract is more about making it more efficient for people to break the rule)
    - Remedy: damage v. punishment (some torts have punitive damage, which works the same way like punishment)
    - Who brings the case? State v. victim or estate
  - c. Difference
    - 1) The nature of the wrong: Civil wrong is some lost to an individual; moral wrong creates social harm. terrifying the social fabric
    - 2) The purpose of legal action: compensate the lost (civil/tort); punish the perpetrator, deter him from doing it again. Federal human traffic: restitution damage.
    - 3) The person bringing the suit: historically, still the family to sue; now, individual is forbidden to bring the problem. **Social harm needs**
      - E.g. still civil case handled by state, environmental law, verse a super big company; solid in the hand of public

- 4) The interest represented in court: (civil) exclusive the victim's interest; (criminal) interest of the state; going to recognizing the right of victim. "acting as the conscience of this community"
  - 5) The sanction: damage (injunctive relief, monetary damage) v. 1) announcement of criminal conviction itself (collective moral condemnation of someone's action); 2) fined prison time and death penalty
4. Sources of American criminal law
- a. Come from common law (decisions from judges) --> 19th development of codes and statutes, to fill gap, for common law does not evolve enough (economic changes) --> 20th, common law + statutes, 1960s Model Penal Code: 1) all criminal in statute instead of common law; 2) uniformity --> not binding, but a huge influence in court.
  - b. Common law: still important, for some states don't have definition or full elements of some crime.
    - 1) Understands where the crime come from, for common law is the origins of criminal law; "in order to know what the law is, we must know where it has been."
    - 2) Court still draw common law as explanations.
  - c. MPC: good place to explain the statute
  - d. Constitution: hovers in the background, criminal procedure as criminal constitutional law;
    - 1) Prohibits laws that criminalize actions protected by the Constitution (spend money to influence the elections, some criminal law says that is criminal act, but U.S. Supreme Court says that is the violation of first amendment)
    - 2) Create substantive crimes: treason
    - 3) Prohibit federal crimes that lack a constitutional grant of power. Congress can only pass law at certain area that Constitution gives rights. (gun free-zone act is out of the scope)
    - 4) Limit punishment: 8th Amendment, abandon cruel punishment.
5. Criminal law in a federalism system
- Two sovereignties: state and federal --> dual criminal justice system
    - a. E.g. DOJ, U.S. Attorney --> (directly report to) attorney general. They are chief federal prosecutors --> like Michigan has two districts. Appointed by president. Their have a lot of discretion to prosecute or not, and most of them are not reviewable.
    - b. FBI: parallel police, one role as investigator, board discretion, working with prosecutor.
    - c. State level: different jurisdictions have different names. More of them take place at state level. Any criminal law as long as that not violating state and federal constitution.
    - d. Where the federal prosecution focus on: immigration (exclusive jurisdiction, boarder district), drug, violent crime(murder or homicide, that's the state case), property, gun
    - e. Statics: mid 1960s, increase the number of violent crime and drug; recently, drop o the violent crime; national security and immigration; **national politics.**
6. Procedural context of criminal law
- a. Investigation: different paths, starts from when gov gets know the issue; but this continues; actor: police officer/FBI for federal; search and seizure (4th Amendment); interrogation (4th and 5th, right against self-crimination, 6th, right to counsel); identification (line-up, due process clause, 6th: counsel present at the interrogation)
  - b. Adjudication:
    - 1) Complaint: initial charge by police or prosecutor; constituting the charge; why they arrest; within the first 24 hours
    - 2) (Initial) Appearance: 48 hours, purpose: reviewing the complaint if there is "probable cause"- reasonable suspicion.
      - giving the notice to the accused;
      - informing the constitutional right;
      - set up a time for preliminary hearing

- Indigent: appoint counsel
  - Consider whether somebody should be released on bail.
- 3) Filing of formal charges: (time between the complaint)
    1. Indictment: depends on the jurisdiction.
      - a. Issued by Grand Jury, rules are more relaxed. Defendant may show up to testify, but he doesn't have right to counsel --> one-sided.
      - b. Required by federal for felony.
    2. Information: the court is making the decision --> preliminary hearing, the defendant has the right to counsel
  - 4) Arraignment: provide the copy of indictment
  - 5) Trial: five to eight months to wait, lasts two-three days for trial
- c. Post-Conviction
- 1) Sentencing: serious crime, another procedure to sentence, more relaxed procedure: introducing more evidence including some that are inadmissible, may hearing from families of the victim
  - 2) Appeals: direct appeal, if the defendant is acquitted, the government cannot do the double jeopardy; as the matter of statute, most states admit the appeal.
  - 3) Collateral Remedies: second level of review, the claim is limited, extra measure of review to check the constitutional era (considered as a civil action, just part of judicial system)
7. Proof of Guilt (burden of proof)
- a. Beyond reasonable doubt: sanction is more severe; deep grounded in common law and U.S. Constitution (due process clause, 5th and 14th, "no state shall deprive any person of life, liberty, or property, without due process." *In Re Winship*, held the burden of proof is grounded Constitution)
  - b. Owen: innocent assumption,
    - the elements are that you have to be at the highway, but there was no direct evidence
    - Two possible explanations: arrived drunk, or get into the car and then drunk --> sufficiency of evidence (the state did not establish one or two elements as beyond reasonable doubt)
    - Upheld the decision that a reasonable jury could conclude that he was drunk at the highway.
  - c. What is beyond reasonable doubt:
    - Supreme Court refuses to quantify the standard; "reach a subjective state of near certitude of the guilt of the accused"
    - "Near certitude" based on the evidence
8. Punishment: **criminal responsibility**
- a. World Incarceration Rate: 144 (worldwide), Europe (84), US (693), constitutional stake of personal liberty, moral justification.
  - b. Why do we punish? (purpose)
    - Retributivism: eye for eye, "deserve"
      - Backward looking at the crime itself, not future benefit.
    - Utilitarianism: what do we want to achieve, punishment as some net social benefit
      - deterrence(general), incapacitation (specific deterrence), rehabilitation (specific person)
    - Both of the theories could be severe, but it real depends. For the utilitarianism, it could send strong message for a slight crime (this focus on explaining); for the retributivism, it could focus on the crime itself.
  - c. When to punish? Who should be punished?
  - d. What do we punish? (necessity condition of criminal liability)
  - e. How do we punish? (form and severity punishment)

9. [AR+MR] A person is not guilty of an offense unless her conduct, which must include a voluntary act, and which must be accompanied by a culpable state of mind (the mens rea of the offense), is the actual and proximate cause of the social harm, as proscribed by the offense.

## Chapter 2 Actus Reus

### I. Overview:

1. Actus Reus: The physical or external portion of crime
  - Definition: 1) voluntary act 2) that causes 3) social harm.
  - An act is some bodily movement, a muscular contraction.
  - American law requires an act both for a principled and a pragmatic reason --> not criminal liable for your mind (difficult to prove in mind)
  - Others
    - As we will see the Actus Reus has a very minimal mental element, as well, which is found in the first component - the notion of voluntary act.
    - mandatory minimum year, system of plea, very expensive (protecting D's constitutional right cost too much money)
2. Mens Rea: the mental or internal portion of crime

### II. Act

- muscular contraction, we do not criminalize thought crime
- Some autonomy that state or government cannot infringe: Conspiracy might be an exception.
- Evidentiary proof will be hard

### III. Voluntary

- A voluntary act: a bodily movement that follows from the person's volition; a willed act.
  - **Defense**: A voluntary act should be understood to be an essential element of every criminal offense, not an affirmative defense.
  - **Rationale**: for retributivism, criminal punishment should only be imposed on those who act as the result of free choice.
- MPC: §2.01
  - A person is not guilty of an offense unless his ability is based on conduct which includes a voluntary act or the omission to perform an act of which *he is physically capable*.
  - The following are not voluntary acts within the meaning of this Section:
    - A reflex or convulsion;
    - A bodily movement during unconsciousness or sleep;
    - Conduct during hypnosis or resulting from hypnotic suggestion;
    - A bodily movement that otherwise is *not a product of the effort or determination of the actor*, either conscious or habitual.
  - [Possession is an act if the possessor either knowingly obtained the object or knew she was in control of it for a sufficient period to have been able to terminate possession.]
- Martin v. State
  - What are the elements: 1) intoxicated or drunk; 2) public place; 3) one or more person present; 4) manifest a drunken condition --> no Mens Rea
  - Reasoning: the defendant was involuntarily and forcibly carried to that place by the arresting officer.
    - Voluntary is assumed everywhere --> acts need to be voluntary (built-in) even though the statute not spelling it out.
    - Not "forced to do something," e.g. seizure, sleepwalking
  - Note: the decision to drink should be voluntary --> time frame, most of jurisdiction need to look at the time when he made the decision to drink.

- State v. Utter
  - Fact:
    - D was accused of murdering his son. (The son said it was his father who killed him)
    - Defense: conditional act (PTSD) --> trial court decided that is mental incapacity --> that state do not recognize this as a defense.
    - AR + MR (BRD) --> guilty, unless the defense works
      - D needs to prove all the elements of defense, e.g. self-defense
      - Thus, even if D is "guilty," he will not be convicted if he could prove the defense.
  - Legal matter:
    - Trial court thinks "mental incapacity" --> part of unrecognized defense
    - COA ruled "mental incapacity" is part of Actus Reus ==> different stages
    - *A voluntary act should be understood to be an essential element of every criminal offense, not an affirmative defense.*
  - Note: what is voluntary
    - Hypos #1: B had a gun, A grabs B's hand, forcing him to pull the trigger, so the gun fires and kills C.
      - No Actus Reus, for this act is not voluntary.
      - **A voluntary act (volition): A bodily movement that follows from the person's volition; a willed act.**
      - (p. 137) "The actus reus is the **culpable act itself**, the means rea is the **criminal intent** with which one commits the actus reus. Mens Rea does not encompass the entire mental process of one accused of a crime."
    - Hypos #2: A holds a gun to B's head and says that if B does not shoot C, A will shoot B.
      - Actus Reus (volition), but probably no Mens Rea(malice) or a defense.

#### IV. Omission: commission (do something) v. omission (fails to do something)

- People v. Beardsley
  - Fact: D was intoxicated and did nothing to save the victim
  - Reasoning: no duty for D to save, unless there is special relationship.
  - Note: David Cash
    - For: Easy to do so; greater sense of security; deterrence
    - Against: Autonomy; intentional averter; problem of proof; limit liability, fear of getting involved
  - In essence, the criminal law distinguishes between an act that *affirmatively cause* harm, on the one hand, and the failure of a bystander to take measures to *prevent harm*.
- **Rule of exception:**
  - Statute imposing a duty to act, e.g. omission to pay tax; some states asks people involved in the same accident
  - Special relationship: dependence between persons, parents and children; married couple(not clear about the definition, but have tendency to extend it); e.g. leaving children at hotel or the other parent leading to children's death
  - Assumption of a contractual relationship to care, e.g. nursing home or babysitter
  - Voluntary assumption of care that excludes others, e.g. doctors/once you start the recue, you have to do it non-negligently
  - (Maybe) accidental creation of risk of harm to others --> wrongful or negligent act, duty to recue the injured party
- [Good Samaritan:
  - 1) the risk of convicting morally innocent persons;
  - 2) difficult line-drawing problems arise in omission cases (nobody feels responsible);
    - Non-actor's mental state and degree of contribution to resulting harm.

- 3) well-meaning bystanders often make matters worse by intervening in ongoing events (a rule requiring assistance might cause more harm than good in many ways);
- 4) issue of freedom (a penal law prohibits a person from doing X permits that individual to do anything other than X. In contrast, a law requires a person to do Y bars that person from doing anything other than Y.)]

## V. Social Harm

1. Result Crimes:
  - Crimes defined in terms of some prohibited result.
    - E.g. common law murder, which results in the death of another human being
  - Result follows some conduct, but nature of conduct is irrelevant in terms of definition of the crime - it's the result that matters.
2. Conduct Crimes:
  - defined in terms of **harmful conduct**, even where there may be no harmful result.
  - Just conduct: "intentionally driving under the influence of alcohol."
  - Some states have both: "killing of another human being, by means of a destructive device, explosive, poison, or torture."
3. Attendant Circumstance:
  - A condition that **must be present**, in conjunction with the prohibited conduct or result, to constitute the crime.
  - Example: common law offense of burglary
    - "breaking and entering a dwelling house of another at nighttime with the intent to commit a felony therein.
    - Actus Reus: breaking and entering --> **conduct, but possibly result**.
      - AC: a dwelling house + of another + at nighttime
    - Mens Rea: with intent to commit felony therein.
4. Difference:
  - Often difficult to determine result v. nature of the conduct.
  - Conduct v. results of the conduct.

## Chapter 3: Mens Rea

### Review:

- *An actus reus is a voluntary act that causes a social harm*
  - *Most of the time, the act has to be voluntary*
- *Although the mens rea requirement is focused on the mental state of the defendant, the actus reus has a very minimal mental element requirement as well: namely, the act must be willed (i.e., volition).*
- *Some conditions render acts involuntary: reflex or convulsion, movements during sleep, physically forced actions, etc.*
- *Criminal Liability does not extend to omissions, except in these circumstances: 1) statute imposes duty to act; 2) statute relationship, 3) contractual relationship for the care; 4) voluntary assumption of care that excludes others; and 5) sometimes accidental creation of risk of harm to others.*

### Preview:

1. Overview
  - *Rationale for a mens rea requirement*
  - *Two uses of mens rea: culpability v. elemental meaning*
  - *Mens Rea terms in the common law*
  - *Mens Rea under the MPC (four distinct non-overlap definition)*
  - *Proving mens rea*

2. *Mistake in fact/law*
3. *Strict liability*

## I. Overview

### A. Rationale:

- When the actus reus is the same, it should be distinct by mens rea.
- Utilitarian: deterrence --> decide to do or not; capacitation. But you could also be punished for accidental crime.
- Retributivism: eye for eye, morally blame worthy
  - Mens Rea roots deeper in retributive than in utilitarian
  - Flows from the society's commitment to individual choice: the punishment should only be imposed upon those who act as the result of free choice, i.e., when people have choice to do.

### B. Two different uses:

- Culpability:
  - the person who committed the act has any morally blameworthy state of mind (gives the jury broad, unguided discretion) --> morally state of mind
  - This use of mens rea applies when a common law crime lacks an expressly state mens rea. The assumption is that a common law crime always has a mens rea, and when the rule does not expressly state one, the court would read the culpability sense of the means rea into the rule --> "wicked"
    - Offenses of this type are called "**general intent offense**"
    - Common law rape: the carnal knowledge of a woman forcibly and against her will. (19th Blackstone) --> there is no mens rea --> general intent (morally blameworthy)
    - Very board and ill-defined.
- Elemental sense:
  - The person who committed the act has a particular state of mind expressly specified in the offense (i.e. intentionally or maliciously or recklessly toward the social harm.
  - Some common law crimes, and almost all modern statutes, use the mens rea in this sense.
  - **Specific intent offense** (as opposed of general intent)
  - Example: murder, killing another person with malice aforethought.

### *Regian v. Cunningham (British, 1957)*

- Fact:
  - Gas meter, he stole it and tried to sell it. He failed to turn off the gas --> endanger mother-in-law
  - He confessed that he intended to steal but not kill
  - Statute:
    - Mens rea: act malicious
    - Instruction: malicious means "wicked" he has no business to do and perfectly well knows it. Wicked is as good a definition as any other --> define elemental sense in a culpability sense
    - Two definitions: 1) an actual intention to do the particular kind of harm; 2) reckless as to whether such harm should occur or not --> whether he knew the risk but still choose to do.
- Issue: whether the jury instruction is appropriate
- Reasoning:
  - According to the statute, the judge should apply two different states of mind, not the general sense.

- Problems of proof are alleviated by the ordinary presumption that one intend the natural and probable consequences of his actions ==> intent can be inferred from the **surrounding circumstances**, the offender's words, the weapon used, and the force of the blow.

### C. Common law

1. **Intentional**: covers purpose (conscious object to engage or cause) + knowledge(virtually certain to occur),
2. **Knowingly** or with knowledge: more narrow, acting with near certainty or practical certainty that some results will occur, even though the object or result is not targeted.
  1. Is aware of the fact (actual knowledge)
  2. Correctly believes that the fact exists
  3. "willful blindness:" a. believes there is a high probability that the fact exists; 2a) take deliberate action to avoid confirming it; 2b) purposefully fails to investigate in order to avoid confirmation of it.
3. **Willfully**: general means "intention"
4. **Negligently**: conduct is negligent if that is a deviation from standard of a care that a reasonable person would observe --> criminal is not the same --> not in kind but in degree, criminal requires more severe deviation --> **gross negligence** = criminal negligence
5. **Recklessly**: evolution through 19th - 21st, used to be the same as negligence; for our purpose, more severe departure/deviation.
  1. It has to do whether or not the actor is conscious the risk they are taking;
  2. Negligence is not aware of the risk that they are posing to others (they should be aware, but they do not)
  3. Difference: awareness of the risk, consciously disregard it
6. Malice: technical meaning, either intend to cause, or acting recklessly --> intentionally or recklessly

### D. MPC: introduction of non-overlapping mental state of requirement

- Feature:
  - Exclusively elemental sense, specific intent offense
  - If there is no mention of mens rea in MPC, **culpability** means **purposefully, knowingly or recklessly**.
    - Negligently is not liable --> **background rule**
  - If the statute requires a lower state of mind, you could prove the culpability through a more severe state of mind. E.g. requiring recklessly, the prosecutor could prove recklessly, knowingly, purposefully.
- Mental state:
  - **Purposely**: 1) [conduct and result crime] conscious object to engage or cause; 2) aware the attendant circumstance, if any
  - **Knowingly**: 1) [conduct and AC] aware his conduct is of that nature; 2) [result] practically certain
  - **Recklessly**: when he consciously disregards a *substantial* and unjustifiable risk . . . that would observe *in the actor's situation*.
  - **Negligently**: when he should be aware of a *substantial* and unjustifiable risk . . . that would observe *in the actor's situation*.
    - Difference: it does not take into account of degree of risk, but the awareness of the risk.

==> CL, "intentional." MPC: "purposely" and "knowingly" --> conscious object v. aware

## E. Proving Mens Rea

- People v. Conley: IL statute (common law):
- How to prove: Intent can be inferred from the surrounding circumstances --> it is probable for a reasonable jury to presume he intended to cause the probable consequences of his action.
  - "the jury could reasonably infer the intent to cause permanent disability"
- The Point:
  - To establish intent BRD, juries can presume that a person intend the ordinary consequences of her voluntary acts.

### Review:

- *Mens rea rests both on utilitarian and retributivist grounds.*
- *Mens rea has both a culpability and elemental meaning . Former is general intent offenses and specific intent offense. --> distinction we use for this class*
  - *Some are specific mentioned in common law or statute*
- *Common law uses various mens rea terms, such as intentionally, with knowledge, willfully, maliciously, and negligently, or recklessly.*
- *MPC identifies only four mens rea requirement: purposefully, knowingly, recklessly or negligently*
- *To establish intent BRD, juries can presume that a person intend the ordinary consequences of her voluntary acts.*

## II. Strict Liability:

- **Overview: case (Staples v. U.S.), background and justification.**
- **Application: statutory rape**
- **Constitutionality of strict liability**
- **Strict Liability and MPC**

### A. Strict Liability Crimes / Common law

- Background:
  - A crime that lacks mens rea requirement --> don't have to get in to state of mind
  - [Strict liability doctrine: conviction of morally innocent person for violation of offense. Such as mistake of law, defense of others.]
- Staples v. United States
  - Fact:
    - Rifles, designed not automatic --> D posses changed one.
    - Statute said: it shall be unlawful for any person to receive or possess a firearm, which is not registered to him in NFRTR ==> no mens rea requirement
    - D stated that he did not know that gun was automatic --> ask the jury instruction requiring mens rea
  - Issue: is there a mens rea requirement
  - Reasoning:
    - The text itself did not have mens rea. But silence does not necessarily mean Congress intend to dispense with mens rea. The assumption starts with there must be mens rea to prove guilty of criminal crime.
      - Gov: they are public welfare or regulatory offense --> they don't come from common law, just legislative --> regulate dangerous items.
      - Once D in control of these items, **he is expected to know** the burden or probability of strict regulation.
    - Possessing a gun is common, for more than half families have that.
    - The harsh penalty attached with, which is ten years --> SL applies when the criminal punishment is not too deep.

- Dissent: The weapon D possessed is very differently dangerous.
- **Statutory Interpretation:** A court may find a statute impose SL when (**this is not a checklist, just factors**)
  1. The statutory crime is not derived from the **common law**, for common law requires mens rea
    - Culpability of mens rea assumed by a common law judge. E.g. MI larceny, getting cases or crime from common law.
    - In this case, owning a gun is not a common law crime.
  2. There is an evidence **legislative policy** that would be undermined by a means rea requirement.
    - The government regulate for signal factor might significantly influence social welfare.
    - *Inherent in state's police power (?): "overriding governmental interest in promoting health, safety and welfare of its citizen." - importance of collective interest*
  3. [reasonable and expectation] 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 severe, Balint.
  5. The conviction does not "**gravely besmirch**" the defendant (stigma).
- Example:
  - Public welfare offenses: such as impure food or drug, environmental law, traffic and motor-vehicle regulation.
  - Non-public-welfare offense: statutory rape, but the punishment is severe and wrong in itself (stigma).
- Justification:
  - Mens rea requirement is inherently based on retributivism, punishing people who made a free will choice, or actor's freedom of choice is the moral basis for punishing him.
  - SL is more justified in utilitarian ground.

## B. Statutory Rape: The knowledge of Victim's age is irrelevant.

- Garnett v. State
  - Fact: D was 20. He had an sexual intercourse with 13-years-old girl.
    - Statute: vaginal intercourse, with another person, under the age of 14, the accused is four years older.
    - D did not the girl was under 14.
  - Reasoning:
    - History of legislative: intended to have strict liability
    - The legislature could mentioned mens rea in the other clause,
  - Dissent:
    - Requirement of the accused being know the possibility of liability. But in this case, the accused cannot even appreciated this expectation.
    - The challenge is that actus reus should be voluntary or volition.

## C. Constitutionality of SL: The court generally rejected this challenge, Balint.

## D. MPC: NO, but with exception

- General rule is requiring mens rea, intentionally, knowingly and recklessly
- New categories: "violation" can be SL. 1.04(5)-2.05
- Penalty: something more than imprisonment -->if it involves imprisonment, then that is not SL in MPC

#### Review:

- *SL is a crime doe not contain a mens rea requirement*
- *The common law is generally reject SL crime*
- *Courts look to several factors to decide whether to read a mens rea requirement into a law otherwise lacking one*
  - *Statutory crime not derived from common law*
  - *Legislative policy that a mens rea requirement would undermine*
  - *Standard is reasonable and adherence expected*
  - *Penalty is small*
  - *Conviction dose not gravely besmirch. (reputational harm)*
- *Statutory rape crimes are a common and controversial example of strict liability crimes*
- *The MPC generally requires a mens rea, unless a lesser crime deemed a "violation," which no threat of imprisonment.*

### III. Mistake of Fact and Law

- Review: specific v. general intent crimes
- Mistake of fact: common law approach, MPC
- Mistake of law: common law approach, MPC

#### A. General Intent and specific intent

1. General intent crime --> culpability use of mens rea
  - Whether defendant acted with a morally blameworthy state of mind
  - E.g. common law crime of rape, "carnal knowledge of a woman forcibly and against her will"
2. Specific intent crime --> elemental use of mens rea
  - Whether defendant acted with whatever mental state requirement is expressly stated in the crime.
  - Common law crime of murder, "killing of another person with malice aforethought."

#### B. Mistake of Fact

- Justification:
  - "voluntariness" involves cognition (what he is aware of) and volition (his capacity to control his conduct).
  - Mens Rea:
    1. moral culpability or his vicious will --> morally blameless for causing social harm - -> no punishment
    2. his particular mental state --> fail to prove an express element of the offense.
- People v. Navrro
  - Fact:
    - Common law crime of larceny: "The trespassory taking and carrying away of the personal property of another **with the intent to steal** the property." --> Code is restating the common law crime definition.
    - The statute only used the word "steal the personal property of another," so the court looks into common law to define "steal."
  - Issue: Whether the judge erred by failing to instruct the jury that the D is not guilty if he made a sincere, but **unreasonable**, mistake of fact.
- **Common Law Rule**
  - ★ A mistake of fact occurs when a D is unaware of, or mistaken about, a fact **pertaining to an element** of the offense.

- Mistake of fact (usually, not but necessarily) negates the mens rea; if the fact is true, prosecutor cannot prove mens rea BRD
- "an honest mistake of fact or law is a defense when it negates a required mental element of the crime."
- "Failure of prove defense:" prosecutor failed to prove certain element BRD, not the usual "defense."
- ★ Rule of mistake of fact is different for general and specific intent requirement
  - **Specific intent crimes:**
    - A D is not guilty of an offense if his mistake of fact negates the specific-intent portion of the crime, i.e., if it negates the mens rea requirement.
    - Common law does not care if mistake is reasonable or not.
  - **General-intent crimes:** a D is not guilty of an offense if his mistake of fact was reasonable, but he is guilty if his mistake of fact was unreasonable.
  - [Strict Liability: under no circumstance does a person's mistake of fact negates his criminal responsibility
    - Any unfairness in this outcome is a function of strict-liability nature of the offense, not of the mistake-of-fact rule pertaining to such offenses.]
- MPC: everything in MPC uses specific intent;

### C. Mistake of law:

- People v. Marrero
  - Fact:
    - Peace officer exempt from criminal liability under the firearm possession statute. "Peace officer" as an official or guard of any state prison or of any penal correctional institution.
    - N.Y.P.L.: Mistake of law: no mistake of law unless such mistaken belief is founded upon an official state the law contained in 1) a statute or other enactment; 2) an interpretation of the statute or law relating to the offense, officially made or issued by a public servant, agency, ...."
- **Common Law Principle:**
  - The common law generally prohibits a mistake of law defense. No claim of mistake of law.
    - Background: Bad in itself (murder), bad in outlaw (statutory crime)
  - **Exceptions:**
    - Reasonable reliance exception:
      - 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.
      - A statement of the law is official if
        - a. it is *expressly stated* in a statute later determined invalid;
        - b. based on a *judicial decision* of the highest court in the jurisdiction;
        - c. interpretation from *public officers* who is in charge of interpretation, administration or enforcement.
      - CANNOT rely on your own interpretation of law or on advice of private counsel.
    - Constitutional exception: fair notice, due process
      - [Nothing to alert a law-abiding person to the need to inquire into the law.
      - punish on omission + punish status, not activity + malum prohibitum (wrong by statute). ]
    - Knowledge of the law as an express element of the offense exception
      - You are only guilty if you know you are committing a crime

- Example: MI 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."
  - Different law mistake exception: Applies to **specific intent crime**.
    - ★ Ignorance of some other law - usually some non-criminal law other than the criminal offense for which the defendant was charge - the ignorance of which has the effect of negating the mens rea (i.e., the prosecution cannot prove the mens rea BRD)
    - Example:
      - Common law larceny: taking and carrying away of the property of another with intent to steal
        - Olga takes her car to Mary mechanic for repair; O refused to pay; M kept the car
        - Olga goes on lot and drives her car away at night. She was prosecuted for larceny (requires "intent to steal")≥
        - Olga was unaware that another state law says a mechanic retains legal **possession** of a repaired automobile until bill paid.
      - No larceny because Olga's unaware of different law, and therefore no intent to steal. **Doesn't matter if reasonable or not.**
- MPC:
  - Follow common law closely, with a general no-mistake-of-law rule.
    - MPC 2.02 (9), knowledge of law is not an element
  - The exception:
    - Reasonable reliance - codifies common law exception.
    - Fair notice: but only when the statute is not published or not reasonably available.
    - Knowledge of the law as an element of the offense exception
      - MPC 2.02 (9), "unless the definition of the offense or the Code so provides."
    - Different-law mistake - also recognized.

*Review:*

- *Mistake of fact:*
  - Occurs when a D is unaware of, or mistaken about, a fact **pertaining to an element** of the offense, negating the mens rea.
  - Common law rule: 1) specific intent (historic use) crimes - no guilt if in good faith; 2) general intent crimes - no guilt only if in good faith + reasonable
  - MPC rule: no guilt if in good faith (same as 1 above, since all MPC crimes are specific intent crime)
- *Mistake of law*
  - Occurs when D is unaware of, or mistaken about, the law under which she is charged with violating.
  - Common law rule: 1) reasonable reliance (on official statement of law); 2) knowledge of law is element of offense; or 3) different law mistake exception.
  - MPC: same as common law.
- Note: mistake of fact only (?) applies to crime requiring intentionally and knowledgeable, not negligently crime.

## Chapter 4 Causation

*Preview: discretionary judgement to decide if the criminal law want to punish him (close enough)*

1. Common law of causation
  - a. Actual cause: cause-in-fact, but-for cause
  - b. Proximate cause: legal cause

- *Case: People v. Rideout*
  - *Six factors for determining proximate cause*
2. *MPC of causation*
  3. *Concurrence of the Element: State v. Rose*

## I. Background and Common Law

- Causation: belongs to actus reus: voluntary act + causes + some social harm.
- Difference: compared with Torts
  - Causation of two types: actual causation and proximate causation
  - Criminal: causal problems fewer and less factually complex in criminal cases
    - In result crime not conduct crime --> almost always in the context of homicide
  - BRD instead of preponderance of evidence
  - Often the case that the causal connection has to be stronger, b/c states higher in criminal law (esp. in judgements about proximate causation, which include much judicial discretion)

### A. Actual Causation:

- **Test: *But for the D's voluntary act, would the social harm have occurred when and as it did?* (so also called, "but for causation")**
- **If the answer is "No" (i.e. the social harm would not have occurred when it did but for the D's voluntary act), then the D is an actual cause of the result.**
- **MPC 2.03 (1): it is an antecedent but for which the result in question would not have occurred**
- Note 2:
  - 2A: X intentionally stabs V in the chest. V will die from loss of blood in 15 minutes. Simultaneously, D intentionally shoots V in the leg. V would not die from this wound by itself. V dies in 10 minutes.
    - ★ **Rule**(accelerated): An otherwise non-lethal act, concurrent with a lethal act, that accelerates a death in an actual cause of death.
    - Notice the rest, but for the D's voluntary act, would the social harm have occurred *when it did*.
  - 2E: D1 and D2 shoots V in the same time. V would die instantly from either wound. V dies instantly.
    - **Rule**(concurrent sufficient causes)
    - but for D's voluntary act, would the social harm occur *when and as it did*.
- Rule from supplement
  - Accelerating a result: but for D1/D2's act, V would die in 1 hour not 5 minutes.
    - But for the act, the harm would have occurred *when it did* [in five minutes]?
    - D1/D2 is still an (not the) actual cause.
  - Concurrent sufficient causes: D1 and D2 acted simultaneously and independently, shooting V.
    - Not a sufficient factor test for it is ill-defined and hard to comprehend.
    - Preferably, but for act, would the social harm have occurred *when and as it did*.
      - i.e., death of V by two simultaneous moral wounds.

### B. Proximate Causation

- Considerable discretion to the judge and jury, public policy consideration
  - Strength: Criminal conviction is more serious than tort conviction
1. *People v. Rideout*
    - Fact: D hit Ps' car. Ps get out of the car and talked with D. Ps walked back to the car. K was killed by an oncoming car.

- Issue: whether there is causation in fact and proximate cause?
- Reasoning:
  - Apparent-safety doctrine: K voluntarily chose to stay out of the car.

## 2. Principle:

- An intervening cause, which is also a superseding cause, would break the causal chain and negate proximate causation.
- **Intervening Cause**
  - Another but for cause, after D's but for cause, that falls in the causal chain leading to the social harm
  - Typical pattern
    - D gravely harms C (actual cause)
    - Another force intervenes as a second actual cause (usually wrongdoing of a third party; contributory negligence, and natural force)
    - Intervening cause aggravates V's injuries or accelerates C's inevitable harm.
- **Superseding Cause**
  - When it breaks the causal chain as to the D and thereby negates any finding of proximate causation as to the D.

## 3. Six factors:

- **De minimis** contribution to the social harm: (small v. big) but for cause is highly insubstantial compared to other significant cause.
- **Foreseeability** of the intervening cause: responsive and coincidence IC
  - **Responsive IC**: act occurs in response to D's wrongful act
  - **Coincidental IC**: act does not occur in response to D's wrongful act.
  - Rules:
    - RIC does not negate criminal responsibility (i.e., is not superseding), unless RIC is not foreseeable and highly abnormal. [such as grossly negligent or reckless medical care]
    - CIC is superseding unless CIC was foreseeable.
- D's mens rea: **intended** consequence doctrine
  - D who is a but for cause, can be proximate cause, where the D intended some intervening cause would produce the social harm.
  - E.g. mother who decided to kill her child, p. 244 (note 7) --> *intentional wrongdoer*.
- Dangerous forces that come out rest (**apparent safety** doctrine)
  - Came into some place safe but some intervening cause come to kill him.
  - E.g., V could be saved if she knocked his father's door, but she chose not to, and was frozen to death.
- **Free, deliberate**, informed human intervention
  - The decision is free, deliberate and *with full knowledge of the fact* --> consistent with retributive principle that accords special significance to the free-will actions of human agents
  - E.g. K's voluntary decision to go back to the road
- **Omission**: it rarely or ever breaks the causation chain.

## II. MPC:

- In-fact cause: follows the common law, including the concurrent causes
- Proximate cause: not listed 6 factors. But 2.03 listed similar factors.
  - Not based on the notion of "proximate cause," but on the mens rea, i.e., whether D still causes the prohibited result with the level of culpability required by **the Code**.

## III. Concurrence

- State v. Rose
  - Fact:

- D properly entered the cross, the victim improperly crossed the road. After the hit happened, D did not stop, and the victim
- Direct verdict of acquittal, judge conclude that no reasonable Jury in the light most favorable to the state could conclude beyond the reasonable doubt.
- Elements: Negligently manslaughter: negligently killing another person
  - AR: killing another person [result crime]
  - MR: with negligence
- Application:
  - If V was killed at T1 or T2, AR satisfies (voluntary act causing social harm), CIF: but for cause, PC: no intervening cause besides the V
  - MR: if T1, no evidence to show negligent culpable; if T2, negligence.
- Rule: concurrence of the elements
  - The D must possess the requisite mens rea **at the same moment** her voluntary conduct causes the social harm.
- [Other thoughts:
  - Temporal concurrence: MR and AR at the same time
  - Motivational concurrence: MR causes AR, e.g., D killed V when he only intended to test his guns, but he did have intent to kill V otherwise.]

*Review:*

1. *A component of the AR: a voluntary act that causes a social harm.*
2. *Two steps:*
  1. *actual causation - but for D's voluntary act, social harm would not have occurred when it did and as it did;*
  2. *proximate causation - policy judgment; causal chain broken by intervening superseding cause; factors for determining PC.*
3. *Concurrence of the elements: the D must possess the requisite MR during the commission of the AR.*

## Chapter 5 Homicide

*Preview:*

*Homicide: an overview of the evolving common law*

1. *Historic common law*
2. *Statutory reformulations*
2. *Intentional killing: in general*
  1. *Common law*
  2. *MPC*
3. *Intentional killing with heat of passion: voluntary manslaughter*
4. *Unintentional killing unjustified risk-taking: involuntary manslaughter*
5. *Felony Murder*

### I. Intentional Killing: Overview

#### A. Homicide: common law term

- Homicide: killing of a human being by another human being (legally natural term)
- Criminal Homicide: same, but without a defense (no excuse)
  - Some type of homicide could be lawful: e.g., self-defense
- Types of homicide: Murder and manslaughter
  - Murder: killing of another human being by another human being **with malice aforethought**.
    - All criminal homicides are sentenced to capital punishment --> distinguish,

- Degree came from state legislature later.
- Manslaughter: killing of a human being by another human being **without** malice aforethought.
  - Voluntary manslaughter: with intention
  - Involuntary manslaughter: unintentionally
  - Punishment are the same, but today voluntary is more serious.
- Distinguish:
  - Turns on the mental state, the AR is the same.

### 1. **Murder: Malice Aforethought:**

Intent to kill: purposefully, or knowledge that near practical certainty that some result will happen --> 1 or 2.

- "awareness that death of another would result from one's action, even if the actor had no particular desire to achieve such a consequence."

Intent to cause grievous bodily injury to another person, where death results -- 2

Extreme reckless disregard for the value of human life -- recklessness -- 2

Intent to commit a felony, during which a person is killed (felony murder) -- 1 and sometimes 2

### 2. **Manslaughter:**

- Voluntary: heat of passion killings, an intentional killing committed in the heat of passion upon adequate provocation.
- Involuntary: [difference between these two]
  - Unintentionally killing that results from **negligence** (not aware of harm, but should have been aware.)
  - Unintentionally killing that occurs during the commission of some unlawful act not a felony (misdemeanor manslaughter)
- Note:
  - even if an intentionally killing could be manslaughter if that is mitigated by heat of passion.
  - for killing that resulted from undue danger to life yet not sufficiently reckless or criminal negligent, that is involuntary manslaughter, the misdemeanor-manslaughter.

### B. **Statutory Reformulations:**

- First and second degree, limiting the death penalty
- First degree
  - a. Murders committed in some **statutorily-specified manner**
    - E.g., Means of poison, lying in wait
    - Sometimes, killing someone in certain way would be murder as part of AR, not based on MR
  - b. Any **willful, deliberate, and premeditated** killing -- broadly used [WDP]
  - c. Any homicide that occurs during commission of certain other felonies (**Felony murder**)
- Second Degree: all other forms of murder
  - Such as intentional killings not WDP; intent to inflict grievous harm killings; depraved heart killings.
- Models
  - **States that follow the early PA model:** divide murder into 1 and 2 degree, plus manslaughter
  - States that modify early PA model: divide murder into 1, 2, and 3 (felony murder) degree, plus manslaughter
  - States that follows the MPC: eliminate degree of murder and divide criminal homicide into murder, manslaughter, and negligent homicide

### C. Intent to kill: WDP

- Intent to kill contains *willful, deliberated and premeditated*.
  - Willfully: a specific intent to kill
  - Deliberation: measure and evaluate the major facets of a choice or problem + quality of time + cool purpose
  - Premeditation: to think about beforehand + quantity of time (sharply divided)
    - Any **interval** between forming and execution is sufficient --> no meaningful distinction
    - Some appreciable time**: not only to form intent, but also turn the matter over in her mind and at least a second thought.
    - Undisturbed by hot-blood, the time interval affords a reasonable man to give a second thought.
- Justification:
  - legislative division of murder into degree is meant to separate. Otherwise, the legislative line between first- and second-degree murder is lost.
- State v. Guthrie
  - The old instruction: premeditation, killing to be intentional; exist only at instant.
  - This acquits WDP with the intent to kill (make it identical)
  - ★ The proper instruction: killing is done after a period of time for **prior consideration**. Any **interval** of time between the forming of the intent to kill and execution of that intent is sufficient --> so he could fully conscious of what he intended, it could be satisfied easily.
- Comparison:
  - Premeditation and deliberation need precede the homicidal act only momentarily. This new test of Guthrie is as close as to the intent to kill, but it could still be identified from it
  - Some states, e.g., MI, requires more than an instant. A thought process **undistributed by hot blood**, the time interval should be long enough to afford a reasonable man time to subject he nature of his response to a "second look."
    - Premeditation**: quantity of time, i.e., to think about beforehand.
    - Deliberation**: quality of time, i.e., measure and evaluate the major facets of a choice or problem.

### D. MPC

- **Definition**: A person is guilty of criminal homicide if, without a defense, she takes the life of another human being purposely, knowingly, recklessly, or negligently.
- **Forms**: Murder (no degree), manslaughter, negligently homicide
  - Murder is killing another person without a defense
    - Purposely or knowingly
    - Recklessly, under circumstances manifesting "extreme indifference to the value of human life" (common law depraved heart murder)
      - Note: Murder differs from common law: no degree, abandons language of "malice aforethought"
      - It applies to robbery, burglary, rape (in first degree and second degree)
  - Manslaughter:
    - criminal homicide is committed *recklessly*, or
    - A homicide would otherwise be murder but under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. (heat of passion)
  - Negligent homicide: when it is committed *negligently*.

### Review:

- *Homicide, criminal homicide --> 1) murder (malice aforethought); 2) manslaughter*
  - *The difference is mens rea, whether there is malice aforethought, or heat of passion.*
- *Malice Aforethought*
  - *Intent to kill --> 1st or 2d, depends on WDP or statutorily-specified murder*
  - *Intent to cause grievous bodily injury where death results --> 2d degree*
  - *Extreme reckless disregard for value of human life --> difference is whether the defendant consciously aware --> 2d degree*
  - *Felony murder --> 1st*
- *Codify, different degree of murder and manslaughter*
- *First Degree Murder*
  - *1) Statutorily-specified manner; 2) Willful/deliberately/premeditated; 3) felony murder*
  - *Intent to kill --> 1/2; felony --> 3*
- *Second Degree Murder*
  - *1)Intentional but not WDP; 2) intent to inflict grievous bodily injury killings; 3) reckless killings; felony murder (some jurisdictions)*
- *Manslaughter*
  - *Voluntary manslaughter*
  - *Involuntary manslaughter: 1) out of negligence --> it could be omission; 2) misdemeanor*
- *MPC: criminal homicide:*
  - *1) murder (purposely + knowingly + recklessly under circumstances manifesting "extreme indifference to the value of human life.");*
  - *2) manslaughter (reckless not extreme + murder but under influence of extreme mental or emotional disturbance)*
  - *3)negligent homicide: criminally negligent.*

## II. Intentional Killing with Heat of Passion

### A. Common Law

#### 1. *Principle Law: difference between murder with intent to kill and voluntary manslaughter.*

- *Girouard v. State*
  - *D and V were a couple. V told someone that hurt D and then verbally assault him, with conduct of pulling his hair and stepping up on his back. She also said she sued him at JAG. Then D stabbed her.*
  - *D contended he should be manslaughter. Whether the verbal provocation is "adequate provocation?"*
- *Reasoning:*
  - *Words alone never account as adequate provocation --> traditional common law, not MPC*
  - *Difference between intent to kill of murder and voluntary manslaughter*
    - *[Intro] Total defense: acquittal; partial defense: lesser degree or crime*
    - *The second one is with a partial defense (mitigation)*
  - *Rationale: someone out of heat of passion for certain reasons --> but they may be more dangerous than the second-degree murder.*

#### 2. *Black Letter Law: elements for heat of passion defense*

- *Definition: "An intentional homicide, done in a sudden heat of passion, caused by adequate provocation, before there has been a reasonable opportunity for the passion to cool off."*
- **Requirement:**
  - a. *The D must have acted in the heat of passion.*

- b. The passion must be some result of adequate provocation.
  - Traditional categories: 1) discovering one's spouse in the act of sexual intercourse with another; 2) mutual combat; 3) assault and batter; 4) injury to D's relatives or to a third party; 5) resistance of an illegal arrest.
  - For adequate provocation, 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 --> **usually objective standard** (average).
    - Usually needs to look at the common law to decide
- c. The D must not have had a reasonable opportunity to cool off.
  - Opposed of sudden heat of passion,
  - Common law do not recognize aggregating minor provocation.
  - Common law requires the D to kill source of provocation.
- d. There must be a causal link between the provocation, the passion, and the homicide.

## B. MPC Principle

- People v. Casassa: D contended with defense of "extreme emotional disturbance"; Trial court found him guilty of second degree murder.
1. **MPC: under the influence of extreme mental or emotional disturbance (EMED) for which there is a reasonable explanation or excuse, from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be. [allowed for mistake]**
    - Whether he did it under EMED: subjective
    - Was there is a reasonable excuse or explanation for EMED --> **subjective** view of point with objective portion
      - A range of possible factors the jury could consider
      - On one end of the spectrum of subjectivity, it is disability, such as blindness; on the other end, it is cultural beliefs like a belief that murder is acceptable.
    - From the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.
  2. **Difference between common law and MPC about EMED**
    - A **specific** provocative act is not required to trigger the EMED defense.
    - No fixed categories of adequate provocation, and **words count**.
    - EMED allows for more **subjectivity** in assessing what counts as adequate provocation.
    - (source of provocation) For MPC, the victim need not have committed the provocation **upon the D**: could be mistaken, even if D strikes out at an innocent person.
    - No rigid **cooling-off** period (no suddenness requirement)
- **No state completely adopts MPC or common law**

### Review:

- *General- degree of different murder*
- *Heat of Passion: it could be a partial defense to their murder (voluntary manslaughter)*
  - *Partial defense: moving an intentional killing from murder to manslaughter*
  - *Requirement:*
    - *Act in a heat of passion*
    - *Result of adequate provocation (AP)*
    - *No reasonable opportunity for cooling-off*
    - *Causal link between provocation, passion, and homicide.*
  - *Debate about whether reasonable person standard for adequate provocation is subjective or objective.*

- *Common law particular: rigid categories of AP; no cumulative provocation for AP; words not AP; misdirected retaliation.*
- *MPC: EMED, reasonableness determined "from the viewpoint of a person in the actor's situation under circumstances as he believes them to be."*
  - *Most states are reluctant to follow*

### III. Involuntary killings with Unjustified Risk-Taking

- *Doctrine:*
  - Common Law;*
  - MPC*
- *Cases and discussion:*
  - Depraved heart murder (type of murder): People v. Knoller*
  - Involuntary manslaughter: State v. Williams*

#### A. Unjustified risk-taking

- **Mens Rea:** not for purpose, negligently or recklessly, did not take reasonable steps that is severe enough to cause criminal liability
- **Risk:** long spectrum, desirable, neutral, undesirable (civil liability and criminal liability)
  - Awareness of risk: aware/conscious or not.
  - Degree of risk: substantial or not
  - Justification of risk: like the doctor example, or benefit could bring to the society.

#### B. Doctrine: common law and MPC

##### 1. *Common Law Liability for Risk-Taking*

Degree of Risk	Justification	Aware 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  (i.e., "substantial risk" which is extreme)	unjustified	Aware  (conscious disregard) --> <b>implied malice</b>	Recklessness  ("depraved heart," "abandoned and malignant heart," "extreme indifference.")	Murder (2nd degree, where distinguished)

- Therefore, the difference between manslaughter and depraved heart murder, is NOT degree of risk, but awareness of risk.
- Justification: for different **malice** aforethought
  - **Express malice**
    - Intent to kill
  - **Implied malice:**
    - Intent to cause grievous bodily injury to another person, where death results
    - Extreme indifference to the value of human life (i.e., **recklessness**, conscious disregard of a substantial, nonjustifiable risk to human life)
    - Felony murder, but no mens rea as to murder

## 2. MPC Liability for Risk-Taking

Degree of Risk	Justification for risk	Aware of risk	Mens Rea	Liability
Substantial	Unjustified	Not aware	Negligently	Negligent Homicide (210.4(1))
Substantial	Unjustified	Aware	Recklessly	Manslaughter (210.3(1) (a))
Substantial "under circumstances manifesting extreme indifference to the value of human life."	Unjustified	Aware	Recklessly	Murder (210.2(1)(b))

- Personal note:
  - Equation:
    - MPC's manslaughter = Common Law's **voluntary** manslaughter.
    - MPC's negligently homicide = Common Law's **involuntary** manslaughter
  - For common law, the difference between depraved heart murder and involuntary manslaughter is **recklessness v. negligence**, i.e., the awareness of the risk. [both the risk they take are extreme]
  - For MPC, the difference between murder and manslaughter is **recklessness with extreme indifference v. general recklessness** (not extreme). It is not about the awareness of the risk, but the degree of risk.

Common Law	MPC	Mental state	Risk-Taking
Murder	Murder	<ul style="list-style-type: none"> <li>• MPC: no grievous bodily injury</li> <li>• MPC: no felony murder</li> </ul>	[Same] recklessness with extreme indifference.
Voluntary Manslaughter	Manslaughter		[ <b>Not comparable</b> ] Criminal reckless (not extreme) + intention but heat of passion.
Involuntary Manslaughter	Negligently homicide	• MPC: no misdemeanor manslaughter	[Same] Criminal negligent

## C. Cases and Discussion

### 1. Murder: depraved heart murder

- People v. Knoller (dog killing)
  - Knoller was charged with 2nd degree murder --> reflecting common law, but you could be charged of murder due to the recklessness, "deprive hearted"
- Charge:
  - Common Law: The difference between 2d murder and manslaughter is the awareness -> the issue here is whether there is the awareness, and the awareness of what.
    - Conscious disregard to **human life** (depends on jurisdiction, e.g., MI requires "death or great bodily injury.")
  - MPC: the husband will be liable for murder.

- If the jury found him unaware of the risk, common law will be manslaughter, MPC will be negligent manslaughter.
- Implied Malice
  - Malice may be express or implied.
  - It is express when there is manifested a deliberate *intention to take away the life* of a fellow creature.
  - It is implied when the circumstances attending the killing show *an abandoned and malignant heart*.

## 2. Involuntary manslaughter

### *State v. Williams*

- Fact:
  - The parents knew baby was ill during Sep. 1 to 12; if they realized it from 1 to 5, the baby could be saved.
  - Parents knew the how sick the baby is; they did not go to doctor b/c they afraid the gov. will take him away; parents knew the medical help is available
  - Negligent for not seeking medical attention
- Note: WA at that time recognized ordinary caution as criminal liability; exception of omission applies (special relationship exists)
  - The parents did not aware the risk; but under the objective reasonable standard, they could be liable anyway.

### Review:

- Unintentional killing: *unjustified risk-taking*
  - Degree of risk, justification for risk, awareness of risk
- Common law:
  - Manslaughter (involuntary): *high degree of risk, unjustifiable; not aware (criminal negligence)*
  - Murder (2nd): *high degree of risk, unjustifiable; aware (recklessness), (depraved of heart)*
- MPC
  - Negligence homicide: *substantial risk; unjustifiable; not aware (negligently)*
  - Manslaughter: *substantial risk; unjustifiable; aware (recklessly)*
  - Murder: *substantial risk "under circumstances manifesting extreme indifference to the value of human life;" unjustifiable; aware (recklessly + depraved heart)*

## IV. Felony Murder

- Intentional killing
  - 1st and 2nd degree murder
  - Voluntary manslaughter (heat of passion)
- Unintentional killings
  - That follows *unjustified risk-taking* (2nd murder or involuntary manslaughter)
  - That follows *unlawful conduct* (felony murder)
- Felony Murder
  - Overview
  - Controversy- *People v. Fuller*
  - Modern Limitation
    - *Inherently dangerous limitation - People v. Howard*
    - *Independently felony (merger rule) limitation - People v. Smith*
    - *Res gestae requirement*
    - *Killing by a non-felon*

- E.g. kidnapping, he causes the death of a person other than one of the participants
- "Predicate" felony, **AR and MR of the felony**, the death, and the causation
- **AR of homicide**, NOT MR of homicide,

## A. Overview: not for MPC

- Definition:
  - A person is guilty of if a murder if a death results from conduct, **during the commission or attempted commission of a felony**, regardless of the Defendant's state of mind as to the killings.
  - It does not matter if the felon kills the victim intentionally, recklessly, negligently, or even accidentally and unforeseeably.
  - [intent to commit a felony implies malice] + [strict liability for death results from the commission of a felony]
- Elements:
  - Predicate felony: Actus Reus, Mens Rea
  - Homicide: Actus Reus
- Note
  - Most states called second degree of felony murder (this is not a charge or crime, but just a theory of murder), defined **by the court** not the legislature, any inherently dangerous felony could be changed into felony murder (2nd)
  - Most states has first-second felony murder if the D committed **listed felony**
  - (pure retributivism needs to know the mental state of the defendant)

## B. Controversy

### *People v. Fuller*

- Fact: D for burglary, one of the numerated crime. To flee from the police, they rushed and hit another car, causing the other driver's death.
- Reasoning:
  - CA Penal Code: all murder which is committed in the perpetration of, or attempt to perpetrate, . . . burglary . . . is murder of first degree.  
==> impose **strict liability** for the death committed in the course of one of the **enumerated felonies**.
  - The court ruled that such harsh result destroys the symmetry of the law by equating an accidental killings.
- Note 1 (p.336): if the door is unlocked, then not burglary, then probably not first-degree.
  - Difference: 1) prove mens rea of murder (4 options); 2) second degree instead of first degree murder.
- Felony could be strict liability, for you don't have to prove mens rea, yet other requirement are all about mens rea.
  - Rationale: felony itself + the result of death

## C. Modern Limitation

1. ***Inherently dangerous limitation***: *only applies in cases when the predicate felony that is inherently dangerous. E.g. mortgage fraud is not inherently dangerous.*
  - Rationale: **Deter** people from committing crime. But not for the crimes that did not impose heighten risk.
  - People v. Howard:
    - The crime is not numerated, but it is inherently dangerous (see p.348 definition)
    - Issue: if the action/conduct is inherently dangerous
    - The D could be guilty of second degree murder since he was reckless.
  - Reasoning: 2 possible theories/test

- In the abstract test: court ignores particular facts of case and considers only the elements of the offense as defined by statutes, asking if the crime "by its very nature cannot be committed without creating a *substantial risk that someone will be killed.*"
- Fact of the case test: court considers facts and circumstances of the *particular cases* to determine whether felony as it was committed was inherently dangerous. E.g. slightly over the statute.
- Difficulties: first one is line drawing, second is pressure imposed.
- Either way, this theory is similar to depraved heart murder, but depraved heart requires conscious disregard

## 2. Merger Rule: independent felony limitation

- [Predicate felony has to be other than a crime that falls in the spectrum of **at least assault** crime. But this limitation refers to some crimes not within this spectrum. ]
- The predicate felony must be independent of the homicide, otherwise the felony merges with the homicide. There is no independent felony, and the FMR does not apply
  1. ★ The predicate felony is NOT independent when its **principal purpose is an assault** on the person of the victim
  2. The predicate felony must have an "independent felonious purpose."
- Note: this is very controversial; it meant punish only the very serious crime.
- People v. Smith
  1. Whether the trial court erred in convicting 2nd murder?
  2. (p. 354) independent felony not containing assault.
    - All direct physical harm, ranging from assault to 1st/2nd degree murder.
    - Robbery: A robbes B; though A might stroke B, A's purpose is not to assault but to steal money, which is the independent felonious purpose.
  3. Rationale:
    - This highly artificial concept *should not be extended* beyond any rational function that it is designed to serve.
    - The narrowest possible application consistent with its ostensible purpose - **which is to deter those engaged in felonies from killing negligently or accidentally.**
  4. Demonstration:
    - Adultery leads to D killing his spouse --> involuntary manslaughter;
    - If there is no merger rule, it could a first degree murder simply because someone died.
    - Meaning: it could use this theory to convict any defendant as first degree murder as long as a death occurred.
    - **Deference** justifies the rule
  5. Holding: not upheld
  6. Reasoning: The child abuse --> **it is an assault of crime** --> merge with homicide --> cannot be held as 2nd degree murder.

## 3. The res gestas ("thing done to commit") requirement

- Note: common law only applies this FMR **during** the commission or attempt to commit.
  1. To what extent: what if V died after the commission
  2. What is the causal link
- Time and distance requirements
  1. **Distance**:
    - FMR applies when the actor could be prosecuted for attempt (start point), and continues at least until all the elements of the crime are completed. (*ending point*)
    - (*ending point*) Most courts, however, apply the doctrine if the killing conduct occurs after the commission of the crime, while the felon flees and until the felon reaches a place of safety.

2. **Time:** The FMR applies when the death **results from** to killing conduct, even if the person dies days **later**. (*killing v. death*)
- Causal requirement: the D must be the cause of the death (both actual and proximate).
  1. It seems that is just a usual requirement
  2. For example, mere coincidental connection in time and place between the felony and the homicidal act does not have actually causal connection.

#### 4. *Killing by a non-felon*

- **Major rule:** [agency approach] if a person not committing the predicate felony takes some action that kills a third person, the FMR does not apply. An assailant is only guilty under the FMR for the killing conduct she effects (or her accomplice) --> If A tried to robber C, C tried to defend, yet ended up with killing D, a person happened to be nearby --> A is not liable for D's death due to FMR.
- **Minority rule:** [proximate cause approach] if a person not committing the predicate felony takes some action that kills a third person, the FMR applies as to the felon (or her accomplice).

#### *Review:*

1. *Generally: a person is guilty of murder if a death results from conduct during the commission or attempted commission of any felony.*
2. *Elements: predicate felony (actus reus and mens rea) + homicide (actus reus).*
3. *Limitation:*
  - *Inherently dangerous: close to depraved heart murder; two tests.*
  - *Independent felony limitation/merge rule: predicate felony must be independent of homicide, otherwise it merges with homicide and no FMR.*
    - *Independent felonious purpose, usually assault.*
    - *Almost always applies in cases of assault (see diagrams)*
    - *Rationale: 1) preserve degrees of culpability for homicide; 2) deterrence*
  - *Res Gestae limitation (time/distance, causation)*
  - *Killing by a non-felon limitation.*

## Chapter 6 Rape

#### *Preview:*

- *Rape and the Common Law*
  - *The traditional requirements of rape: force and non-consent - State v. Alston*
  - *The amount of force and the "resistance requirement" - Rusk v. State*
- *Modern Reformulations of the Crime of Rape*

### I. Overview

- Modern term
  - Criminal Sexual Assault (CSA): crime of violence
  - Criminal Sexual Conduct (CSC)
  - But not showed in the common law
- Common Law: rape
  - A lot of conduct could falls within CSA, CSC, not necessarily rape.
  - Reasons
    - Disturbing common crime
    - Crimes that has been treated as second class crime

- Changing social attitude, moral blame, and changing political power --> difference approaches, no specific modern definition --> what are the modern options and rationale behind them.
- Elastration
  - State v. Brown: Enormous attention for the victim; common law **resisting** elements.
  - 1979: police drop lie tests for rape victims, standard procedure for many police department.

## II. Common Law

- Blackstone: "rape is carnal knowledge of a woman forcibly and against her will."
  - Actus Reus: carnal knowledge, force, "against her will" (non-consent)
  - Mens Rea: [general intent] culpability, morally blame state of mind.:
- Force: always required as an elements
  - It could be constructive force: threats of serous bodily harm which reasonably induce fear
  - Though that is not determinative, considering the *totality of the circumstances* gives rise to a reasonable inference that the unspoken purpose of the threat was to force the victim to submit to unwanted sexual intercourse.
- Note for forcible rape
  - **Force**: Uses force, or threatens to use force *likely to cause serious bodily harm*, or sufficient force to overcome the V's physical resistance to his action.
    - **Threat and fear of force**:
      - Threat: objective - conduct D did that places V in *reasonable* apprehension of her safety
      - Fear: subjective - *subjective* apprehension of serious harm
  - **Consent**: it could be subjective(attitudinal) or objective (expressly)
    - Subjective: V failed to manifest it outwardly
      - Problem: miscalculation by the other party --> *reasonable* mistake of fact to negate MR.
    - Objective: permission needs to be given verbally or by other action; permission is absent when actively refused.
      - Problem: whether "no" means no + how long does "no" applies.
    - Always a question about "**silence**," and if the consent is given out of **duress**, a consent can be **withdrawn**.
  - **Resistance**: *evidentiary important to force*
    - If there is extreme force, the element is satisfied.
    - If there is only moderate force, resistance is needed to prove force used.
      - V needs to resist AND
      - V's resistance is overcome by force or V is prevented from resisting by threats to safety
- Note for Mens Rea: general intent is not strict liability
  - Mistake of fact: a genuine and reasonable belief that V gives consent voluntarily might not work.
  - General culpability: "specific intent" to commit such crime or conduct.

### 1. Traditional Approach: force and non-consent

State v. Alston

- Issue: sufficiency of evidence regarding BRD to prove crime of rape
- Second degree rape involves vaginal intercourse with the victim both by force and against V's will.
- Holding:
  - The victim did not give consent + but insufficient evidence regarding show of force.
  - The D's former statement and conduct are unrelated to the act of sexual intercourse.

Brown v. State

- Not only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the women's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated.

## 2. The amount of force and resistance requirement

Rusk v. State:

- D could escape during the process.
- A person is guilty of rape in the second degree if the person engages in *vaginal intercourse* with another person by force or threat of force against the will and without the consent of the other person.
- No resistance showed in the case + no fear that overcomes her attempt to escape
  - Evidence must warrant a conclusion **either** that the victim resisted and her resistance was overcome by force **or** she was prevented from resisting by threats to her safety.
  - There is no mention of resistance
  - Functioning as a proxy both as force and non-consent --> often lack of evidence, no other witness.
    - Proxy as non-consent; necessary amount of force.
    - Most states dropped the resistance requirement, or it will be a huge bar.

Review:

- *Common law definition of rape: the carnal knowledge of a woman, forcibly and against her will.*
- *Actus Reus*
  - *Conduct: vaginal intercourse*
  - *Attendant circumstances:*
    - *Force: actual, or threat of serious bodily harm.*
    - *Non-consent*
  - > *resistance requirement: proxy for force and non-consent, given evidentiary challenges.*
- *Mens Rea: none stated, therefore a general intent offense (morally blameworthy state of mind)*
- *Critical Questions:*
  - *Why does the proof of this crime focus on the V's response?*
  - *What if V's response is passivity/numbing/freezing rather than resistance?*
  - *What if resistance increases risk of harm?*
  - *Why requires force at all? Isn't non-consent enough?*

## D. Modern Reforms

- Challenge
- Possibilities for Reform
- Cases: Commonwealth v. Verkowitz; State of New Jersey in the Interest of M.T.S.

Note for reformation:

- **Resistance:** no longer require resistance "to the utmost," but a "earnest" resistance, or enough to prove "by force" or the resistance is reasonable.
- **Force:** based on the sexual autonomy theory, force is only a **factor** in deciding whether V gives consent.
  - A minor physical act should suffice - for cases like MTS, the force inherent in the sexual act itself suffices -- > then what conduct short of an express "yes" is sufficient to prove permission? To what extent the permission given is tainted?

### 1. The Challenge

- Murder:

- AR: killing another person
- MR: with malice aforethought
- Rape
  - AR: sexual intercourse with another person --> **very common**, only becomes felony at some points
    - Attendant#1: force
    - Attendant#2: non-consent
  - MR: morally culpable state of mind (general intent offense)

## 2. Reform:

- a. Drop or diminish Resistance requirement, but still require force and non-consent
- b. Redefine force
- c. Drop force requirement altogether
  - New federal definition (for reporting purpose): penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.
- d. Redefine consent
- e. Drop Consent

## 3. Cases

- *Commonwealth v. Berkowitz*
  - Fact: no issue of consent (she kept saying no); she did not resist for the defendant was on the top of her; D said the no is more like an encouragement; and sexual indication before.
  - Reasoning: the government said the force to complete sexual intercourse will be enough; but this will vitiate the element of force and there is *no consent requirement* in statute.
  - Then the legislator changed the definition, dropping the force requirement.
- Statute: engaged in sexual intercourse with another person not his spouse: 1) by *forcible compulsion*; 2) by **threat** of forcible compulsion that would prevent resistance by a person of reasonable resolution.
  - No need for show of resistance + no consent requirement
  - For the forcible compulsion, it not only means *physical force or violence* but also moral, psychological or intellectual force used to compel a person to engage in sexual intercourse against that person's will.
- *State of N.J in the interest of M.T.S.*
  - Statute: sexual penetration + physical force or coercion
  - Argument:
    - The prosecutor required the force in doing the sexual intercourse.
    - Plainly that
- Common and elements, and what the difference way you could reform it.

### Review: Rape

- *Common Law: carnal knowledge, force + non-consent (with resistance serving as proxy for both)*
- *Challenge:*
  - *The underlying conduct - sex is pervasive and non-criminal*
  - *Difficult to determine CSC without looking to victim response*
    - *Force - hard to avoid measuring resistance*
    - *Non-consent - is a feature of victim's response*
- *Possible areas of reform*
  - *Drop diminish resistance requirement, but still require force and non-consent*
  - *Refine force (M.T.S.) - mere act itself*
  - *Drop force (rape as non-consensual sexual)*
  - *Redefine consent (yes means yes)*

- Drop consent (N.J. statute in M.T.S.)

## Chapter 7 Theft

Crime against a person, but theft is a crime against property

- Theft: **involuntary and unlawful transfer of property**, e.g., stealing
- Theft: just a contemporary term used to describe what a common law understands as several distinguish crimes.
  - Larceny, embezzlement, false pretenses, robbery(with force, aggravated larceny), burglary(committed at night time).
  - Larceny is a common law crime; embezzlement (filling the common law gaps) and false pretenses are early statutory crime, since the common law does not move too fast.

Preview

1. Larceny
  - a. Overview
  - b. Actus reus (the below will cover up some conducts that the common law did not cover, they are all legal fiction.)
    - "Trespassory taking" - caption
      - Basic analysis
      - Special situations (consent for temporary use + employer/-ee and bailor/-ee relationship + fraud)
    - "And carry away" - asportation
    - Of the personal property of another
  - c. Mens rea (with intent to steal the property)
  - d. Concurrence of the elements:
    - Doctrinal expansion: "continuing trespass," where trespassory taking, but mens rea did not form at the time taking.
2. Embezzlement
3. False pretenses
4. Theft crimes today
  - a. State theft: Michigan and MPC examples
  - b. Federal theft crimes: mail and wire fraud

### I. Larceny

#### A. Overview

- "The trespassory taking and carrying away of the person property [**from the lawful possession**] of another with the intent to permanently deprive the possessor of the property. "
  - Actus Reus:
    - The trespassory taking: caption
    - Carry away: asportation.
    - Of the personal property of another
  - Mens Rea: intent to permanently deprive the possessor of the property. (with the intent to steal)

#### B. Actus Reus: Trespassory taking (caption)

##### 1. Basic Analysis

- It involves the trespassory taking of person property from the **possession** of another.
  - Trespassory + taking
  - Possession: it does not require the title. The possessor is fine, not necessarily be the owner
  - Personal property + of another
- What the common law means by **possession**

- A person has possession of property when she has sufficient control over the property to use it in a *reasonably unrestricted* manner. Possession does not turn on ownership.
- Actual and **constructive possession**:
  1. **Custody**: temporary and limited use of property [critical factor is **possessor's presence**]
  2. In furtherance of **employment**: receive property for use in the employment relationship
  3. **Bailee** of goods enclosed in a container
  4. Obtained by **fraud**.
- **Taking** is a *transfer* in possession and can be lawful or unlawful --> **trespassory taking** is unlawful one.
  - Lawful possession (non-trespassory taking) occurs when the person who has possession **CONSENTS** to the taking.
  - Unlawful possession (trespassory taking) occurs when the person who had possession does **NOT CONSENT** to the taking.
- Questions to determine whether a trespassory taking
  - Who initially has the possession of the allegedly stolen property --> must be the victim
  - To whom did the possession transfer --> must transfer to the D
  - Whether such transferred possession (taking) occurred lawfully or trespassorily --> must occur trespassorily (i.e., without consent of victim)

## 2. *Special Situations*

### a. **Consent for temporary use**

- *Rex v. Chisser*
  - What is the liability for a person to steal something that someone gets the consent just temporarily
  - Fact: D arrives in shop --> D asks to see crevats --> Shopkeeper hands crevats to D --> D runs out of shop with crevats.
- Basic Analysis
  - Who initially has possession of the allegedly stolen property --> shopkeeper
  - Whether and to whom possession transferred?
    - **For the crime of larceny**, once the person has the **lawful possession** of the item, he cannot be liable for larceny. You cannot take the item which you already has the lawful possession --> Neither did D commit a larceny, nor he commit any crime.
    - Difference between **possession** and **custody**:
      - Shop-owner: the item was not out of the possession by such delivery, till the perfection of contract. --> that is still constructive possession
      - ★ **Custody**: A person with *temporary and extremely limited* authority to use a piece of property has mere custody of it - person who gave custody retains "constructive possession."
    - But once you have the lawful possession of the property. The fact you need to give it back does not change anything. E.g. A lend B her bike for one week; or rent a car but with some limitation, they are still possession.
  - Was the transfer of possession lawful or unlawful?

### b. **Employer/-ee and Bailor/-ee relationships (breaking bulk)**

- Bailment: Bailor and bailee
  - Bailment: The act of delivering goods or personal property to another person.
  - Bailor: the person who hands over the goods to be delivered. E.g. Amazon
  - Bailee: the person who receives the goods to deliver. E.g. UPS
- *U.S. v. Maffnas*
  - D, as an employee, delivered the money bag, but he took the money away.

- The federal statute used the word "steal" in the text, then the court used the crime, larceny, to interpret "steal".
- Argument/contention: D claimed he had the lawful possession.
- Reasoning:
  - The court introduced another legal fiction: breaking bulk
    - When the person is entrusted with a container for the delivery for an unopened condition, the bailee, or D, received the **possession** of the **container**, but receive only the **custody** of the **contents**.
  - Compared with Pruitt (what is problematic)
    - In Pruitt, the D was the employee. But the employer usually give certain property to her employee in the course of employment --> the employer has the possession of the item; the employee has the custody.
- Note: if D did not open the container, just sell it to another person, then he is not liable for larceny.
  - **c. Larceny by trick** (MR at the moment of taking)
- Rex v. Pear:
  - Pear rent the horse but left the wrong address; but there is question about what is Pear's intent at the time he left his address.
  - In 1779, rent a horse is like rent a car, which he will has the lawful possession.
- Another legal fiction is needed: Pear intended to steal the horse at the time of renting the horse.
  - ★ If at the time of otherwise will be taking as lawful possession, the court will pause at the moment, then the D will has the custody instead of possession of the item.

#### Review:

- *Theft is the involuntary / unlawful transfer of property and encompasses several crimes: larceny, embezzlement, false pretenses, and other offenses.*
- *Larceny: the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive the possessor of the property.*
- *Actus Reus: trespassory taking*
  - Basic Analysis:
    - *A trespassory taking turns on possession, not ownership*
    - *Three questions: 1) who initially has possession? 2) to whom possession transferred? 3) whether such transferred possession happened lawfully or unlawfully (trespassorily)?*
    - *Lawful v. unlawful possession turns on consent (and the scope of it)*
  - Closing of three loopholes:
    - *Possession v. custody distinction*
    - *Bailor/bailee - application of possession/ custody distinction*
    - *Larceny by trick - application of possession / custody distinction*

### C. Carrying away: Asportation

- Under the law, almost any movement of the property away from the point of caption.

### D. Of the personal property of another:

- Real property: land and anything attached to the land.
  - P978 n.3: modified: if someone come to land and chop down the tree. Larceny? Probable not
  - If someone found it on the land already, then that is not real property, he will be liable for larceny.
- Intangible property: including intellectual property, also labor and services

- "Another:"
  - For the property law, if the car's bill is not paid, then the **possession right** belong to the mechanic. So if you don't pay the bill yet take the car, you will be liable for larceny.

## E. Mens Rea: with the intent to permanently deprive the possessor of the property

- People v Brown
  - Fact: the defendant took the wheel because he want to get even; but he intend to return it back. Before he could return it, he was caught by someone.
  - Though he was charged with burglary, but the element goes to the mens rea of larceny.
  - Brown did not intend to **permanently**, so he was not liable for theft.
  - Burglary could be felony, but the trespass is misdemeanor.
- Note: intent to **permanently deprive** not to gain. E.g., sell it to others; destroys it, but not use it to fraud temporally.
- Problems:
  1. He intends to steal it; he did not keep it but sell it --> that does not matter, he still with the intent to permanently deprive it from the lawful possessor.
  2. **Continuing trespass**: a D trespassorily takes property but, at the time of the trespassory taking, does not intend to permanently deprive and only later makes the decision to do so. i.e., the AR happened first, then he has the MR.
    - ★ **Legal fiction**: "continuing trespass," where MR did not form at that time of trespassory taking.
      - Original trespassory taking continues at each point of time until he terminates possession of the property.
    - Compare this doctrine with Pear (larceny with trick)
      - Since Pear had the intent at the time he got the consent, therefore, he got AR and MR at the same time;
      - That's why if he did not have the intent at the time he got the horse, then he did not take it trespassorily --> no AR --> continuing trespass does not apply.
  3. If Frank agrees to let Brown borrow the bike for a week, then Brown later decide to steal it later? NO!
  4. The same situation that Frank gave his consent, but the Brown decide to steal it at the beginning? Yes, the Pear case, the larceny by trick.
    - Frank still has the constructive possession; Brown only got the custody.

## II. Embezzlement

- The **fraudulent conversion** of the personal property of another over which one has **lawful possession**.
  - [MR] **fraudulent**: intent to permanently deprive.
  - [AR] **conversion**, a series of interference with the owner's rights. Different from asportation, e.g., take the money and walk out.
  - [AR] lawful possession of the personal property of another.
  - [AR] D came into possession of the property **in a lawful manner** as the result of **entrustment**: it will limits the application. When the property is entrusted to you by a third party.
- For someone who does get the lawful possession.
  - E.g. in employment relationship, employee gets the custody from the employer;
  - **but**, if the property handed over to you in the name of the employer, and intended you to give it to you employer --> here, the employee gets the lawful possession.
- Who is in the possession of **trust**, but probably **not** in the relationship of the **employment**.

### III. False Pretense

- Knowingly obtaining title of the property of another by means of false representations of fact with intent to defraud.
  - AC: obtaining title --> according to common law, larceny does not include title (you cannot be liable for larceny if you get the title)
  - AC: false representations of fact
    - **Nondisclosure** is usually not enough; it has to be the representation of the **fact**: opinion is not enough.
  - MR: knowledge of falsity
  - MR: intent to defraud.
- Comparison: **TITLE + Fraud**

### IV. Theft Crime

#### A. State Theft: consolidated

- It is virtually impossible to justify theft law as it has developed. Many legal fictions complicate the law of larceny, embezzlement, and false pretenses, and the lines between the offense are exceedingly thin. And there is no meaningful difference between the offenses in terms of the **culpability** of the actors, their **dangerousness**, or the **seriousness** of the harm caused.
- Comparison:
  - Michigan: very into the common law; PA: very closely follow the MPC
  - Michigan: retains much of the common law, and patchwork that resulted, while adding new crimes to cover loopholes and new offenses.
  - PA: consolidates all the common law crimes into one crime called theft.
    - An accusation of the theft may be supported by evidence that it was committed "in any manner that would be theft under this chapter, notwithstanding the specification of a different manner in the complaint or indictment."

#### B. Federal theft crime: mail and wire fraud.

- Elements of mail and wire fraud
  1. [AR] D engaged in a "scheme to defraud," which involved material misstatements or omission.
  2. [AR] The U.S. mail, a private courier, or interstate or international wire (i.e., internet, mobile phone)
    - Were used "in furtherance" of the scheme to defraud; and
    - The D used, or caused the use, of these services.
  3. [AR] Scheme resulted, or would have resulted, in loss of money/property/honest services.
  4. [MR] D acted with the intent to defraud
- Prosecutors' discretion
  - Covers inchoate harms ("a scheme to defraud")
  - Jurisdiction triggered by a form of communication that is ubiquitous
  - Covers traditional state crimes (i.e., employer/employee relations; fraud in sale of used cars)
  - Court rejected narrow definitions of fraud, limited to certain common law distinctions
  - Steep punishment (max 20 years per count)

#### Review:

- *Larceny*:
  - *Larceny by trick: only custody where intent to steal concealed by fraud (custody, for the possession is necessary fro )*
  - *Carry away: asportation, any movement of the property*
  - *Of the personal property: larceny does not apply to intangible property or real property*
  - *Of another: no larceny against property you won, unless victim possessory interest*
  - *With the intent to steal: intent to permanently deprive (not just a short term)*

- *Embezzlement: fraudulent conversion of personal property over which one has lawful possession (hand which has been entrusted to the D by a 3d party on behalf of another).*
  - *Classic example: employee who receives goods from employer*
  - *Unlike larceny, applies where D has lawful possession.*
- *False Pretense: knowingly and designedly obtaining title to the property of another by means of untrue representation of fact with intent to defraud.*
  - *Classic example: D give counterfeit money to buy a used car*
  - *Unlike embezzlement and larceny, for D receives title*
  - *Like larceny by trick, because D uses fraud (but here, to receive title)*
- *Two types*
  - *E.g., MI: common law governs, though there is statute governing the theft*
  - *E.g., PA, MPC, the same kind of crime.*

## Chapter 8 General Defense

- *Overview of defense*
- *Self-defense*
  - *Elements (common law)*
  - *Necessity component*
    1. *Imminent rule*
    2. *Provocation rule*
    3. *Retreat rule (and castle doctrine)*
  - *Proportionality component*
  - *Reasonable Belief component*
- *Defense of Others*
- *Necessity*
  - *Overview*
  - *As a defense to homicide*
- *Excuses: Duress and Intoxication(?)*
  - *Duress:*
    1. *General Principle*
    2. *As a defense to murder*
  - *Intoxication:*
    1. *Introduction*
    2. *Traditional common law rules*
    3. *Evolution of the law and where it stands today*
- *Excuses: Insanity*
  - *Rationale for the Insanity Defense*
  - *Insanity Defense and Criminal Procedure*
  - *Tests for Insanity*
    1. *M'Naghten Test*
    2. *Control Test (Irresistible Impulse Test)*
    3. *Product Test (Durham Test)*
    4. *MPC Test*
  - *Insanity Tests among states*

### I. Overview of Defense

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

- *Total defense:* most of the defense are total, acquittal (or no conviction in first place) (i.e., self-defense).
- *Partial Defense:* conviction for a lesser offense (i.e., heat of passion - voluntary manslaughter)

## Types of defense

1. Failure to prove defense (negative defense):
  - Nothing other than prosecutor failed to prove one or more elements BRD.
  - "Elements not satisfied, therefore not culpable."
2. Traditional Defense (affirmative defense)
  - The lawyer admitted that the prosecution proved all elements BRD, but the defendant satisfied some statutory elements that could be the defense.
  - "Elements satisfied, but not culpable for some other reason."
  - Example of defense deeply in bedded in **common law**.
    0. Justification: a set of condition which prevent conviction because the otherwise criminal **act** was the right or permissible in the instance.
      - E.g. self-defense, a necessity --> "some greater good." (even if your effort failed, the defense will probably stand)
    1. Excuse: A set of conditions which prevent conviction because the **actor**, while committing an otherwise criminal act, is not morally blameworthy. (but the social harm sustains)
      - E.g. Insanity. Not morally culpable
3. Specialized defenses: only applies to one or a few crimes. E.g., legal impossibility to attempt crime, abandonment to attempt or conspiracy, "Wharton's rule" to conspiracy.
4. Extrinsic defense: social interest outweighs utilitarian/retributive reasons to punish. E.g., statute of limitation, incompetency to stand trial.

## II. 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 the other person.
- *Deadly force* is only justified if the actor *reasonably* believes it is necessary to prevent *imminent* and unlawful use of *deadly force* by the aggressor.

### A. **Necessity** component: force should not but used against another person unless it is necessary

- The society does not generally encourage such defense.
- "Can I use the force?"
- Corollary: all come from common law
  1. **Imminent rule**: use of force in self-defense is permissible only where the threat of force is *imminent* -- "just **moment away**." measure of **temper proximity**, about to happen
    - You don't have other opportunity to save yourself
    - MPC: "immediate necessary"
      - MPC §3.04: use of force justifiable for protection of the person
      - The use of force upon or toward another person is justifiable when the actor believes that such of force is *immediately necessary* for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.
  2. **Provocation rule**: the right to use **deadly force** and self defense is not available to someone how provokes a conflict or is the aggressor in it unless the D first *withdraws* from the conflict in good faith and *informs* the other party to the conflicts of that withdrawal by words or acts.
    - [Deadly force: likely results in death or grievous bodily injury. MPC requires "with purpose."
    - Feature:
      - D is an aggressor if he starts a **nondeadly** conflict.

- Actually **use** deadly force is not required to an aggressor. E.g., Someone who brandishes a weapon is an aggressor; but the threatened one who *uses* actual force is not. ]
- MPC 3.04(2)(b)(i): the use of *deadly* force is not justifiable, if the actor, **with the purpose** of causing *death or serious bodily injury*, provided the use of force against himself in the same encounter
  - Difference, the one started the **nondeadly** force is not an aggressor.
  - [In a general force scenario, it seems there is no mention of aggressor.]
- 3. **Retreat rule (and castle doctrine):** a person cannot invoke the doctrine of self-defense where that person had some means to **safely retreat** and avoid the harm.
  - The majority rule: no retreat rule, a person can use deadly force to appeal lawful force, even if he was in a safe place.
    - Fla: no duty to retreat and has the right to stand his or her ground and meet force with force.
  - This is the minority rule: retreat rule
  - ★ **The Castle Doctrine:** every state recognize the retreat rule, also recognize the castle doctrine.
    - A non-aggressor is not ordinarily required to retreat from **his dwelling**, even though he knows he could do so in complete safety, before using deadly force in self-defense.
    - The castle doctrine usually dose not apply outside the dwelling but on the property "curtilage."
    - The trend today is to upheld even if the aggressor is a co-dweller.
  - MPC 3.04 (2) (b) (ii): generally favors the retreat rule, but with exception.
    - The use of *deadly force* is not justifiable . . . if 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, except that the actor is not obliged to retreat from is **dwelling or place of work**.
    - p.527 1(C): she has no duty to walk on that road.
    - Exception: castle doctrine for both home and **place of work**
      - The exception to exception: if the aggressor is co-worker, he is required to retreat.

U.S. v. Peterson (necessity)

- Imminent: no imminent threat to himself.
- Provocation: the D is the one who provoke or start such conflict. He only face the imminent danger because he started it. [you cannot use deadly force to protect your property.]

**B. Proportionality component:** a person is not justified in using force that is **excessive** in relation to the **harm** threatened.

- "How much force I can use?" - the amount of force
- The extent:
  1. Nondeadly force/threat --> nondeadly force (never deadly force, even if only way to prevent harm)
  2. Deadly force/threat --> nondeadly or deadly force.
- Defense of Property: applies to any real or personal property
  1. 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.
  2. Maj: The common law would never allow deadly force to defense for property

3. Min: e.g., Texas, theft-related felony, or escaping after felony --> then you could deadly force.
- Defense of habitation:
  1. a person can use **deadly** force, if she reasonably such force is necessary to prevent an imminent and unlawful entry of her **dwelling** with intent to injury or **commit a forcible felony**.
  2. applies very narrowly. The person must reasonably believe that the other person **intend to injury** or that person will commits a **forcible felony**.
- Note: in most jurisdictions, if you are not allowed to use force, then you are not allowed to use the threat of force.

C. **Reasonable-belief component:** anytime we use the *reasonable* test, it would use the same test as this one --> not by the statute, but **by court's** interpretation.

- Subjective prong: person must **believe** that she needed to use (deadly) force to repel
- Objective prong: person's belief must be one **a reasonable person** in the same situation would have possessed.
- [For the MPC, there is only subjective requirement for **general force using**.]

*Review:*

- *Overview of Defense*
  - *Define: any condition which, if proven, prevents conviction*
  - *Types: negative v. affirmative (justification v. excuses)*
    - *Even if you assumed prosecutor prove it all BRD, the client is still not guilty*
    - *Justification: negates the social harm, **focus on act** ; excuse: negate morally blameworthy, **focus on the actor**.*
- *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 the other person, (necessity, proportionality, reasonable belief)*
  - *Necessity: force should not be used against other person unless, and only to the extent that, it is necessary*
    - *Imminent rule: use of force in self-defense is permissible only where the threat of force is imminent (MPC immediate), **proxy for necessity**.*
    - *Provocation: self-defense not available to one who provokes a conflict, unless D withdraws and informs*
    - *Retreat rule: A D cannot invoke the doctrine of self-defense where the D had some means to safely retreat and avoid the harm.*
      - *Maj: reject the common law, but a stand ground rule: even if you could retreat, you could still use the force, if other elements are satisfied.*
      - *As a departure from the requirement of necessity.*
      - *Castle Doctrine: exception to retreat rule. The one place you don't have to retreat is your house (or place of work), even if you could retreat in completely safety.*
  - *Proportionality: not justified in using force that is excessive*
  - *Reasonable belief: reason test for both objective and subjective part.*

### III. Defense of Others: *People v. Kurr*

- Background: Mich does not codify such defense, the court has more leeway + Fetus Protection Act
- The issue is whether the D could use defense of others as a justification.

- D probably cannot use self-defense: she was only punched in stomach, so she cannot use deadly force to respond.
- **Defense of others applies very narrowly:**
  - Only to someone who has a special relationship with the person being protected -- not anymore
  - Only if the others could have validly claim the self-defense: if there is mistake of fact, D cannot claim this defense, even if he reasonably believes so. E.g., D actually kills a police officer who was arresting X.
  - (Michigan extend the self-defense rule to fetus, regardless of whether it is viable.)

## IV. Necessity: choice of evil or lesser of evil defense

### A. General Principle

- Background:
  - As a result of natural (**non-human**) force or condition, he must choose between violating a relatively minor offense and suffering substantial harm to person or property.
  - **Residual** justification: it legitimizes technically illegal conduct that common sense, principles of justice, and utilitarian considerations convince us justifiable.
- **Elements:**
  - Clear and imminent danger
  - Reasonable belief that action will **abate** the danger
  - Harm cause not disproportionate to harm avoided.
  - No adequate alternative to avoid the danger.
  - None of the following applies
    - The D causes the danger
    - State limits defense to naturally caused emergencies
    - Legislature has struck a different balance (addressing the specific circumstances at issue)
- **MPC 3.02.** Conduct that the actor believes to be *necessary* to avoid a harm or evil to himself or to another is justifiable provided that:
  - The harm or evil sought to be avoided is **greater than** sought to be prevented by the law defining the offense charged.
  - Neither the code or other law provides exceptions or defense with the specific situations
  - No legislative purpose to exclude such conduct.
- **Difference:** there is no requirement of imminent; no natural caused limitation; no non-perpetrator requirement.
- Nelson v. State
  - The issue is whether it is necessity to steal the truck.
  - Self-defense: particular application in necessity, v. necessity: a more board notion.

### B. Necessity as a defense to murder

- Queen v. Dedley and Stephens
  - No self-defense: the victim did not use deadly force towards the defendants
  - Common law: cannot use necessity used toward murder.
- Confrontational v. non-confrontational homicide
  - Confrontational: for reasonable person, most states allow the introduction of history
  - Non-: most states do not admit the history of abuse

#### Review:

- *Classification:*
  - *Negative defense: failure to prove*

- Traditional common law defense - Affirmative defense:
  - Justification: no social harm, focus on actus reus,
  - Excuse: no moral culpability, on mens rea, including insanity
- Defense of others
  - Available on behalf of any third party
  - Generally applies when the third party could have claimed defense, or where third party would apparently have been justified in using force in self-defense
- Necessity:
  - Common law elements, 1) clear and imminent danger; 2) reasonable belief that action will abate the danger; 3) no adequate alternative; 4) harm caused not disproportionate to harm avoided; 5) and none of the following apply - D caused the danger; defense limited to naturally-caused emergencies; legislature balanced harms otherwise.
  - MPC is **broader** : 1) no imminent requirement; 2) no automatic loss of defense because of fault; 3) not limited to emergencies from natural causes (as in some states under common law)
  - Common law denied defense of necessity in cases of murder (MPC does not per se deny)

## V. Excuses - Duress; Intoxication

### A. Duress: an affirmative defense

#### 1. Common law

- Elements: a person will be acquitted of any offense **except murder**, if the criminal act was committed:
  - 1) An **immediate (imminent)** threat of death or serious bodily injury
  - 2) A well-grounded fear that the threat will be **carried out**
  - 3) **No reasonable opportunity** to escape the threatened harm: D did not flee and did not report to the police for he believed the police was corrupt.
  - 4) Defendant **not at fault** for creating situation: the concerns for gang member
- Application:
  - Just applies to the physical (bodily) harm, not applies to property
  - Limits from common law
    - 1) It has to come from human beings, not natural force (necessity arose from the natural source)
    - 2) To you or your family --> most states did not adopt this tradition
- United States v. Contento-Pachon
  - D was threaten by killing his family + he believed the police was corrupt.
  - D claimed both the necessity and duress, yet the district court rejected both of them
  - Necessity: correctly denied, only applies to natural force and general welfare, here neither of them satisfied here.
- Difference:
  - It was suggested that duress negates the mens rea (i.e. a type of negative defense), but it should be a **affirmative defense**.
  - Common law distinction:
    - Necessity as justification: balancing of evils, only applies some greater good is sought
    - Duress as excuse: overwhelmed, to choose a greater evil --> you cannot **deter** it; and less morally culpable.
- 2. **MPC 2.09**, duress is an affirmative defense if:
  - D was compelled to commit the offense by the use or threatened use of unlawful force by the coercer upon D or another person; and
  - A person of reasonable firmness in D's situation would be unable to resist.
- 3. **Difference**:
  - No requirement of imminent threat.

- Not expressly disallow the duress as a defense to homicide.
- No requirement about the family member.
- Not limited to death or serious bodily injury (SBI)

#### 4. *Duress as a defense to murder*

- People v. Anderson
  - The common law refuses to recognize duress as a defense to homicide.
  - Reasoning:
    - Public policy:
      - the defendant could always choose to resist
      - concerns about street gang --> the common law has the limitation about "not at fault"
    - Mitigation: it should be the Legislature's decision, not the court.
  - Reality: 17 states reinstate the common law, 40 do the same as the case, a few states recognize it as a partial defense.

## B. Intoxication: negative defense to specific-intent crime.

### 1. *General Principle*

- The disturbance of mental or physical capacities resulting from the introduction of **any substance** into the body, whether voluntarily or involuntarily.
  - Not limited to alcohol.
  - It could be involuntarily intoxicated due to mistake or deceit. Involuntary one usually be a total defense to the crime.
  - Today focus on the voluntary intoxication
- United States v. Veach
  - Charged by federal statute at a national park, KY. The question is whether it is permissible to introduce voluntary intoxication as a negative defense.
  - It only applies to specific intent crime, not the general intent (no mention of specific intention in the statute), e.g., common law rape.
    - Your choice to be intoxicated is morally blameworthy.
  - Background: as Scalia said, it was generally barred. Then most states at the end of 19th c, then it could negate the specific intent.

### 2. *Common Law Rule:*

- Voluntary intoxication is **never an excuse**, but it can serve a failure-to-prove defense if, as a result of intoxication, the D did not have the requisite **mens rea** as required in a **specific intent crime**.
- Intoxication usually negates the **mens rea (negative defense)**, but it could also be the affirmative defense (but not the reality, just theoretically). It is possible to negates the **actus reus's** volition as negative defense (you have to be very drunk).

### 3. *Evolution of the law and where it stands today*

- Today, there is limitation on that defense (rewind to limit), but no majority rule.
  - One end of the spectrum, it can negates actor's mens rea. Do not ask whether the person is voluntarily get intoxicated.
  - On the other end, disallow any defense of intoxication at all. E.g. Montana's code.
    - Not a criminal defense, not able to be considered in determining MR, unless that is involuntary.
- Generally: common law, voluntary intoxication can be admitted as a specific-intent crime.

#### *Review:*

- *Duress:*
  - *Common law: 1) imminent threat of death or serious bodily injury; 2) reasonable belief threat will be carried out; 3) no reasonable opportunity to escape; 4) D not at fault for creating emergency.*

- MPC: 1) no imminent requirement; 2) applies against any use or threat; 3) not limited to threat of death or SBI; 4) may be raised in homicide cases.
- Intoxication:
  - General rule: voluntary intoxication is never an affirmative defense, but can serve as a failure to prove defense to negate mens rea for specific intent crimes.
  - State approach: 1) **freely allow** intoxication to negate mens rea; 2) no evidence of intoxication permitted; 3) intoxication as a failure of proof defense to **specific intent crimes**.

## VI. Insanity

- Rationale for insanity defense
- Insanity defense and criminal procedure
- The tests for insanity
  - M'Naghten Test
  - Control Test (irresistible Impulse Test)
  - Product Test (Durham Test)
  - MPC Test
- Insanity Test among the States

Background: increasing understanding of human mental state; significant move going back to M'Naghten; the majority of the states follows the M'Naghten.

### A. Rationale for insanity defense:

- Rehabilitation, deterrence (utilitarian); not morally blameworthy, *lack of free will* (retributivism)
- Mental ownership; increase in assassination; the question is about how to draw the line?
  - the science understanding; public perception - hard to understand;
  - the rationale is lack of free will, but this comes from a spectrum, so hard to draw the line;
  - risk of undermining the criminal system

### B. Insanity defense and criminal procedure

- Decision #1: Competency
  - The time: at the time of **trial** (adjudication), is the person competent to the trial
  - Under the Due Process Clause of 5th and 14th Amendment, a person is incompetent to stand trial if
    - D lacks the capacity to consult with her attorney with a "reasonable degree of rational understanding" - can they consult with attorney
    - D lacks "a rational as well as factual understanding of the proceedings against her."
  - Related and governed by Bill of Rights: e.g., 6th Amend right to consult; conferring witness;
  - This is the court/ the judge who made the decision + it can be made at any time during the trial and made by anyone, including the judge and defendant's attorney.
  - Result: 1) the authority could medicate them for the purpose of standing trial (forcible medication); 2) the trial is suspended until he or she is competent.
- Decision #2: Insanity
  - The time: at the time of **crime**.
  - Three possible results: not guilty; not guilty for the reason of insanity; guilty
  - Procedure:

- Waive out if they are guilty or not; if they are judged guilty, then the defense of insanity raises.
- If someone find not guilty, the civil liability goes one + the D walks out of the court.
- Decision #3: **Release**
  - The question is "Does the person impose a danger to herself and others?"
  - As long as a person is both mental ill and dangerous to his- or herself OR another, then the D is not released; if either of them is not satisfied, he will go free.
  - The civil could impose confinement - every 4 months, the question has to be asked: if he or she is still dangerous?
- Note:
  - The judgement of insanity and competency are both judicial decision, not the medical decision.

## C. The Test for Insanity

### 1. *M'Naghten Test*

- A person is insane if, at the time of her act, she experienced such a mental defect that
  - Prong 1: She did not know the nature and quality of the act she was doing;
  - Prong 2: If she did know, she did not know that what she was doing was wrong.
- "Know:"
  - it could be interpreted narrowly or broadly, the ability to describe the crime, but did not realize it;
  - the ability to evaluate your conduct and appreciate its impact on other people
- Criticism: 1) mainly covers the cognitive part, not volition part; 2) "know or nothing", no degree of incapacity.

### 2. *Control Test (irresistible impulse)*

- **In addition** to M'Naghten, a person is insane if, at the time of the act:
  - Prong 3: she acted from an irresistible and uncontrollable impulse; or
  - Prong 4: She lost the power to choose between right and wrong because her free agency was destroyed.
- Either volition and cognitive could do so, but
  - still not cover "all or nothing," no degree of insanity;
  - no measurable test for measuring volition
  - Someone thinks the volition cannot be excused and cannot be considered as a factor

### 3. *Product Test (Durham Test)*

- A person could be excused if her unlawful act was the product (causation) of some **mental illness or defect**.
- Judgement of the experts not the jury: that there is no line between volition and cognition.
- Criticism:
  - It hands over the judgement to the experts not the jury or the court.
  - It covers a minor subset of the mental illness: insanity is a small part of mental illness, and it depends on the expert to say if that is insanity

### 4. *MPC Test (4.01)*

- A person should be excused if, at the time of the conduct and as the result of some **mental defect**, the person lacked **substantial capacity** to:
  - Prong 1: **appreciate** the criminality (or "wrongdoing") of her conduct; or - cognition
  - Prong 2: to **conform** her conduct to the requirement of the law - volition
- It recognized the degree of capacity, it is "substantial capacity."

## D. Insanity Tests among States

- States like Texas only adopted the first prong of the MPC, which is almost the M'Naghten, "did not know that his conduct was wrong."
- Predominate Test: **M'Naghten test**
- Some states abolished the insanity defense, but the S. Ct. did not grant cert on that --> but it raised as a challenge to actus rea (volition) and mens rea.
- The burden to prove:
  - most states have the burden on the defendant,
  - the preponderance of evidence, some requires convincing and clear evidence

### Review:

- *Defense-Insanity:*
  - *Rationale: traditional goals of punishment not fulfilled*
  - *Procedure: competence(trial) vs insanity (crime)*
- *Test: M'Naghten Test; Control Test; Product Test; MPC*
- *Criticism: 1) cognitive and volitional; 2) degrees of insanity; 3) expert do not supplant role of jury; 4) discern moral responsibility (ultimate issue)*
- *Swing back toward M'Naghten, to limit defense.*

## Chapter 9 Inchoate Offense

### Preview:

- *Inchoate Crimes*
- *Attempt*
  - *General principle: definitions; elements; rationale; punishment*
  - *Mens Rea*
    - *Dual intent requirement*
    - *Second: no attempted felony murder*
  - *Actus Reus*
    - *Common Law: where to draw the line; Common Law Test; Cases*
    - *MPC Approach*
  - *Defense: Impossibility, Abandonment.*
- *Conspiracy*
  - *Common law + MPC + difference*
  - *Conspiratorial liability - Pinkerton Doctrine*
  - *Actus Reus*
  - *Mens Rea: problem with the second, knowledge v. purpose*
  - *Bilateral v. Unilateral*
  - *Defense: impossibility, abandonment, Wharton's Rule*
- *Solicitation:*
  - *Definition: MR, AR*
  - *Merger Rule*
  - *MPC + difference*

## I. Attempt Crime

### A. Background: Inchoate --> Target Crime

- The question is when in time we will criminalize inchoate crime.
- The steps before a target crime be committed
  - Stage 1: Conceive the idea of committing a crime
  - Stage 2: Evaluating the idea
  - Stage 3: Forming intention to go forward with crime --> Mens Rea formed
  - Stage 4: **Preparing** to commit the crime --> the earliest time to punish (inchoate crime)

- Stage 5: Commencing with **commission** of crime (perpetration) - ready to do it --> inchoate crime
  - Stage 6: Completing the crime --> Target Crime charged
- Three different crimes: attempt (incomplete); conspiracy (more than one people to commit); solicitation (as little as encouraging)
  - Discretion to the judiciary; e.g., Michigan, only creating the possibilities
  - For many crimes, cannot find the elements in the statute that expressly spell out.
- Rationale:
  - Deterrence: not much this value, for people did not expect he will just attempt the crime, they want to commit the target crime, which has already been criminalize.
  - Criticism: hard to tell the difference between the inchoate crime and just mens rea + people can change their mind.

## B. General Principle

- Attempt: occurs when a person, with the intent to commit an offense, *intentionally* performs some **substantial step** toward carrying out that intent. (favors MPC definition)
  - Incomplete attempt: D 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 attempt: D performs all the acts that she set out to do to commit the crime, but fails to attain the criminal goal.
  - Attempt itself is a distinct from the target crime, free standing crime.
- Merger Rule: less inclusion of the target crime merges the target crime, if the latter is successfully carried out.
- Punishment: how to grade compared with the target crime
  - Common Law:
    - Death or life in prison --> 10-50 years
    - Something less than death or life in prison --> 1/2 max for target crime
    - There is no difference between the complete and incomplete crime.
  - MPC:
    - "of the same grade and degree as the most serious offense that is attempted"
    - "An attempt to commit a capital crime or a felony of the first degree is a felony of the second degree."
    - The attempt crime is punished the same as the target crime, except the target crime is the first degree (then it will be lessen to the second)

## C. Mens Rea: dual intent

- Intent #1: The D must intentionally commit the act that constitutes the actus reus of an attempt. (In other words, D must intentionally perform the act that brings D into proximity of committing the substantive offense - the "substantial step.")
- Intent #2: The D must perform the act with **the intent to commit** the target crime.
  - A person is not guilty, unless the action is come with the specific purpose of committing the target crime.
    - > the recklessness and negligence is not enough / is not "intentional," one of the three mental state that is defined in MPC.
  - You cannot have the attempt crime where the mens rea of the target crime is less than that of attempt crime.
- ★ Not every crime could be made into a attempt crime.
  - You could not be liable for being recklessly to commit the crime.
- People v. Gentry
  - Issue: jury instruction stated that as long as the D had either of four states of mind, D would be liable for attempted murder.

- Reasoning: the error is that not every malic aforethought is amendable into attempt murder.
  - The second requirement is intent to kill --> the only mental state for you could be charged with attempt.
  - If you actually killed somebody, then any four of them could be the mens rea of the target crime (murder)
  - But if you did not kill anyone, only the first (the intent to kill) one will satisfy the mens rea for attempt.
- Problem check: do not use the word "intent"
  - Amendable: Attempted voluntary manslaughter
  - Not: depraved heart murder (extreme recklessness); involuntary manslaughter; no felony murder
  - ★ Bottom line: attempt always requires an intent to commit the target crime, but you cannot intentionally commit an unintentional crime. Therefore, only target crimes that have a mens rea of intent (purpose) can give rise to attempt crime.
- Bruce v. State
  - Is it possible to have attempted felony murder?
  - Reasoning: felony murder,
    - Actus Reus and mens rea of the predicated felony; actus reus of the homicide.
    - You never satisfied the second intent requirement of the attempt one, for there is no proof of the person intended to kill.

*Review:*

- *Inchoate crime: a class of incipient offenses that criminalize acts taken with requisite mental state toward some target crimes.*
- *Three major inchoate crimes: attempt; conspiracy; solicitation*
- *Attempt: occurs when a person, with the intent to commit an offense, intentionally performs some substantial step towards carry out that intent.*
- *Rationale: prevention of crime (not general deterrence)*
- *Grading of punishment: common law (often 1/2 target crime); MPC (same)*
- *Mens Rea -dual intent:*
  - *The D must intentionally commit the act that constitutes the actus reus of an attempt;*
  - *The D must perform this act with the **intent of committing the target crime.***
    - ★ *No attempt to commit depraved heart murder, involuntary manslaughter, felony murder, etc.*
    - *A person cannot intent to commit a crime that, by definition, is unintentional, less than "intent to commit the act."*

## D. Actus Reus: how to draw the line between preparation and perpetration.

- General Note:
  - Common law is harder to prove; MPC will be easier.
  - There is almost no statute defining the test; it usually goes to the court to decide;
  - balancing the liberty and security
  - Most states did not adopt a single test; usually you need to go to the cases.
- Factors:
  - ★ **Proximity to the crime; Seriousness** of the crime; how Strongly the **mens rea** is (subjectivist)
  - The common law does NOT punish **preparation**, only perpetration. The preparation alone is not enough, there must be some **appreciable fragment** of the crime committed.
  - MPC: what acts have already been taken, some crimes might punish the **preparation**.

- Test: common law
  - The last act test: A criminal attempt only occurs when the person performed all of the acts necessary to commit the target offense. Punish the completed attempt only.
  - 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.
  - Dangerousness proximity: Similar to the proximity test, but more flexible, taking account of several factors: 1) the nearness of the danger; 2) the greatness of the harm; 3) the degree of apprehension felt.
  - Indispensable element: attempt applies after D has secured every indispensable aspect of the crime. (complete the preparation)
  - Probable desistance test: A court will find an attempt when, in the ordinary course of events, without interruption from an external source, the D reached a point where it was unlikely that he would have voluntarily desisted from his effort to commit the crime, judged by when a ordinary person would reach **a point of no return**.
  - The unequivocal 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.
- **MPC language**: 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
  - [Complete - Conduct] Purposely engages in conduct that would constitute the crime if the attendant circumstances were **as he believes them to be**;
  - [Complete - Result] When causing a particular result is an element of the crime, does or omits to do anything with the purpose of **causing** or with the belief that it will **cause** such result without further conduct on his part;
  - [Incomplete] Purposely does or omits to do anything which, under the circumstances **as he believes them to be**, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.
  - > for second part of dual intent, **belief or knowledge will satisfies**, not necessarily intent or purpose.

People v. Rizzo:

- The dangerous proximity to success: V was never found; the Ds were still looking for him; no attempt to rob him could be made.

State v. Reeves:

- Issue: whether the girls constituted a substantial step in committing the crime?
- For MPC: focus on what has already been taken place
  - (a) and (b) refers to the complete crime; (a) is the conduct crime; (b) is a result crime.
  - (c) refers to the incomplete crime: **substantial step**.
- Many examples at MPC state that mere preparation could be a substantial step, which could happen months ago.
- Reasoning: adopting MPC, so mere possession could be a substantial step.

## E. Defense: impossibility and abandonment

- Impossibility (both common law and MPC): NOT a requirement
- Abandonment (some common law and MPC): common law, some do not recognize; some recognized requires: 1) voluntarily; 2) completely renounce the criminal purpose --> renunciation of a criminal purpose cannot undo the harm already inflicted.
  - Voluntarily: **out of genuine change** of heart + not motivated by unexpected resistance, lack of instrumentality, or increased likelihood of arrest
  - Completely: not merely postpones the criminal endeavor.

Review:

- *They all have dual intent requirement: 1) intentionally perform the conduct; 2) intent to commit the crime.*
- *Actus Reus: common law*
  - *Multiple: overlapping tests state having adopted*
  - *Factors: proximity; seriousness; evidence of mens rea*
  - *Generally, punishes perpetration and not preparation.*
  - *Six tests: last act; physical proximity; dangerous proximity; indispensable element; probable desistance; unequivocality*
- *Actus Reus: MPC*
  - *Focus on what's already been done, rather than what remains*
  - *Willing to punish for preparation, not just perpetration*
  - *Incomplete attempt test: intent + some substantial step (i.e., MPC, reconnoitering the place contemplated to commit crime)*
  - *25 states, most federal courts*
- *Defense:*
  - *Impossibility: no defense (common law + MPC)*
  - *Abandonment: some common law + MPC, if voluntary and complete*

## II. Conspiracy

- *Common Law Review: definitions, rationale, elements, relationship between conspiracy and target crime (merger rule); punishment*
- *MPC differences*
- *Conspiratorial Liability (Pinkerton Doctrine)*
- *Criticism*
- *Mens Rea*
  - *Dual intent requirement*
  - *Meaning of intent - purpose v. knowledge*
- *Actus Reus*
- *Bilateral v. Unilateral Conspiracy*
- *Defense: impossibility, abandonment; Wharton's Rule.*

*Note: In this crime, the act is as minimal as the beginning, e.g., agreed to act --> the earliest time that a person could be convicted*

### A. Background: common law

- *Definitions: An agreement between two or more persons to commit a criminal act, or to accomplish a legal act by unlawful means (+ an overt act)*
- *Rationale: 1) increased danger of collective action (people might be more likely to do something); 2) prevent crimes, allowing the police can prevent the crime early.*
- **Elements**
  - *Actus Reus: an **agreement** (+ an overt act)*
    - **Any act**, no matter insignificant, that is done in **furtherance** of the conspiracy. The act is not a legal act. Once the act is done by one person, that counts for everybody.
    - **[Optional] Any overt act** is enough, not matter how preliminary or preparatory in nature, as long as it is a manifestation that the agreement is being carried out.
    - The people do not need to know the identity or even existence of other members. He does not need to know all the details, but he needs to know the **scope and objective of the conspiracy** and **mutual understanding**.
  - *Mens Rea:*
    - intend to agree, conspiracy;
    - intend that the object of the agreement be achieved: knowledge + purpose (tests)
- **Merger Rule**

- Merger rule applies in attempt and solicitation crimes; but there is NO merge rule in common for conspiracy.
- Conspiracy is a separate and distinct from the target offense.
- Conspiracy was once a misdemeanor, but most of the states punish it more severely; treated it as felony if the target crime is a felony, but punished less severe than the target crime.
  - The prosecutor can decide what charges are and sometimes they just charge with conspiracy

## B. MPC: differences (MPC § 5.03)

- Requires **an over act** (except for a felony of 1 and 2nd murder)
- Punishment same for conspiracy as target crime (unless target crime is 1st degree felony --> punishment is 2nd degree)
- **Merger rule**: cannot be convicted of target offense and conspiracy.
  - Exception: unless the agreement involves commission of additional offenses not yet committed or attempted.
  - MPC might only recognize one rationale: preventing the crimes.

## C. Conspiratorial Liability (**Pinkerton Doctrine**)

- Pinkerton: these substantive offenses were committed by Walter in furtherance of the unlawful act; reasonably foreseeable; there is no evidence that his withdrawal from it.
- **Rule**: Where a conspiracy is formed, the conspirators will be guilty for any crimes committed by a party to the conspiracy if 1) the crime is committed **in furtherance** of the conspiracy, and 2) the crime is **reasonably foreseen** as *necessary or natural consequence* of the conspiracy.
  - One of the two ways that you could be liable for others' action --> Conspiratorial Liability
  - The second way is that Accomplice Liability.
- MPC: no such doctrine

### *Review:*

- **Conspiracy**: *an agreement between two or more persons to commit a criminal act, or to accomplish a legal act by unlawful means (plus over act).*
- **Rationale**: *increased danger of collective; early intervention.*
- **Common Law**: *no merger, punishment usually less severe than target crime; may or may not include overt act requirement.*
- **MPC**: *requires an overt act; same punishment as target crime (if 1st degree felony --> 2nd degree felony); merger*
- **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 for the substantive offense (MPC rejects this doctrine).*

## D. Mens Rea:

### *People v. Swain*

- Could a person could be guilty of conspiracy murder?
  - Intent to commit the offense the objective of the crime
- The only one satisfying the requirement is "the intent to kill"
- Is the knowledge sufficient especially in the situations of supply.

1. **MPC difference:** Note 4 at 848: *purposefully for the crime + knowledge for the homicide.*
  - If the bomb did explode, then murder for "knowingly" is one of the mens rea under the murder of MPC.
  - For the result crime, **knowledge** is sufficient to satisfy the second of the dual mens rea requirement under the MPC for the attempted crime.
  - ★ For the conspiracy, the MPC does not contain the knowledge, it has to be **with the purpose of** promoting or facilitating.
2. **Second part of the dual intent requirement**
  - People v. Lauria
    - For the second of dual mens rea requirement: "intend that the object of the agreement be achieved." What is that?
      - To what extent, we could hold the **supplier** liable for conspiracy.
    - Fact: the D had a answering phone business and had knowledge about the existence of prostitution business.
    - Issue: is the D's knowledge about the business sufficient to constitute mens rea? NO
3. **Rule:** *The intent necessary to satisfy the mens rea component of conspiracy is satisfied where a supplier **knows** the criminal activity connected with the supplies he furnishes and there is*
  - Direct evidence that he intends to participate; or
  - Evidence that supports the inference that he intends to participate, based on
    - The D's **special interest** in the activity (stake in the venture; no legitimate use for goods; high proportion of business) *or*
    - **Aggravated nature** of the crime itself.
  - Note: mere knowledge is usually not sufficient to common law.
  - For MPC: with the purpose of promoting and felicitating its commission.

## E. Actus Reus

- The actus reus of conspiracy is **an agreement** to commit an unlawful act, or series of acts. (plus, in some jurisdictions, an overt act.)
  - The agreement can be implied; it need not to be express. When implied, can be established through circumstantial evidence of a **mutual understanding**.
- The parties to an agreement do not need knowledge of all the details; they only need to be aware of its essential nature - **its scope and objective**.
- Where an **overt act** is required, **any act** is sufficient no matter how minor, if in pursuance of the conspiracy.

### *Commonwealth v. Azim*

- Sufficiency of the evidence: if the evidence is enough to prove beyond reasonable doubt.
- No record showed that he was merely a hired driver.

### *Commonwealth v. Cook*

- One of the Ds raped the girl and then his companion was charged with conspiracy of rape and accomplice, for he laughed and kind of help the other one to rape her.
- Accomplice: encourage to commit a crime; you could be a accomplice, but not a conspirator.
- He could be held liable for target crime (the rape) through the theory of aiding.

## F. Bilateral v. Unilateral Conspiracy

- People v. Foster: whether one person could be held liable for conspiracy when the other one did not agree?
  - Unilateral: MPC
  - Bilateral: common law

## G. Defense:

- Impossibility: common law and MPC no.
- Abandonment: renunciation.
  - Common law NO; but recognize that for the Pinkerton Doctrine
  - MPC: generally YES as a defense. It has to be complete, voluntary + **thwarted the success** of the conspiracy (e.g., call the police)
- **Wharton's rule**: just in common law; **not MPC**.
  - **Rule**: An agreement by *two persons* to commit an offense that *by definition* requires the voluntary concerted criminal participation of two persons, cannot be prosecuted as a conspiracy.
    - E.g., receive a bribe, adultery,
    - Justification: recognize the rationale of increased danger of collective action; but NOT prevention
  - **Two exceptions**:
    - 3d party exception: If more than the minimum number of people necessary to commit the offense agree to do so.
    - If two persons involved in the conspiracy are not the two people involved in committing the target offense(, but they could still be charged by conspiracy).

## III. Solicitation

### A. Definition:

- intentionally inviting, requesting, commanding, hiring, or encouraging another person to engage in conduct constituting any felony, or a misdemeanor relating obstruction of justice or a breach of the peace, with the intent that the other person commit the solicited crime.
  - An attempted conspiracy
- **Actus Reus**: invite / request / command / hire / encourage another person to carry out a target crime.
- **Mens Rea**:
  - Must intent to invite / request / command / hire / encourage;
  - Must intend to have the solicited act (target crime) carried out.

### B. Merger Rule:

- Where a person is held liable for the **target crime** under a theory of accomplice liability - which is a basis of liability for the target crime - the **solicitation merges** with the target crime (or the attempt to commit the target crime, or the conspiracy to commit the target crime).
  - It could be independent crime, but could also be merged with target crime.
  - \* In order for solicitation to stand alone, the defendant cannot be charged with target crime, the attempted crime, and conspiracy.
  - It is possible that the people are charged with conspiracy, but not solicitation, if they happened at the same time.

### C. MPC 5.02:

- A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.
- Difference:
  - Common law, less or much less offense; MPC, the solicitation is punished as the same as the target crime.
  - Common law, felony and some misdemeanor; MPC, all crimes.
  - Common law, NO; MPC, abandonment, complete, voluntary and actually towards the success.

Review:

- *Conspiracy: An agreement between two or more persons to commit a criminal act, or to accomplish a legal act by unlawful means (plus overt acts).*
- *Mens Rea: 1) intent to agree; 2) intent to commit the offense which is the object of the conspiracy. Debate about knowledge / purpose*
- *Actus Reus: 1) **agreement** to commit an unlawful; 2) can be implied; 3) awareness only as to essential elements; 4) established through circumstantial evidence; 5) overt act is any act pursuant to conspiracy*
- *Bi-/Uni-lateral: some states bilateral; MPC is unilateral*
- *Defense:*
  - *Impossibility: NO;*
  - *Abandonment:*
    - *common law: Only to prevent conspiratorial liability, if complete and voluntary*
    - *MPC: Yes, if complete and voluntary renunciation and thwarts success*
  - *Wharton's Rule: no conspiracy where offense by its nature requires 2+ people.*

## Chapter 10 Accomplice Liability

Preview:

- *General Principles and common law background*
- *The elements*
- *Mens Rea*
  - *Liability for crimes of recklessness and negligence*
  - *Natural and probable consequences doctrine*
- *Actus Reus:*
  - *Mere Presence*
  - *Accomplice liability and trivial assistance*
  - *Causation and complicity*
  - *Attempting to aid*
- *Relationship of the liability of the accomplice to the principle*
  - *If the principle is acquitted*
  - *If the principle is convicted*

### A. Background:

- Definition: a person is guilty of the target crime if she intentionally **assists or encourages** another person to engage in the conduct that constitutes the crime and **shares the mental state** required for commission of such target crime.
  - Vicarious (take **no act**, but be liable due to the special relationship) v. derivate (take **some act**, "closely tied with the D," deriving from other people doing)
  - Not distinct crime (which is inchoate crime) but **a theory of liability** for the target crime (aiding and abetting) --> you are held liable for target crime, and the sentence is totally the same.
- Common law distinction
  - The reason that common law develop is because the common law used to only recognize death as the punishment, so they want to limit the people who is liable for this punishment
  - At least still very helpful for use to understand the role, but does not make any difference for sentence.
  - Note: the law does not make any difference between these four distinctions.
- **Four different types of accomplice**

- a. Principle in the first degree: the person who physically commits the crime (+ innocent instrumentality / innocent human agent.)
- b. Principle in the second degree: a person who intentionally *assisted or encouraged* in the commission of the crime *in the presence*, either actual or constructive, of the principle in the first degree.
- c. Accessory before the fact: the person who intentionally assisted or encouraged in the commission of the crime, but who is not actually or constructively present when the crime is committed. This person often counsels or commands the principle in the first degree regarding the crime.
- d. Accessory after the fact: the person who, with knowledge of another's guilt, assists the felon to avoid arrest, trial, or conviction --> in most states, still treated differently, usually less severely.
- State v. Hoselton
  - Fact: D was charged because he said he was a "look-out," so he was a principle in the second degree. But he did not get any stolen objects and he did not know the crime. (In WV, the second and third is treated as the first one)

## B. Elements: common law

- **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 to assist or encourage the primary party (principle in the 1st degree) 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 (where duty to act).
  - **Sharing** the mental state required for the commission of the offense as defined for the substantive crime, not ruling out some mental states, such as recklessly or negligently.
- **Overlaps** between conspirator and accomplice
  - The questions is about when it is one crime but not the other.
  - Accomplice: probably not know before the crime.
  - Just conspirator: when the agreement is not an assistance or encourage, e.g., agreement for something.
  - ★ Key difference:
    - The basis (AC) for the conspiracy is the agreement, but the actual assistance/encourage for the accomplice liability is not required.
    - Time: Accomplice liability requires the assistance or encourage, but the agreement to do so **beforehand** is not necessary.

### Review:

- *Accomplice liability: a person is guilty of the target crime if she intentionally assists or encourage another person to engage in the conduct that constitutes the crime and shared the mental state required for commission of such target crime.*
- *Derivative liability: accomplice liable for another's crime.*
- *Elements:*
  - *AR: assistance or encouragement*
  - *MR: 1) intentionally performs AR (assist / encourage) + 2) shares the mental state required for the offense.*
- *Difference between accomplice and inchoate offense.*
  - *Accomplice just a means for liability, not separate one.*
  - *Second dual intent requirement.*

- *Common law distinctions: principle in the 1st and 2nd degree; accessory before and after the fact. All actors treated same today, except for the accessories after the fact.*

### C. Elements: MPC: 2.06 (3) / (4)

- 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
    - (i) solicits such other person to commit it; or
    - (ii) aid or agrees to aids or **attempts to** aid such other person in planning or committing it.
    - [while in common law, the word is "aids."]
  - (4) When causing a particular result in 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.
- Elements:
  - AR: solicitation, or aiding or agreeing or attempting to aid another person in planning or committing an offense
  - MR:
    - [assumed: intentionally performs AR (solicit / aid)]
    - Performs the AR with "**purpose** of promoting or facilitating the commission of the offense" *or*
    - In the case of result crime with a mental state of **recklessness or negligence**, shares the mental state required for the offense.
  - Note: attempting to aid is recognized in MPC, but not common law.
- Problems at p. 898
  - "waiting outside the store" is not an assistance or aiding --> NO for both.
  - AR: he did honk; MR: 1) he intentionally honked; 2) he did not intent to honk or help to commit the crime --> NO for both.
  - AR: he did honk; MR: 1) he intentionally honked; 2) if the target crime requires intent, D had such intent --> YES for both.
  - [His friends did not hear him.] AC: he tried to assist, but he failed to do it --> NO for common law; Yes for MPC, for it includes "attempts to aid."
  - MR: satisfies; AR: the sheer agreement to assist is an encourage served in common law; and it could also be an agreement to aid under MPC --> Yes for both.
  - AR: still no for he took no action; MR: no MR.

### D. Mens Rea

#### 1. *Liability for recklessness and negligence crime.*

- Riley v. State:
  - Fact:
    - Two Ds were charged by first-degree of assault. The mental state is reckless.
    - If death: 1) probably second degree murder for recklessly or deprived heart murder; 2) if attempted murder, then it requires the intent to murder (you cannot have an attempted involuntary manslaughter)
    - Accomplice crime: AR, for assistance or at least encourage of doing things together; the punishment is the same.
  - Issue: does the prosecution proves BRD for the second dual mens rea requirement?
  - Reasoning:
    - D must share the mental state required for the offense, i.e., recklessly, which is required by the first-degree assault for the principle.
- Problems:

- AC: solicits; MR: acted negligently
- AC: solicits, but, speeding is not directly related with the running through a red light.
- 2. *Natural and Probable consequence doctrine*
  - Background:
    - It could significantly enlarges or expands the accomplice liability.
    - This doctrine is found in the common law and most jurisdictions today - majority.
  - **Definition:** It says that an accomplice to a crime may be held criminally liable not only for the target crime, but for any other offense that was a natural and probable consequence of the target crime.
  - Extra Elements:
    - A crime is a "natural and probable consequence" if it was a **reasonably foreseeable** consequence.
    - The accomplice need not share the principle's mental state for the crime under this doctrine.
  - MPC rejects the natural and probable consequence doctrine, like Pinkerton Doctrine.

*Review:*

- *Mens Rea*
  - *Liability for crimes of recklessness and negligence*
  - *Natural and probable consequences doctrine.*
- *Actus Reus:*
  - *Mere presence (VT)*
  - *Accomplice liability and trivial assistance (Wilcox; Helmenstein)*
  - *Causation and complicity*
  - *Attempting to aid (Genoa)*
- *Relationship of the liability of the accomplice to the principle*
  - *If the principle is acquitted (Lopez)*
  - *If the principle is convicted (McCoy)*

## E. Actus Reus

### 1. *Mere Presence:*

- State v. VT: D was at the scene where he knew the other two suspects would steal the camcorder.
- **Rule: "Passive behavior**, such as mere presence - even continuous presence - absent evidence that the D 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."

### 2. *How much the assistance is enough?*

- Wilcox v. Jeffery
  - D knew Hawkins come to UK, D then brought ticket for Hawkins's concert and wrote an article about it.
  - There is no measure for how much the encourage you provide, even the trivial encourage would satisfy the actus reus.
  - Problems: 1) if D was outside of the concert and applauded, then probably no; 2) for the audience who were at the concert, the actus reus should satisfy, but not mens rea.
- Problem at 917:
  - Cheering customer: Yes for MR and AR;
  - Cheering customer not heard:
    - common law, not liable. It requires the actual assistance.
    - MPC: yes, for the "attempt to aid" is satisfied.
  - Bartender: probable he has special legal duty.
  - Non-cheering customer: no duty.

### 3. Causation:

- [CL] A person is not an accomplice unless her conduct in fact **assists in the commission** of the offense.
  - While MPC does not require actual assistance or encouragement, just **an attempt to do so**.
- [CL and MPC] Once a factfinder determines that the defendant assisted, the **degree of aid** or assistance is immaterial - even a trivial amount is sufficient.
- [CL and MPC] An accomplice is liable even if her assistance is **causally unnecessary** to the commission of the offense - causation not required for the accomplice's AC.
  - Genoa: common law, since the crime was never completed, he was not liable.

## F. Relationship of the liability of accomplice to the principle

- Common Law and MPC agrees / are the same

### 1. If the principal is acquitted

- United States v. Lopez
  - D helped his girlfriend to escape from prison. His girlfriend claimed duress/necessity defense.
  - Issue: is the girlfriend's claim a justification or excuse? Justification.
- **Rule:**
  - A defendant can be convicted on a theory of accomplice liability even if the principal in the first degree (PIFD) is neither identified nor convicted, as long as proof of a criminal offense (namely, the target crime).
  - If the PIFD is acquitted on the basis of a defense, then an accomplice is not liable where the PIFD's defense is a **justification**, but is liable where the defense is an **excuse**.

### 2. If the principal is convicted

- *People v. McCoy*: can accomplice be guilty a greater homicide-related offense than the principle's?
- **Rule:** An accomplice can be liable for a more severe harm than the principle in the first degree (PIFD) as long as the accomplice satisfies **mens rea of the more severe crime**.
- Rationale
  - Accomplice and principal have same AR, but can have different MR.
  - For instance, a person who murdered someone out of heat of passion, but an accomplice set up the situation in hopes that it would happen.