Criminal Law Outline  
Prof. Legomsky, Spring 2001

I. General Criminal Law
   A. General Classification of Crimes
      1. Infamous v. non-infamous crimes
         a. Moreland held a crime is infamous if the possible punishment is infamous, for purposes of the 5th Amendment indictment requirement.
         b. Melton held the state classification of a crime is controlling for state civil disability statutes.
            1. Fed. definition: felony if possible punishment is imprisonment of more than 1 year
            2. State (MT) definition: felony if actual punishment after judgment is death or imprisonment in the state prison.
      2. Two General Types of Crimes
         a. Malum in se: a wrong in and of itself (murder, rape, arson, burglary)
         b. Malum in prohibitum: a wrong this is prohibited (licenses, liquor laws)

   B. General Principles of Criminal Liability
      1. Actus Reus
      2. Mens Rea
      3. Concurrence between mens rea and actus reus

   C. Actus Reus -
      1. Common Law
         a. must have an act toward putting the intent into effect
            1. State v. Quick- intent alone, w/out some overt act toward putting the intent into effect, is not a cognizable offense (D had intent to manufacture liquor, but committed no act)
            b. the act must be conscious/ voluntary to constitute the basis for a crime (actus reus)
               1. People v. Decina- the act was driving while knowingly subject to seizures; it was both conscious and voluntary, b/c aware of possible risk of his actions and acted anyway.
            c. only punished for voluntary inaction/ omission if have a legal duty to act
               1. Jones v. U.S.- four ways to prove duty:
                  a. statute imposes a duty to care for another; i.e., taxes, hit and run statutes
                  b. one stands in a certain statutes relationship to another; i.e., parents, captains
                  c. one has assumed a contractual duty to another
                  d. one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid.
               2. other ways to prove duty
                  a. if create the victim’s peril, then legal duty to give assistance
                  b. if, b/c of some relationship, a person has control over the behavior of another person, then there is a duty to control that person’s behavior; parents must use reasonable care to control their children’s behavior.
            3. there are now “Good Samaritan” Laws in some states that require people to come to another’s aid.
               a. the debate over these centers on personal autonomy.
      2. MPC
a. §2.01(1) (p379): a person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.
b. §2.01(2): the following are not voluntary acts within the meaning of this Section:
   (a) a reflex or convulsion;
   (b) a bodily movement during unconsciousness or sleep;
   (c) conduct during hypnosis or resulting from hypnotic suggestion;
   (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.
   -- Decina D still guilty under §2.01 b/c the act was getting into the car in the first place.
c. §2.01(3): Liability for the commission of an offense may not be based on an omission unaccompanied by action unless:
   (a) the omission is expressly made sufficient by the law defining the offense; or
   (b) a duty to perform the omitted act is otherwise imposed by law.
d. §2.01(4): Possession is an act if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.

D. Mens Rea
   1. Common Law
      a. General
         1. the culpable state of mind required for the commission of the offense; can be intent, or some other, like recklessness or criminal negligence.
         2. specific to each crime and often to each element of the crime
         3. Malum en se v. Malum prohibitum Crimes
            a. Mala en se:
               1. True Crimes, bad in and of the themselves
               2. Typically require some mens rea and lack of exculpation (j or e)
            b. Malum Prohibitum:
               1. crimes b/c statute says they are
               2. generally strict liability- no mens rea requirement; Unless statute says otherwise or courts infer mens rea
                  a. Chicago, Milwaukee & St. Paul Railway Co.- ct. inferred mens rea into the statute, even though not explicitly required in the statute, b/c a penal statute
            b. Intent Crimes
               1. Intent: either purpose or desire or knew consequence substantially certain to occur
                  a. must have at least do the act “knowingly,” carelessness or thoughtless is not enough. State v. Peery,
                  b. Knowingly:
                     1. maj. view- Bealle- “knowing it to be stolen” requires a subjective test
                        a. how prove subjective knowledge? Draw inferences from speech, behavior, motives; also, take into account what reasonable person would do if find D is/ was a reasonable person of ordinary intelligence and capabilities
                        b. ct. really looks for belief that something is true, not positive knowledge
                     2. minority view- objective test
                        a. some require D have information from facts and circumstances that would lead a reasonable person to believe that the facts exist
                        b. some require D knows or has reasonable cause to know (or believe)
c. some require reckless disregard of knowledge

2. General Intent v. Specific Intent:
   a. General Intent: intent to do the deed that constitutes the actus reus
      1. Railway case- intent not to stop was required
      2. Indecent exposure only requires general intent. Peery ct. infers intent even though not explicitly stated.
      3. Assault defined by tort def. only requires a general intent
   b. Specific Intent: crimes requiring intent to do something beyond the actus reus; additional intent required for guilt of a particular offense.
      1. Examples
         a. Burglary- break and enter w/ intent to commit theft or other felony; intent to B & E (actus reus) and intent to commit theft or other felony(specific intent)
            Dobb’s Case- no burglary b/c no intent to commit a felony; although guilty of the felony b/c doesn’t require intent, only malice, which includes recklessness
         b. Larceny- intent to take property (actus reus) & intent to steal it (specific intent)
         c. Forgery- uttering and passing a forged document; intent to falsify a document (actus reus) & intent to defraud someone (specific intent)
            State v. May- D signed Dad’s name as co-signer on a loan;
               1. Intent to defraud for forgery = purpose to use false writing as if it were genuine to gain some advantage at other’s expense
               2. Mere creation of the forged document creates a rebuttable presumption of intent to defraud regardless of later permission from one whose signature is forged.
               3. Fraud doesn’t have to succeed, and don’t have to prove loss to V.
      d. Assault, attempted battery def.: need specific intent to batter
      e. Attempt to commit any crime: requires intent to do the actus reus & intent to cause the consequences of the crime.
         1. Thacker- drunks shoot into tent, trying to shoot out light; not guilty of attempt b/c no intent to murder; if killed her, would be guilty of murder; maybe guilty of reckless endangerment under MPC (recklessness rebuttably presumed if shoot gun at someone)
         2. Must prove intent as a matter of fact; no presumption or implied intent
      f. Assault w/ intent to kill: requires intent to do the assault (actus reus) and further intent to kill (specific intent)
         c. MPC does not recognize specific intent; but, some states that have adopted the MPC still follow general and specific intent.
   3. Conditional Intent
      a. If make demand, and if not fulfilled will kill, conditional intent
      b. Conditional intent is sufficient to satisfy mens rea is the demand is unlawful. People v. Connors.
   c. Crimes requiring some other mens rea
      1. Crimes requiring recklessness or criminal negligence, or depraved heart
      2. Examples
         a. involuntary M/S
         b. murder
   d. Strict Liability Crimes
1. for malum prohibitum offenses, where there is no element required for the commission of the offense, one who acts in violation of the statute is guilty of the crime irrespective of his intent or belief. Commonwealth v. Olshefski.

2. There are defenses, so not absolute liability; but ignorance is not a defense

3. How know if legislature intended strict liability?
   a. see if express men rea in the statute
   b. if not, ct. can read mens rea in
      1. look at punishment/ type of sentence- if fine, likely strict liability
      2. look to stigma attached to the offense
   c. Examples
      1. Stevens- blocking of river case; ct. holds no mens rea required b/c a public nuisance case
      2. Olshefski- truck weight statute violated, ct. says strict liability
      3. Koczwara- agent sold liquor to minors; ct. held malum prohibitum offenses, which impose vicarious strict liability may not be punishable by imprisonment under the state constitution; liability for all true crimes, must be based upon personal causation, not the acts of another.

   e. Edward’s Categories of mens rea requirements for criminal statutes (from Ewart)
      1. If statute expressly requires mens rea, a guilty mind must either be necessarily inferred from the nature of the act done or must be established by independent evidence; burden of proof on prosecutor
      2. Cases in which the legislature intended to prohibit the act absolutely w/ no regard to mens rea; actual mens rea only relevant to punishment.
      3. If no express mens rea, but courts read in one, the commission of the act in itself prima facie imports an offense, yet the D may excuse self by proving that he did not have the mens rea; burden of proof on D to rebut the presumption of guilt.
         a. to determine if mens rea to be read in, look to level of punishment and stigma
         b. Ewart- fell into category 3, and court read in mens rea of knowledge; prosecutor only has to establish D sold a newspaper that contained indecent matter; up to D to rebut the presumption of mens rea by showing that he did not know (& should not have known) that the publication contained obscene matter.

   f. Ignorance or Mistake as a Defense
      a. Ignorance of Law- generally, NOT a defense
         1. Exceptions:
            a. If no notice and no reason to inquire into an offense is malum prohibitum and prohibits an act that typically is lawful.
               1. Lambert- convicted felon, didn’t know that there was a law that had to register to live in city
            b. If rely on government/ judicial declaration/ pronouncement (overrule statute, etc.)
               1. but, not an excuse if rely on attorney
            b. If knowledge of another law is necessary to form the specific intent that is required for the statute, and you are ignorant to that other law, then a defense
               1. Cude- D ignorant to rule of property law that gives possession to mechanic until the bill is paid; ignorant of some law other than the one violated.
                  -- larceny requires an intent to steal, and no intent to steal b/c thought belonged to him since ignorant of property law
               2. Benesch- need knowledge of the underlying offense and knowledge of the intended violation of it to be guilty of conspiracy to commit a malum
prohibitum offense; Ds did not know of “Blue Sky Laws,” so could not
conspire to violate it
a. For conspiracy to commit a malum en se offense, only need to intend to do
the offense, even if don’t know the law prohibiting it
b. Mistake of Fact- may be an excuse
1. Test: if (1) honest and reasonable belief, and (2) the mistaken circumstances, if true,
would make the act, for which the person is indicted, an innocent act, then a defense.
   a. generally, if mens rea required, then an honest and reasonable belief will be
      enough; but if a strict liability offense, no defense, b/c no mens rea requirement.
   b. Vogel (bigamy case)- ct. recognized a mistake of fact that was honest and
      reasonable as a defense; read statute as requiring mens rea, which is a minority
      view; usually this is an exception to the test.
   c. Mistake of Age for statutory rape: two views
      1. Majority: Cash- rejects reasonable mistake of fact as a defense
         a. says doesn’t pass (2) b/c even if wouldn’t violate statutory rape law, still
            not “innocent” b/c sex outside of marriage not innocent
         b. anyway, treats statutory rape as a strict liability offense, despite the high
            punishment and stigma attached.
      2. Minority: Hernandez- mistake of fact has to be reasonable
         a. says passes (2) b/c would be innocent if how D thought it to be.

2. MPC
   a. §2.02 General Requirements of Culpability
      (1) A person is not guilty of an offense unless he acted purposely, knowingly, recklessly or
          negligently, as the law may require, with respect to each material element of the offense
      (2) Kinds of Culpability Defined
         (a) Purposely- A person acts purposely with respect to a material element of an offense
             when:
             (i) if the element involves the nature of his conduct or the result thereof, it is his
                 conscious object to engage in conduct of that nature or to cause such a result; and
             (ii) if the element involves the attendant circumstances, he is aware of the existence
                 of such circumstances or he believes or hopes that they exist.
         (b) Knowingly- A person acts knowingly with respect to a material element of the offense
             when:
             (i) if the element involves the nature of his conduct or the attendant
                 circumstances, he is aware that his conduct is of that nature or that such
                 circumstances exist; and
             (ii) if the element involves a result of his conduct, he is aware that it is practically
                 certain that his conduct will cause such a result
                a.) practically certain → close to 100%
         3. also, §2.02(7) when knowledge of the existence of a particular fact is an element
            of an offense, such knowledge is established if a person is aware of a high
            probability of its existence, unless he actually believes that it does not exist.
            a.) high probability seems to mean >50%
         (c) Recklessly- A person acts recklessly with respect to a material element of an offense
             when he consciously disregards a substantial and unjustifiable risk that the material
             element exists or will result from his conduct. The risk must be of such nature and
degree that, considering the nature and purpose of the actor’s conduct and circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.

(b) Negligently- A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk and the material element exists or will result from his conduct. The risk must be of such a nature and degree that he actor’s failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation form the standard of care that a reasonable person would observe in the actor’s situation.

b. Conditional Intent §2.02(6)
   1. When a particular propose is an element of an offense, , the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense
   a. Ex. where condition does not negate purpose, so conditional intent is sufficient
      1. People v. Connors- harm/ evil sought to be prevented by the statute is threat to kill; the threat is: will kill if condition of refusing to stop work is met; Therefore, if condition is met (refusal) then it does not negate the harm meant to be prevented
   b. Ex. where condition does negate the harm to be prevented
      1. studying in library; see book; not sure if yours, so decide to take it home & see if yours is at home; if it is plan to return book tomorrow; if no book at home, then yours so keep it.
         a. Here, if either condition is met, then the purpose of the statute will be negated b/c no purpose to keep if not really yours
   c. Strict Liability- see §2.05  p702.
d. Ignorance/ Mistake
   1. Mistake of fact
      a. honest and reasonable mistake of fact is a defense to bigamy [§230.1  p847]
      b. honest and reasonable mistake as to age is a defense to sexual offenses [§213.6(1)]

III. Homicide
   A. General
   1. Definitions
      a. Homicide = the killing of one person by another person (not a crime by itself, an element of specific homicide offenses.)
         1. Common Law: an unlawful homicide (not justified or excused) is a criminal offense; either murder, manslaughter, or negligent homicide
         2. MPC §210.1 (p152): a person is guilty of criminal homicide if he purposely, knowingly, recklessly, or negligently causes the death of another human being; criminal homicide is murder, manslaughter, or negligent homicide.
      b. Person = a living human being, for purposes of common law homicide.
         1. to be considered a person, it is necessary that a child be born alive and exist independently of it mother’s body.
            a. Guthrie held a viable fetus is not a “person” for purposes of homicide statutes, absent express language to the contrary.
            b. MPC [§210.0(1)]: “human being” means a person who has been born and is alive.
      c. Killing = evidence of brain death as a proximate result of defendant’s actions is sufficient to prove cause of death, which is necessary to establish a killing by the defendant. Fierro.
2. **Corpus Delicti Rule**
   a. the *corpus delicti* (death + criminal agency) must be proved by evidence other than the defendant’s out of court confession. *Downey*.
      1. Standard of Proof: there need only be evidence (other than out of court confession) **tending to show** that the *corpus delicti* has been established; does not have to establish it beyond a reasonable doubt. *Hicks*.
      2. Death: for purposes of the *corpus delicti* rule, death may be established without the body if there is evidence established that is equally persuasive/sufficient to justify the jury’s finding that death ensued. *Warmke*.
      3. Criminal Agency: for purposes of establishing the *corpus delicti*, criminal agency may be established by circumstantial evidence, other than D’s out of court confession. *Warmke*.

B. **Specific Homicide Offenses**
   1. Murder
      a. Common Law
      1. Common Law Definition: an unlawful homicide with malice aforethought
         a. Malice Aforethought is
            1. intent to kill, unless j.e.m., *or*
            2. intent to do great bodily harm, unless j.e.m., *or*
            3. depraved heart, recklessness under circumstances manifesting extreme indifference to the value of human life, unless j.e.m. *McLaughlin, Banks or* *Banks*.
         4. felony murder rule (common law)
            a. California:
               1. unless specifically listed in a felony murder rule, only such felonies that are in themselves “inherently dangerous to human life” can support the application of the rule. *Phillips*.
               a. Inherently dangerous test: (a law question) whether can think of way that could be done that would not be dangerous, in the abstract.
               2. also, the felony and the death must be a continuous transaction (the continuity test).
               b. Penn: test = whether the conduct that caused the death was in furtherance of the felony
               c. Requirements:
                  1. felonies which can be used
                     a. *Ireland*: can’t use assault w/ a deadly weapon a felony for F/M rule b/c not an independent crime (no murder w/out the felony)
                     b. *Wilson*: burglary based on entry w/ an intent to commit assault with a deadly weapon cannot be used to invoke F/M rule.
                  2. *Williams*: must define the misdemeanor in the jury instruction
                  e. if felony invokes the rule, then D is guilty of murder, no rebuttal.
            2. Common law affirmative offenses (don’t meet p.f.c. of murder)
               a. **Justification**: justified in doing the killing; ex. self-defense; therefore, not guilty.
               b. **Excuse**: committed the offense, but some reason why won’t be punished; ex. Insanity; therefore, not guilty by reason of insanity.
               c. **Mitigation**: b/c of circumstances will reduce the severity of the crime; ex. provocation, in which case, murder will be mitigated to manslaughter.
            3. Common law classifications
               a. first-degree murder: if willful, deliberate and premeditated
b. second-degree murder: all other

b. **MPC** § 210.2 (p152)

1. Definition: murder is criminal homicide committed
   a. purposely or knowingly; or
   b. recklessly under circumstances manifesting extreme indifference to the value of human life.
      1. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnap. (MPC felony-murder rule)
         a. only the specific offenses listed invoke the rule
         b. the rule only raises a rebuttable presumption of guilt of murder—not really a separate classification/ offense, only a different way to get there. (D must show no reckless endangerment or indifference to value of human life to rebut the presumption.)

2. Murder is a felony of the first degree.
   * There are no classifications of murder listed in the MPC.

2. Manslaughter
   a. common law
      1. Definition: an unlawful homicide without malice aforethought
      2. common law classifications:
         a. voluntary: usually, murder with mitigating circumstances (intent, but mitigated, so no malice)
            1. Farris held that in order to give vol. M/S instruction, must be provocation & words alone are not sufficient to show provocation.
            2. Gurgin held there are situations where words do amount to provocation in law, such as where the words give information of an insulting act (in this case, victim admitted to raping D’s daughter).
            3. Borchers held that passion encompasses many emotions and can build up over time
            4. If person has an unreasonable, but honest belief that their life is in danger, then murder may be mitigated to vol. M/S, even though the killing is not justified.
            5. Also, can get M/S from criminal negligence in some jurisdictions.
               a. Rodriguez held that the conduct must be criminally negligent, i.e. must have actual or imputed knowledge that the conduct tends to cause a high degree of risk of death/ g.b.h.
         b. involuntary: manslaughter without intent
            1. homicide without malice and unintentionally, but in the course of doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm (misdemeanor), or in the course of doing some lawful act negligently, or by the negligent omission to perform a legal duty. McLaughlin
            2. misdemeanor-manslaughter rule: in some jurisdictions, leads to negligent homicide, not involuntary manslaughter.
               a. Williams holds must define the misdemeanor in the jury instruction; but did not reverse, b/c held the error did not result in the miscarriage of justice.

b. **MPC** §210.3 (p153)

1. Definition: Criminal homicide constitute manslaughter when
   a. it is committed recklessly; or
b. a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. (MPC mitigation rule)

1. the reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.

2. Manslaughter is a felony of the second degree.

* There are no classifications of manslaughter in the MPC.

3. Negligent Homicide

  a. Common law

    1. Definition: unlawful homicide with conscious disregard of a risk that the result will occur or disregard a risk of which should be aware that the result will occur. Also, risk must be of such a nature and degree that to disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor’s situation. Bier.

  b. MPC §210.4 (p153)

    1. Definition: Criminal homicide constitutes negligent homicide when it is committed negligently.

      a. Negligently [§2.02(2)(d) (p701)]: person should be aware of the substantial and unjustifiable risk, and the risk must be of such nature and degree that the failure to perceive it involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.

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

4. Determination of homicide offense

  a. If there is any evidence, however improbable, unreasonable, or slight, which tends to reduce the homicide to a lesser grade, the defendant is entitled to an instruction of the lesser offense.

IV. Assault and Battery

A. General

  1. Assault is often substituted for battery in a statute

B. Common Law

  1. Battery

    a. Definition: an unlawful application of force to the person of another

      1. unlawful requires a specific state of mind and the absence of privilege.

      2. state of mind: does not require an intent, just criminal negligence (or recklessness).

        a. State v. Foster- intent is not a required element in all malum en se offenses; assault, like murder and manslaughter, does not always require a showing of intent

        b. NOTE: while most jurisdictions only require a showing of criminal negligence, the MPC and some jurisdictions require a showing of recklessness.

          1. either way, a lower mens rea than tort negligence, which always requires intent

          2. if criminal negligence is required, must establish a higher threshold of negligent behavior than for tort negligence, must be a “gross deviation” from the standard.

          3. if recklessness is required, must show “gross deviation” and subjective knowledge of risk (conscious disregard).

    3. Therefore, assault is an unprivileged, criminally negligent (or reckless) application of force to the person of another.

    b. often said that every battery includes an assault, but that is not true

  2. Assault

    a. C.L. definition: attempt to commit a battery; no apprehension by victim is necessary
1. **United States v. Bell** - an attempt to commit a battery upon an unconscious or otherwise insensitive victim is an assault
   a. Principle of Statutory Interpretation: where a C.L. term is used w/out definition in a statute, assume the C.L. definition applies.
   b. Ct. followed this and adopted the C.L. def. of assault as attempted battery, but recognized an alternative definition, the tort definition.

b. The Modern definition:
   1. Three Modern views of what constitutes Criminal Assault
      a. **Rule 1**: an attempted battery (a minority view)
         1. requires intent to batter
         2. possible to have a civil assault w/out a crim. Assault b/c can intent to assault, but not to batter, so no attempted battery
      b. **Rule 2**: an attempted battery w/ present ability to commit it (a minority view)
         1. requires intent to batter plus present ability
         a. present ability typically requires actual present ability, not V’s subjective belief.
         2. possible to have a civil assault w/out a crim. assault if only intend to assault
      c. **Rule 3**: either (a) an attempted battery or (b) tort definition of assault (majority view) *(Bell followed this rule)*
         1. if D had intent to batter, then no apprehension on part of V is necessary
         2. if D had no intent to batter, then need apprehension on part of V *and* D’s intent to assault (tort def.: cause apprehension of imminent harmful or offensive contact)
      d. 4th definition of assault (very small minority): whenever a battery is committed, an assault is also committed (even if no apprehension on part of V prior to the battery).

U.S. v. Jacobs
   1. This rule does not hold true under the Rules 1-3.

2. Application of Rules 1-3: D points a gun at V and pulls trigger; the gun is not loaded.
   a. Hypo 1: D knows the gun is NOT loaded, but V thinks the gun IS loaded.
      1. Under Rule 1, D not guilty b/c no intent to commit battery
      2. Under Rule 2, D not guilty b/c no intent & no present ability in fact
      3. Under Rule 3(b) D is guilty b/c V had a reasonable apprehension, but only if D realizes that V thinks the gun is loaded, otherwise probably no intent to assault.
   b. Hypo 2: D thinks the gun IS loaded; V knows that the gun is NOT loaded.
      1. Under Rule 1, D guilty b/c intent to batter and attempted to do so.
      2. Under Rule 2, D not guilty b/c no present ability.
      3. Under Rule 3(a), D is guilty b/c an attempted battery.
   c. Hypo 3: Both know the gun is NOT loaded
      1. Under Rule 1, D not guilty b/c no intent to batter.
      2. Under Rule 2, D not guilty b/c no intent and no present ability.
      3. Under Rule 3, D not guilty b/c (a) no intent, so no attempted battery; and (b) no apprehension on part of V, so no tort def. of assault.
   d. Hypo 4: Both incorrectly think the gun IS loaded.
      1. Under Rule 1, D guilty b/c intent to batter, and attempted to do so.
      2. Under Rule 2, D not guilty b/c no actual present ability.
      3. Under Rule 3, D guilty under (a) b/c an attempt & under (b) b/c intent to put V in imminent apprehension and apprehension on part of V.

2. Some jurisdictions recognize attempted assault, but most hesitant to do so b/c its essentially an attempt to attempt battery; also cts seem to think not a serious crime.
C. **MPC-- Assault** §211.1 (p173)

(1) Simple Assault (a misdemeanor): A person is guilty of assault if he:
   
   (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another
      
      1. this is narrower than the tort definition of assault which only requires harmful or offensive
         contact
      
      or
   
   (b) negligently causes bodily injury to another with a deadly weapon;
      
      1. this is like criminal definition of battery, except it requires at least recklessness
      or
   
   (c) attempts by physical menace to put another in fear of imminent serious bodily injury.
      
      1. sounds like attempted assault; more expansive than tort definition of assault which
         requires actual apprehension (an injury to V).
         a. prob. b/c goal of crim. Law = punish; goal of tort = compensations
         2. more restrictive b/c requires attempt to put another in fear of imminent serious bodily
            injury, not just offensive contact, which would suffice for tort def.

(2) Aggravated Assault: a person is guilty of aggravated assault if he:
   
   (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly
       or recklessly under circumstances manifesting extreme indifference to the value of human
       life. (aggravated assault under this prong is a felony of the 2nd degree);
       
       or
   
   (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly
       weapon. (aggravated assault under this prong is a felony of the 3rd degree).

3. Example: D shoots into moving train and hits V, but V does not die, only injured.
   
a. Simple Assault
      
      1. under (a), no intent to batter, so not purposely, but probably recklessly, b/c a gross
         deviation & subjective knowledge of risk (conscious disregard)
      2. under (b), D guilty b/c gross deviation, so negligent, and w/ a deadly weapon.
      3. Under (c), not guilty b/c no intent to assault
   
b. Aggravated Assault
      
      1. under (a), jury would have to decide if a “serious bodily injury” and if reckless “under
         circumstances manifesting extreme indifference to the value of human life”
      2. under (b), not guilty b/c not purposely or knowingly

2. **Recklessly Endangering Another Person** §211.2 (p173)
   
a. A person commits a misdemeanor if he recklessly engages in conduct which places or may
   place another person in danger of death or serious bodily injury. Recklessness and danger
   shall be presumed where a person knowingly points a firearm at or in the direction of another,
   whether or not the actor believed the firearm to be loaded.

V. Inchoate Crimes: incomplete crimes; must be connected to a substantive crime

A. **Conspiracy**
   
   1. Common law
      
      a. Definition: an agreement (between two or more people) for an unlawful purpose; do not have
         to take steps to put into action.

      1. **Wharton’s Rule** (Exception to Conspiracy)- Cannot charge individuals with conspiracy if
         the substantive crime is of such a nature as to necessarily require the participation of two
         [or more] persons in its commission.
         a. Exceptions to Wharton’s Rule-
1. Rule does not apply when the offense could be committed by one of the conspirators alone.

2. Rule does not apply when concerted action was not logically necessary, even though as a practical matter the offense could not have been committed w/o it. [one and two not really exceptions; clarification only]

3. Third party conspiracy: Wharton’s Rule limited to cases where the essential participants are the only conspirators.
   a. Ex: adultery that was arranged by a matchmaker; only the two adulterers are essential participants; but when conspire with the 3rd party, all guilty of conspiracy.
   b. Ex.: A seller sells heroine to a buyer and they communicated through a 3rd person, then all guilty of conspiracy to sell heroine.
   c. Only the first two are involved in what the substantive crime required, 3rd person played a logically unnecessary role; but all can be convicted on conspiring to commit the subst. crime.
      (3rd person could also be guilty of subst. crime b/c an accessory).
   d. U.S. v. Figueredo- conspiracy charge was dismissed b/c found that third party conspiracy did not exist when five or more people were all involved in what the substantive crime required and more than one person is required to commit the crime; therefore, Wharton’s Rule applies and no conspiracy.

b. In Fed. Circuit (and some others), Wharton’s Rule is now just a rebuttable presumption that the legislature intended not to prosecute/ punish conspiracy if necessarily involves concert of action; a rule of interpretation.

2. **Gebardi Rule** Exception:
   a. Can be no conspiracy including a particular person where:
      1. the substantive offense frequently involves that person’s consent; and
      2. that person is not guilty of the substantive offense.
   b. **Gebardi**- legislature intended that a consenting female would not be found guilty of the Mann Act unless aid; therefore, didn’t intend that such consent would lead to conviction of conspiracy to do it.
      a. Wharton’s Rule would not preclude conspiracy here because doesn’t necessarily involve 2 or more people; not impossible to commit w/o 2 or more people.

2. Synthesis of Wharton’s Rule and Gebardi Rule:
   a. Ex. of where Wharton’s Rule applies, but Gebardi Rule does not: When a crime necessarily involves more than 1 person; and all the participants *are* guilty of the substantive offense. **Figueredo**.
   b. Where both apply:
      1. prostitution law only punishing the prostitute; can’t charge other person w/ conspiracy b/c (1) nature of the crime necessarily involves more than 1 person and (2) the second person is not guilty of the substantive offense.
      2. adultery where one person is unmarried and does not know the other is married???
   b. U.S. v. Falcone- a seller of articles of free commerce, that are in themselves innocent, is no a conspirator with or an abettor of the buyer just because the seller knows that the buyer means to use the articles for an illegal purpose (violation of some liquor laws)
      1. rationale: the seller gets no additional benefit from the conspiracy on top of what would get from selling to anyone; therefore, would apply to giving away the goods, too.
         a. although seller could be held civilly liable, to be crim. liable, must have intent to promote it, make it his own, or have a stake in the outcome.
      2. Split of authority on this issue. The Ninth, Seventh and Sixth Circuits hold seller can be
Katie Herbert

3. In *Backmun v. U.S.* the court held that if sell gun knowing that murder is going to be committed, guilty of abetting. How reconcile with *Falcone*?
   a. *Falcone*: a malum prohibitum offense; whereas, *Beckun*: a mala en se offense (so guilty if know and sell anyway)
   b. Courts must balance seller’s interest in making a living w/ the public’s interest in preventing crime; where public int. higher, more likely seller will be guilty

   c. *Pinkerton v. U.S.* - if D is a participant in a conspiracy, D can be convicted of any foreseeable substantive offense committed in furtherance of the conspiracy, even if committed by someone other than D who is involved in the conspiracy.
      1. Federal jurisdiction accepts Pinkerton, but majority of states and the MPC reject it.
      2. If *Pinkerton* jurisdiction, ask (1) if the crime is in furtherance of the conspiracy; and (2) if it if foreseeable.

   d. Today, for conspiracy, must be conspiracy to commit an offense X

   e. Today, under most modern statutes, must agree to commit the offense and someone must commit some overt act toward its commission.
      1. the overt act does not need to go as far as for an attempt

   f. **Renunciation**: once conspire, can’t turn back the clock; if renounce and make reasonable attempt to thwart the commission of the crime, then not guilty of the target crime, but still guilty of conspiracy.

2. MPC
   a. §5.03 Criminal Conspiracy
      (1) Definition of Conspiracy. A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he:
         (a) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or
         (b) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime
      * * *
      (5) Overt Act. No person may be convicted of conspiracy to commit a crime other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.
   b. §5.03(6) Renunciation
      1. It is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose

B. **Attempt**
   1. **Common Law**
      a. Purpose of Attempt Law:
         1. deterrence
         2. retribution
            a. moral culpability the same as if successful if the person did not change their mind, but were prevented from accomplishing it.
            b. yet, punish less than if actually committed the crime, b/c more severe when harm actually caused to victim, so more need for retribution
         3. incapacitation
            a. have intent and ability, so dangerous
4. rehabilitation

b. Elements of attempt. (People v. Paluch)
   1. intent or purpose to commit the substantive offense. Wilson v. State (forgery case)
      a. Test: if D completed all he intended to do, would he have committed any offense?
         if not, no attempt.
   2. person does any act which constitutes a substantial step toward the commission of the offense; must come w/in dangerous proximity of success; preparation not enough
      a. People v. Paluch- maj. held D’s action in preparing to cut the witness’s hair was enough; dissent disagreed b/c no preparation taken toward the witness.  
         1. Majority seems to say that if a more trivial crime, probability of turning back is low, so need less proximity for attempt; once start, will finish if can.
      b. People v. Rizzo- to come w/in dangerous proximity, act must be so close that would be committed in all reasonable probability but for the timely interference.
         1. Therefore, in Rizzo, D not guilty for driving around looking for the person they intended to rob.
            a. Ds could be convicted of conspiracy, which requires less of an overt act
         2. In People v. Gormley, where Ds waited in the pathway of a clerk they intended to rob but were arrested just b/f the clerk arrived, the actions were sufficient b/c they came very close to completion but for the interference by the police.
   c. Impossibility doctrine- whether can be convicted on attempt to commit an offense if commission of the actual offense is impossible.
      1. Test: if D succeeded in doing all he intended to do, would he be guilty of the substantive crime?-- if so, then no impossibility defense; if no, then impossibility defense applies.
         a. State v. Mitchell- D guilty of attempted murder for shooting into V’s bed, assuming he was there, and intending to kill him; if D had been successful in doing all he intended to do, then would be guilty of murder; no possibility of turning back.
            1. this is like where a pickpocket reaches into a pocket and comes out empty handed
            2. different from Wilson v. State (forgery case)- D not guilty b/c did all intended to do and still not guilty of the substantive crime.
         b. People v. Rojas- shows how definition of what intended to do can be determinative
            1. D set up to receive stolen property by police. D believe the property to be stolen, but it in fact was not stolen according to the law. Ct. follows Prosecutor’s arg: D intended to receive stolen goods, if had succeeded in doing so, would be guilty of the substantive offense; but, ct. could just have easily argued that D intended to receive those goods, and did succeed in doing so and not guilty of the subst. crime.
            2. another hypo: D sells what he thins is heroin, but it’s really a harmless substance. Prosecutor argue that D intended to sell heroine, if he had succeeded he would be guilty of subst. Crime; but D argues that he intended to sell that substance, he succeeded in completing the crime and not guilty of the substantive crime.
         c. Preddy v. Commonwealth- impotency is not a defense to attempted rape, where the defendant had the intent to commit rape and the apparent capacity, at law, to commit it
            1. if defendant had succeeded in completing what he intended (to accomplish sexual penetration with an unwilling victim) he would be guilty of rape.
            2. This is unlike the case of 14yr. old boy or a husband b/c law says can’t be guilty of the substantive offense, so even if succeed in completing all intended to do, not guilty of rape.
         d. State v. Wilson- D may be convicted of attempt to assault, where circumstances beyond D’s control prevent D form having the present ability to carry out the assault,
and D has proceeded far beyond the stage of preparation and has the intent to accomplish the assault.

1. used def. #2 of assault, attempted battery w/ present ability; D had intent to battery and would have had present ability if not for some condition beyond D’s control \(\rightarrow\) attempted assault (really an attempted battery, but no such crime there)
2. no state that adopts def. #1 of assault has a crime of attempted assault \(\rightarrow\) Wilson might be guilty of assault if intnet plus dangerous proximity of battery.
3. if use 3rd def. of assault, Wilson could be guilty of completed crime of asault

d. Abandonment
   1. When an attempt is completed, abandonment of the substantive crime b/f its completion does not negate the commission of the attempt; renunciation is no defense.
      a. State v. Stewart, gas station hold-up, D changes mind b/c police arrive. Under this case, still guilty of attempt even if abandon b/c of a change in intention due to a stricken conscious.

2. MPC
   a. §5.01 Criminal Attempt (p. 414) (see copy)
      (1) Definition of Attempt: A person is guilty of an attempt to commit a crime if acting with the kind of culpability other required for commission of the crime, he:
         (a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be;
            1. Ex: Rojas- D would be guilty b/c thought bought stolen goods & if correct, would have committed a crime. (also heroine example, would be guilty b/c selling heroine.)
            2. Counter Ex: Wilson (forgery)- D not guilty b/c under circumstances as he believed them, still no crime
         or
            (b) when causing a particular result is an element of the crime, does <or omits to do> anything with the purpose of causing <or the belief that it will cause> such result without further conduct on his part;
            1. Ex: Mitchell- D guilty b/c thought shooting into that area was all needed to do to commit the crime.
            or
            (b) 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.
            1. Ex: Preddy- D guilty b/c believed could commit rape and took substantial step in a course of conduct planned to culminate in his commission of the crime.
      (2) Conduct shall not be held to constitute a substantial step under (1)(c) unless it is strongly corroborative of the actor’s criminal purpose. [This section then lists acts which, if strongly corroborative of the actor’s criminal purpose, shall not be held insufficient as a matter of law; question will go to jury]
      (3) A person who engages in conduct designed to aid another to commit a crime which would establish his complicity under §2.06 if the crime were committed by such other person, is guilty of an attempt to commit the crime, although the crime is not committed or attempted by such other person.
      (4) Renunciation of Criminal Purpose
   b. MPC approach to impossibility question:
      1. §5.01(1) (a), (b), or (c)
2. if (a) or (b), then no impossibility defense;
3. if (c), then go to §5.01(2) to see if a substantial step; if yes, then no impossibility defense

c. Renunciation under MPC

1. [§5.01(4)] When the actor’s conduct would otherwise constitute an attempt, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.
   a. To be voluntary, cannot be motivated by circumstances not present or apparent at the inception of the conduct
   b. To be a complete renunciation, cannot be motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar object or victim.
   c. Stewart would not have a defense under the MPC

C. Solicitation

1. Common Law
   a. the actus reus of solicitation is the actual soliciting, not the subsequent commission of a crime
      1. Therefore, D can be convicted of soliciting, even though the person refuses and the solicited crime is never perpetrated, State v. Blechman, as long as the intent that that crime be committee (the mens rea for soliciting) is present
   b. If cannot be convicted of the substantive crime, then analyze like Gebardi to determine whether can be convicted of soliciting it
      1. Ex: where a crime to prostitute, but not to purchase a prostitute; buyer cannot be guilty of solicitation if intent of legislature to not make the purchasing a crime.
   c. If person being solicited could not be convicted of the crime, then person doing the soliciting is not guilty of solicitation of the crime. The MPC takes the opposite approach §5.04 p415.
      1. Ex: X asks Y to get his bike and bring it to him; X does not own the bike, but Y does not know this; X is NOT guilty of solicitation to steal b/c what X is asking Y to do is not a crime for Y to do (Y has not met the mens rea, even though the actus reus has been done).
   d. Renunciation/ Withdrawal
      1. If one solicits another to commit a crime, but changes mind and withdraws from the act & communicates this withdrawal to the one solicited b/f the crime or any attempt has been committed, then a renunciation defense. State v. Peterson.

2. MPC §5.02 Criminal Solicitation
   a. Definition: §5.02(1), (2)
      1. 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 which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission
      2. It is immaterial that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such a communication.
   b. Renunciation
      1. [§5.02(3)] It is an affirmative defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.
D. Merger Doctrine

1. **Common Law**
   a. Solicitation: merges into attempt, conspiracy, and the target crime of the solicitation
   b. attempt
      1. merges into the substantive crime
      2. does NOT merge into conspiracy,
   c. conspiracy
      1. does NOT merge into attempt
      2. does NOT merge into the substantive crime

2. **MPC**
   a. §5.05(3): A person may not be convicted of more than one [inchoate crime] for conduct designed to commit or to culminate in the commission of the same crime.
   b. at a diff. Section, also says cannot convict of target crime and an inchoate crime for that target crime.

VI. Parties to a Crime

A. Aiding and Abetting/ Accessory

1. **Common Law**
   a. guilty of the substantive crime if perpetrate the crime or if help someone else perpetrate it. (includes accessory “b/f the fact” and “at the fact”)
   c. A person can aid and abet in a crime for which he/she couldn’t have been convicted. *Law v. Commonwealth* (14 yr. old boy guilty of aiding and abetting another in the commission of a rape, even though, at law, cannot be guilty of rape).
      1. the legal presumption (a 14yr. old cannot rape) does not preclude aiding and abetting b/c not true that if the boy accomplished all that he intended to do, he would not be guilty of the crime; he did all that intended to do.
   d. Termination of Aiding and Abetting
      1. rule: guilty of any crime committed up to time of renunciation. Can’t turn back the clock
      2. *King v. Richardson*- where two intend to commit a crime, but one withdraws b/f the actual commission of the crime, that one is not an accomplice; where cannot distinguish the two, both must be acquitted.

2. **MPC**
   a. §2.06 Liability for Conduct of Another; Complicity
      (1) A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both
      (2) A person is legally accountable for the conduct of another person when:
         (a) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct; or
         (b) he is made accountable for the conduct of such other person by the Code or by the law defining the offense; or
         (c) he is an accomplice of another person in the commission of an offense
   (3) A person is an accomplice of another person in the commission of an offense if:
      (a) with the purpose of promoting or facilitation the commission of the offense, he
         (i) solicits such other person to commit it; or
         (ii) aids or agrees or attempts to aid such other person in planning or committing it; or
(iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or

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

(4) When causing a particular result is an element of an offense, as accomplice in the conduct causing such result is an accomplice in the commission of that offense, if he acts with the kind of culpability . . . which is sufficient for the commission of the offense

(5) A person who is legally incapable of committing a particular offense himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity.

(6) . . . A person is not an accomplice in an offense committed by another person if:

(a) he is a victim of that offense; or

(b) the offense is so defined that his conduct is inevitably incident to its commission; or

(c) he terminates his complicity prior to the commission of the offense and

(i) wholly deprives it of effectiveness in the commission of the offense; or

(ii) gives timely warning to . . . authorities or otherwise makes proper effort to prevent the commission of the offense.

(7) An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, thought the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity . . . or has been acquitted.

b. Accomplice Ex. - Law v. Commonwealth under MPC §2.06, the boy is legally accountable if:

1. show boy is legally accountable for the conduct of another.

a. boy is legally accountable if, inter alia, an accomplice.

b. an accomplice if: with the purpose of promoting or facilitating the commission of the offense, he, inter alia, aids or agrees or attempts to aid such other person in planning or committing it.

2. unless such liability is inconsistent with the purpose of the provision establishing his incapacity. [§2.06(5)]

a. not here; but in statutory rape case, making the victim an accomplice would be inconsistent

b. §2.06(6) also prevents conviction in such a case

c. Termination Ex. – King v. Richard under §2.06(6)(c)

1. D charged with substantive crime of robbery, therefore, must terminate his complicity prior to the commission of that offense. (Okay, here)

a. Under (i), D required to wholly deprives his complicity of effectiveness in the commission of the offense; therefore, required to take whatever steps necessary to negate whatever effectiveness his complicity would have aided in the commission.

1. D prob. did not fulfill this: fact that he was on the scene might have helped the other person w/ the commission; started the chain of events and did nothing to negate it; presence of the 2nd person may have emboldened the other person. Even if jury finds (i) not satisfied, must look to (ii) to see if that satisfied.

b. Under (ii), D required to make proper effort to prevent the commission of the offense.

1. Maybe. satisfied. D tried to convince the other guy not to rob V. (a jury question)

2. If terminated complicity, could still be guilty of conspiracy or attempt

a. Renunciation for attempt and conspiracy more difficult- requires complete and voluntary renunciation; also, for attempt, must actually thwart the commission.
3. Under MPC, once gone far enough under attempt, it is still possible to have renunciation defense for the substantive crime, but once gone far enough under the substantive crime, it is not possible to have a renunciation defense.

B. Accessory after the fact
   1. Common Law
      a. guilty of a lesser charge than the substantive crime, since it is different in kind from the substantive crime.
      b. Requirements
         1. to be convicted of accessory after the fact of a felony, the felony must have been already completed at time of the aiding.
         a. State v. Williams: held, one cannot be convicted of accessory after the fact of murder when the aid was given after the wound was inflicted, but before the victim died.
         2. Split of Authority on type of substantive crime required
            a. in many states, can only be accessory after the fact if substantive crime = felony.
            c. in other states and under MPC, accessory after the fact is called “obstruction of justice” and can be found guilty of it even if substantive crime is a misdemeanor.
   2. MPC
      a. §242.3 Hindering Apprehension or Prosecution: A person commits an offense if, with purpose to hinder the apprehension, prosecution, conviction, or punishment of another for crime, he
         (1) harbors or conceals the other; or
         (2) provides or aids in providing a weapon, transportation, disguise or other means of avoiding apprehension or effecting escape; or
         (3) conceals or destroys evidence of the crime, or tampers with a witness, informant, document or other source of information, regardless or its admissibility
         (4) warns the other of impending discovery or apprehension, except . . . a warning given in connection with an effort to bring another into compliance with the law; or
         (5) volunteers false information to a law enforcement officer
         The offense is a felony of the 3rd degree if [the actor knows that the principle offense] would constitute a felony of the 1st or 2nd degree. Otherwise, it is a misdemeanor.
      b. §242.4 Aiding Consummation of Crime: A person commits an offense if he purposely aids another to accomplish an unlawful object of a crime, as by safeguarding the proceeds thereof or converting the proceeds into negotiable funds. The offense is a felony of the 3rd degree if the principle offense was a felony of the 1st or 2nd degree. Otherwise, a misdemeanor.

VII. International Crimes
   A. General
   B. War Crimes
   C. Crimes Against Humanity
   D. Genocide